

FACTUAL HISTORY

This case has previously been before the Board. In a July 11, 2012 decision, the Board set aside a December 2, 2010 decision in which OWCP denied modification of an October 6, 1997 wage-earning capacity determination. The Board found that in the December 2, 2010 decision, OWCP did not indicate that it had assessed appellant's case in accordance with FECA Bulletin No. 09-05.² On remand OWCP was to follow the procedures found in FECA Bulletin No. 09-05 to determine if appellant met her burden of proof to modify the October 6, 1997 wage-earning capacity determination, to be followed by an appropriate decision.³ In an August 16, 2013 decision, the Board found that OWCP failed to follow the guidelines in FECA Bulletin No. 09-05, and set aside the November 29, 2012 decision and remanded the case for further consideration. After proper compliance with FECA Bulletin No. 09-05 guidelines, OWCP was to issue a *de novo* decision on appellant's entitlement to wage-loss compensation beginning October 6, 2010.⁴ The law and facts of the previous Board decisions are incorporated herein by reference.

Upon remand by the Board, on October 24, 2013 OWCP requested that the employing establishment provide information. This was to include any medical evidence, a formal position description or other documentation related to the position appellant had been working, and a written statement addressing whether the position on which the wage-earning capacity decision was based was a *bona fide* position at the time of the rating. The employing establishment did not respond.

² FECA Bulletin No. 09-05 (issued August 18, 2009) discusses the procedures to be followed when a wage-earning capacity decision is in place and the dismissal of a claimant by the employing establishment is due to the National Rehabilitation Process (NRP). FECA Bulletin No. 09-05 (issued August 18, 2009); *see also M.A.*, Docket No. 12-316 (issued July 24, 2012).

³ Docket No. 11-733 (issued July 11, 2012). On November 29, 1994 appellant, a mail handler, filed an occupational disease claim for bilateral wrist weakness and pain. The claim, adjudicated by OWCP under file number xxxxxx291, was accepted for bilateral carpal tunnel syndrome. Appellant had surgery on September 25 and October 30, 1996 on the right and left, respectively. She returned to a modified mail handler position on February 10, 1997. A September 24, 1997 letter described appellant's modified duties and indicated that the position was available as long as her medical restrictions warranted. In an October 6, 1997 decision, OWCP found that her actual earnings in the modified position fairly and reasonably represented her wage-earning capacity with zero loss. On April 24, 1998 appellant was granted a schedule award for 10 percent impairment of the right arm and 5 percent impairment of the left arm. On March 16, 1999 she filed a traumatic injury claim, alleging that she strained her arms, shoulder, and hands lifting a tub of mail on March 13, 1999 when she stopped work. OWCP adjudicated the claim under file number xxxxxx777 and accepted right shoulder strain and right partial rotator cuff tear. On June 21, 1999 appellant returned to limited duty at the nixie table and continued in the job until July 26, 2004 when she underwent authorized arthroscopy of the torn right rotator cuff. She returned to modified duty on October 12, 2004. In March 2007 appellant began working as a security monitor. On April 11, 2007 she was granted a schedule award for an additional 18 percent impairment of the right arm. On November 26, 2007 an OWCP hearing representative affirmed the April 11, 2007 decision. Appellant returned to the nixie position in February 2009 and continued in this job until October 6, 2010 when she was dismissed under NRP. She filed claims for compensation, beginning October 6, 2010 and continuing. On November 9, 2010 OWCP doubled appellant's claims.

⁴ Docket No. 13-921 (issued August 16, 2013).

By decision dated February 21, 2014, OWCP denied modification of the October 6, 1997 wage-earning capacity determination. It noted that the employing establishment had not responded. OWCP stated that the record was reviewed consistent with the procedures outlined in FECA Bulletin No. 09-05 and found that the medical evidence did not establish that her employment-related conditions had materially changed. It also found that there was no information of record that either implied or contended that the October 6, 1997 decision was without a factual or legal basis at the time it was issued. As there was also no evidence that supported that appellant had been retrained or otherwise vocationally rehabilitated, she did not establish a basis for modifying the wage-earning capacity decision.

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.⁵

OWCP 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.⁶

Chapter 2.1501 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-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 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.⁷

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

⁵ *Katherine T. Kreger*, 55 ECAB 633 (2004).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Wage-Earning Capacity*, Chapter 2.1501 (June 2013).

⁷ *Id.* at Chapter 2.1501.3.a(1) (June 2013).

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.⁸

ANALYSIS

The Board finds that this case is not in posture for decision. As noted in the August 16, 2013 Board decision, OWCP issued a formal loss of wage-earning capacity on October 6, 1997. On October 6, 2010 appellant's position on the nixie desk was reassessed under NRP, which resulted in a withdrawal of her modified position. Appellant thereafter filed claims for wage-loss compensation.⁹ Following the Board's remands on July 11, 2012 and August 16, 2013, OWCP was to assess appellant's claim in accordance with FECA Bulletin No. 09-05.¹⁰ In the August 16, 2013 decision, the Board instructed OWCP to obtain additional evidence from the employing establishment in this regard, and by letter dated October 24, 2013, OWCP requested that the employing establishment furnish additional information. The employing establishment did not respond, and on February 21, 2014 OWCP issued a decision denying modification of the October 6, 1997 wage-earning capacity determination.

FECA Bulletin No. 09-05 requires 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.¹¹

In the case at hand, pursuant to the Board's order to follow the dictates of FECA Bulletin No. 09-05, OWCP requested additional information from the employing establishment on October 24, 2013, including medical evidence, a formal position description or other documentation related to the position appellant had been working, and a written statement addressing whether the position on which the wage-earning capacity decision was based was a *bona fide* position at the time of the rating. The employing establishment did not respond to this letter, and yet OWCP issued its February 21, 2014 decision denying modification of the October 6, 1997 wage-earning capacity determination. The reasoning proffered was that the absence of response from the employing establishment regarding the veracity of the loss of wage-earning capacity rating of October 6, 1997 does not amount to error. The Board finds that this reasoning is misplaced. The record must contain relevant evidence as to the specific job appellant was performing at the time of the October 6, 1997 wage-earning capacity determination. The evidence may include a job offer, an SF-50, Notification of Personnel Action, a formal position description, or other relevant documentary evidence.¹² Such evidence

⁸ FECA Bulletin No. 09-05, *supra* note 2.

⁹ *Supra* note 3.

¹⁰ FECA Bulletin No. 09-05, *supra* note 2.

¹¹ FECA Transmittal No. 13-09 (issued June 4, 2013); A.T., Docket No. 14-82 (issued July 15, 2014).

¹² FECA Bulletin No. 09-05, *supra* note 2.

must relate to the job that was the basis for the wage-earning capacity determination. Based on a proper factual background, OWCP should then make a determination, in accordance with Board case law and relevant authority, as to whether the wage-earning capacity determination was based proper.¹³ 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 this case is not in posture for decision.¹⁴

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 21, 2014 is set aside and the case remanded to OWCP for further action consistent with this decision of the Board.

Issued: October 16, 2015
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

¹³ See *A.J.*, Docket No. 10-619 (issued June 29, 2010); 20 C.F.R. § 10.510.

¹⁴ *Supra* note 6.