



## **FACTUAL HISTORY**

OWCP accepted that on or before October 19, 1992 appellant, then a 30-year-old mail processing machine operator, sustained lumbar disc herniations at L4-5 and L5-S1 due to repetitive lifting and bending in the performance of duty. Appellant underwent an L5-S1 fusion in 1993. On April 6, 1994 she underwent a posterior L4-5 fusion with screw and plate instrumentation. OWCP approved both surgical procedures.

Dr. William A. Earman, Jr., an attending osteopathic physician Board-certified in orthopedic surgery, opined on July 7, 1995 that appellant had reached maximum medical improvement. Appellant required permanent physical restrictions due to her postsurgical status. Dr. Earman limited lifting to 20 pounds, with no bending, stooping or twisting. Appellant also required frequent changes of position. Dr. Edward G. Nicholson, an attending osteopathic physician Board-certified in family practice, reduced appellant's lifting limitation to 10 pounds due to lumbar instability.

On December 30, 1996 appellant accepted a permanent job offer as a modified mail processor. The employing establishment stated that the position was offered to her as the physical demands of a full-time mail handler exceeded the permanent physical restrictions mandated by the accepted lumbar disc herniations. The modified mail processor position required eight hours of alternate standing and sitting, with lifting limited to pieces of mail weighing one ounce. Appellant returned to work on December 30, 1996.

By decision dated May 15, 1997, OWCP determined that appellant had no loss of wage-earning capacity as she worked as a modified mail processor at retained pay for more than 60 days.

By decision dated September 24, 1998, OWCP granted appellant a schedule award for an 11 percent permanent impairment of the right lower extremity due to the accepted lumbar disc herniations.<sup>2</sup>

From June 2000 through 2005, appellant continued working as a modified mail processor under the limitations specified in the December 30, 1996 position description. In 2002, OWCP assigned a vocational rehabilitation counselor to appellant's case to assist the employing establishment in obtaining a prescribed ergonomic chair.

On August 23, 2006 appellant accepted a full-time modified reassignment position in the cancellation unit. She had no production quota and could work at her own pace. Appellant was allowed to change positions at will, with lifting limited to five pounds. In reports from June 8, 2007 to December 6, 2010, Dr. Yolanda Escalona, an attending Board-certified internist, affirmed appellant's work restrictions against lifting more than five pounds, with no kneeling, bending, stooping or twisting.

Appellant claimed wage-loss compensation beginning on September 13, 2010. She claimed 80 hours of wage-loss compensation for the period December 6 to 17, 2010. On the

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<sup>2</sup> OWCP denied an additional schedule award by decision issued January 12, 1999.

reverse of the forms, the employing establishment wrote “NRP [National Reassessment Process], No Work Available.” By decision dated January 13, 2011, OWCP denied a recurrence of disability on the grounds that the medical evidence did not establish a spontaneous worsening of the accepted lumbar conditions.

The employing establishment placed appellant in “stand by” status on February 4, 2011. In a March 4, 2011 letter, it advised her that, under the limited-duty guidelines of NRP, there was no work available within her restrictions as of that day. A review of area operations demonstrated that there were no necessary tasks within her medical restrictions available in her commuting area. Appellant was not to report for duty until work could be found for her. The employing establishment instructed her to claim wage-loss compensation under FECA. Appellant claimed compensation for total disability commencing March 4, 2011.

Appellant submitted reports dated from March 2011 through October 2012 from Dr. Holly Carobene, an attending physician Board-certified in pain management, diagnosing cervical and lumbar radiculopathy. Dr. Carobene administered lumbar epidural injections. Dr. Escalona affirmed prior work restrictions through November 3, 2011.<sup>3</sup>

In a February 22, 2012 letter, appellant contended that the May 15, 1997 wage-earning capacity determination was in error as it was based on a makeshift job specifically designed to accommodate her work limitations and was not available on the open labor market.

In an April 5, 2012 letter, OWCP advised appellant of the evidence needed to establish that the May 15, 1997 wage-earning capacity determination should be modified. It noted that she must submit factual evidence that the original determination was in error or that she had been vocationally retrained. Alternatively, appellant was to submit medical evidence demonstrating a material worsening of the accepted conditions such that she could no longer perform the permanent modified-duty position. OWCP afforded her 30 days to submit such evidence.<sup>4</sup>

Appellant submitted April 17 and 24, 2012 reports from Dr. Carobene reiterating prior work restrictions.

By decision dated July 23, 2012, OWCP denied appellant’s claim for wage-loss compensation beginning March 4, 2011 on the grounds that the medical evidence did not establish a worsening of the accepted conditions such that she was totally disabled for work.

On August 16, 2012 appellant requested an oral hearing, held on November 27, 2012. At the hearing, she again asserted that the May 15, 1997 wage-earning capacity determination was erroneous as it was based on a makeshift position not available on the open labor market. Appellant submitted November 2010 physical therapy notes and an October 2, 2012 report from Dr. Carobene noting administration of a left L5 nerve root block.

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<sup>3</sup> A March 18, 2011 lumbar magnetic resonance imaging (MRI) scan showed trace disc bulges at L2-3 and L5-S1 superimposed on spinal changes from the two lumbar fusions with fixation.

<sup>4</sup> The record reflects that OWCP requested the employing establishment to submit information pertaining to the position appellant had been performing. The record does not document a response.

By decision dated and finalized February 11, 2013, an OWCP hearing representative affirmed the July 23, 2012 decision, finding that appellant presented insufficient medical evidence to establish a material worsening of the accepted condition. The hearing representative further found that the evidence submitted was not sufficient to demonstrate that the May 15, 1997 wage-earning capacity determination was erroneous. The hearing representative did not mention FECA Bulletin No. 09-05 or the criteria it sets forth for adjudicating claims for wage loss under NRP when a loss of wage-earning capacity determination is in place.

### **LEGAL PRECEDENT**

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.<sup>5</sup> When an employee cannot return to the date-of-injury job because of disability due to work-related injury or disease, but does return to alternative employment, OWCP must determine whether the earnings in the alternative employment fairly and reasonably represent the employee's wage-earning capacity.<sup>6</sup>

Once OWCP determines the employee's wage-earning capacity, a modification of the determination is not warranted unless there is a material change in the nature and extent of the employment-related condition, the employee has been vocationally rehabilitated or retrained, or the original determination was erroneous. These are the customary criteria for modification. The burden of proof is on the party attempting to demonstrate that a modification of the wage-earning capacity determination is warranted.<sup>7</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, OWCP issued a formal wage-earning capacity determination, it must develop the evidence to determine whether a modification of that determination is appropriate.<sup>8</sup>

### **ANALYSIS**

OWCP accepted that appellant sustained L4-5 and L5-S1 disc herniations on or before October 19, 1992, necessitating lumbar fusions in 1993 and 1994. Appellant returned to work on December 30, 1996 as a modified mail processor, a permanent position designed to accommodate her specific work-related physical limitations. On May 15, 1997 OWCP issued a formal wage-earning capacity determination finding that she had no loss of wage-earning capacity as she had been working the permanent modified job at retained pay for more than 60 days. Appellant claimed that she sustained a recurrence of total disability when her modified-duty position was withdrawn effective March 4, 2011 under NRP.

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<sup>5</sup> 5 U.S.C. § 8102(a).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claim, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (October 2009). *See also M.A.*, Docket No. 12-316 (issued July 24, 2012).

<sup>7</sup> *Daniel J. Boesen*, 38 ECAB 556 (1987).

<sup>8</sup> FECA Bulletin No. 09-05 (issued August 18, 2009). *See also M.A.*, *supra* note 6.

In the February 11, 2013 decision, OWCP analyzed the case under the customary criteria for modifying a loss of wage-earning capacity determination. It found that appellant did not submit sufficient medical evidence to establish a worsening of the accepted condition or that the May 15, 1997 wage-earning capacity determination was in error. OWCP did not address FECA Bulletin No. 09-05 or fully follow the procedures outlined therein for claims, such as this, in which limited-duty positions are withdrawn pursuant to NRP.

When a wage-earning capacity determination is issued, FECA Bulletin No. 09-05 requires OWCP to develop the evidence to determine whether a modification of the decision is appropriate. It requires OWCP to review the wage-earning capacity decision to determine whether it was based on an actual bona fide position. OWCP confirmed that the file contains documentary evidence supporting that the position was an actual bona fide position. FECA Bulletin No. 09-05 also 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 results from residuals of the accepted injury 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 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 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. The record reflects that on April 5, 2012 OWCP requested information from the employing establishment as to the position appellant had been performing; but does not document a response. The Board further notes that the December 30, 1996 job offer on which the May 15, 1997 wage-earning capacity was based stated that the position was created for appellant to accommodate her particular medical limitations.

As OWCP failed to follow the guidelines in FECA Bulletin No. 09-05, the Board will set aside the February 11, 2013 decision and remand the case for further consideration. After proper compliance with FECA Bulletin No. 09-05 guidelines, OWCP shall issue a *de novo* decision on appellant's entitlement to wage-loss compensation for the period commencing March 4, 2011.<sup>9</sup>

On appeal, appellant asserts that she remains disabled for her date-of-injury position. She also contends that the original wage-earning capacity determination was in error as it was based on a makeshift, odd-lot job created exclusively for her and not available on the open labor market. As stated above, the case will be remanded to OWCP for an appropriate analysis of the medical aspects of the claim and whether the original wage-earning capacity determination was based on a makeshift or odd-lot position, under FECA Bulletin No. 09-05.

### **CONCLUSION**

The Board finds that this case is not in posture for determination on whether modification of OWCP's May 15, 1997 wage-earning capacity determination is appropriate. The case will be remanded to OWCP for further development, to be followed by issuance of a *de novo* decision.

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<sup>9</sup> See *M.E.*, Docket No. 11-1416 (issued May 17, 2012); *M.A.*, *supra* note 6.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated February 11, 2013 is set aside and the case remanded to OWCP for further action consistent with this decision.

Issued: September 10, 2013  
Washington, DC

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

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

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