

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

J.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Troy, MI, Employer**

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**Docket No. 15-0726
Issued: October 20, 2015**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 3, 2015 appellant, through counsel, filed a timely appeal from a December 23, 2014 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 to review the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to modify OWCP's July 10, 2006 loss of wage-earning capacity (LWEC) decision.

On appeal, counsel contends that OWCP's decision is contrary to fact and law.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.² In an August 29, 2012 decision, the Board set aside a July 8, 2011 OWCP decision denying modification of the July 10, 2006 LWEC determination. The Board remanded the case for OWCP to apply FECA Bulletin No. 09-05. The Board noted that OWCP had not discussed the medical evidence as to whether appellant continued to have residuals of his accepted employment-related injury. The relevant facts are set forth below.

On February 10, 2005 appellant, then a 41-year-old mail processing clerk, filed an occupational disease claim alleging that his repetitive work duties caused his injury.

On April 27, 2005 OWCP accepted appellant's claim for lumbosacral degenerative intervertebral disc disease and spondylolisthesis. It approved L4-5 spinal fusion performed on March 18, 2005. On December 13, 2005 Dr. David M. Montgomery, an attending Board-certified orthopedic surgeon, released appellant to return to work eight hours a day with restrictions of no lifting over 10 pounds and no repetitive bending, and a sit/stand option. Appellant could sit, stand, and walk intermittently up to eight hours a day.

On May 1, 2006 the employing establishment offered appellant a full-time modified clerk position based on the restrictions provided by Dr. Montgomery. The offer noted the position had been tailored to meet appellant's physical needs and allowed him to work eight hours a day, with intermittent, walking, and standing, simple grasping, and no bending, truncal twisting, reaching, reaching above shoulder level, pushing, pulling, squatting, kneeling, bending, stooping, climbing, and lifting more than 10 pounds.³ Appellant accepted the position on May 4, 2006.

In a July 10, 2006 decision, OWCP reduced appellant's compensation to zero based on its determination that he had worked more than 60 days in the modified clerk position and the actual wages he earned in the position fairly and reasonably represented his wage-earning capacity.

On September 28, 2010 the employing establishment informed appellant that, pursuant to the guidelines of the National Reassessment Process (NRP), it could no longer find any necessary tasks for him to perform that were within his restrictions.

On September 29, 2010 appellant filed a recurrence of disability (Form CA-2a) due to the employing establishment's withdrawal of his modified-duty position.

OWCP developed appellant's claim for compensation as a request for modification of its July 10, 2006 LWEC determination, and denied modification on July 8, 2011.

² Docket No. 11-2036 (issued August 29, 2012).

³ The job description stated that appellant's duties and physical activities included manual sorting letter mail into a 77-hole case with a wing section utilizing a chair with back support or while standing at his option and loading ledge by using half trays or by manually taking portions of mail out of full trays and placing the mail on his ledge. Appellant was restricted from participating in the pull-down procedure or in dispatching equipment.

After the August 29, 2012 remand by the Board in Docket No. 11-2036.⁴ OWCP requested that appellant submit medical evidence and legal arguments to support modification of its July 10, 2006 LWEC determination. Appellant was afforded 30 days to submit this evidence.

In a November 27, 2012 letter, counsel contended that the employing establishment had specifically tailored appellant's job for him, it had not been open to the general public and was obviously a temporary job because they eliminated it after he returned to the job.

In a decision dated January 8, 2013, OWCP denied modification of its July 10, 2006 LWEC determination. It found that counsel's November 27, 2012 letter had not established that the original LWEC determination was in error.

By letter dated January 14, 2013 appellant, through counsel, requested a telephone hearing before an OWCP hearing representative.

Following a preliminary review, on March 11, 2013 an OWCP hearing representative set aside the January 8, 2013 decision and remanded the case for OWCP to review the medical evidence of record to determine whether the LWEC determination was based on an actual *bona fide* position.

By decision dated April 19, 2013, OWCP denied modification of the July 10, 2006 LWEC determination. It found that counsel had provided no evidence to support the broad allegations that appellant's modified clerk position was a makeshift position. OWCP found that the record contained sufficient documentation to support that it was a bona fide position and appellant had failed to establish any of the three criteria required to modify the LWEC decision.

On April 23, 2013 appellant, through counsel, requested a telephone hearing by an OWCP hearing representative.

In a September 5, 2013 prescription, Dr. Tristan Guevara, a Board-certified family practitioner, diagnosed back pain and ordered a chair with arms to support appellant's back.

A telephone hearing was held on September 11, 2013.

Subsequent to the hearing, OWCP received a Merit Systems Protection Board (MSPB) supplemental stipulation and settlement agreement signed by appellant on April 19, 2013 reflected that the terms of a prior settlement agreement (not in the record) was being modified. There is some reference to a prior payment of \$35,000.00.

In a December 3, 2013 decision, an OWCP hearing representative set aside the April 19, 2013 decision and remanded the case for OWCP to make specific findings regarding whether appellant continued to have residuals and disability causally related to the accepted employment injuries, as required by FECA Bulletin 09-05 and previously ordered by the Board and the prior OWCP hearing representative. He also directed OWCP to determine whether appellant's

⁴ *Supra* note 2.

modified position was a *bona fide* position and to obtain a complete copy of the MSPB settlement agreement.

On remand, OWCP sent the employing establishment a February 4, 2014 letter requesting all current medical evidence, copies of a job description and other documentation related to the position appellant had been working at the time he was sent home under NRP, whether his job duties had changed subsequent to the LWEC determination, and to provide a written statement addressing whether the position on which the LWEC determination was based was a *bona fide* position at the time of the rating. It also requested that appellant submit any final determinations regarding the MSPB settlement agreement.

The employing establishment provided the May 1, 2006 modified job offer which appellant had accepted on May 4, 2006. It also submitted a July 8, 2008 notice of personnel action (Form SF-50) effective July 5, 2008 changing a work status code and a September 3, 2008 personnel action request noting appellant's placement in a modified clerk position effective May 15, 2006.

A November 7, 2005 work capacity evaluation (Form OWCP-5c) and July 3, 2008 duty status (Form CA-17) report of Dr. Bruce D. Abrams, a prior OWCP referral physician and Board-certified orthopedic surgeon, provided appellant's work restrictions and noted that he had been released to full-time regular work with restrictions.

In a February 27, 2006 report, Dr. Montgomery provided appellant's permanent work restrictions.

In an April 24, 2007 letter, Dr. Paul Malick, a Board-certified family practitioner, stated that appellant had a work-related herniated disc. He further stated that appellant's residuals had resolved. In a May 11, 2007 Form CA-17 report, Dr. M. Malick reiterated his diagnosis of herniated disc. He advised appellant to resume full-time regular-duty work with restrictions on the date of his examination.

A July 3, 2008 Form CA-17 report, Dr. Flura S. Dawde, a Board-certified family practitioner, provided a diagnosis of herniated disc. She noted that she had advised appellant to resume full-time regular-duty work with restrictions on May 11, 2007.

A full copy of the October 31, 2012 MSPB stipulation and settlement agreement was received, in which the employing establishment agreed to, among other things, identify a full-time regular mail processing clerk position that could be modified and assigned to appellant, assuming he met certain conditions and pay him \$35,000.00.

In a March 17, 2014 decision, OWCP denied modification of the July 10, 2006 LWEC determination. It found that the medical evidence was sufficient to establish that appellant's modified clerk position was a *bona fide* position and that the position fairly and reasonably represented his wage-earning capacity.

By letter dated March 21, 2014, appellant, through counsel, requested a telephone hearing with an OWCP hearing representative.

During a telephone hearing held on October 16, 2014, counsel reiterated that OWCP's LWEC determination was erroneous as the job upon which the determination was made was not a *bona fide* job. He contended that appellant was sent home under the NRP because he did not have a classified job. Counsel stated that, if he had such a job, then a determination as to who was sent home would have been based on seniority. He claimed that appellant's job was makeshift in nature as it was created to accommodate his disabilities following his work injury. Counsel further claimed that it was not comparable to his pre-injury job. Appellant stated that he did not bid on his modified job or have an opportunity to grieve the withdrawal of this job.

In a December 23, 2014 decision, an OWCP hearing representative affirmed the March 17, 2014 decision. She found that the evidence established that there had not been a material change in appellant's accepted conditions, that the position on which the LWEC decision was made was a *bona fide* position and not odd-lot or makeshift, and that he had not been retrained or vocationally rehabilitated.

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 at Chapter 2.1501 contain provisions regarding the modification of a formal LWEC.⁶ The relevant part provides that a formal LWEC 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.⁷ 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.⁸ Chapter 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.⁹

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.¹⁰ FECA Transmittal No. 13-09 provides information regarding updating Federal (FECA) Procedure Manual Chapters 2.814 to 2.816 and

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

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

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

⁸ *Id.* at Chapter 2.1501.4 (June 2013).

⁹ *Supra* note 6.

¹⁰ FECA Bulletin No. 09-05 (issued August 18, 2009).

2.1500 to 2.1501.¹¹ OWCP procedures further provide that the party seeking modification of a formal LWEC decision has the burden to prove that one of these criteria has been met.¹²

OWCP procedures provide that factors to be considered in determining whether the claimant's work fairly and reasonably represents his or her wage-earning capacity include the kind of appointment, that is, whether the position is temporary, seasonal, or permanent, and the tour of duty, that is, whether it is part time or full time.¹³ Further, a makeshift or odd-lot position designed for a claimant's particular needs will not be considered suitable.¹⁴

ANALYSIS

In its March 17 and December 23, 2014 decisions, OWCP denied modification of the July 10, 2006 LWEC determination. It found that the duties of the modified clerk position fairly and reasonably represented appellant's wage-earning capacity, and that he had no loss in wage-earning capacity. OWCP stated that he had worked in this full-time position over 60 days and had demonstrated his ability to perform the duties of the position. The record established that appellant returned to work as a modified clerk on May 4, 2006 and worked at this position until September 28, 2010, when the employing establishment advised him that there was no work available to him within his restrictions and the job was withdrawn under NRP.

Appellant subsequently filed a recurrence of disability on September 29, 2010, requesting compensation for wage loss as of September 28, 2010. OWCP properly found that appellant was not entitled to wage-loss compensation when he stopped work, as his wage-earning capacity had previously been established. As noted above, when the employing establishment has withdrawn a light-duty assignment, which accommodated appellant's work restrictions and a formal wage-earning capacity decision has been issued, the decision will remain in place, 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 erroneous.¹⁵

Appellant argued that the LWEC decision should be set aside because it was based on a position that was not *bona fide* and was therefore not suitable for an LWEC determination, pursuant to FECA Bulletin No. 09-05. This bulletin provides that the determination of whether a loss of wage-earning capacity was based on an actual *bona fide* position may be evinced by a job offer, Form SF-50, a classified position or formal position description, or the documentary evidence.¹⁶ Based on these guidelines, OWCP properly found that the modified clerk job was *bona fide* and not a makeshift or odd-lot position. The May 1, 2006 job offer which appellant

¹¹ FECA Transmittal No. 13-09 (issued June 4, 2013).

¹² *Supra* note 8.

¹³ *Id.* at Chapter 2.815.5.c(1) (June 2013).

¹⁴ *Id.* at Chapter 2.815.5.c(2)(a) (June 2013).

¹⁵ *Sharon C. Clement*, 55 ECAB 552 (2004).

¹⁶ *See also P.P.*, Docket No. 14-656 (issued December 18, 2014); *T.P.*, Docket No. 14-1207 (issued November 7, 2014).

accepted contained a clear position description, identified the title of the job, a set schedule, and the duties of the position. The duties of the modified clerk were clearly outlined in the job offer. It was not a temporary position. In fact appellant worked in this position for over four years. He has provided no evidence that he was unable to perform the duties of the modified position on the date the LWEC decision was issued. There is no indication that appellant needed assistance from his supervisor or his coworkers to fulfill the assigned duties of his position, or that he worked in a self-directed manner or schedule. The Board finds that OWCP has established that the position was a *bona fide* position.

Further, the Board finds that appellant has not submitted medical evidence sufficient to establish that he was unable to perform the duties of his modified clerk position. In a prescription dated September 5, 2013, Dr. Guevara diagnosed back pain and ordered a chair with arms to support appellant's back. It is well established that pain is a description of a symptom and not considered a compensable medical diagnosis.¹⁷ Moreover, Dr. Guevara did not specifically relate any diagnosed condition or total disability to the accepted employment injuries. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship.¹⁸

The reports from Drs. Abrams, Malick, and Dawde predate the alleged period of total disability and do not relate any condition or disability to employment. None of the physicians provided an opinion stating that appellant was totally disabled as of September 28, 2010 due to a worsening of his accepted employment-related conditions.¹⁹ The Board finds that these reports are insufficient to meet appellant's burden of proof to establish a material change in his work-related conditions.

The evidence does not establish that appellant's accepted work-related medical conditions have materially changed, that the original LWEC determination was in error, or that he had been retrained or otherwise vocationally rehabilitated. For these reasons, the Board finds that appellant has not established that the July 10, 2006 LWEC determination should be modified.

The MSPB settlement agreement of 2012 is of no probative value to the issues before the Board. The Board has previously held that the decisions of other administrative agencies do not establish benefits under FECA.²⁰

Appellant may request modification of the LWEC determination, supported by new evidence or argument, at any time before OWCP.

¹⁷ *B.P.*, Docket No. 12-1345 (issued November 13, 2012); *C.F.*, Docket No. 08-1102 (issued October 8, 2008).

¹⁸ *See A.D.*, 58 ECAB 149 (2006); *Michael E. Smith*, 50 ECAB 313 (1999).

¹⁹ *Id.*

²⁰ *Daniel Deparini*, 44 ECAB 657 (1993).

CONCLUSION

The Board finds that appellant did not meet his burden of proof to modify OWCP's July 10, 2006 LWEC determination.

ORDER

IT IS HEREBY ORDERED THAT the December 23, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 20, 2015
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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