

FACTUAL HISTORY

This case has previously been before the Board. The facts as set forth in the Board's prior decision are hereby incorporated by reference.² The relevant facts are set forth below.

On December 18, 1991 appellant, then a 32-year-old postal distribution clerk, filed an occupational disease claim alleging that work factors caused neck, arm, and hand pain. OWCP accepted her claim for a cervical strain, bilateral carpal tunnel syndrome, bilateral ulnar nerve compression, and left ulnar nerve transposition.

On June 15, 1994 appellant was offered a position as a modified clerk for the employing establishment. The offer stated that in consideration of her injury/illness, she would be limited to standing and sitting two to four hours a day, intermittent walking and lifting (1 to 10 pounds) zero to one hour a day, twisting intermittently for one to two hours a day and continuous simple grasping six to eight hours a day. The job duties included running edit reports on the keyers in the unit, inputting time for the supervisors and checking and correcting the time for everyone in the unit, and other duties that were within appellant's medical limitations. The work hours were listed as 3:30 p.m. to 12:00 midnight on Monday, Thursday, Friday, and Saturday, and 5:00 p.m. to 1:30 a.m. on Sunday. Appellant's salary would be unchanged. On July 7, 1994 she was reemployed in this position.

By decision dated October 20, 1994, OWCP determined that appellant's actual earnings in the position of a modified clerk represented her wage-earning capacity and reduced her compensation benefits to zero.

By letter dated October 8, 2004, the employing establishment amended appellant's job description and changed the position title to "rehab clerk." The modified work duties included nixie clerk duties; assisting facility safety coordinator with filing, data entry, and telephone calls; and any other duties that may be available and be within her restrictions. The physical requirements consisted of sitting up to eight hours a day, occasional standing, use of hands to perform duties, and lifting not to exceed 10 pounds. The employing establishment noted in the October 8, 2004 letter that the position of rehab clerk was tailored to meet appellant's personal physical limitations. It stated that, although she would "have and gain seniority," she could not be awarded any bid assignment unless she was medically certified to be able to perform the physical requirements of the bid position. The letter also indicated that should appellant vacate the position, the modified job would be abolished. Appellant accepted the rehab clerk job offer on October 15, 2004.

By letter dated March 16, 2007, the employing establishment asked appellant to request that her treating physician provide her current medical information/restrictions. It indicated that failure to provide the information may result in the termination of her modified position. Following receipt of updated restrictions from appellant's physician, on July 18, 2008 the employing establishment again modified appellant's position to add manual casing up to four hours, surface visibility (SV) scanning and placard printing up to four hours, and any other duties that may be available within her medical restrictions. However, on August 1, 2008, appellant

² Docket No. 13-475 (issued May 17, 2013).

rejected the modified job offer as she indicated that it was outside of her physical imitations as set by her treating physician.

On August 25, 2008 the employing establishment modified the amended rehab clerk position to limit casing to two hours a day, nixie section for two hours, surface visibility for up to four hours a day, and any other duties within restrictions. Appellant rejected this position on August 27, 2008. She received compensation from August 15, 2008 to January 2, 2009.

On September 25, 2008 the employing establishment modified the amended rehab clerk position to limit casing and nixie section up to four hours a day alternating hands each hour; SV scanning zero to four hours a day; and any other duties within her restrictions. Appellant then accepted the modified job offer commencing January 3, 2009.

By letter dated September 2, 2010, the employing establishment sent appellant an informational letter and informed her that the National Reassessment Process (NRP) had completed a search for necessary tasks meeting her medical restrictions in all crafts and on all tours within her facility and commuting area, and that based on this search, they were unable to identify any available necessary tasks within her medical restrictions. Appellant was told not to report back for duty unless she was contacted and informed that necessary work tasks had been identified for her within her medical restrictions.

On September 14, 2010 appellant filed a claim for wage-loss compensation commencing September 2, 2010. On December 14, 2010 OWCP denied modification of the October 20, 1994 LWEC determination, and this decision was affirmed by the hearing representative on June 7, 2011. By decision dated August 10, 2012, it denied appellant's request for reconsideration.

In a May 17, 2012 decision, the Board set aside OWCP's August 10, 2012 decision as it determined that appellant had requested modification of a LWEC determination and that OWCP improperly treated this as a request for reconsideration. The Board instructed it to properly adjudicate appellant's request for modification of the LWEC determination.³

After remand, in a letter dated June 19, 2013, OWCP requested that appellant submit arguments and relevant evidence pertaining to the job upon which the LWEC determination was made. It also requested that the employing establishment submit information with regard to appellant's modified position. In response, the employing establishment submitted, *inter alia*, a copy of the regular job description for a mail processing clerk. The duties included sorting outgoing and incoming mail, loading mail onto automated equipment, preparing the work area, and removing sorted mail from bins or other places. The job duties required heavy lifting (up to 70 pounds), heavy carrying, walking, and standing for eight hours a day. In a February 26, 2009 worksheet, the employing establishment noted that appellant was working with the rehabilitation modified position, and was restricted to letter carrier/casing letters for two hours a day and "nixes" as needed. All other listed duties were redacted.

³ *Id.*

By decision dated July 22, 2013, OWCP denied modification of the LWEC determination.

On July 29, 2013 OWCP requested a telephone hearing before the hearing representative.

At the hearing held on January 2, 2014, counsel contended that OWCP should have recognized the difference between a classified position, which one bids for, and nonclassified position. Appellant testified that, prior to the injury, she worked as a clerk, which was a classified open bid job, and that after the injury, she returned to work in a position with limitations specifically determined for her. She also testified that when she was sent home under NRP, it was not due to a reduction-in-force, and she was not sent home according to seniority. Counsel testified that the circumstances by which she was sent home established that appellant's position was makeshift.

In a decision dated March 21, 2014, the hearing representative affirmed OWCP's July 29, 2013 decision, as she determined that appellant had not met the criteria to modify the 1994 LWEC determination.

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.⁴ OWCP procedures at Chapter 2.1501, and Board precedent, contain provisions regarding the modification of a formal loss of wage-earning capacity.⁵ 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 materially changed; or (3) the claimant has been vocationally rehabilitated.⁶ Chapter 2.1501 further provides that FECA Bulletin No. 09-05 should be consulted if the circumstances in the case indicated that the position in question may have been withdrawn (in whole or in part) as a result of NRP.⁷ 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.⁸ FECA Transmittal No. 13-09 provides information regarding updating Federal (FECA) Procedure Manual Chapters 2.814 to 2.816 and 2.1500 to 2.1501.⁹

⁴ *Katherine T. Kreeger*, 55 ECAB 633 (2004).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501 (June 2013); *L.P.*, Docket No. 14-344 (issued December 4, 2014).

⁶ *Id.* at Chapter 2.1501.3(a).

⁷ *Id.* at Chapter 2.815(c)(2)(a).

⁸ FECA Bulletin No. 09-05 (issued August 18, 2009).

⁹ FECA Transmittal No. 13-09 (issued June 4, 2013).

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.¹⁰

OWCP's 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.¹¹ Further, a makeshift or odd-lot position designed for a claimant's particular needs will not be considered suitable.¹² The Board has discussed several factors that may support a finding that the offered position was makeshift in nature. These factors include: (1) the position did not have an official title or formal position description; (2) there were strict limitations, such as five-pound lifting and no casing of mail, which indicated that the claimant would not be able to secure a position in the community at large with such limited duties; (3) the claimant did not perform any meaningful tasks in the position; and (4) the job appeared to be temporary in nature.¹³

ANALYSIS

The Board finds that the modified position on which the October 20, 1994 LWEC determination was based was makeshift in nature. As such the March 21, 2014 decision must be reversed as appellant has established that modification of the LWEC determination is warranted.

OWCP accepted appellant's claim for cervical strain, bilateral carpal tunnel syndrome, bilateral ulnar nerve compression, and left ulnar nerve transposition. On July 7, 1994 appellant was reemployed by the employing establishment as a modified clerk. On October 20, 1994 OWCP determined that her actual earnings in her position represented her LWEC and reduced her compensation benefits to zero. Appellant continued working modified duties, with an interruption from August 15, 2008 to January 2, 2009, until September 2, 2010, when she was sent home under NRP.

When an LWEC decision has been issued, as provided in Chapter 2.1501 of the procedure manual, FECA Bulletin No. 09-05 requires OWCP to develop the evidence to determine whether a modification of the decision is appropriate.¹⁴ FECA Bulletin No. 09-05 directs 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 as a result of residuals of

¹⁰ *Supra* note 5 at 2.1501.4 (June 2013); *L.P.*, *supra* note 5 citing *Stanley B. Plotkin*, 51 ECAB 700 (2000).

¹¹ *Id.* at Chapter 2.815.5(c)(1).

¹² *Id.* at Chapter 2.815.5.c(2)(a).

¹³ *T.P.*, Docket No. 14-1207 (issued November 7, 2014); *V.H.*, Docket No. 14-2076 (issued March 5, 2014).

¹⁴ *Supra* note 8.

the employment injury and to further develop the evidence from both appellant and the employing establishment if the records lack current medical evidence.¹⁵

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.¹⁶

OWCP's LWEC determination of October 20, 1994 was based on a job offer of June 15, 1994. The evidence establishes that the position had a title, *i.e.*, modified clerk, and specific work hours. However, the June 15, 1994 position description clearly stated that appellant's assignment would have strict limitations and was specifically set to be within her physician's medical limitations. These restrictions required her to perform significantly less physical duties than other clerks. For example, a position as a clerk required heavy lifting (up to 70 pounds), heavy carrying, walking and standing for eight hours a day. The duties of appellant's position limited her to standing two to four hours a day, walking intermittently up to one hour a day, and lifting intermittently 1 to 10 pounds for up to one hour a day. The job description for a clerk involved sorting outgoing and incoming mail, loading mail onto automated equipment, preparing work area, and removing sorted mail from bins or other places. Appellant's position involved running edit reports, inputting time and "other duties that are within her physician's medical limitations." At the time of the June 15, 1994 job offer, she was not required to case mail, but was instead restricted to very limited sedentary-type duties. Despite the fact that appellant's duties were limited, her salary remained unchanged.

The Board notes that the evidence of appellant's employment history subsequent to the LWEC decision also confirms that the position was makeshift. On August 8, 2004 the employing establishment modified the duties of appellant's position. While informing appellant of the new rehab clerk job offer, it clearly noted that failure to provide medical information may result in the termination of the rehab clerk modified position. Furthermore, the employing establishment indicated that the position was tailored to meet appellant's physical limitations. This was followed by another attempt by the employing establishment on July 18, 2008 to change her position description, an offer which appellant temporarily rejected, and this resulted in her being out of work and paid compensation from August 15, 2008 to January 2, 2009, after which she returned to the rehab clerk job.

Accordingly, the treatment of appellant subsequent to the LWEC determination, including job offers written to accommodate appellant's medical restrictions, the statement that although appellant continued to have seniority but could not bid on other assignments until she could meet all of the requirements, as well as the admission by the employing establishment that the position was not available to the community-at-large, indicate the position on which the

¹⁵ *Id.*

¹⁶ *L.P.*, *supra* note 5.

LWEC decision was made was makeshift.¹⁷ The Board notes that OWCP did not issue a new LWEC determination based on the new job assignments.

The Board further notes that the hearing representative, in affirming the denial of the modification of LWEC determination, stated that there was no evidence that appellant was released from her position as a result of her condition or because work was not available for medical reasons, but rather she was released as a result of the NRP based on the needs of the employing establishment. The hearing representative indicated that appellant was not singled out because of her condition. The Board cannot affirm this finding. In the September 2, 2010 letter to appellant, the employing establishment clearly stated that a search for necessary tasks meeting her medical restrictions in all crafts and on all tours within her facility and commuting area was unable to identify any available necessary tasks within her medical restrictions, and that she was not to report to work unless she was contacted and informed that necessary work tasks had been identified for her within her medical restrictions.

A basis for modifying a LWEC determination is to establish that the original decision was in error.¹⁸ The Board finds under the facts of this case that the modified assignment upon which the LWEC determination was made was makeshift in nature. The assignment was created to accommodate appellant's restrictions and the duties outlined did not constitute a *bona fide* job that would be available to the community-at-large.¹⁹ The position, therefore, does not fairly and reasonably represent appellant's LWEC and the October 20, 1994 LWEC determination was erroneous. As the position on which the October 20, 1994 decision was based was makeshift in nature, appellant met her burden of proof to establish that the LWEC determination should be modified.

CONCLUSION

The Board finds that appellant has established that modification of the October 20, 1994 LWEC determination is warranted. The case will be returned to OWCP for further action consistent with this opinion.

¹⁷ See *A.T.*, Docket No. 14-82 (issued July 15, 2014).

¹⁸ Federal (FECA) Procedure Manual, *supra* note 10.

¹⁹ See *supra* note 17.

ORDER

IT IS HEREBY ORDERED THAT the March 21, 2014 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 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