

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

M.A., Appellant)	
)	
and)	Docket No. 13-1342
)	Issued: May 27, 2014
U.S. POSTAL SERVICE, POST OFFICE, Kahului, HI, Employer)	
)	

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

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 14, 2013 appellant, through her attorney, filed a timely appeal from the April 3, 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 over the merits of this case.

ISSUE

The issue is whether modification of OWCP's October 27, 2006 loss of wage-earning capacity (LWEC) determination is warranted.

FACTUAL HISTORY

On the prior appeal,² the Board set aside OWCP's October 25, 2011 decision denying modification of its October 27, 2006 LWEC determination. OWCP had analyzed appellant's claim for wage-loss compensation under the customary criteria for modifying a LWEC

¹ 5 U.S.C. § 8101 *et seq.*

² Docket No. 12-0316 (issued July 24, 2012).

determination without acknowledging FECA Bulletin No. 09-05 or following the procedures outlined therein for claims, such as this, in which a limited-duty position is withdrawn pursuant to the national reassessment process (NRP). The Board remanded the case to OWCP with instructions to comply with the bulletin.³

On August 22, 2012 OWCP asked the employing establishment to notify in writing whether the position on which the LWEC determination was based was an actual *bona fide* position at the time of the rating. It added: "Please review your files for contemporaneous evidence concerning the position."

On November 14, 2012 OWCP received the following reply:

"Nov[ember] 16, 2012

"[Claims examiner]

"[Appellant's] position was an actual *bona fide* position at the time of the rating.

"Thanks,"

In a decision dated December 11, 2012, OWCP denied modification of its October 27, 2006 LWEC determination. It noted that the employing establishment had verified in writing that the rated position was an actual *bona fide* position at the time of the rating and that this was supported by the job offer in the record. Further, appellant's current restrictions remained the same since she was rated and were listed as permanent, indicating no material worsening of her condition. "As such, the medical evidence indicates there has been no material change in the nature and extent of the injury-related condition and that the reason for the loss of work hours is the U.S. Postal Service's NRP." OWCP noted that the unavailability of full-time work due to the NRP was not one of the criteria for modifying a formal LWEC determination.

On April 3, 2013 an OWCP hearing representative affirmed. He found that the July 2006 job offer contained a specific occupational title and a written description of duties. Appellant testified that she performed the duties described, which were normal functions of a postal clerk, and the evidence established a *bona fide* position. Further, the medical evidence showed no material change in the accepted condition or prescribed work limitations. Consequently, there was no basis for modification of the October 27, 2006 LWEC determination.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁴ When an employee cannot return to the date-of-injury job because of disability due to work-related injury or disease, but does return to alternative employment with an actual wage loss, OWCP must determine whether the earnings in

³ On February 1, 2005 appellant, a 33-year-old mail carrier, filed an occupational disease claim alleging that her carpal tunnel syndrome, right rotator cuff syndrome and neck and low back pain were the result of performing the duties of her position. OWCP accepted her claim for right supraspinatus tendinitis, right carpal tunnel syndrome and cervical, thoracic and lumbosacral subluxations.

⁴ 5 U.S.C. § 8102(a).

the alternative employment fairly and reasonably represent the employee's wage-earning capacity (WEC).⁵

Once a LWEC 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. These are the customary criteria for modification, and the burden of proof is on the party attempting to show that modification of the determination is warranted.⁶

FECA Bulletin No. 09-05, however, outlines OWCP procedures when limited-duty positions are withdrawn pursuant to NRP. If, as in the present case, a formal WEC decision has been issued, OWCP must develop the evidence to determine whether a modification of that decision is appropriate.⁷

ANALYSIS

As the Board noted on the prior appeal, FECA Bulletin No. 09-05 requires OWCP to develop the evidence to determine whether a modification of a WEC determination is appropriate. It shifts the burden onto OWCP to determine, among other things, whether the LWEC determination was based on a *bona fide* position. The Board finds that OWCP did not adequately develop the evidence under FECA Bulletin No. 09-05.

The response OWCP received to its August 22, 2012 request for information was inadequate. The response consisted of a single sentence from someone identified as Lori, who stated that the position offered in 2006 was a *bona fide* position. OWCP did not discharge its responsibility under FECA Bulletin No. 09-05 with such a perfunctory response.

OWCP's hearing representative attempted to rehabilitate its decision by pointing to such things as a specific occupational title and a written description of duties, which were found the normal functions of a postal clerk. There is evidence that the position was both sheltered and odd-lot. The July 7, 2006 job offer stated that the position was "for incumbent only." The labor distribution code⁸ indicated that the position was one of miscellaneous customer service and administrative duties. The offer listed 21 such duties, from assisting at the will-call window when needed, to assisting customers standing in line to ensure the article is properly prepared for mailing, to rubberstamping nixie mail, to answering telephones and handling routine inquiries, to filling vending machines with stamps. The offer noted that while all of these duties fell within appellant's restrictions, it did not mean that she would perform them all on a daily basis.

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (October 2009).

⁶ *Daniel J. Boesen*, 38 ECAB 556 (1987).

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

⁸ A labor distribution code is a two-digit number that describes the major work assignments within a postal facility. The first digit represents the functional area (e.g., mail processing) and the second digit identifies the type of activity (e.g., supervision). *Glossary of Postal Terms*, Publication 32 (USPS, Washington, DC), July 2013 at p. 112.

As FECA Bulletin No. 09-05 points out, wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions. It remains unclear how appellant's ability to perform the miscellaneous and sundry duties of the July 7, 2006 job offer demonstrated that she has the capacity, with her physical limitations, to earn the same wages (\$46,331.00 annually) performing the same or similar duties in the open labor market. It is necessary, therefore, that OWCP establish that it based the LWEC determination on an actual *bona fide* position, one that demonstrates the employee's capacity to earn wages in the open labor market.

The Board finds that OWCP did not discharge its responsibility under FECA Bulletin No. 09-05 and has not complied with the Board's July 24, 2012 order. Accordingly, the Board will set aside OWCP's April 3, 2013 decision and remand the case for further development of the evidence and a *de novo* decision on whether the October 27, 2006 LWEC determination should be modified.

CONCLUSION

The Board finds that this case is not in posture for decision. Further development of the evidence is warranted.

ORDER

IT IS HEREBY ORDERED THAT the April 3, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action.

Issued: May 27, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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