

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

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R.N., Appellant )

and )

U.S. POSTAL SERVICE, POST OFFICE, )  
Grand Rapids, MI, Employer )

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**Docket No. 13-2113  
Issued: March 19, 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  
PATRICIA HOWARD FITZGERALD, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On September 16, 2013 appellant, through his attorney, filed an appeal from an August 5, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 this case.

**ISSUE**

The issue is whether appellant met his burden of proof to establish that a July 6, 2009 wage-earning capacity decision should be modified.

On appeal appellant's attorney asserts that the August 5, 2013 decision is contrary to fact and law.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

## **FACTUAL HISTORY**

On November 3, 2006 appellant, then a 44-year-old mail handler, filed a traumatic injury claim alleging that on November 2, 2006 he injured his head and neck when he hit a stationary pole with a Hi-Lo he was driving, causing him to fall. He stopped work that day. On November 6, 2006 Dr. James R. Stubbart, a Board-certified orthopedic surgeon, performed a cervical laminectomy and fusion from C4 through C7. On December 7, 2008 OWCP accepted that a concussion and right forehead laceration were caused by the claimed injury. The claim was later expanded to include permanent aggravation of cervical spondylosis with central cord syndrome, permanent aggravation of cervical stenosis and incomplete quadriplegia.

On March 16, 2007 appellant accepted a limited-duty assignment for four hours a day. The duties were that he would prep at desk with sit or stand option for four hours a day and restrictions on grasping, lifting, twisting and reaching. Appellant returned to modified duty for four hours a day on March 24, 2007. He thereafter received compensation for four hours a day.

In February 2008 appellant was referred to Dr. Craig T. Kuesel, a Board-certified osteopath specializing in neurology.<sup>2</sup> In a February 26, 2008 report, Dr. Kuesel described a history that appellant injured his cervical spine in a motor vehicle accident while in the military, the history of injury, his review of the medical record and physical examination findings. He diagnosed partial quadriparesis due to myelopathy and due to preexisting cervical spondylosis, aggravated by the November 2, 2006 employment injury which produced numbness in appellant's extremities and significant pain. Dr. Kuesel advised that appellant was disabled from full-time work duties, that he had significant work restrictions, and that he should not work more than four hours a day, five days a week. He also indicated that appellant needed to use a four-prong cane.

Appellant came under the care of Dr. Stephen Winston, Board-certified in anesthesiology and pain medicine, who provided progress notes beginning on April 15, 2008 in which he described appellant's physical findings and medical management.

On July 19, 2008 the employing establishment offered appellant a modified mail handler position based on the restrictions provided by Dr. Kuesel. The offer indicated that the job was tailored to meet appellant's physical needs. Appellant accepted the position on July 23, 2008.

In a July 6, 2009 decision, OWCP found that appellant's part-time earnings in the modified mail handler position fairly and reasonably represented his wage-earning capacity. It applied the principles identified in the *Shadrick* decision,<sup>3</sup> finding a new wage-earning capacity of 51 percent, and reduced his compensation accordingly, effective July 1, 2009. OWCP found that, based on the restrictions provided by Dr. Kuesel, appellant was capable of part-time employment in the modified position.

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<sup>2</sup> In a decision dated February 20, 2008, appellant's monetary compensation was suspended for failure to attend a scheduled medical evaluation with Dr. Kuesel. In a May 14, 2008 decision, an OWCP hearing representative reversed the suspension because the appointment letter was not properly addressed.

<sup>3</sup> *Albert C. Shadrick*, 5 ECAB 376 (1953); 20 C.F.R. § 10.403(d).

On June 24, 2010 the employing establishment notified appellant that, under the National Reassessment Program (NRP), there was no work available for him and that he would remain on administrative leave until July 24, 2010. Appellant claimed wage loss beginning July 24, 2010. On the claim form, the employing establishment indicated that he was an “NRP employee.”

By letter dated November 3, 2010, OWCP informed appellant of the criteria needed to modify the July 6, 2009 wage-earning capacity determination. In a second letter, it asked the employing establishment to provide medical evidence in their possession and information regarding the position he was working at the time he was sent home under NRP, including whether his duties had changed since the wage-earning capacity determination of July 6, 2009.

Dr. Winston and his associate Dr. Derek Lado, a Board-certified physiatrist, continued to submit progress reports regarding appellant’s condition and care. On November 30, 2010 he indicated that appellant’s pain had escalated and that he had progressive weakness. Dr. Winston advised that appellant was no longer able to work due to the progression of his symptoms. A December 7, 2010 nuclear medicine bone scan demonstrated severe degenerative changes in the right C3-4 facet joint and milder changes in the left C4-5 facet joint. A follow-up cervical computerized tomography (CT) study confirmed the diagnoses. On December 13, 2010 Dr. Lado indicated that appellant had increased loss of balance and was describing myoclonic jerks and increased spasticity. He recommended physical therapy to increase mobility. Appellant had a series of lidocaine and Botox cervical spine injections. A November 23, 2011 magnetic resonance imaging (MRI) scan study of the cervical spine demonstrated postsurgical changes, bilateral foraminal encroachment at C3-4 and no acute findings.

By letter dated April 13, 2012, OWCP asked Dr. Winston to provide an update on appellant’s medical condition, to include whether he could return to full- or part-time employment, with or without restrictions. In progress notes dated June 27 and August 12, 2012, Dr. Winston advised that appellant could not work due to pain and chronic myelopathic changes from C5 to C6 with some numbness in the distal extremities. On November 6, 2012 he informed the employing establishment that appellant was unable to work.

In November 2012 OWCP referred appellant to Dr. Emmanuel Obianwu, a Board-certified orthopedic surgeon, for a second-opinion evaluation. In a December 10, 2012 report, Dr. Obianwu noted his review of the statement of accepted facts and medical record and appellant’s medical history that included the 1985 cervical injury when he was in the military and the employment injury that occurred on November 2, 2006. He described appellant’s complaints of radiating neck pain and limited function in the hands and feet with numbness and spasm and occasional falls. Dr. Obianwu provided extensive physical examination findings, noting hyporeflexia in upper extremity reflexes and diminished grasp strength in both hands, an obvious left-sided scoliosis and tenderness about the cervicothoracic junction. There was no intrinsic atrophy of the hands and no gross weakness of upper extremity muscle groups. Dr. Obianwu indicated that appellant walked with an exaggerated limp, leaning against his cane. He diagnosed preexisting old posterior fusion at C1 to C2 with marked angulation of the relationship between C1 and C2; preexisting, fairly significant degenerative changes of the lower cervical spine with neural foraminal narrowing on the left; old clay shoveler’s fracture of C7; status post posterior cervical laminectomies at C4, C5, C6 and subtotal C7 laminectomies; status post posterior instrumentation at C4 through C7, with lateral mass screw and rod construct;

posterolateral fusion at C4 through C7; and mild cervical myelopathy. Dr. Obianwu advised that appellant continued to have objective findings of the accepted conditions, indicating that the accepted aggravation of cervical spondylosis still existed but the conditions of central cord syndrome and aggravation of cervical stenosis no longer existed. He further indicated that incomplete quadriplegia no longer existed because weakness characteristic of central cord syndrome in the upper extremity did not exist and there was a lot of exaggeration and inconsistency in appellant's responses. Dr. Obianwu stated that appellant had limitation of range of motion partly attributable to the fused cervical spine and this also caused persistence of some weakness in the upper extremities that was not as gross a condition as quadriparesis but did limit functional capacity. He concluded that appellant could not return to full duty due to the accepted conditions but could work with restrictions. Dr. Obianwu opined that appellant needed extensive vocational rehabilitation. On an attached work capacity evaluation, he indicated that appellant was capable of working four hours of restricted duty with permanent restrictions of no reaching above the shoulder, bending or stooping. Walking, standing and twisting were limited to one hour and lifting limited to 20 pounds for two hours.

In a January 17, 2013 decision, OWCP denied appellant's claim for wage-loss compensation beginning on July 24, 2010 on the grounds that the evidence submitted was insufficient to modify the July 6, 2009 wage-earning capacity decision. It noted reviewing the evidence in accordance with FECA Bulletin No. 09-05 and found that the record established that the position on which the wage-earning capacity decision was based was a *bona fide* position and that, while the medical evidence established that he continued to have residuals of the work injury, he was able to work in a limited-duty assignment for four hours per day, consistent with the modified mail handler position he was doing prior to July 24, 2010 when he was sent home.

Appellant, through his attorney, timely requested a hearing that was held on May 16, 2013. At the hearing counsel asserted that the July 6, 2009 wage-earning capacity determination was in error because the position on which it was based was part time when appellant had been working full time when he was injured on November 2, 2006 and the position was makeshift because it was made to accommodate his specific restrictions. He further maintained that, as appellant's light duty was withdrawn, he had established a recurrence of disability. Appellant described his regular and limited-duty positions and indicated that he still received pay based on the July 6, 2009 wage-earning capacity decision.

In reports dated August 28, 2012 through April 23, 2013, Dr. Winston described appellant's continued medical care. He advised that appellant was unable to work due to his chronic weakness and postlaminectomy fusion pain syndrome. In a June 5, 2013 report, Dr. Stubbart described appellant's medical history and complaints of radiating neck pain, numbness and tingling in the hands and feet and occasional leg jerks that caused him to fall. He found severe loss of cervical range of motion on physical examination with diminished sensation in the left C8 and T1 dermatomes. Hoffman's and Clonus examinations were positive bilaterally. Dr. Stubbart's impression was status post C1 to C2 posterior fusion and C4 through C7 posterior fusion with laminectomies, myelopathy, chronic neck pain and stiffness and disability. He advised that appellant was clearly impaired and had a significant degree of disability. Dr. Stubbart recommended additional diagnostic studies. In a June 5, 2013 report, Dr. Winston indicated that appellant had a "horrible" neck with limited range of motion. He noted that 2010 diagnostic studies showed good decompression but also showed progression of

degenerative changes in the cervical spine and opined that appellant was disabled. A June 11, 2013 cervical spine MRI scan study demonstrated no change since the November 23, 2011 study. A June 11, 2013 CT scan of the cervical spine demonstrated extensive postoperative changes and little alteration when compared to the November 23, 2011 MRI scan study. In a June 26, 2013 report, Michael J. Parniske, a physician's assistant and associate of Dr. Stubbart, noted reviewing the diagnostic studies with Dr. Stubbart. He indicated that appellant would always have some degree of neurologic dysfunction and that his ability to work was severely restricted due to ataxia, upper extremity weakness, restricted cervical spine range of motion and advanced cervical spondylosis with a risk of falls. Mr. Parniske concluded that appellant was disabled and this was consistent with Dr. Stubbart's opinion.

In an August 5, 2013 decision, an OWCP hearing representative affirmed the January 17, 2013 decision. She found that the position on which the wage-earning capacity determination was based was a *bona fide* job, that appellant had not been retrained or vocationally rehabilitated and that the medical evidence did not establish that he was totally disabled.

### **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>4</sup> OWCP procedures at section 2.1501 contain provisions regarding the modification of a formal loss of wage-earning capacity.<sup>5</sup> The relevant part provides that a formal loss of wage-earning capacity 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.<sup>6</sup> Section 2.1501 further provides that FECA Bulletin No. 09-05 should be consulted 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.<sup>7</sup> 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.<sup>8</sup> FECA Transmittal No. 13-09 provides information regarding updating of procedure manual sections 2.814 and 2.816 and 2.1500 and 2.1501.<sup>9</sup> OWCP

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<sup>4</sup> *Katherine T. Kreger*, 55 ECAB 633 (2004).

<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity*, Chapter 2.1501 (June 2013).

<sup>6</sup> *Id.* at § 2.1501.3(a).

<sup>7</sup> *Id.* at § 2.1501.1.

<sup>8</sup> FECA Bulletin No. 09-05 (issued August 18, 2009).

<sup>9</sup> FECA Transmittal No. 13-09 (issued June 4, 2013).

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.<sup>10</sup>

### ANALYSIS

The Board finds that this case is not in posture for decision. OWCP accepted that appellant sustained a concussion, right forehead laceration, permanent aggravation of cervical spondylosis with central cord syndrome, permanent aggravation of cervical stenosis, and incomplete quadriplegia on November 2, 2006 when he was involved in a Hi-Lo accident at work. Dr. Stubbart performed cervical laminectomy and fusion from C4 through C7 on November 6, 2006. Appellant returned to a modified mail handler position for four hours a day on July 23, 2008. On July 6, 2009 OWCP issued a formal wage-earning capacity decision, finding that his part-time work fairly and reasonably represented his wage-earning capacity and reduced his compensation accordingly. Appellant continued his part-time mail handler duties until June 24, 2010 when he was sent home under NRP. He thereafter claimed wage loss beginning July 24, 2010.

When a loss of wage-earning capacity decision has been issued, as provided in section 2.1501 of OWCP procedures, FECA Bulletin No. 09-05 is to be consulted if a position has been withdrawn under NRP.<sup>11</sup> FECA Bulletin No. 09-05 requires OWCP to develop the evidence to determine whether a modification of the decision is appropriate.<sup>12</sup> The FECA Bulletin No. 09-05 asks 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 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.<sup>13</sup>

The 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.

In the case at hand, while OWCP wrote the employing establishment on November 3, 2010 requesting information regarding the position appellant was working at the time he was sent home under NRP, including whether his duties had changed since the wage-earning capacity determination of July 6, 2009, it did not specifically ask the employing establishment if the position on which the wage-earning capacity was based was a *bona fide* position at the time of

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<sup>10</sup> *Supra* note 5 at § 2.1501.4.

<sup>11</sup> *Supra* note 7.

<sup>12</sup> *Supra* note 8.

<sup>13</sup> *Id.*

the wage-earning capacity decision. The record does not contain a response from the employing establishment. Moreover, OWCP procedures in effect at the time the wage-earning capacity was issued provided that the reemployment may not be considered suitable when the position was part time and the employee did not work part time at the time of injury.<sup>14</sup> In this case on the date of injury, November 2, 2006, appellant was a full-time mail handler, and the July 6, 2009 wage-earning capacity determination was based on a part-time position. It was therefore erroneous on its face. Moreover, the position description on which the July 6, 2009 wage-earning capacity determination was based clearly indicated that the job was tailored to meet appellant's physical needs and, as noted above, OWCP failed to secure information from the employing establishment regarding the legitimacy of the position.

Lastly, the Board notes that the record is replete with evidence that appellant continues to have significant residuals of the accepted conditions, as described by his attending physicians Drs. Winston, Lado and Stubbart, and by OWCP referral physician, Dr. Obianwu.

As OWCP failed to follow the guidelines provided in FECA Bulletin No. 09-5, the Board will set aside the August 5, 2013 decision and remand the case to OWCP. After proper and documented compliance with FECA Bulletin No. 09-05 and any further evidence deemed necessary, OWCP shall issue an appropriate decision on appellant's entitlement to wage-loss compensation beginning July 24, 2010.<sup>15</sup>

### **CONCLUSION**

The Board finds that this case is not in posture for decision regarding whether modification of OWCP's July 6, 2009 wage-earning capacity determination is warranted.

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<sup>14</sup> Federal (FECA) Procedure Manual, *supra* note 5 at Chapter 2.814.7 (July 1997). These procedures were modified in June 2013.

<sup>15</sup> See *L.P.*, Docket No. 12-1297 (issued June 18, 2013).

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 5, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: March 19, 2014  
Washington, DC

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

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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