

FACTUAL HISTORY

On October 5, 1999 appellant, then a 42-year-old full-time mail processor, sustained a traumatic injury in the performance of duty while bending over to put labels in boxes. She twisted when her name was called, and she felt a sharp pain in her lower back. OWCP accepted appellant's claim for lumbosacral strain and aggravation of herniated disc at L4-5. Appellant underwent a discectomy at L4-5 on March 2, 2000.

On January 14, 2002 OWCP issued a loss of wage-earning capacity (LWEC) determination after appellant was reemployed for four hours a day as a mail processor effective January 8, 2001. It found that her wages in this position fairly and reasonably represented her wage-earning capacity. OWCP adjusted appellant's compensation for wage loss accordingly.

In a decision dated July 31, 2002, however, OWCP rescinded its January 14, 2002 LWEC determination. It found that the decision was in error, as earnings in a part-time position cannot reasonably represent the wage-earning capacity of an employee whose date-of-injury position was full time.

On December 5, 2012 appellant filed a Form CA-2a, notice of recurrence. She claimed that she sustained a recurrence of total disability on June 30, 2012 when her employing establishment withdrew her light-duty assignment.

By letter dated February 7, 2014, OWCP informed appellant that a formal LWEC determination had been issued in her case on January 14, 2002. It provided her with a copy of that determination. OWCP then notified appellant of the three criteria for obtaining modification of an LWEC determination. It advised that an employing establishment withdrawal of a light-duty assignment was not considered one of the three reasons to modify "the current LWEC decision."

In a decision dated March 25, 2014, OWCP denied modification of its January 14, 2002 LWEC determination.

Counsel argues that OWCP rescinded the January 14, 2002 LWEC determination, and as a result, the issue was not modification of an LWEC determination, but rather was one of recurrence.

LEGAL PRECEDENT

Once OWCP issues a formal decision on wage-earning capacity, the rating should be left in place until the claimant requests resumption of compensation for total wage loss for more than a limited period of disability, in which instance OWCP will need to evaluate the request according to the customary criteria for modifying a formal wage-earning capacity determination.³

³ *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sharon C. Clement*, 55 ECAB 552 (2004).

FECA specifies that an award for or against payment of compensation may be reviewed at any time on the Director's own motion. Such review may be made without regard to whether there is new evidence or information. If the Director determines that a review of the award is warranted (including, but not limited to, circumstances indicating a mistake of fact, or law or changed conditions), the Director (at any time and on the basis of existing evidence) may modify, rescind, decrease, or increase compensation previously awarded, or award compensation previously denied.⁴

ANALYSIS

After appellant filed her recurrence claim on December 5, 2012, OWCP observed that it had issued a formal LWEC determination on January 14, 2002 and that the issue, therefore, was whether appellant had established one of the three criteria for modifying the existing LWEC determination. Under normal circumstances, this would have been the correct procedure.

However, OWCP rescinded its January 14, 2002 LWEC determination, approximately six months after its issuance. In a decision dated July 31, 2002, it explained that LWEC determination was in error. OWCP found that actual earnings in a part-time position could not be used to determine the wage-earning capacity of an employee who was a full-time employee at the time of injury.

Thus, when appellant filed her recurrence claim on December 5, 2012, there was no longer a formal LWEC determination in place. She was free to pursue her recurrence claim in the usual manner without having to meet the criteria for modifying an LWEC determination. Counsel correctly argued this issue on appeal.

Accordingly, the Board will set aside OWCP's March 25, 2014 decision denying modification of the January 14, 2002 LWEC determination. The Board will remand the case to OWCP for further development and a *de novo* decision on appellant's recurrence claim.

CONCLUSION

The Board finds that this case is not in posture for decision. Further action is warranted.

⁴ 20 C.F.R. § 10.610.

ORDER

IT IS HEREBY ORDERED THAT the March 25, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action.

Issued: February 4, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board