



## **FACTUAL HISTORY**

The case was before the Board on a prior appeal.<sup>2</sup> The Board noted that OWCP had accepted that appellant sustained lumbosacral, right forearm and right wrist sprains/strains in the performance of duty on April 25, 2003.<sup>3</sup> By decision dated November 30, 2006, OWCP determined that she had no loss of wage-earning capacity, finding that actual earnings in a modified distribution clerk position fairly and reasonably represented wage-earning capacity. The only decision before the Board on the prior appeal was a request for a review of the written record regarding the November 30, 2006 decision. In the February 24, 2011 decision, the Board affirmed a May 11, 2010 OWCP decision denying the request for a review of the written record.

With respect to the modified clerk position, the record indicates that the employing establishment offered appellant the position by letter dated February 14, 2006. The stated physical requirements of the position were "5" hours of intermittent standing, walking, sitting, simple grasping and fine manipulation.<sup>4</sup> The lifting restrictions were 13 pounds continuously and 15 pounds intermittently. The job was described as distributing and sorting mail.

As to the medical evidence at the time of the job offer, the record contains duty status reports (Form CA-17) from Dr. J. Raschbacher, an occupational medicine specialist. In a Form CA-17 dated August 19, 2005, Dr. Raschbacher indicated that appellant should alternate sitting and standing every 20 minutes. In a Form CA-17 dated September 16, 2005, he again indicated that appellant should alternate sitting and standing every 20 minutes.<sup>5</sup>

In a report dated October 28, 2005, Dr. Greg Smith, an osteopath, provided results on examination and a permanent impairment rating. He indicated that appellant had a functional capacity evaluation on October 14, 2005. According to Dr. Smith, she could stand for 1 hour and 20 minutes continuously, but could only sit for 32 minutes. He stated that appellant could lift 15 pounds intermittently, should continue to alternate sitting and standing, but she could stand for 1 hour and 20 minutes without difficulty. Dr. Smith indicated that a CA-17 was completed based on the functional capacity evaluation.<sup>6</sup>

By decision dated November 30, 2006, OWCP found that actual earnings as a modified clerk since March 4, 2006 fairly and reasonably represented appellant's wage-earning capacity.

The record indicates that, by letter dated February 8, 2010, the employing establishment advised appellant that, pursuant to the National Reassessment Process (NRP), no jobs within her

---

<sup>2</sup> Docket No. 10-609 (issued February 24, 2011).

<sup>3</sup> On September 8, 2009 OWCP accepted ruptured L4-5 disc and grade 1 spondylosis.

<sup>4</sup> The record contains a copy of the job offer requirements signed by appellant on January 18, 2006, also stating that appellant may stand one hour 20 minutes and then sit for 10 minutes. The copy signed by appellant on February 15, 2006 does not provide this statement.

<sup>5</sup> The record indicates this form was marked as received by OWCP on March 8, 2011.

<sup>6</sup> There does not appear to be an October 14, 2005 CA-17 in the record.

work restrictions were found to be available. Appellant filed claims for compensation commencing January 30, 2010.

In a report dated February 16, 2010, Dr. Barry Ogin, a Board-certified physiatrist, provided a history and results on examination. He diagnosed low back and buttock pain, history of L4-5 fusion in 2004, possible facet syndrome L5-S1, myofascial pain and possible sacroiliac joint dysfunction.

By letter dated March 8, 2010 from OWCP to the employing establishment, OWCP noted that a wage-earning capacity determination had been made and appellant was claiming compensation for wage loss. It requested the employing establishment submit any current medical evidence, copies of personnel records and information regarding work duties. In a CA-17 report dated June 24, 2010, Dr. Raschbacher indicated that appellant should continue to alternate sitting, standing and walking every 20 minutes.

In a decision dated November 10, 2010, OWCP denied modification of the wage-earning capacity determination. It found that the criteria for modifying a loss of wage-earning capacity determination had not been met.

Appellant requested a review of the written record in a letter dated March 3, 2011. She argued that the job was outside of her work restrictions and that the job changed periodically. In a report dated January 27, 2011, Dr. Raschbacher diagnosed lumbar disc disease and right S1 joint pain/dysfunction. He stated that the right S1 joint findings would be secondary to an altered gait from appellant's disc problems and therefore would be considered work related.

In a decision dated April 27, 2011, the hearing representative affirmed the November 10, 2011 decision. He noted the provisions of FECA Bulletin No. 09-05 with respect to claims for total disability, referable to NRP, when a wage-earning capacity determination is in place.<sup>7</sup> The hearing representative found that the offered position was not a makeshift position and the original wage-earning capacity determination was correct. He further found that the offered job was consistent with restrictions provided by Dr. Smith in his October 28, 2005 report. The hearing representative stated that the offered job did not require more than five hours daily of sitting, walking, and lifting and clearly the job required only up to five hours of each activity. He also found that appellant had not established a material change in an employment-related condition.

Appellant requested reconsideration, by letter dated September 20, 2011, and submitted a letter dated September 2, 2011, from Dr. Brian Reiss, a Board-certified orthopedic surgeon, who stated that he was responding to questions from appellant's representative. Dr. Reiss stated that the modified job appeared to require more than five hours standing, and it would seem that appellant could do the job only if she was not required to stand for that long. He stated that appellant had degenerative changes at L5-S1 that were related to her previous injury and subsequent fusion. Dr. Reiss indicated that he would not suggest appellant had a significantly altered gait.

---

<sup>7</sup> FECA Bulletin No. 09-05 (issued August 18, 2009). This Bulletin indicates that OWCP should determine whether a modification of the wage-earning capacity is appropriate.

By decision dated November 14, 2011, OWCP declined to review the merits of the claim. On December 20, 2011 appellant again requested reconsideration.

By decision dated May 1, 2012, OWCP reviewed the case on its merits and denied modification. With respect to the modified job, it referred to an October 2007 employing establishment form stating that appellant would alternate standing walking and sitting every 20 minutes.

### **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>8</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>9</sup>

### **ANALYSIS**

In the present case, OWCP issued a wage-earning capacity determination on November 30, 2006, based on actual earnings in a modified job since March 4, 2006. Under 5 U.S.C. § 8115, wage-earning capacity may be determined by actual earnings if actual earnings “fairly and reasonably” represent wage-earning capacity.

Appellant filed claims for compensation following notification that, pursuant to NRP, no light-duty work was available. She argued that the November 30, 2006 loss of wage-earning capacity determination was erroneous. Pursuant to FECA Bulletin No. 09-05, OWCP should confirm the loss of wage-earning capacity was based on an “actual bona fide position” and make a determination whether “the loss of wage-earning capacity rating was without any factual or legal basis at the time it was issued....”<sup>10</sup>

The hearing representative followed the guidelines of FECA Bulletin No. 09-05 and found the modified clerk position was a bona fide position. In this regard, the Board notes that the light-duty position had a written job description that described the job duties. There was no indication that this was a makeshift position otherwise inappropriate for a loss of wage-earning capacity determination. The modified clerk position was not temporary, had meaningful duties and was not based on overly strict physical limitations.<sup>11</sup>

The Board notes that, although the written job description contained typographical errors as to the hours required for certain activities, appellant performed the position since March 4, 2006. There was no probative evidence that the job was outside of any established

---

<sup>8</sup> *Sue A. Sedgwick*, 45 ECAB 211 (1993); *Elmer Strong*, 17 ECAB 226, 228 (1965).

<sup>9</sup> *Id.*

<sup>10</sup> FECA Bulletin No. 09-05 (issued August 18, 2009).

<sup>11</sup> *See A.J.*, Docket No. 10-619 (issued June 29, 2010).

work restrictions. Dr. Smith indicated on October 28, 2005 that appellant could lift 15 pounds and needed to alternate sitting and standing. The evidence indicated that the modified clerk position was a bona fide position that represented appellant's wage-earning capacity.

Another basis for modification of the loss of wage-earning capacity determination is a material change in the nature and extent of the injury-related condition.<sup>12</sup> In accord with FECA Bulletin No. 09-05, OWCP requested evidence from the employing establishment with respect to any relevant medical evidence in its possession.<sup>13</sup> In this case, the medical evidence did not establish a material change in the employment-related condition. Dr. Raschbacher noted right S1 joint findings in a January 27, 2011 report, stating this would be secondary to an altered gait from appellant's disc problems, but Dr. Reiss indicated that appellant did not have a significantly altered gait. Dr. Reiss stated in his September 2, 2011 letter that she had degenerative changes at L5-S1, without providing any medical rationale or explanation as to causal relationship with the employment injuries. The Board finds there is no probative medical evidence establishing a material change in the nature and extent of an employment-related condition.

Based on the evidence of record, the Board finds that OWCP properly denied modification of the November 30, 2006 loss of wage-earning capacity determination. OWCP followed the guidelines of FECA Bulletin No. 09-05 and appellant did not meet any of the requirements to modify the loss of wage-earning capacity determination. Appellant may request modification of the loss of wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

### **CONCLUSION**

The Board finds that appellant has not established a modification of the November 30, 2006 loss of wage-earning capacity determination was warranted.

---

<sup>12</sup> FECA Bulletin No. 09-05 notes that, if the accepted condition has worsened and meets the criteria in *Elmer Strong*, *supra* note 8, a modification of the loss of wage-earning capacity is warranted.

<sup>13</sup> FECA Bulletin No. 09-05(A)(2).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 1, 2012 is affirmed.

Issued: March 29, 2013  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board