

December 15, 1994 wage-earning capacity determination.² OWCP had accepted right elbow traumatic synovitis and post-traumatic osteoarthritis, and appellant's modified position had been withdrawn on February 9, 2010 pursuant to the National Reassessment Process (NRP). The Board noted that FECA Bulletin No. 09-05 outlines specific procedures to follow when a light-duty job is withdrawn due to NRP and a wage-earning capacity determination is in effect, but OWCP had not acknowledged or followed the provisions of FECA Bulletin No. 09-05. The history of the case as provided by the Board in the prior appeal is incorporated herein by reference.

In a letter dated November 14, 2012, OWCP requested that the employing establishment submit a formal position description and any other documentation as to the position appellant "has been working." The letter also requested the employing establishment to indicate whether appellant had been performing the same duties as the position for which he received a loss of wage-earning capacity (LWEC) decision. OWCP also issued a November 14, 2012 letter to appellant, advising him to submit evidence with respect to a modification of the wage-earning capacity determination.

In a report dated January 14, 2013, Dr. Kazem Hak, a Board-certified internist, stated that appellant had a history of multiple injuries and medical conditions. He opined that appellant could not perform duties as a letter carrier.

By decision dated February 15, 2013, OWCP denied modification of the December 15, 1994 wage-earning capacity determination. It found that the evidence did not establish that a modification was warranted.

Appellant requested a hearing before an OWCP hearing representative, which was held on June 10, 2013. By decision dated September 9, 2013, the hearing representative affirmed the February 15, 2013 decision. The hearing representative found that appellant had failed to submit evidence supporting a modification.

LEGAL PRECEDENT

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.³ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁴

ANALYSIS

In the prior appeal, the Board remanded the case to OWCP to follow the provisions of FECA Bulletin No. 09-05. This bulletin indicates that the file must contain documentary

² Docket No. 11-298 (issued August 30, 2012).

³ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

⁴ *Id.*

evidence that the LWEC rating was “based on an actual bona fide position.”⁵ OWCP attempted to develop the claim by sending the employing establishment a November 14, 2012 letter. There is no response in the record. OWCP’s decision does not make adequate findings on the issue or cite to relevant evidence.

The record must contain relevant evidence as to the specific job appellant was performing at the time of the December 15, 1994 wage-earning capacity determination. The evidence may include a job offer, an SF-50, a formal position description or other relevant documentary evidence.⁶ Such evidence must relate to the job that was the basis for the wage-earning capacity determination, not a job subsequently performed by appellant. Based on a proper factual background, OWCP should then make a determination, in accord with Board case law and relevant authority, as to whether the wage-earning capacity determination was based proper.⁷ Once the issue of whether the initial wage-earning capacity determination was proper and based on an actual bona fide position, OWCP may address the medical evidence with respect to the modification issue.

In the absence of such documentation, the case will be remanded to OWCP for further development of the evidence. After such further development as OWCP deems necessary, it should issue an appropriate decision.

CONCLUSION

The Board finds that the case must be remanded to OWCP for further development of the modification of the December 15, 1994 wage-earning capacity determination in accord with FECA Bulletin No. 09-05.

⁵ FECA Bulletin No. 09-05 (issued August 18, 2009).

⁶ *Id.*

⁷ *See A.J.*, Docket No. 10-619 (issued June 29, 2010); 20 C.F.R. § 10.510.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 9, 2013 is set aside and the case remanded to OWCP for further action consistent with this decision of the Board.

Issued: June 18, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board