

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

S.J., Appellant

and

**U.S. POSTAL SERVICE, CENTRAL
FACILITY, Chicago, IL, Employer**

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**Docket No. 13-4
Issued: March 12, 2013**

Appearances:
Norman R. McNulty, Jr., 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 October 1, 2012 appellant, through her attorney, filed a timely appeal from a July 25, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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 has established that the April 18, 2003 loss of wage-earning capacity determination should be modified.

FACTUAL HISTORY

On February 24, 2001 appellant, then a 39-year-old distribution clerk, filed an occupational disease claim alleging that she sustained right carpal tunnel syndrome causally

¹ 5 U.S.C. § 8101 *et seq.*

related to factors of her federal employment. OWCP accepted the claim for a right wrist sprain and tenosynovitis of the right wrist.

On July 19, 2001 appellant accepted a limited-duty position as a modified distribution clerk. The position was available from July 19 through September 20, 2001. The job offer indicated that the position would subsequently continue in accordance with her physician's work restrictions.

By decision dated April 18, 2003, OWCP reduced appellant's compensation to zero based on its finding that her actual earnings as a modified distribution clerk effective July 19, 2001 fairly and reasonably represented her wage-earning capacity.²

On May 26, 2007 appellant accepted a position as a modified mail processing clerk repairing damaged mail.

On April 21, 2011 appellant filed a claim for compensation beginning April 8, 2011. She related that she was sent home from work as part of the National Reassessment Program (NRP).

In a report dated April 21, 2011, Dr. Samuel J. Chmell, an attending Board-certified orthopedic surgeon, diagnosed right carpal tunnel syndrome and multiple tendinitis. He noted that appellant was "only being allowed to work two hours at a time." Dr. Chmell advised that she could work seven hours per day with restrictions.

On May 18, 2011 Dr. Chmell related that he had treated appellant for 10 years for employment-related right wrist strain and multiple tendinitis and tenosynovitis. He asserted that as the employing establishment had decreased her work hours to two hours per day, the original loss of wage-earning capacity determination was erroneous.

By decision dated June 13, 2011, OWCP denied appellant's claim for compensation beginning April 8, 2011. It found that the evidence was insufficient to show modification of the prior loss of wage-earning capacity determination.

On July 7, 2011 appellant requested a telephone hearing before an OWCP hearing representative.³

At the telephonic hearing, held on October 12, 2011, appellant's attorney contended that the original loss of wage-earning capacity determination was in error as the offered position was makeshift in nature. Appellant related that she had worked in the nixie unit since 2001.

² In a decision dated April 24, 2003, OWCP granted appellant a schedule award for a 21 percent permanent impairment of the right upper extremity. By decision dated September 15, 2010, it found that she had not established a recurrence of disability from April 14 through 24, 2010.

³ In a progress report dated August 4, 2011, Dr. Chmell related that appellant had a "positive median nerve compression test on the right side. He diagnosed multiple tendinitis and right carpal tunnel syndrome. Dr. Chmell noted that she was only working two hours per day even though she was able to work seven hours. In a progress report dated November 17, 2011, he diagnosed a flare-up of right carpal tunnel syndrome and tendinitis. Dr. Chmell found that appellant would return to work on November 29, 2011.

By decision dated December 19, 2011, an OWCP hearing representative affirmed the June 13, 2011 decision. She found that appellant did not establish that the original loss of wage-earning capacity determination was in error or that her condition materially worsened.

On January 11, 2012 Dr. Chmell related that appellant's right upper extremity condition "has shown steady and progressive deterioration as she has continued to work following her original injury." He attributed her right carpal tunnel syndrome to her chronic tendinitis. Dr. Chmell asserted that appellant's condition had materially changed.⁴

On April 3, 2012 appellant, through her attorney, requested reconsideration. He maintained that the opinion of Dr. Chmell established a material worsening of her condition and also that the original job offer by the employing establishment was makeshift in nature.

By decision dated July 25, 2012, OWCP denied modification of its December 19, 2011 decision.

On appeal appellant's attorney argues that she has established a material change in her condition. He further contends that the original loss of wage-earning capacity determination was erroneous as it was based on a makeshift position.

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.⁵ Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.⁶

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.⁷ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁸

FECA Bulletin No. 09-05, however, outlines OWCP's procedures when limited-duty positions are withdrawn pursuant to NRP. If, as in the present case, a formal wage-earning

⁴ On March 23, 2012 Dr. Chmell advised that diagnostic studies confirmed that appellant had right carpal tunnel syndrome. He stated, "In essence, she has had a significant deterioration of her already accepted work-related condition of multiple tendinitis of her right forearm and wrist and right wrist strain such that her tendons and wrist remain inflamed and swollen to the point where they have compressed the median nerve which is known as a compression neuropathy of the median nerve at her right wrist...."

⁵ See 5 U.S.C. § 8115 (determination of wage-earning capacity).

⁶ *Sharon C. Clement*, 55 ECAB 552 (2004).

⁷ *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Tamra McCauley*, 51 ECAB 375, 377 (2000).

⁸ *Id.*

capacity decision has been issued, OWCP must develop the evidence to determine whether a modification of that decision is appropriate.⁹

ANALYSIS

OWCP accepted that appellant sustained right wrist sprain and tenosynovitis causally related to factors of her federal employment. On April 18, 2003 it found that her actual earnings as a modified distribution clerk effective July 19, 2001 fairly and reasonably represented her wage-earning capacity. On April 20, 2011 appellant filed a claim for compensation beginning April 8, 2011 because her hours were reduced under NRP.

OWCP issued a formal loss of wage-earning capacity decision on April 18, 2003. The employing establishment reassessed appellant's position under NRP, resulting in a withdrawal of limited duty and a claim for wage-loss compensation. OWCP analyzed the case under the customary criteria for modifying a loss of wage-earning capacity determination. Its decision did not acknowledge FECA Bulletin No. 09-05 or fully follow the procedures outlined therein for claims, such as this, in which modified-duty positions are withdrawn pursuant to NRP.

FECA Bulletin No. 09-05 requires OWCP to develop the evidence to determine whether a modification of the decision is appropriate. 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.¹⁰ It requires OWCP to review whether a current medical report supports work-related disability and to further develop the evidence from both the claimant and the employing establishment if the case lacks current medical evidence.¹¹ In this case, in May 18, 2011, Dr. Chmell indicated that he continued to treat appellant for right wrist strain and tendinitis and opined that she could work with restrictions.

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 the employing establishment to 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 a review of its files for contemporaneous evidence concerning the position.¹²

As OWCP failed to follow the guidelines in FECA Bulletin No. 09-05, the Board will set aside the July 25, 2012 decision and remand the case for further consideration. After proper compliance with FECA Bulletin No. 09-05 guidelines, OWCP shall issue an appropriate decision on appellant's entitlement to compensation beginning April 8, 2011.¹³

⁹ FECA Bulletin No. 09-05 (issued August 18, 2009).

¹⁰ A position that is makeshift in nature is not appropriate for a loss of wage-earning capacity determination. *See Selden H. Swartz*, 55 ECAB 272 (2004).

¹¹ FECA Bulletin No. 09-05 §§ I.A.1-2.

¹² *Id.* at § I.A.3; *see also P.B.*, Docket No. 12-799 (issued December 11, 2012).

¹³ *See M.E.*, Docket No. 11-1416 (issued May 17, 2012).

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the July 25, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: March 12, 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