

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

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**T.B., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Cleveland, OH, Employer**

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**Docket No. 13-1772  
Issued: January 27, 2014**

*Appearances:*  
*Alan J. Shapiro, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
RICHARD J. DASCHBACH, Chief Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On July 22, 2013 appellant, through her attorney, filed a timely appeal from a May 30, 2013 decision of the Office of Workers' Compensation Programs (OWCP), which denied modification of a wage-earning capacity decision. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

**ISSUE**

The issue is whether appellant established that modification of OWCP's May 20, 1997 wage-earning capacity determination is warranted.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>2</sup> On September 24, 2012 the Board set aside OWCP's June 3, 2011 decision, which denied modification of a May 20, 1997 wage-earning capacity decision and remanded the matter for further development.<sup>3</sup> The Board found that OWCP analyzed appellant's case under the customary criteria for modifying a wage-earning capacity determination but did not assess her case in accordance with FECA Bulletin No. 09-05.<sup>4</sup> On remand, OWCP was to follow the procedures found in FECA Bulletin No. 09-05 to determine if she met her burden of proof to modify the May 20, 1997 wage-earning capacity determination, to be followed by an appropriate decision on the merits of her claims for compensation beginning August 16, 2010. The facts as contained in the Board's prior decision are incorporated by reference.<sup>5</sup>

In a letter dated October 3, 2012, OWCP requested that the employing establishment address whether the position on which the wage-earning capacity rating was based was a *bona fide* position at the time of the rating. In a September 26, 2012 statement, the employing establishment noted that appellant retired effectively August 31, 2012.

In a statement dated October 30, 2012, appellant noted that she started her career as a clerk on June 16, 1979 and from August 1986 to January 1997 was totally disabled due to a work injury. She accepted a permanent rehabilitation position as a modified mailhandler on January 18, 1997 and another similar job offer on October 12, 2003. On January 28, 2004 appellant was informed that she was no longer allowed to patch mail and in June 2005 she was placed on a nonproductive operation. In the fall 2005, she was assigned to calculate the mail volume count and on August 2, 2008 she was excessed out of the mail volume count position and offered a scanning job and performed this job until the fall of 2008. In the fall 2008, appellant was informed that she could no longer scan mail and in 2009 she was assigned to work the recycle belt. On August 7, 2010 she was offered a position on the hand cancel belt for six hours a day. On August 25, 2010 appellant's hours were reduced to four hours per day and she retired on August 31, 2012.

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<sup>2</sup> Docket No. 12-325 (issued September 24, 2012).

<sup>3</sup> On July 2, 1986 appellant, a clerk, filed an occupational disease claim that was accepted her claim for bilateral wrist sprain, bilateral overuse syndrome and bilateral myofascial pain of the upper extremities. She stopped work intermittently until she returned to full-time light-duty work on February 15, 1997.

<sup>4</sup> FECA Bulletin No. 09-05 discusses the procedures to be followed when a wage-earning capacity decision is in place and the dismissal of a claimant is due to the National Rehabilitation Process (NRP). *See also M.A.*, Docket No. 12-316 (issued July 24, 2012); FECA Bulletin No. 09-05 (issued August 18, 2009).

<sup>5</sup> On May 20, 1997 OWCP advised that appellant had been reemployed as a modified mailhandler with wages of \$806.76 per week, effective February 15, 1997. It determined that her actual earnings as a modified mailhandler fairly and reasonably represented her wage-earning capacity. OWCP found that appellant had performed the job for more than 60 days without incident and it was suitable to her partially disabled condition. Because there was no loss in earnings, it found that she had zero loss of wage-earning capacity. On August 27, 2010 appellant filed a Form CA-7, claim for compensation, leave without pay, for 28.75 hours, for the period August 16 to 27, 2010. She also requested a night differential. In an August 31, 2010 time analysis form, the employing establishment noted that no work was available. It noted that the employee was part of NRP.

On October 31, 2012 the employing establishment advised that the position on which the wage-earning capacity rating was based was a *bona fide* position at the time of the wage-earning capacity rating. The job offer was signed by appellant on January 14, 1997 and became effective January 18, 1997. The employing establishment attached an SF-50, notification of personnel action, which listed that, effective January 18, 1997, she began working in a rehabilitation position.

In a November 6, 2012 decision, OWCP denied modification of the May 20, 1997 wage-earning capacity determination. It stated that the record was reviewed consistent with the procedures outlined in FECA Bulletin No. 09-05 and that the medical evidence failed to establish that appellant continued to have disabling residuals of the accepted condition. Appellant's claim for compensation commencing August 17, 2010 was denied.

On November 9, 2012 appellant requested an oral hearing which was held on March 14, 2013. She submitted a January 9, 2013 report from Dr. Audley M. Mackel, III, a Board-certified orthopedic surgeon, who treated her for repetitive stress syndrome of the wrists bilaterally. Dr. Mackel advised that appellant was still symptomatic with certain repetitive use of the hands. He noted clinical findings of full range of motion of the hands with mild limitation at the extremes, tenderness about the dorso radial aspect of the wrists, negative Finkelstein's test and minimal synovitis. There was no significant crepitus noted with range of motion with intact strength. Dr. Mackel diagnosed repetitive stress syndrome, bilateral wrists, stable and recommended follow up in six months.

In a May 30, 2013 decision, an OWCP hearing representative affirmed the decision dated November 6, 2012 decision. She noted that the medical evidence did not establish a material change in appellant's accepted condition.

### **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.<sup>6</sup>

OWCP's procedures provide that, if a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In this instance the claims examiner will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity.<sup>7</sup>

Chapter 2.814.11 of the procedure manual contains provisions regarding the modification of a formal loss of wage-earning capacity. The relevant part provides that a formal loss of wage-

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<sup>6</sup> *Katherine T. Kreger*, 55 ECAB 633 (2004).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

earning capacity will be modified when: (1) the original rating was in error; (2) the claimant's medical condition has changed; or (3) the claimant has been vocationally rehabilitated. OWCP's 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. If OWCP is seeking modification, it must establish that the original rating was in error, that the injury-related condition has improved or that the claimant has been vocationally rehabilitated.<sup>8</sup>

The Board has held that OWCP may accept a limited period of disability without modifying a standing wage-earning capacity determination. This occurs when there is a demonstrated temporary worsening of a medical condition of insufficient duration and severity to warrant modification of a wage-earning capacity determination. This narrow exception is only applicable for brief periods of medical disability. It does not apply to situations where there is a wage-earning capacity determination in place and the employee claims additional wage-loss compensation due to the withdrawal of light-duty work.<sup>9</sup>

FECA Bulletin No. 09-05 outlines very specific procedures for light-duty positions withdrawn pursuant to NRP. Regarding claims for total disability when a wage-earning capacity decision has been issued, OWCP should, *inter alia*, further develop the medical evidence and inquire from the Postal Service whether the position on which the rating was based was a *bona fide* position at the time of the rating before issuing a decision denying modification.<sup>10</sup>

### ANALYSIS

After OWCP issued its formal wage-earning capacity decision in 1997, the employing establishment reassessed appellant's rated position as a modified mailhandler under NRP, resulting in a reduction of limited-duty hours and a claim for wage-loss compensation beginning August 16, 2010. On September 24, 2012 the Board set aside OWCP's June 3, 2011 decision which denied modification of the May 20, 1997 wage-earning capacity decision and remanded the matter for further development. The Board determined that OWCP failed to follow the guidelines in FECA Bulletin No. 09-05.

When a wage-earning capacity decision has been 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. To this end, the Bulletin asks OWCP to confirm that the file contain documentary evidence supporting that the position was an actual *bona fide* position. It 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 is a result of injury-related residuals and to further develop the evidence from both the claimant and the employing establishment if the case lacks current medical evidence.

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<sup>8</sup> *Id.* at Chapter 2.814.11 (June 1996).

<sup>9</sup> *K.R.*, Docket No. 09-415 (issued February 24, 2010).

<sup>10</sup> *See* FECA Bulletin No. 09-05, *supra* note 4.

The criteria for addressing cases under NRP, when a formal wage-earning capacity decision has been issued, are delineated above. OWCP followed the procedures outlined in FECA Bulletin No. 09-05 following the Board's remand. It requested on October 3, 2012 that the employing establishment address whether the position on which the wage-earning capacity determination was based was a *bona fide* position at the time of the rating.<sup>11</sup>

On October 31, 2012 the employing establishment advised that the position on which the wage-earning capacity rating was based was a *bona fide* position at the time of the wage-earning capacity rating. The job offer was signed by appellant on January 14, 1997 and became effective January 18, 1997. The employing establishment submitted an SF-50, notification of personnel action, which noted that, effective January 18, 1997, she began working in a rehabilitation position. There is no evidence that establishes that it was temporary or makeshift.

The Board further finds that the medical evidence does not establish that appellant experienced a material change in her accepted condition. Appellant submitted a January 9, 2013 report from Dr. Mackel, a Board-certified orthopedic surgeon, who treated her for repetitive stress syndrome of the wrists bilaterally. Dr. Mackel advised that she was still symptomatic with certain repetitive use of the hands. He noted clinical findings of full range of motion of the hands with mild limitation at the extremes, tenderness about the dorso radial aspect of the wrists, negative Finkelstein's test, minimal synovitis, no significant crepitus is noted with range of motion with intact strength. Dr. Mackel diagnosed repetitive stress syndrome, bilateral wrists, stable and recommended follow up in six months. He did not advise that the residuals of appellant's accepted condition had changed such that she was disabled from her position as a modified mailhandler. Dr. Mackel did not note any change in appellant's injury-related condition that would render her unable to perform the position of a modified mailhandler. His report does not establish a material change in the nature and extent of her injury-related condition. Dr. Mackel's report notes that appellant's accepted upper extremity condition essentially remained static and stable.

OWCP properly followed the guidelines in FECA Bulletin No. 09-05. The Board finds that the evidence establishes that the wage-earning capacity decision of May 20, 1997 was proper and none of the customary criteria for modifying the determination were met. Therefore, OWCP properly denied appellant's claim for wage loss commencing on August 16, 2010.<sup>12</sup>

### **CONCLUSION**

Appellant has not established a basis for modifying OWCP's May 20, 1997 wage-earning capacity determination.

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<sup>11</sup> *Id.*

<sup>12</sup> *M.A.*, Docket No. 12-316 (issued July 24, 2012); *see M.E.*, Docket No. 11-1416 (issued May 17, 2012).

**ORDER**

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

Issued: January 27, 2014  
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