

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are set forth below. On February 24, 2001 appellant, then a 39-year-old distribution clerk, filed an occupational disease claim (Form CA-2) alleging that she sustained right carpal tunnel syndrome causally related to factors of her federal employment. OWCP accepted her claim for a right wrist sprain and tenosynovitis.

In a report dated July 12, 2001, Dr. Samuel J. Chmell, an attending Board-certified orthopedic surgeon, found that appellant could work with restrictions of no repetitive movement, throwing, or casing mail. He also found that she should wear a wrist brace.

Appellant accepted a limited-duty position as a modified distribution clerk on July 19, 2001. The duties of the position were to "[w]ork mail in accordance with work restrictions." The physical requirements consisted of "no casing or throwing mail, avoiding prolonged repetitive right wrist movements, and the use of a brace." The job offer noted that appellant was entitled to eight hours of work each day "in accordance with FECA laws" and that she might also perform other duties as needed within her limitations. It indicated that the position was available from July 19 through September 20, 2001 and would "continue in accordance with [her] doctor's instructions." The job offer further indicated that appellant's work location and tour of duty would be determined based on her restrictions, its needs, and availability.

In an initial evaluation dated January 8, 2002, a nurse noted that appellant advised that she worked in the nixie unit and that her duties included "casing mail and taping and stamping mail, as needed."

By decision dated April 18, 2003, OWCP reduced appellant's compensation to zero based on its finding that her actual earnings as a modified distribution clerk effective July 19, 2001 fairly and reasonably represented her wage-earning capacity.⁴

On May 26, 2007 appellant accepted a position as a modified mail processing clerk repairing unsealed or damaged mail.

On June 19, 2010 the employing establishment assigned appellant to work for two hours per day in the nixie unit.

On April 21, 2011 appellant filed a claim for compensation (Form CA-7) beginning April 8, 2011. She related that she was sent home from work as part of the National Reassessment Program (NRP).

In a report dated April 21, 2011, Dr. Chmell diagnosed right carpal tunnel syndrome and multiple tendinitis. He advised that appellant could work seven hours per day with restrictions.

³ Docket No. 13-4 (issued March 12, 2013).

⁴ In a decision dated April 24, 2003, OWCP granted appellant a schedule award for 21 percent permanent impairment of the right upper extremity. By decision dated September 15, 2010, OWCP found that she did not establish a recurrence of disability from April 14 through 24, 2010.

On May 18, 2011 Dr. Chmell related that he had treated her for 10 years for employment-related right wrist strain and multiple tendinitis and tenosynovitis. He noted that the employing establishment had decreased appellant's work hours to two hours per day and, thus, the original loss of wage-earning capacity determination was erroneous.

By decision dated June 13, 2011, OWCP denied appellant's claim for compensation beginning April 8, 2011. It determined that the evidence of record failed to establish that its original loss of wage-earning capacity determination should be modified.

On July 7, 2011 appellant requested a telephone hearing before an OWCP hearing representative. At the telephonic hearing, held on October 12, 2011, counsel contended that the original loss of wage-earning capacity determination was in error as the offered position was makeshift in nature. Appellant related that she had worked in the nixie unit since 2001.

By decision dated December 19, 2011, an OWCP hearing representative affirmed the June 13, 2011 decision. She found that appellant had not established that the original loss of wage-earning capacity determination was in error or that her condition had materially worsened.

On January 11, 2012 Dr. Chmell related that appellant's right upper extremity condition "has shown steady and progressive deterioration as she has continued to work following her original injury." He attributed her right carpal tunnel syndrome to her chronic tendinitis. Dr. Chmell asserted that appellant's condition had materially changed.

On March 23, 2012 Dr. Chmell advised that diagnostic studies confirmed right carpal tunnel syndrome. He noted, "In essence, she has had a significant deterioration of her already accepted work-related condition of multiple tendinitis of her right forearm and wrist and right wrist strain such that her tendons and wrist remain inflamed and swollen to the point where they have compressed the median nerve which is known as a compression neuropathy of the median nerve at her right wrist...."

On April 3, 2012 appellant, through counsel, requested reconsideration. He argued that the opinion of Dr. Chmell established a material worsening of her condition, and alternatively, that the original job offer by the employing establishment was makeshift in nature.

By decision dated July 25, 2012, OWCP denied modification of its December 19, 2011 decision.

Appellant appealed to the Board. In a decision dated March 12, 2013, the Board set aside the July 25, 2012 decision.⁵ It remanded the case for OWCP to apply the guidelines of FECA Bulletin No. 09-05 to determine whether she had established modification of the loss of wage-earning capacity determination.

In a report dated February 3, 2013, received by OWCP on February 12, 2014, Dr. Chmell related that he had treated appellant over the past 13 years.⁶ He advised that her multiple

⁵ *Supra* note 3.

⁶ In a report dated April 26, 2013, Dr. Chmell related his belief that the original loss of wage-earning capacity determination was in error as it was based on a full-time position, but the employing establishment reduced appellant's hours to two per day.

tendinitis of the right wrist had worsened with the “performance of her limited work duties including repairing of letters.” Dr. Chmell opined that appellant had sustained carpal tunnel syndrome due to her multiple tendinitis, and described the mechanism by which the inflamed tendons “compromised the function of the median nerve at the carpal tunnel of [her] right wrist.”

By letter dated April 17, 2013, OWCP requested that the employing establishment address whether the position on which it based its loss of wage-earning capacity determination was a *bona fide* position. It further asked that the employing establishment submit any relevant medical evidence in its possession and a formal job description of appellant’s position. No response was received.

By decision dated July 12, 2013, OWCP denied modification of its April 18, 2003 loss of wage-earning capacity determination. It consequently found that appellant was not entitled to compensation beginning April 8, 2011. OWCP further found that the medical evidence of record failed to establish carpal tunnel syndrome as a consequence of her accepted employment injury.

On July 30, 2013 appellant requested a telephone hearing.

In a report dated October 10, 2013, Dr. Chmell noted that appellant had multiple tendinitis or swelling of the tissues. He explained that as the tendons “became inflamed and swollen they become larger and larger in the enclosed space and press harder and harder on the median nerve. As this condition continues and worsens, a carpal tunnel syndrome develops because of continued pressure on the median nerve preventing it from working properly.” Dr. Chmell diagnosed carpal tunnel syndrome due to appellant’s employment-related multiple tendinitis, which he opined established a material worsening of her condition.

At the telephone hearing, held on January 23, 2014, appellant related that she worked in the nixie unit sealing, stamping, and repairing mail. Counsel argued that the May 2007 offer was tailored to meet her restrictions.

On January 28, 2014 counsel contended that appellant was disabled from her date-of-injury position and that OWCP should expand her claim to include carpal tunnel syndrome. She also argued that electrodiagnostic testing confirmed right carpal tunnel syndrome, which demonstrated a material worsening. Counsel also asserted that the original loss of wage-earning capacity determination was erroneous as it was based on a position that was not a bid position or available to the general public.

By decision dated April 9, 2014, OWCP’s hearing representative affirmed the July 12, 2013 decision.

On appeal counsel argues that the medical evidence establishes that appellant remains disabled from her usual employment due to her work injury, as evidenced by reports dated January 11 and March 23, 2012 by Dr. Chmell. She also contends that appellant’s claim should be expanded to include carpal tunnel syndrome as a consequential injury. Counsel maintains that appellant has shown a material change in her condition and that the original loss of wage-earning capacity was erroneous as it was based on a makeshift position. She notes that a position should be a classified position rather than tailored for a claimant’s limitations, citing *A.J.*⁷ Counsel also

⁷ Docket No. 10-619 (issued June 29, 2010).

maintains that the limited-duty assignment was temporary in nature. She further notes that OWCP did not comply with the Board's instructions to apply FECA Bulletin No. 09-05 as the employing establishment did not respond to its development letter.

LEGAL PRECEDENT -- ISSUE 1

A wage-earning capacity 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.⁸ OWCP procedures contain provisions regarding the modification of a formal loss of wage-earning capacity.⁹ 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 materially changed; or (3) the claimant has been vocationally rehabilitated.¹⁰ OWCP procedures further provide 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.¹¹ 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.¹² FECA Transmittal No. 13-09 provides information regarding updating OWCP Procedure Manual Chapters 2.814 to 2.816 and 2.1500 to 2.1501.¹³ 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.¹⁴

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.¹⁵ Further, a makeshift or odd-lot position designed for a claimant's particular needs will not be considered suitable.¹⁶

⁸ See *Katherine T. Kreger*, 55 ECAB 633 (2004).

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

¹⁰ *Id.* at Chapter § 2.1501.3(a).

¹¹ *Id.* at Chapter § 2.1501.1.

¹² FECA Bulletin No. 09-05 (issued August 18, 2009).

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

¹⁴ Federal (FECA) Procedure Manual, *supra* note 9 at Chapter 2.1501.4 (June 2013).

¹⁵ *Id.* at Chapter 2.815.5c(1).

¹⁶ *Id.* at Chapter 2.815.5c(2)(a).

ANALYSIS -- ISSUE 1

In the prior appeal, the Board remanded the case to OWCP to follow the procedures outlined in FECA Bulletin No. 09-05 with respect to claims for compensation when the employing establishment withdraws a light-duty position pursuant to the NRP and a loss of wage-earning capacity determination is in effect. The Board specifically noted that FECA Bulletin No. 09-05 required that the record contain documentary evidence that the position performed was a *bona fide* position and that current medical evidence be obtained.

On remand OWCP sent an April 17, 2013 letter to the employing establishment requesting that it provide current medical evidence, copies of a job description and other documentation related to the position, and a written statement addressing whether the position offered at the time of the loss of wage-earning capacity determination was *bona fide*. The employing establishment, however, did not respond to its request.

Appellant alleged that her condition had worsened or, in the alternative, that OWCP's original wage-earning capacity determination was in error as it was makeshift in nature. The Board has found that a loss of wage-earning capacity determination can be modified by establishing that the original decision was in error.¹⁷

In the case of *A.J.*,¹⁸ the Board discussed several factors that could support a finding that an offered position was makeshift or odd-lot in nature. These factors include: (1) the position did not have an official title or formal position description; (2) there were strict physical 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.¹⁹

The Board finds that the July 19, 2001 modified assignment upon which OWCP based the April 18, 2003 loss of wage-earning capacity determination was makeshift in nature. Although the position had a formal title of distribution clerk, appellant had strict restrictions against throwing or casing mail or performing any repetitive wrist movements. The actual duties of the position were not set forth in the job offer, which specified only that she should work within her restrictions. The offer did not indicate that she performed any meaningful tasks. The nurse assigned to appellant's claim indicated that appellant was casing, taping, and stamping mail, yet those duties were not listed in the job offer and were prohibited by her physical restrictions. OWCP requested additional information about her work duties and the nature of her assignment, but the employing establishment again did not respond to its request. The offer did not specify appellant's work schedule or work location, but instead indicated that these matters would be determined by management based on availability, the employing establishment's needs, and her restrictions. Additionally, the job offer provided that it was available only from July 19 through September 20, 2001, though it further indicated that it would continue in accordance with instructions by her physician.

¹⁷ See *supra* note 8.

¹⁸ See *A.J.*, *supra* note 5.

¹⁹ See also *V.H.*, Docket No. 13-2076 (issued March 5, 2014).

As the job offer did not set forth appellant's work duties, included strict physical limitations, such that the position would not generally be available in the general community, indicated that the specific offer was temporary, and did not provide her work schedule or work location, the Board finds that the offered position was makeshift in nature and designed to meet her particular needs.²⁰ The position, therefore, did not fairly and reasonably represent her wage-earning capacity. Accordingly, appellant has met her burden of proof to establish that the April 18, 2003 loss of wage-earning capacity determination should be modified.

LEGAL PRECEDENT -- ISSUE 2

The general rule respecting consequential injuries is that, when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause, which is attributable to the employee's own intentional conduct. The subsequent injury is compensable if it is the direct and natural result of a compensable primary injury. With respect to consequential injuries, the Board has stated that, where an injury is sustained as a consequence of an impairment residual to an employment injury, the new or second injury, even though nonemployment related, is deemed, because of the chain of causation to arise out of and in the course of employment and is compensable.²¹

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, it shares responsibility to see that justice is done.²² The nonadversarial policy of proceedings under FECA is reflected in OWCP's regulations at section 10.121.²³

ANALYSIS -- ISSUE 2

On appeal counsel argues that appellant's claim should be expanded to include carpal tunnel syndrome as a consequential injury. In its July 12, 2013 decision, OWCP found that Dr. Chmell's reports were insufficiently rationalized to establish that she sustained right carpal tunnel syndrome due to the work factors identified as causing her original work injury.

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.²⁴ The Board has reviewed Dr. Chmell's reports and notes that he provided a clear opinion that appellant sustained right carpal tunnel syndrome as a consequence of her accepted right tendinitis. He based his diagnosis of right carpal tunnel syndrome on positive diagnostic studies. Dr. Chmell explained that appellant's tendinitis caused wrist inflammation and swelling that compressed the median nerve of her right wrist and resulted in compression neuropathy. His opinion is

²⁰ See *A.J.*, *supra* note 5; see also 20 C.F.R. § 10.510.

²¹ See *S.S.*, 59 ECAB 315 (2008); *Debra L. Dillworth*, 57 ECAB 516 (2006).

²² *Jimmy A. Hammons*, 51 ECAB 219 (1999).

²³ 20 C.F.R. § 10.121.

²⁴ *A.A.*, 59 ECAB 726 (2008); *Phillip L. Barnes*, 55 ECAB 426 (2004).

supportive, unequivocal, bolstered by objective findings, and based on a firm diagnosis and an accurate work history. Consequently, while the medical evidence from Dr. Chmell is insufficiently rationalized to meet appellant's burden of proof to establish that she sustained right carpal tunnel syndrome as a consequence of her work injury, it raises an undisputed inference of causal relationship sufficient to require further development by OWCP.²⁵ Accordingly, the Board will remand the case to OWCP. On remand it should further develop the medical record to determine whether appellant sustained employment-related right carpal tunnel syndrome. Following this and such further development as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

The Board finds that appellant has established modification of the April 18, 2003 loss of wage-earning capacity determination. The Board further finds that the case is not in posture for decision regarding whether she sustained right carpal tunnel syndrome as a consequence of her accepted employment injury.

ORDER

IT IS HEREBY ORDERED THAT the April 9, 2014 decision of the Office of Workers' Compensation Programs is reversed and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 15, 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

²⁵ *Id.*