

dislocation of a lumbar vertebra, lumbar sprain, right lateral epicondylitis, and right forearm pain due to repetitive lifting, bending, and upper extremity motions in the performance of duty. He performed light-duty work with intermittent work absences through May 2009 and continuing. OWCP paid wage-loss compensation for intermittent work absences.

Beginning in November 2009, appellant worked as a modified mail handler, a limited-duty position, for three days a week, four hours a day, with no consecutive workdays. OWCP paid wage-loss compensation for the remaining 28 hours a week.

By decision dated August 13, 2010, OWCP determined that appellant's actual wages as a modified mail handler for 12 hours a week fairly and reasonably represented his wage-earning capacity. It continued to issue compensation for the remaining 28 hours a week.

On February 5, 2011, pursuant to the National Reassessment Process (NRP), the employing establishment reduced appellant's work schedule from 12 hours a week to 6 hours a week.² He worked two hours a day on Monday, Wednesday, and Saturday. Appellant continued to perform the part-time, modified mail handler position through 2015 and continuing. He was paid compensation for 28 hours a week.

In a May 10, 2016 letter, appellant, through a union representative, requested assistance in obtaining back pay for the six hours a week exceeded from his part-time schedule on February 5, 2011.

By decision dated October 6, 2016, OWCP denied modification of the August 13, 2010 LWEC determination. It found that appellant failed to establish that the original LWEC determination was in error, or that the accepted condition materially changed. OWCP reiterated that the medical evidence failed to establish total disability for work from June 14 to July 29, 2016 due to the accepted injuries.

LEGAL PRECEDENT

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.³ OWCP procedures contain provisions regarding the modification of a formal loss of wage-earning capacity.⁴ The relevant part provides that a formal loss of wage-earning capacity will be modified when: (1) the original rating was in error;

² On April 13, 2011 appellant claimed compensation (Form CA-7) for an additional six hours a week based on the reduction of his schedule. OWCP did not issue a final decision at that time adjudicating this specific claim.

³ See *Katherine T. Kreger*, 55 ECAB 633 (2004).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity*, Chapter 2.1501 (June 2013).

(2) the claimant's medical condition has materially changed; or (3) the claimant has been vocationally rehabilitated.⁵

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.⁶ 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.⁷ FECA Transmittal No. 13-09 provides information regarding updating FECA procedure manual Chapters 2.814 to 2.816 and 2.1500 to 2.1501.⁸ 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.⁹

ANALYSIS

OWCP issued an August 13, 2010 LWEC determination, based on appellant's actual earnings in a modified position for 12 hours a week. In his May 10, 2016 letter, appellant argued that the wage-earning capacity determination should be modified as the employing establishment partially withdrew his light-duty position.

The record indicates that on February 5, 2011, the employing establishment partially withdrew light duty pursuant to NRP, reducing appellant's work schedule from 12 to 6 hours a week. It is well established that a withdrawal of a light-duty position is considered a recurrence of disability under OWCP's regulations.¹⁰ As noted above, FECA Bulletin No. 09-05 was issued specifically to provide guidance when a claimant is sent home through NRP because light duty is no longer available.

When an LWEC determination has been issued, FECA Bulletin No. 09-05 requires OWCP to develop the evidence to determine whether a modification of the decision is appropriate.¹¹ FECA Bulletin No. 09-05 asks OWCP to confirm that the file contains documentary evidence supporting that the position was an actual *bona fide* position, and to conduct appropriate medical development.¹² Additionally, FECA Bulletin No. 09-05 states that

⁵ *Id.* at Chapter § 2.1501.3(a).

⁶ *Id.* at Chapter § 2.1501.1.

⁷ FECA Bulletin No. 09-05 (issued August 18, 2009).

⁸ FECA Transmittal No. 13-09 (issued June 4, 2013).

⁹ Federal (FECA) Procedure Manual, *supra* note 4 at Chapter 2.1501.4 (June 2013).

¹⁰ *See* 20 C.F.R. § 10.5(x).

¹¹ FECA Bulletin No. 09-05 (issued August 18, 2009); *see also* *A.T.*, Docket No. 11-375 (issued September 19, 2012), *N.F.*, Docket No. 13-0846 (issued July 3, 2013).

¹² *Id.* at § I.A. 1-2.

OWCP may undertake further nonmedical development, such as requiring that the employing establishment address in writing whether the position on which the LWEC determination was based was a *bona fide* position at the time of the rating and direct the employing establishment to review its files for contemporaneous evidence concerning the position.¹³

The October 6, 2016 decision denying modification of the August 13, 2010 LWEC determination does not refer to FECA Bulletin No. 09-05 or attempt to follow its provisions. There was no analysis of the appropriateness of the part-time, modified position on which the LWEC determination was based, or whether the February 5, 2011 partial withdrawal of that light-duty position entitled appellant to additional wage-loss compensation. The case will therefore be remanded to OWCP for a proper decision in accord with the established guidance. After such further development as OWCP deems necessary, it shall issue a *de novo* decision.

On appeal appellant contends that he claimed compensation due to a lack of work available within his medical restrictions. He emphasizes that he did not assert a worsening of the accepted medical conditions. Rather, the employing establishment partially withdrew his light-duty position on February 5, 2011, reducing his work schedule from 12 hours a week to 6 hours a week. As explained above, the case will be remanded for additional development to comply with FECA Bulletin No. 09-05.

CONCLUSION

The Board finds that the case is not in posture for a decision.

¹³ *Id.* at § I.A.3.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 6, 2016 is set aside, and the case remanded for additional development consistent with this decision and order.

Issued: December 7, 2017
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board