

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

L.P., Appellant

and

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

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**Docket No. 14-1344
Issued: December 4, 2014**

Appearances:

*Alan J. Shapiro, 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 May 27, 2014 appellant, through her attorney, filed a timely appeal from the April 3, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP) regarding a loss of wage-earning capacity (LWEC) determination. 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 met her burden of proof to modify OWCP's September 12, 2003 LWEC determination.

FACTUAL HISTORY

This case has previously been before the Board. In a June 18, 2013 decision, the Board set aside an April 30, 2012 OWCP decision that denied modification of the September 12, 2003

¹ 5 U.S.C. § 8101 *et seq.*

LWEC determination. The Board noted that it analyzed the case under the customary criteria for modifying an LWEC determination, but did not acknowledge FECA Bulletin No. 09-05 or follow the procedures outlined for claims in which limited-duty positions were withdrawn pursuant to the National Reassessment Policy (NRP).² The facts and circumstances surrounding the prior appeal are incorporated by reference.

In a July 26, 2013 decision, OWCP again denied modification of the LWEC decision.

On August 5, 2013 appellant requested a telephonic hearing before an OWCP hearing representative. At the January 16, 2014 hearing, counsel argued that the employing establishment informed the Office of Personnel Management that appellant was not capable of working and there was no job available for her. Appellant sought disability retirement benefits. Counsel argued that the position made available to her was not a bid position, was developed just for her and was not open to the general public. He noted that the job was not a productive position, and that appellant could not have been laid off under NRP unless the position was not productive. Counsel concluded that her position was a “make work” job.

By decision dated April 3, 2014, an OWCP hearing representative affirmed the July 26, 2013 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. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.³ OWCP procedures at Chapter 2.1501 contain provisions regarding the modification of a formal LWEC.⁴ The relevant part provides that a formal LWEC will be modified when: (1) the original rating was in error; (2) the claimant’s medical condition has materially changed; or (3) the claimant has been vocationally rehabilitated.⁵ Chapter 2.1501 further provides that FECA Bulletin No. 09-05 should be consulted if the circumstances in the case indicated that the position in question may have been withdrawn (in whole or in part) as a result of NRP.⁶ FECA Bulletin No. 09-05 outlines the procedures OWCP should follow when limited-duty positions are withdrawn pursuant to NRP. If OWCP has issued a formal wage-earning capacity determination, it must develop the evidence to determine whether a modification of that determination is appropriate.⁷ FECA Transmittal

² Docket No. 12-1297 (issued June 18, 2013). 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. OWCP accepted her claim for left knee patellofemoral stress syndrome.

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

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification Loss of Wage-Earning Capacity*, Chapter 2.1501 (June 2013).

⁵ *Id.* at § 2.1501.3(a).

⁶ *Id.* at § 2.815(c)(2)(a).

⁷ FECA Bulletin No. 09-05 (issued August 18, 2009).

No. 13-09 provides information regarding updating OWCP Procedure Manual Chapters 2.814 to 2.816 and 2.1500 to 2.1501.⁸ OWCP procedures further provide that the party seeking modification of a formal loss of wage-earning capacity decision has the burden to prove that one of these criteria has been met.⁹

OWCP's procedures provide that factors to be considered in determining whether the claimant's work fairly and reasonably represents his or her wage-earning capacity include the kind of appointment, that is, whether the position is temporary, seasonal or permanent and the tour of duty, that is, whether it is part time or full time.¹⁰ Further, a makeshift or odd-lot position designed for a claimant's particular needs will not be considered suitable.¹¹

ANALYSIS

The Board finds that the April 3, 2014 decision of OWCP must be reversed. The modified position on which the September 12, 2003 wage-earning capacity determination was based was makeshift in nature and based on appellant's particular needs. Appellant has established that modification of the wage-earning capacity determination is warranted.

OWCP accepted appellant's claim for left knee patellafemoral stress syndrome. In separate cases, it also accepted her claim for right arm epicondylitis and right carpal tunnel syndrome.¹² On July 2, 2003 the employing establishment made appellant a permanent limited-duty rehabilitation job offer as a modified letter carrier and noted that her duties would be within her medical restrictions. Appellant accepted this position and began work on July 12, 2003. By decision dated September 12, 2003, OWCP determined that her actual earnings as a modified city letter carrier fairly and reasonably represented her LWEC, that she had no loss in earning capacity and that therefore her benefits were reduced to zero. Appellant continued work at modified duty until September 15, 2010 when she was sent home under NRP, for the reason that there was no productive work that could be performed within her restrictions.

When an LWEC decision has been issued, as provided in Chapter 2.1501 of the procedure manual, FECA Bulletin No. 09-05 is to be consulted if a position has been withdrawn under NRP.¹³ FECA Bulletin No. 09-05 requires OWCP to develop the evidence to determine whether a modification of the decision is appropriate.¹⁴ FECA Bulletin No. 09-05 directs OWCP to confirm that the record contains documentary evidence supporting that the position on which the wage-earning capacity determination was made was an actual *bona fide* position. It further

⁸ FECA Transmittal No. 13-09 (issued June 4, 2013).

⁹ *Supra* note 4 at Chapter 2.1501.4 (June 2013).

¹⁰ *Id.* at Chapter 2.815.5(c)(1).

¹¹ *Id.* at Chapter 2.815.5.c(2)(a).

¹² *See L.P.*, Docket No. 12-1297 (issued June 18, 2013).

¹³ *Supra* note 8.

¹⁴ *Supra* note 9.

requires OWCP to review whether current medical evidence supports work-related disability and establishes that the current need for limited duty and medical treatment is a result of residuals of the employment injury and to further develop the evidence from both appellant and the employing establishment if the record lacks current medical evidence.¹⁵

FECA Bulletin No. 09-05 further 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 wage-earning capacity decision and direct the employing establishment to review its files for contemporaneous evidence concerning the position.

A basis for modifying a wage-earning capacity decision is to establish that the original decision was in error.¹⁶ The Board finds that the modified assignment upon which the September 12, 2003 LWEC determination was made was makeshift in nature. The Board notes that in an October 25, 2010 letter, Thomas J. Biddle, a health and resource management specialist for the employing establishment, noted that appellant worked numerous duties not specified in the rehabilitation job offer. Mr. Biddle stated that the greatest percentage of the duties appellant performed were not part of the job offer and that many of the duties she did perform were make work duties, created by her supervisors.

In a follow-up October 27, 2010 letter, Mr. Biddle stated that the limited-duty/rehabilitation modified job offer performed by appellant “since July 5, 2003 consisted of odd-lot duties and ‘make work.’” He stated:

“The [LWEC] determination issued as a result of this position appears to have been made in error and should be modified. The work offered does not reflect [appellant’s] ability to earn wages.”

Mr. Biddle requested that OWCP modify the LWEC “since it appears that it meets the criteria held by the Board that the original rating was in error.”

The Board finds that Mr. Biddle’s letters are sufficient to establish that the modified duties to which appellant was assigned were created to accommodate her restrictions and did not constitute a *bona fide* job that would be available to her in the general labor market. The Board finds that the position does not fairly and reasonably represent her wage-earning capacity and the September 12, 2003 determination was erroneous. Accordingly, the April 3, 2014 decision will be reversed.¹⁷ As the position on which the September 1, 2003 decision was based was makeshift in nature, appellant has met her burden of proof to establish that the LWEC determination should be modified.

¹⁵ *Id.*

¹⁶ *Supra* note 5.

¹⁷ *A.J.*, Docket No. 10-619 (issued June 29, 2010); *see also A.T.*, Docket No. 14-82 (issued July 15, 2014).

CONCLUSION

The Board finds that appellant has established that modification of the September 12, 2003 LWEC determination is warranted.

ORDER

IT IS HEREBY ORDERED THAT the April 3, 2014 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 4, 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