

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

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**L.P., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
West Des Moines, IA, Employer**

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**Docket No. 12-1297  
Issued: June 18, 2013**

*Appearances:*

*Alan J. Shapiro, Esq., 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 May 29, 2012 appellant, through her attorney, filed a timely appeal from the April 30, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 appellant met her burden of proof to modify OWCP's September 12, 2003 loss of wage-earning capacity (LWEC) determination.

**FACTUAL HISTORY**

On May 27, 1999 appellant, then a 40-year-old letter carrier, filed an occupational disease claim for bilateral knee problems due to the walking and standing required by her federal duties. On July 19, 1999 OWCP accepted her claim for left knee patellofemoral stress syndrome. In a

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<sup>1</sup> 5 U.S.C. § *et seq.*

separate case, on October 19, 1999 appellant filed a claim that was accepted for right arm epicondylitis.<sup>2</sup> On July 29, 2005 she filed a third occupational disease claim that was accepted for right carpal tunnel syndrome.<sup>3</sup>

By letter dated July 2, 2003, the employing establishment made appellant a permanent limited-duty rehabilitation job offer as a modified letter carrier and noted that all her duties would be within her medical work restrictions. Appellant accepted this position and began working in this position on July 12, 2003.

By decision dated September 12, 2003, OWCP determined that appellant's position as a modified city letter carrier fairly and reasonably represented her LWEC. It determined that she had no loss in earning capacity and that her benefits were therefore reduced to zero.

On September 20, 2010 appellant filed a claim for compensation for the period September 15 through 24, 2010. On the claim form she indicated that the loss in wages was due to the National Reassessment Program (NRP). Appellant later filed forms claiming additional periods of disability.

In an October 27, 2010 letter, a health and resource management specialist for the employing establishment indicated that the modified job offer performed by appellant consisted of odd-lot duties and "make work." He contended that the LWEC determination issued as a result of this position appears to have been made in error and should be modified as the work offered does not reflect appellant's ability to earn wages.

On November 18, 2010 appellant filed a recurrence of disability claim as of September 15, 2010 due to NRP. She noted that the employing establishment met her work restrictions for seven years but that they were no longer making the accommodations. On the notice, the employing establishment indicated that appellant worked limited duty with job restrictions since 2003, and that her restrictions had never been lifted or changed since then. They noted that, as of September 15, 2010, it was determined that there was no productive work that could be performed by her within her restrictions, and that as a result she was sent home and has not returned to work.

By decision dated December 8, 2010, OWCP denied appellant's claim for compensation as it determined that appellant had not met one of the three criteria for modifying a formal LWEC decision.

On December 30, 2010 appellant requested review of the written record by an OWCP hearing representative. She alleged that the LWEC determination was in error. On March 1, 2011 appellant, by her attorney, requested a telephonic hearing. At the hearing, she testified that she returned to work as a modified city carrier but was sent home under NRP. Appellant noted that her modified-duty job could not be taken from her by someone with more seniority and that it was designed specifically for her and was within her restrictions and limitations. Counsel

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<sup>2</sup> OWCP File No. xxxxxx530.

<sup>3</sup> OWCP File No. xxxxxx300.

requested reversal of the decision and to direct the employing establishment to pay compensation for the recurrence from the date that appellant was sent home under NRP.

By decision dated July 8, 2011, OWCP's hearing representative remanded the case for additional development to determine whether the September 12, 2003 LWEC determination should be modified on the basis that it was erroneous.

In a July 20, 2011 letter, a health and resource management specialist for the employing establishment indicated that the position and duties contained in the job offer of July 12, 2003 were considered makeshift in nature and were made specifically to fit appellant's restrictions. He noted that she gave up her bid job when she accepted the permanent limited-duty job offer. The specialist noted that this job offer was not available to other employees. He noted that appellant performed the position and duties contained in the July 12, 2003 job offer until NRP and the determination that there was no available productive work as of September 15, 2010.

In a September 1, 2011 memorandum responding to queries from OWCP, the employing establishment discussed appellant's duties, noting that she was responsible for working on time sensitive mail and noted that, if she did not do the computer input work, that a supervisor would do the work as time was available. A supervisor noted that appellant performed a permanent rehabilitation job offer that was not performed by other regular carriers or other employees and was created as make-work duties. He noted that the job was strictly created and unique to appellant's restrictions.

In an October 25, 2011 decision, OWCP found that the evidence was not sufficient to show that appellant's duties were makeshift or odd lot. It determined that the evidence did not substantiate that she met one of the three criteria for modifying a formal LWEC decision and that she was therefore not entitled to compensation.

On November 4, 2011 OWCP requested a telephone hearing. At the hearing held on February 14, 2012, appellant's attorney argued that the employing establishment indicated that the job was makeshift and explained that the job was created for her, was not available to the general community and was specifically tailored to the injured worker. He argued that the position was a specially constructed job for a special person and that it was an odd-lot job. Appellant also testified and noted that, at the time she left her position, she still had the same medical restrictions. She discussed some of the duties of her modified job, including computer input, driving express mail, checking mileage for supervisor, running wrong zip codes and other computer work.

In a decision dated April 30, 2012, OWCP's hearing representative affirmed OWCP's October 25, 2011 decision.

### **LEGAL PRECEDENT**

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn

wages.<sup>4</sup> Compensation for LWEC is based upon the loss of capacity to earn and not on actual wages lost.<sup>5</sup> Compensation payments are based on the wage-earning capacity determination, which remains undisturbed until properly modified.<sup>6</sup>

Modification of a standing LWEC 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 erroneous.<sup>7</sup> The burden of proof is on the party attempting to show a modification of the LWEC determination.<sup>8</sup>

FECA Bulletin No. 09-05 outlines OWCP's procedures when limited-duty positions are withdrawn pursuant to NRP. If, as in the present case, a formal LWEC decision has been issued, OWCP must develop the evidence to determine whether a modification of that decision is appropriate.<sup>9</sup>

### ANALYSIS

OWCP analyzed this case under the customary criteria for modifying an LWEC determination. The Board finds, however, that OWCP's hearing representative did not fully follow the procedures outlined in FECA Bulletin No. 09-05 for claims, such as this, in which limited-duty positions are withdrawn pursuant to NRP.<sup>10</sup> In fact, although the hearing representative did discuss whether appellant's position was a *bona fide* job, but he never mentioned FECA Bulletin No. 09-05 in his decision.

When an LWEC 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>11</sup> To this end, FECA Bulletin No. 09-05 asks OWCP to confirm that the file contains 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

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<sup>4</sup> 5 U.S.C. § 8115(a); *K.R.*, Docket No. 09-415 (issued February 24, 2010); *Lee R. Sires*, 23 ECAB 12, 14 (1971) (the Board held that actual wages earned must be accepted as the measure of a wage-earning capacity in the absence of evidence showing that they do not fairly and reasonably represent the employee's wage-earning capacity).

<sup>5</sup> *K.R., id.*; *Roy Matthew Lyon*, 27 ECAB 186, 190 (1975). *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

<sup>6</sup> See *Sharon C. Clement*, 55 ECAB 552, 557 (2004).

<sup>7</sup> *Sue A. Sedgwick*, 45 ECAB 211, 215-16 (1993); *Elmer Strong*, 17 ECAB 226, 228 (1965).

<sup>8</sup> *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

<sup>9</sup> FECA Bulletin No. 09-05 (issued August 18, 2009).

<sup>10</sup> See *M.A.*, Docket No. 12-316 (issued July 24, 2012).

<sup>11</sup> *Supra* note 9.

further develop the evidence from both the claimant and the employing establishment if the case lacks current medical evidence.<sup>12</sup>

As OWCP failed to fully address the guidelines in FECA Bulletin No. 09-05, the Board will set aside OWCP's April 30, 2012 decision and remand the case for further consideration. After proper and documented compliance with FECA Bulletin No. 09-05 guidelines and any necessary further development, OWCP shall issue an appropriate *de novo* decision on appellant's entitlement to wage-loss compensation beginning September 15, 2010.

### **CONCLUSION**

The Board finds that this case is not in posture for determination on whether modification of OWCP's September 12, 2003 LWEC determination is appropriate. Further action by OWCP is warranted.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the April 30, 2012 decision by the Office of Workers' Compensation Programs is set aside and the case is remanded for further action.

Issued: June 18, 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>12</sup> *Id.* at § 1.A.1-2.