



determination, but had failed to acknowledge FECA Bulletin No. 09-05 or fully follow the procedures outlined therein for claims, such as this, in which limited-duty positions are withdrawn pursuant to the National Reassessment Process (NRP).<sup>2</sup> The record establishes that after OWCP issued its May 5, 1998 wage-earning capacity decision, the employing establishment reassessed appellant's rated position under the employing establishment's NRP, which resulted in a withdrawal of limited duty and a claim for wage-loss compensation beginning October 24, 2007. The facts of the previous Board decision are incorporated herein by reference.

OWCP accepted that appellant, then a 35-year-old clerk, suffered an aggravation of right Keinbock's disease and authorized several surgeries. Appellant returned to work on March 5, 1997 in a modified assignment and, on October 16, 1997, began working in a limited-duty clerk position on a full-time basis. The title of the position was clerk and it paid a salary of \$37,210.00 at a Level 06, Step N. The hours were from 1630 to 0100 (4:30 p.m. to 1:00 a.m.) and the days off were Saturday and Sunday. The duties of the position included verifying trays, answering the telephone and every two hours, for 20 minutes, to perform letter case distribution. The physical restrictions of the position included a 10-pound weight limit, with no keyboarding and no constant, repetitive use of upper extremities. The limited job offer was effective immediately and would remain in effect until such time as medical restrictions changed or appellant was cleared to full duty.

By decision dated May 5, 1998, OWCP determined that appellant's actual earnings in that position fairly and reasonably represented her wage-earning capacity and reduced her wage-loss compensation benefits to zero.

Following the May 5, 1998 wage-earning capacity decision, on June 18, 1998 appellant accepted another limited-duty clerk position which included the same duties as the October 1997 job offer, but also included additional duties, as needed.

On November 5, 1999 appellant accepted a modified assignment as a transportation clerk, which constituted a reassignment under the employing establishment rehabilitation program. She worked as a modified transportation clerk, until she was injured in another work-related motor vehicle accident on October 14, 2005.<sup>3</sup> Appellant returned to work on January 23, 2006 in a different modified position for four hours per day and received wage-loss compensation based on partial disability for the October 14, 2005 injury claim. Following her recovery from her October 14, 2005 work-related motor vehicle accident, she intermittently performed general clerical work for the employing establishment.<sup>4</sup> Appellant also filed Forms CA-7, claims for compensation, for the period July 10 through August 25, 2006, claiming four hours per day wage

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<sup>2</sup> Docket No. 12-799 (issued December 11, 2012).

<sup>3</sup> The October 14, 2005 injury, assigned OWCP File No. xxxxxx511, was accepted for multiple contusions, neck sprain, right elbow sprain, right hand sprain, and torn ulnar collateral ligament of the right hand, for which appellant underwent surgical repair on November 4, 2005. Appellant eventually recovered from these injuries.

<sup>4</sup> On August 28, 2006 appellant began a two-week full-time job performing general clerk duties within her medical restrictions. In an August 31, 2006 letter, MDO Raymond Fields noted that the job was temporary and they would come up with another job offer for duties that met her medical restrictions.

loss. OWCP adjudicated the requests for wage-loss compensation as requests for modification of the May 5, 1998 LWEC determination which were denied.

The employing establishment continued to offer appellant several positions, which she either refused or her physician rejected. On October 24, 2007 appellant was separated from the employing establishment as it could no longer accommodate her medical restrictions due to her accepted work-related injury. On February 19, 2008 she filed a claim of recurrence (Form CA-2a) which covered the period of work stoppage effective October 24, 2007.

In an April 17, 2009 letter, John T. Godlewski, Jr., human resource manager, advised that the limited-duty job offer of October 16, 1997, upon which the LWEC was based, was a modified position uniquely created to meet appellant's medical limitations. He noted the title of modified clerk was created in order to designate appellant's craft affiliation and the duties listed in the limited-duty job were a combination of tasks from other employees as well as administrative duties that a supervisor would normally perform. Mr. Godlewski noted that appellant was given a new offer on October 25, 1999 as a modified transportation clerk which met the same criteria indicated above. The employing establishment further stated that they withdrew the October 25, 1999 position as they no longer could accommodate appellant's medical restrictions due to her accepted work injury.<sup>5</sup>

Following the Board's December 11, 2012 remand, in letters dated March 21 and April 24, 2013, OWCP requested that the employing establishment provide all current medical evidence, copies of a job description, and other documentation related to the position appellant had been working at the time she was sent home under NRP, whether her job duties had changed subsequent to the May 5, 1998 wage-earning capacity determination. The employing establishment was also asked to provide a written statement addressing whether the position on which the wage-earning capacity was based was a *bona fide* position at the time of the wage-earning capacity rating.

In a May 3, 2013 response, Kimberly A. Killer, Health and Resource Management specialist, noted that appellant's job offers changed when her restrictions changed. She indicated that the October 16, 1997 job offer was not a *bona fide* position; rather, it was a collection of duties grouped together to accommodate appellant's medical limitations. Ms. Killer resubmitted appellant's medical records in 1997, 1998, and 1999, which identified a need for ongoing work restrictions relative to the right hand as a result of wrist fusion and chronic pain; PS Form-50's and inter-office correspondence relating to the duty assignments of the October 16, 1997 job offer, which were all previously of record. In an October 16, 1997 note, Raymond C. Farr, operation support specialist, indicated that effective October 25, 1997 appellant would become an unassigned, unencumbered distribution clerk.

By decision dated June 28, 2013, OWCP reviewed the evidence in accordance with FECA Bulletin No. 09-05 and denied modification of the May 5, 1998 wage-earning capacity determination. It determined that the October 16, 1997 limited-duty job offer which appellant accepted was not temporary as the job offer stated that the position would remain in effect until she was cleared for full-duty work. OWCP further determined that she worked in the position

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<sup>5</sup> No action was taken on the recurrence claim until 2010. On June 1, 2010 appellant reformed OWCP of her recurrence claim filed on February 19, 2008. She contended that the May 5, 1998 LWEC decision was in error.

for more than 60 days. Thus, it found the wage-earning capacity determination had been properly established. OWCP also found no evidence in the file to establish a medical change in appellant's work-related condition to warrant modification of the May 5, 1998 wage-earning capacity determination. It determined that she had failed to demonstrate any change in her underlying medical condition relative to the 1993 injury after she returned to work following her October 2005 injury.

On July 22, 2013 appellant requested an oral hearing, which was held telephonically on November 20, 2013.<sup>6</sup> Counsel argued that the employing establishment failed to produce any additional evidence to demonstrate that the limited-duty position was a *bona fide* position at the time of rating consistent with FECA Bulletin No. 09-05. She also argued that there was no evidence to support that the October 16, 1997 limited-duty job offer, in which the wage-earning capacity decision was based, was a regular *bona fide* position. Rather, counsel claimed it was based on a temporary limited-duty position consisting of *ad hoc* clerical duties, as needed, within appellant's restrictions and not available on the open market. She argued that the case was analogous to the Board's decision in *A.J.*,<sup>7</sup> Docket No. 10-619 (issued June 29, 2010). Copies of the employing establishment's April 17, 2009 letter, which indicated that the October 16, 1997 position had been uniquely created to meet appellant's medical limitations, was submitted along with other evidence previously of record, which included the October 18, 1997 limited-duty job offer; a July 23, 1998 amended statement of accepted facts, which noted she worked in a limited-duty capacity; and a March 5, 1998 worksheet which identified the position as limited duty.

At the hearing, counsel further argued that the employing establishment admitted that the position was not *bona fide* and the fact that appellant accepted other modified assignments over the years meant the October 16, 1997 assignment was in fact temporary. The employing establishment noted that new job offers were based on new restrictions from appellant's physician and the withdrawal of the modified assignment was the result of NRP.

By decision dated February 5, 2014, an OWCP hearing representative affirmed the June 28, 2013 decision. He found the May 5, 1998 wage-earning decision was correctly issued as the employing establishment provided full-time employment with no wage loss for approximately 10 years until NRP resulted in the withdrawal of the work assignment.

### **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.<sup>8</sup> OWCP procedures at Chapter 2.1501 contain provisions regarding the modification of a formal LWEC.<sup>9</sup> The relevant part provides that a

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<sup>6</sup> On November 13, 2012 appellant's counsel requested that the oral hearing be converted to a telephonic hearing.

<sup>7</sup> Docket No. 10-619 (issued June 29, 2010).

<sup>8</sup> *Katherine T. Kreger*, 55 ECAB 633 (2004).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity*, Chapter 2.1501 (June 2013).

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.<sup>10</sup> The Board has long recognized these provisions.<sup>11</sup>

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.<sup>12</sup> 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.<sup>13</sup> FECA Transmittal No. 13-09 provides information regarding updating OWCP procedure manual chapters 2.814 to 2.816 and 2.1500 to 2.1501.<sup>14</sup> 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.<sup>15</sup>

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.<sup>16</sup> Further, a makeshift or odd-lot position designed for a claimant's particular needs will not be considered suitable.<sup>17</sup>

### ANALYSIS

OWCP accepted that appellant sustained an aggravation of her right wrist Keinbock's disease and authorized surgeries on November 20, 1995 and August 1, 1996. On October 16, 1997 appellant started a limited-duty position as a clerk. On May 5, 1998 OWCP issued a formal wage-earning capacity decision, finding that her modified position fairly and reasonably represented her wage-earning capacity. Appellant continued working modified duties in other positions, such as a limited-duty clerk on June 4, 1998 and a modified transportation clerk on November 5, 1999, as well as performing modified duties and general clerical work following a work-related motor vehicle accident on October 14, 2005. She continued working modified duties until October 24, 2007 when the employing establishment sent her home under NRP.

Appellant does not argue that her 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

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<sup>10</sup> *Id.* at Chapter 2.1501.3(a).

<sup>11</sup> See *Sue A. Sedgwick*, 45 ECAB 211 (1993); *D.M.*, 59 ECAB 164 (2007); see also *A.T.*, Docket No., 14-82 (July 15, 2014).

<sup>12</sup> *Supra* note 9 at Chapter 2.1501.1.

<sup>13</sup> FECA Bulletin No. 09-05 (issued August 18, 2009).

<sup>14</sup> FECA Transmittal No. 13-09 (issued June 4, 2013).

<sup>15</sup> Federal (FECA) Procedure Manual, *supra* note 9 at Chapter 2.1501.4 (June 2013).

<sup>16</sup> *Id.* at Chapter 2.815.5.c(1).

<sup>17</sup> *Id.* at Chapter 2.815.5.c(2)(a).

been retrained or vocationally rehabilitated. Rather, she argues that the original LWEC capacity determination was in error as it was based on a makeshift position or odd-lot position which could not be used to support LWEC.

When an LWEC decision has been issued, as provided in Chapter 2.1501 of the procedure manual, FECA Bulletin No. 09-05 is to be consulted if that position is withdrawn under NRP.<sup>18</sup> FECA Bulletin No. 09-05 requires OWCP to develop the evidence to determine whether a modification of the decision is appropriate.<sup>19</sup> FECA Bulletin No. 09-05 asks 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.<sup>20</sup>

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 it was created or review its files for contemporaneous evidence concerning the position.

OWCP requested on March 21, 2013 that the employing establishment provide all current medical evidence, copies of a job description, and other documentation related to the position appellant had been working at the time she was sent home under NRP. The employing establishment was also asked to submit information as to whether her job duties had changed subsequent to the wage-earning capacity determination and to provide a written statement addressing whether the position on which the wage-earning capacity was based encompassed functions that were necessary to the operation of the employing establishment at the time of the determination.

The record contains forwarded copies of the October 16, 1997 limited-duty clerk position, appellant's medical records in 1997, 1998, and 1999, which identified a need for ongoing work restrictions relative to the right hand; PS Form-50's and inter-office correspondence relating to the duty assignments of the October 16, 1997 job offer. The record also contains a May 3, 2013 letter from the employing establishment representative, Ms. Killer, which stated that the October 16, 1997 job offer was not a *bona fide* position. Rather she claimed that it was a collection of duties grouped together for the employee to accommodate her medical limitations. An April 17, 2009 letter from a human resource manager, previously of record, also indicated that the October 16, 1997 job offer had been created in order to designate appellant's craft affiliation and the duties listed in the job offer were gathered from other employee tasks as well as administrative duties a supervisor would normally perform.

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<sup>18</sup> *Supra* note 12.

<sup>19</sup> *Supra* note 13.

<sup>20</sup> *Id.*

The Board finds that the October 1997 modified 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 progeny<sup>21</sup> and these criteria have been met in this case. The offered limited-duty clerk position was not temporary as it was to remain in effect indefinitely unless appellant's restrictions changed or she returned to full duty. Appellant had been performing the duties of the modified job offer for at least 60 days prior to the wage-earning capacity determination.<sup>22</sup> The October 1997 offered position was a classified position with an official title and a salary. The title of the position was clerk and it paid a salary of \$37,210.00 at a Level 06, Step N. The hours were from 1630 to 0100 (4:30 p.m. to 1:00 a.m.) and the days off were Saturday and Sunday. The offered job had a position description, a set work schedule, and specific duties appropriate to the position. The duties of the position included verifying trays, answering the telephone, and every two hours, for 20 minutes, to perform letter case distribution. Furthermore, the physical restrictions for the limited-duty position, which included a 10-pound weight limit, with no keyboarding and no constant, repetitive use of upper extremities, were reasonable. Appellant worked in this capacity or similar capacities for almost 10 years.

That appellant later accepted other full-time positions, with the same restrictions, does not warrant modifying the May 5, 1998 LWEC as counsel contends. Furthermore, the employing establishment's characterizations of the position as makeshift also fail to defeat the Board's finding, as these characterizations were made in letters dated more than 10 years after the October 1997 job offer. OWCP and the Board have been provided the statutory and regulatory authority to make such determinations. Most positions created for injured workers within an employing establishment are created to accommodate the injured worker's specific limitations. Accordingly, the Board finds that appellant has not met her burden of proof to modify OWCP's May 5, 1998 wage-earning capacity determination.

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 May 5, 1998 wage-earning capacity determination.

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<sup>21</sup> 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).

<sup>22</sup> See *R.S.*, Docket No. 14-1426 (issued April 20, 2015).

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' decision dated February 5, 2014 is affirmed.<sup>23</sup>

Issued: March 3, 2016  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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<sup>23</sup> James A. Haynes, Alternate Judge, participated in the original decision but was no longer a member of the Board after November 16, 2015.