

**United States Department of Labor  
Employees' Compensation Appeals Board**

C.A., Appellant	)	
	)	
and	)	<b>Docket No. 12-1952</b>
	)	<b>Issued: February 6, 2013</b>
U.S. POSTAL SERVICE, POST OFFICE,	)	
San Francisco, CA, Employer	)	
	)	

*Appearances:*  
Brian Stephens, for the appellant  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
RICHARD J. DASCHBACH, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
PATRICIA HOWARD FITZGERALD, Judge

**JURISDICTION**

On September 23, 2012 appellant, through her representative, filed a timely appeal from the August 9, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied wage-loss compensation. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether OWCP properly denied appellant's claim for wage-loss compensation from September 12, 2009 to February 14, 2010.

**FACTUAL HISTORY**

In the prior appeal,<sup>2</sup> the Board found that the case was not in posture for decision on whether appellant was entitled to a resumption of compensation for total wage loss from

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> Docket No. 11-556 (issued November 4, 2011).

September 12, 2009 to February 14, 2010, notwithstanding an existing wage-earning capacity determination in 2005. The Board found that if appellant were claiming compensation for a closed or limited period, OWCP should adjudicate her claim as one of recurrence. The facts of this case as set forth in the Board's prior decision are hereby incorporated by reference.<sup>3</sup>

On February 21, 2012 OWCP denied appellant's claim for wage-loss compensation. It found that a claimant may sustain a recurrence following a loss of wage-earning capacity determination only when there is a brief period of medical disability and not when the claimant claims wage loss due to a withdrawal of light duty. OWCP found that the evidence did not substantiate that appellant had met one of the three criteria for modifying a formal loss of wage-earning capacity determination.

On August 9, 2012 an OWCP hearing representative affirmed the February 21, 2012 OWCP decision, finding that appellant had not established a recurrence of disability due to a worsening of her work-related injury for a closed period. Appellant submitted no medical evidence that her condition materially worsened. Rather, she established that she stopped work because her limited-duty position was withdrawn under the National Reassessment Process (NRP). Further, the hearing representative found that appellant did not claim and did not establish that the existing wage-earning capacity determination should be modified.

Appellant indicates on appeal that by regulation the term "recurrence of disability" also means an inability to work that take place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force).<sup>4</sup>

### **LEGAL PRECEDENT**

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of her duty.<sup>5</sup> "Disability" means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.<sup>6</sup>

A "recurrence of disability" includes an inability to work that take place when a limited-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn, except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force.<sup>7</sup>

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<sup>3</sup> Appellant, a mail handler, developed carpal tunnel syndrome as a result of continuous heavy lifting in the performance of duty. OWCP accepted her claim for bilateral carpal tunnel syndrome/wrist tendinitis, bilateral/lateral epicondylitis, bilateral *de Quervain's* tenosynovitis, bilateral upper trapezius strain and cervicothoracic sprain.

<sup>4</sup> 20 C.F.R. § 10.5(x).

<sup>5</sup> 5 U.S.C. § 8102(a).

<sup>6</sup> 20 C.F.R. § 10.5(f).

<sup>7</sup> *Id.* at § 10.5(x).

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.<sup>8</sup> The wage-earning capacity of an employee is determined by the employee's actual earnings if the employee's actual earnings fairly and reasonably represent his or her wage-earning capacity.<sup>9</sup>

Once the loss of wage-earning capacity is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous. The burden of proof is on the party attempting to show modification of the award.<sup>10</sup>

When an employee claims a recurrence of disability because his or her limited-duty position was withdrawn under NRP, and a wage-earning capacity determination has been issued, FECA Bulletin No. 09-05 requires that OWCP develop the evidence to determine whether a modification of that determination is appropriate. If OWCP fails to follow those very specific guidelines, the Board will return the case for further development.

FECA Bulletin No. 09-05, however, outlines OWCP procedures when limited-duty positions are withdrawn pursuant to NRP. If, as in the present case, a formal wage-earning capacity decision has been issued, OWCP must develop the evidence to determine whether a modification of that decision is appropriate.<sup>11</sup>

### ANALYSIS

In situations such as this, where a formal loss of wage-earning capacity determination has been issued and the claimant's limited-duty position is withdrawn under NRP, the Board has determined that OWCP must follow the guidance issued in FECA Bulletin No. 09-05.<sup>12</sup>

When a formal loss of wage-earning capacity determination has been issued, FECA Bulletin No. 09-05 requires OWCP to develop the evidence to determine whether a modification of that determination is appropriate. FECA Bulletin No. 09-05 asks OWCP to confirm that the file contains documentary evidence supporting that the position was an actual *bone fide* position. It requires OWCP to review whether a current medical report supports work-related disability and establishes that the current need for limited duty or medical treatment is a result of injury-related residuals and to further develop the evidence from both the claimant and the employing establishment if the case lacks current medical evidence.

Further, FECA Bulletin No. 09-05 states that OWCP, in an effort to proactively manage this type of case, may undertake further nonmedical development, such as requiring that the

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<sup>8</sup> *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

<sup>9</sup> 5 U.S.C. § 8115(a).

<sup>10</sup> *Daniel J. Boesen*, 38 ECAB 556 (1987).

<sup>11</sup> FECA Bulletin No. 09-05 (issued August 18, 2009).

<sup>12</sup> *E.g., H.N.*, Docket No. 11-155 (issued September 24, 2012).

employing establishment address in writing whether the position on which the loss of wage-earning capacity determination was based was a *bona fide* position at the time of the rating, and to direct the employing establishment to review its files for contemporaneous evidence concerning the position.

As OWCP has not followed the guidelines in FECA Bulletin No. 09-05, the Board will set aside the hearing representative's August 9, 2012 decision and remand the case for further consideration. After proper compliance with FECA Bulletin No. 09-05 guidelines, OWCP shall issue an appropriate *de novo* decision on appellant's entitlement to wage-loss compensation beginning September 12, 2009.<sup>13</sup>

**CONCLUSION**

The Board finds that this case is not in posture for decision. Further action is warranted.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 9, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: February 6, 2013  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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<sup>13</sup> *H.R.*, Docket No. 12-1642 (issued December 20, 2012).