

FACTUAL HISTORY

This case has previously been before the Board.² In a July 24, 2012 decision, the Board set aside OWCP's October 25, 2011 decision denying modification of an October 27, 2006 LWEC determination. OWCP had analyzed appellant's claim for wage-loss compensation under the customary criteria for modifying an LWEC 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No. 09-05 or following the procedures outlined therein for claims, such as this, in which a limited-duty position is withdrawn pursuant to the National Reassessment Process (NRP).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

Following further development, by decision dated December 11, 2012 OWCP denied modification of the LWEC determination. After a hearing before an OWCP hearing representative, on April 3, 2013 OWCP affirmed the December 11, 2012 denial of modification.

In a May 27, 2014 decision, the Board set aside OWCP's April 3, 2013 decision which found there was no basis for modification of the October 27, 2006 LWEC determination.⁴ The Board noted that, despite the employing establishment's assertion that the position offered in 2006 was a bona fide position, there was 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 position was one of miscellaneous customer service with 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 rubber stamping 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. The Board found that OWCP did not adequately develop the evidence under FECA Bulletin No. 09-05 and had not complied with the Board's July 24, 2012 order as it remained 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 under FECA Bulletin No. 09-05. The Board remanded the case to OWCP for further development of the evidence and a *de novo* decision on whether the October 27, 2006 LWEC determination should be modified. The facts and circumstances as presented in the prior appeals are incorporated herein by reference.

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

³ On February 1, 2005 appellant, then a 33-year-old mail carrier, filed an occupational disease claim (Form CA-2) alleging that her carpal tunnel syndrome, right rotator cuff syndrome, and neck and low back pain were the result of performing her job duties. OWCP accepted her claim for right supraspinatus tendinitis, right carpal tunnel syndrome and cervical, thoracic and lumbosacral subluxations. In an October 27, 2006 wage-earning capacity decision, it determined that appellant's earnings as rehabilitation clerk, effective July 22, 2006, fairly and reasonably represented her wage-earning capacity. Appellant returned to limited-duty work in November 2010. However, the employing establishment had no work available as of November 12, 2010 due to NRP. Appellant subsequently filed a claim for compensation (Form CA-7) for wage loss for the period November 13, 2010 and continuing.

⁴ Docket No. 13-1342 (issued May 27, 2014).

Following the Board's May 27, 2014 remand, on August 12, 2014 OWCP requested that the employing establishment issue a statement advising whether the position in which appellant was rated was a bona fide position and to explain whether it was a regular position that would have been performed by another employee. It also requested that the employing establishment explain why the job offer indicated the position was "for incumbent only" and listed 21 duties.

In a September 25, 2014 statement, Lori Yamamoto, Health and Resources Management Specialist, indicated that the duties identified in the rehabilitation clerk job offer were core duties that were normally performed in a clerk position and should be considered a bona fide position. She further indicated that the reason the position was identified as "for incumbent only" was for union purposes.

In an August 12, 2014 report and accompanying work status report, Dr. Paula T. Lenny, a physician Board-certified in occupational medicine, provided an assessment of stable right rotator cuff syndrome, stable myofascial pain/cervical and lumbar strains, chronic mild persisting, and stable carpal tunnel syndrome, very mild, rare symptoms. No changes to appellant's permanent restrictions were indicated. The permanent restrictions were noted as: sit/walk/stand up to 2 hours intermittently; no repetitive reaching above shoulder level; lift, push, pull up to 40 pounds; and stand and walk 6 hours per day with a 10-minute break every 2 hours.

By decision dated September 26, 2014, OWCP denied modification of its October 27, 2006 LWEC determination and, therefore, found no basis for payment of wage-loss benefits as of November 13, 2010. It noted that there had been no material change in the nature and extent of the injury-related condition and that the reason for the loss of work hours effective November 13, 2010 was due to full-time work no longer being available as part of NRP.

On October 3, 2014 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative, which was held on April 17, 2015.

In a February 17, 2015 report and accompanying work status report, Dr. Lenny again provided an assessment of stable right rotator cuff syndrome, stable myofascial pain/cervical and lumbar strains, and stable carpal tunnel syndrome. No changes to appellant's permanent restrictions were indicated.

By decision dated July 7, 2015, an OWCP hearing representative affirmed OWCP's September 26, 2014 decision denying modification of its October 27, 2006 LWEC determination. She found that the job offer on which the LWEC was based was a valid job, not odd-lot or makeshift. The employing establishment stated that the duties were core duties for a clerk position and clarified that the position was indicated as for "incumbent only" so that it would not be reposted after it was vacant within 28 days. The hearing representative further found that there is no medical evidence to establish a material change in the accepted condition or work limitations to consider a modification of the LWEC based on a medical basis.

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 materially changed; or (3) the claimant has been vocationally rehabilitation.⁷ The Board has long recognized these provisions.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 OWCP Procedure Manual Chapters 2.814 to 2.816 and 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

As the Board noted in its prior appeals, FECA Bulletin No. 09-05 requires OWCP to develop the evidence to determine whether a modification of a wage-earning capacity determination is appropriate.

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

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

⁷ *Id.* at Chapter 2.1501.3(a).

⁸ *See Sue A. Sedgwick*, 45 ECAB 211 (1993); *D.M.*, 59 ECAB 164 (2007); *see also A.T.*, Docket No. 14-0082 (July 15, 2014).

⁹ *Supra* note 6 at Chapter 2.1501.1.

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

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

¹² Federal (FECA) Procedure Manual, *supra* note 6 at Chapter 2.1501.4 (June 2013).

¹³ *Id.* at Chapter 2.815.5.c(1).

¹⁴ *Id.* at Chapter 2.815.5.c(2)(a).

In accordance with the Board's second remand order, OWCP requested that the employing establishment provide a statement as to whether the rehabilitation clerk job offer was an actual bona fide position at the time of the rating and to explain why the job offer indicated the position was "for incumbent only." In a September 25, 2014 statement, Ms. Yamamoto, Health and Resources Management Specialist, indicated that the duties identified in the rehabilitation clerk job offer were core duties that were normally performed in a clerk position.

The Board has carefully reviewed the statements of the employing establishment, the facts of the case, and the circumstances surrounding the original LWEC determination and finds that the July 7, 2006 job offer was not makeshift in nature. The requirements of a bona fide position have been clearly established and decided by this Board pursuant to *A.J.* and its progeny¹⁵ and these criteria have been met in this case. The offered rehabilitation clerk position was not temporary as appellant was performing the duties of the modified job offer at the time of the LWEC determination and had been performing the duties of the modified job offer for at least 60 days prior to the wage-earning capacity determination.¹⁶ While the labor distribution code indicated that the position had miscellaneous customer service and administrative duties, the employing establishment clarified that it was in reality a clerk position as the rehabilitation clerk job offer contained the core duties that were normally performed in a clerk position. The offered job also had a position description, a set work schedule, and specific duties appropriate to the position.¹⁷ Furthermore, the physical restrictions for the rehabilitation clerk position were reasonable and appellant worked in this capacity for almost four years until full-time work was no longer available as part of NRP. Although the offered rehabilitation clerk position noted that it was for "incumbent" only, the employing establishment explained that this was for "union purposes" and that if the job was vacant for 28 days it would have to be reevaluated prior to being posted automatically. Accordingly, the rehabilitation clerk job offer was not makeshift in nature.¹⁸

There is no evidence that appellant's medical condition has changed such that she could no longer perform the duties of her wage-earning capacity position, nor does she argue that she has been retrained or vocationally rehabilitated.

On appeal counsel contends that OWCP's decision is contrary to fact and law, but fails to provide any arguments or evidence to support such assertion.

¹⁵ Compare *A.J.*, Docket No. 10-0619 (issued June 29, 2010) (wherein 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 adequately function in the position nor 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 by its terms to be temporary in nature).

¹⁶ See *R.S.*, Docket No. 14-1426 (issued April 20, 2015).

¹⁷ While the July 7, 2006 job offer did not list appellant's duty hours, appellant apparently worked full time in such position until NRP in 2010 rendered the job unavailable.

¹⁸ See *P.B.*, Docket No. 14-1049 (issued February 24, 2015).

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

CONCLUSION

The Board finds that appellant has failed to establish modification of the October 27, 2006 wage-earning capacity determination.

ORDER

IT IS HEREBY ORDERED THAT the July 7, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 7, 2016
Washington, DC

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

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board