



## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>3</sup> In a decision dated April 26, 2002, the Board found that appellant established entitlement to four hours of wage-loss compensation for various intermittent dates but did not establish her disability for other claimed dates. The Board also found that OWCP met its burden of proof to terminate her compensation benefits effective January 4, 2000 and properly denied her reconsideration request without conducting a merit review of the claim. In a decision dated February 2, 2005, the Board found that appellant did not submit sufficient evidence to establish that her neck and right shoulder conditions were caused or aggravated by factors of her employment. The Board also found that she did not submit sufficient evidence to establish that she was entitled to wage-loss compensation during the period August 24 to October 10, 2003. The Board further found that OWCP properly denied appellant's request for reconsideration. The findings of fact and conclusions of law in the Board's prior decisions are hereby incorporated by reference.

On May 28, 2008 the employing establishment offered appellant a modified mail processing clerk position, with operation surface visibility scanning duties. The duties included using a scanning screen to perform a placard assignment, select location and attach a placard to container, scan license plate bar code on the container and scan placard bar code to associate dispatching information and destination with a unique container. Additionally, the job entailed performing build scans and other enumerated types of scans and related activities. The physical requirements for the position were intermittent lifting, carrying, pushing and pulling less than 10 pounds, simple grasping not to exceed five minutes per hour and reaching above the shoulder. The employing establishment did not indicate whether the job offer was permanent or temporary. The effective date of the offer was May 15, 2008. Appellant signed the offer on May 28, 2008. The employing establishment offered appellant an updated modified job offer effective June 3, 2008. The new offer as a modified mail processing clerk included duties of monitoring the "UPNS" screen to detect unplanned pieces for eight hours intermittently. The employing establishment noted that appellant would work the graveyard shift. Appellant returned to work on June 2, 2008.

In a November 25, 2008 decision, OWCP found that appellant's actual earnings as a modified mail processing clerk, fairly and reasonably represented her wage-earning capacity.

On December 1, 2009 the employing establishment advised appellant that under guidelines established by the National Reassessment Process (NRP) a search for a modified assignment had been conducted but that it was unable to identify any available necessary tasks within her medical restrictions. Appellant was asked not to report for work until she was contacted by the employing establishment that work was available within her restrictions. She filed a claim for wage loss beginning December 2, 2009. Appellant also filed a recurrence claim for the same period and alleged that her recurrence beginning December 1, 2009 was due to the withdrawal of her limited-duty work.

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<sup>3</sup> Docket No. 04-1195 (issued February 2, 2005) and Docket No. 00-1097 (issued April 26, 2002) *petition for recon. denied* (October 17, 2002).

In a March 15, 2010 telephone call memorandum, OWCP contacted the employing establishment to confirm whether appellant's job offer was permanent and left a message. No response was received from the employing establishment.

In a letter dated April 8, 2010, OWCP noted the withdrawal of appellant's light duty under NRP and advised her of the criteria for modifying a formal loss of wage-earning capacity decision.

In a letter dated April 21, 2010, appellant noted that, at the time she was sent home, she had no duty assignment and for the last week she returned, she "sat idled doing nothing." In an April 27, 2010 letter, she stated that the modified mail processing clerk position that she was assigned to did not represent a position that she was working with the employing establishment. Appellant indicated that it was not a duty assignment at all and "was created simply to accommodate her injury." She explained that the assignment of monitoring the "UPNS" screen and detecting unplanned pieces was to be done on an intermittent basis. Appellant noted that no other employee performed this type of work because it was "totally unnecessary" and that the assignment was odd lot and makeshift. She explained that she did not have any "jurisdiction" over the monitors or any input to control their task, as "there was no such thing as unplanned pieces." Appellant indicated that the job offer was a "make shift, odd lot assignment just to accommodate my injuries" and asserted that the make shift job offer was withdrawn because the operational task was not necessary and the employing establishment contended that it was no longer required to make work for her within her medical restrictions. She also alleged that the wage-earning capacity was not made within 90 days after her return to duty.

In an October 29, 2010 decision, OWCP denied appellant's claim finding that she failed to establish that the wage-earning capacity decision should be modified. It noted that the employing establishment's withdrawal of her limited duty on December 2, 2009 was immaterial. OWCP explained that appellant still had the capacity to earn wages and she was not entitled to compensation for wage loss when the light duty was withdrawn.

Appellant disagreed with the decision and requested a review of the written record on November 12, 2010. In a letter dated December 9, 2010, addressed to the employing establishment, OWCP requested comments. However, no response was received.

On February 17, 2011 OWCP's hearing representative affirmed the October 29, 2010 decision.

Appellant requested reconsideration on March 1, 2011. Along with the request, she submitted additional documentation. Appellant explained that she was rehabilitated for her accepted condition and was in the job search phase when she was returned to the employing establishment. She again requested reconsideration on December 12, 2011 and submitted additional evidence. Appellant explained that she now worked in a different facility as a general clerk and was no longer a mail processing clerk.

On March 12, 2012 OWCP denied modification of the wage-earning capacity determination, finding that appellant did not establish that the November 25, 2008 wage-earning capacity decision was erroneous. The decision found that her arguments that she was treated

differently from other disabled/injured NRP employees and that NRP actions were unlawful, were not grounds for modification of her wage-earning capacity decision.

### **LEGAL PRECEDENT**

Once the wage-earning capacity of an injured employee 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.<sup>4</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>5</sup>

FECA Bulletin No. 09-05 outlines very specific procedures for light-duty positions withdrawn pursuant to NRP. Regarding claims for total disability when a wage-earning capacity decision has been issued, OWCP should develop the evidence to determine whether a modification of that wage-earning capacity position is appropriate.<sup>6</sup>

### **ANALYSIS**

OWCP issued a November 25, 2008 wage-earning capacity decision based on the modified mail processing clerk position appellant performed beginning June 2, 2008. Appellant argued that the wage-earning capacity determination should be modified as the position was makeshift and her work duties were eventually withdrawn under NRP on December 2, 2009. The Board finds that the case is not in posture for decision.

When a loss of wage-earning capacity decision has been issued, FECA Bulletin No. 09-05 requires OWCP to develop the evidence to determine whether a modification of the decision is appropriate.<sup>7</sup> FECA Bulletin No. 09-05 asks OWCP to confirm that the file contain documentary evidence supporting that the position was an actual *bona 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.<sup>8</sup>

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

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<sup>4</sup> *Sue A. Sedgwick*, 45 ECAB 211 (1993).

<sup>5</sup> *Id.*

<sup>6</sup> FECA Bulletin 09-05 (issued August 18, 2009); *see A.T.*, Docket No. 11-375 (issued September 19, 2012).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at § I.A.1-2.

direct the employing establishment to review its files for contemporaneous evidence concerning the position.<sup>9</sup>

As OWCP failed to follow the guideline in FECA Bulletin No. 09-05, the Board will set aside the March 12, 2012 decision and remand the case for further development.

Appellant essentially repeated her arguments on appeal. However, in light of the Board's finding, it is not necessary to her arguments at this time.

### **CONCLUSION**

The Board finds that the case is not in posture for decision and will be remanded to OWCP for further development, to be followed by an appropriate decision.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the March 12, 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: January 15, 2013  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>9</sup> *Id.* at § I.A.3.