

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

P.P., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Jacksonville, FL Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 14-656
Issued: December 18, 2014**

Appearances:

*Capp P. Taylor, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 30, 2014 appellant, through her attorney, filed a timely appeal from a September 30, 2013 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 to consider the merits of the case.

ISSUE

The issue is whether appellant met her burden of proof to modify the September 30, 1997 loss of wage-earning capacity determination.

On appeal, counsel argued that OWCP did not determine whether appellant's position of tag writer was makeshift. He further argued that the medical evidence established that she has residuals of her accepted injury and sustained a recurrence of disability when her hours were reduced due to the National Reassessment Process (NRP).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.² Appellant has an accepted claim for bilateral carpal tunnel syndrome for which she underwent surgical release on December 13, 1994 for the right side. She was offered a permanent light-duty position on November 28, 1995 as a modified clerk, restricted to lifting no more than 10 pounds and no keying or repetitive activity. Appellant was to manually sort parcels, bundles of letters or flats, to push containers of mail, to write tags for contains of mail, or to perform minor rewrap or repair of small parcels. In a telephone memorandum dated December 18, 1995, the employing establishment indicated that she was working reading manuals all day. By decision dated June 27, 1996, OWCP reduced appellant's wage-loss compensation to zero finding that her actual earnings as a modified clerk fairly and reasonably represented her wage-earning capacity.

Appellant requested an oral hearing before an OWCP hearing representative held on June 25, 1997. She testified that she never performed the duties of the modified-duty position. Appellant stated that she read postal manuals eight hours a day from May 1995 until August 1996, because there was no other work available within her restrictions. She attempted to perform the modified clerk duties after the June 27, 1996 decision, but felt unable to accomplish the activities and the employing establishment assigned her to "write up tags" for eight hours a day.

In a decision dated September 30, 1997, the hearing representative affirmed the wage-earning capacity determination. He found that appellant performed duties writing up tags for eight hours a day, which was one of the duties listed in the job offer.

On September 27, 2010 appellant filed a claim requesting wage-loss compensation commencing September 23, 2010. On September 20, 2010 the employing establishment offered her a rehabilitation modified position working 1.5 hours a day until she was reassessed under NRP. Appellant filed a recurrence claim on September 29, 2010 alleging disability as of September 23, 2010 due to NRP. On September 23, 2010 the employing establishment provided her with a modified position working 1.5 hours a day.

By decision dated November 19, 2010, OWCP denied appellant's claim for compensation commencing September 23, 2010. It found that she did not submit sufficient medical evidence to establish her disability for work. On June 28, 2011 an OWCP hearing representative affirmed the denial of modification of the wage-earning capacity determination. She found insufficient medical evidence to establish that appellant's current conditions or disability was due to her accepted employment injury. Further, the most recent medical report was dated October 5, 2007.

Appellant requested reconsideration on October 5, 2011 and stated that she had ongoing medical restrictions due to her accepted condition.

By decision dated November 15, 2011, OWCP reviewed the merits of appellant's claim and denied modification of the June 28, 2011 decision. It noted that a formal loss of wage-earning capacity decision was in place. OWCP also noted that appellant filed a recurrence of

² Docket No. 12-1163 (issued December 13, 2012).

disability claim for compensation as of September 23, 2010 due to NRP. It denied her claim on November 19, 2010 because the medical evidence did not support a worsening of her bilateral carpal tunnel syndrome. OWCP found that the original loss of wage-earning capacity determination was not erroneous and that the modified position was not makeshift as appellant was classified as a full-time modified parcel post distribution machine clerk.

In a December 13, 2012 decision, the Board set aside the November 15, 2011 OWCP decision and remanded the case for findings pursuant to FECA Bulletin No. 09-05. The Board directed OWCP to determine whether appellant's loss of wage-earning capacity was based on an actual *bona fide* position and to further develop the medical evidence. The facts of the claim as set forth in the Board's prior decision are incorporated by reference.

On January 9, 2013 OWCP referred appellant for a second opinion evaluation to Dr. George C. Hochreiter, an osteopath. It also requested that the employing establishment address her modified-duty position.

In a report dated January 31, 2013, Dr. Hochreiter reported that appellant had symptoms of pain and paresthesias involving both hands, with difficulty doing repetitive activities. Appellant advised him that she returned to full-time modified duty as of April 2012 and could perform all activities at work in her modified position without pain. She also gave up activities at home that demanded heavy or repetitive usage of her hands. On physical examination Dr. Hochreiter noted decreased sensation along the ulnar aspect of the right forearm with decrease in sensation to the tips of the thumb, index and middle fingers bilaterally as well as mild weakness of the abductor pollicis brevis on the right side. He opined that appellant had continued symptoms of accepted bilateral carpal tunnel syndrome with residuals following surgery on the right and persistent symptoms on the left. Dr. Hochreiter listed objective findings of positive Tinel's sign and decreased sensation in the fingers as well as weakness of the abductor pollicis brevis. He recommended work restrictions limiting repetitive usage of either hand with no pushing, pulling, or lifting greater than 10 pounds. Dr. Hochreiter stated that appellant could continue performing her current job as she was working eight hours a day with no difficulty.

In a letter dated January 31, 2013, the employing establishment advised that the job offer dated November 28, 1995 as presented to appellant was a *bona fide* permanently modified position. An SF-50 form was subsequently issued on September 6, 1996 to base the modified job offer on updated medical documentation provided by appellant. It included a U.S. Postal Service assignment order, which noted appellant's position as a modified parcel post distribution machine clerk.

OWCP issued a decision on February 12, 2013. It found that appellant was not entitled to wage-loss benefits commencing September 23, 2010 as the loss of wage-earning capacity determination was appropriate, there was no material change in her employment-related condition and she had not been retrained.

Appellant requested an oral hearing on March 6, 2013. Counsel submitted a memorandum contending that the original loss of wage-earning capacity determination was erroneous as she actually only wrote tags for 60 days and the position was modified to reflect

this duty. He also argued that the employing establishment improperly reduced appellant's work hours resulting in a recurrence of disability.

Appellant testified at the oral hearing on July 16, 2013 regarding her modified duties. She had worked full time in secondary sorting on miss-sent parcels and writing up tags. The employing establishment reduced appellant to one and one-half hours a day on September 23, 2010 based on a position requiring her to read manuals. From November 20, 2010 to February 2011, appellant returned to work eight hours a day in the nixie rewrap. The employing establishment again reduced her to one and one-half hours a day from February 11 through April 25, 2012. Appellant then returned to work eight hours a day at modified-duty performing priority mail verification.

In a September 30, 2013 decision, the hearing representative found that the modified position was not makeshift. Appellant performed the job for several years prior to claiming a recurrence of disability in 2010. The hearing representative further found that the medical evidence did not support a material change in her bilateral carpal tunnel condition resulting in disability for work as of September 23, 2010. Appellant did not establish that the original loss of wage-earning capacity decision was in error.

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. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.³ Once a loss of wage-earning capacity is determined, a modification of such a determination is not warranted unless there is a material change in the nature and extent of the employment-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was in fact erroneous.⁴

The burden of proof is on the party attempting to show the award should be modified.⁵ FECA's procedure manual states that when the employing establishment has withdrawn a light-duty position which accommodated the claimant's work restrictions and a formal wage-earning capacity decision has been issued, the wage-earning capacity decision will remain in place.⁶ The claims examiner should, however, consult FECA Bulletin No. 09-05 (United States Postal Service National Reassessment Program Guidance,) issued August 18, 2009 if the circumstances in the case indicate that the position in question may have been withdrawn (in whole or in part) as a result of NRP.⁷

³ *Katherine T. Kreger*, 55 ECAB 633 (2004).

⁴ *K.S.*, Docket No. 08-2105 (issued February 11, 2009); *George W. Coleman*, 38 ECAB 782, 788 (1987).

⁵ *Id.*

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501.7 (June 2013).

⁷ *Id.*

ANALYSIS

The Board finds that appellant has not established that she sustained a recurrence of disability commencing September 23, 2010 or that the wage-earning capacity determination should be modified.

OWCP's decision determining appellant's wage-earning capacity was based on a November 28, 1995 permanent limited-duty job offer as a modified parcel post distribution machine operations clerk. The position description included duties of manual parcel or bundled mail sorting not to exceed 10 pounds, pushing containers of mail or parcels, and writing up tags for containers of mail or placing tags on the outside of mail containers. Appellant returned to work full time in the modified position with actual earnings equivalent to her salary when injured in 1993. As of the September 30, 1997 decision, the hearing representative found that she was working full time writing up tags for containers eight hours a day. He noted that this was a job requirement listed in the 1995 job offer and found that appellant's actual earnings in her modified clerk position fairly and reasonably represented her wage-earning capacity.

Following the Board's December 13, 2012 decision, OWCP obtained from the employing establishment a copy of U.S. Postal Service assignment order form 1723 dated September 10, 1996, which listed appellant's position title as a modified parcel post distribution machine operator. It provided information pertaining to her assigned tour of duty and noted the reason for the assignment based on her move to modified duty. FECA Bulletin No. 09-05 provides that the determination, of whether a loss of wage-earning capacity was based on an actual *bona fide* position may be evidenced by a job offer, SF-50, a classified position a formal position description, or other documentary evidence. As noted, appellant worked full time writing up tags for containers -- a responsibility as defined in the 1995 job offer. On September 17, 1996 she was notified of a new operation number, which was advised to use for the duration of her rehabilitation assignment. The employing establishment noted that appellant would be required to update her medical evidence on an annual basis. The record reflects that she continued to work in the modified position until September 23, 2010.

Following remand, OWCP also developed the medical evidence of record by referring appellant to Dr. Hochreiter to determine whether the record supported work-related disability or established the current need for limited duty or medical treatment due to residuals of the accepted condition. Dr. Hochreiter provided a report addressing her accepted bilateral carpal tunnel condition, noting the prior surgical report and diagnostic tests. On examination, he advised that appellant had residuals of her accepted condition with symptoms of pain and paresthesias involving both hands. Dr. Hochreiter noted a positive Tinel's sign and decrease in sensation to the tip of the thumb, index, and middle fingers. He noted that appellant had returned to full-time modified duty in 2012 and stated that she was able to perform her duties without difficulty. Dr. Hochreiter recommended physical limitations and advised that she could continue in her present position full time. He did not support that appellant was disabled commencing September 23, 2010 due to residuals of her accepted condition.

The other medical evidence of record does not support that appellant became disabled as of September 23, 2010 due to residuals of her bilateral carpal tunnel condition. As noted in the Board's prior decision, an August 31, 2011 report from Dr. Alpa Patel, a Board-certified family practitioner, similarly found that she had residuals of her bilateral carpal tunnel syndrome. He

advised that appellant's work restrictions from September 29, 2000 were still in effect. Dr. Patel did not support that she sustained a recurrence of total disability commencing September 23, 2010 due to residuals of her accepted condition. Neither Dr. Hochreiter nor Dr. Patel support a material worsening of appellant's bilateral carpal tunnel syndrome.

The Board finds that, under FECA Bulletin No. 09-05, appellant has not established a basis for modification of the 1996 wage-earning capacity determination. Further, the medical evidence does not establish disability commencing September 23, 2010 due to a worsening of her accepted bilateral wrist condition.

CONCLUSION

The Board finds that appellant did not establish a basis for modification of the wage-earning capacity determination in this case. Further, the medical evidence does not establish a recurrence of disability as of September 23, 2010 due to a worsening of her accepted bilateral carpal tunnel syndrome.

ORDER

IT IS HEREBY ORDERED THAT the September 30, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 18, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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