

**United States Department of Labor
Employees' Compensation Appeals Board**

A.J., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Bloomington, IL, Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 16-1892
Issued: October 27, 2017**

Appearances:

Kevin L. Card, for the appellant¹

No appearance, for the Director

Oral Argument April 27, 2017

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On September 22, 2016 appellant, through his representative, filed a timely appeal from an August 30, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish that the April 1, 2014 loss of wage-earning capacity decision should be modified.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

On appeal and at oral argument, appellant's representative asserted that the modified sales retention team (SRT) position offered to appellant was not a bona fide position and therefore did not meet the necessary criteria for a wage-earning capacity decision. He argues that the record supported that the SRT program was temporary in nature, that it was solely for injured workers, and that it was not available in the open labor market.

FACTUAL HISTORY

Appellant, then a 48-year-old city carrier, injured his right shoulder on January 8, 2010 when he slipped on ice and fell while delivering mail. His normal duty station was in Bloomington, Illinois. OWCP accepted sprain of shoulder and upper arm, supraspinatus, right. Appellant received intermittent compensation until August 5, 2010, when he stopped work. He underwent right shoulder surgeries on August 31 and October 12, 2010. OWCP paid appellant wage-loss compensation benefits and returned to a part-time modified position on June 23, 2011. OWCP accepted a recurrence of disability and on September 13, 2011, appellant was placed on the periodic compensation rolls.

In July 2012 OWCP referred appellant to Dr. James Elmes, a Board-certified orthopedic surgeon, for a second opinion examination to determine his work capacity. Based on Dr. Elmes' reports dated July 26, September 13, and November 13, 2012, OWCP expanded the accepted conditions to include rotator cuff tear, right shoulder, and disorder of bursae and tendons in the right shoulder region, unspecified, right.

Appellant briefly returned to modified duty in February 2013. OWCP accepted a March 26, 2013 recurrence of disability, and appellant was returned to the periodic rolls.

On June 27, 2013 OWCP expanded the accepted conditions to include sprain of neck, cervical spondylosis without myelopathy, and spinal stenosis in cervical region.

On October 3, 2013 the employing establishment offered appellant a full-time modified city carrier -- SRT position, effective January 6, 2014, at the Fox Valley, Illinois, site. The daily job duties were described as customer service telesales, educate customers on new products and services, research single package, look up issues through eService in customer service database, and assist with small business service issues. The position was sedentary, seated at a computer performing tasks involving use of fingers and hand while using mouse/keyboard to look up customer information and research telephone inquiries for eight hours daily. It required no lifting, carrying, pushing, or pulling. Appellant accepted the offer on December 11, 2013 and began the modified position on January 6, 2014.

OWCP obtained pay rate information from the employing establishment following appellant's commencement of work on January 6, 2014.

By decision dated April 1, 2014, OWCP found that appellant's actual earnings in the modified city carrier position fairly and reasonably represented his wage-earning capacity with zero loss.

On August 21, 2014 appellant, through then counsel, requested reconsideration. He asserted that the position to which appellant returned on January 6, 2014 was temporary and not a permanent position. Two employing establishment Assignment Orders (PS Form 1723),

signed by appellant on January 6 and July 7, 2014 were attached. The former indicated that the job ran from January 6 to July 4, 2014, and that the latter indicated that it ran from June 28 to November 7, 2014.

OWCP requested additional information from the employing establishment on September 10, 2014. E-mail correspondence from an employing establishment's manager of health and resource management dated October 7, 2014 indicated that a PS Form 1723, an employing establishment assignment order,³ was issued for all assignments that were not an employee's regular-duty assignment, and, in this case, it was also used for security clearance for database systems needed for assignments that required headquarters approval. She continued that these were done in six-month intervals, even though the assignment could be for an indefinite period of time. The manager advised that appellant's January 6, 2014 job assignment remained in effect, but that a new PS Form 1723 assignment order was required every six months.

In a merit decision dated November 21, 2014, OWCP denied modification of the April 1, 2014 wage-earning capacity determination. It noted that the PS 1723 forms were administrative formalities and that appellant continued to perform the duties of the January 6, 2014 job offer.⁴

On November 10, 2015 appellant, through his representative,⁵ requested reconsideration of the November 21, 2014 decision. In support he forwarded correspondence from the employing establishment to NALC dated October 19, 2012 providing that, beginning in January 2013, a pilot sales test team would be established and would be staffed with supervisory personnel and employees on the periodic FECA compensation rolls. Correspondence dated October 19, 2012 to May 29, 2014 noted that the pilot program had been named the SRT and listed sites where the pilot program was ongoing. This listing included the Fox Valley site in Aurora, Illinois. October 19, 2012 correspondence indicated that the team would be staffed with supervisory personnel and employees on FECA's periodic compensation rolls whose duty station of record was within the local commuting area of a pilot program location. The program was scheduled to begin in January 2013 and continue for approximately one year, with possible expansion to other locations, noting that test results would be used to determine the viability and effectiveness of the concept.⁶ Each letter indicated that it remained a pilot program. On January 31 and May 29, 2014 the employing establishment indicated that the pilot test was continuing. On May 29, 2014 it further explained that newly injured employee's with an accepted OWCP claim would also be eligible for the SRT positions.

³ As noted, a PS Form 1723 is used by the employing establishment for temporary assignments and is valid for six months.

⁴ On April 7, 2015 appellant was granted a schedule award for 12 percent right upper extremity permanent impairment. He filed a claim for an additional schedule award on June 15, 2016 which is not presently before the Board.

⁵ Appellant was briefly represented by local union representative from Illinois. On August 1, 2015 he authorized the representation of Kevin Card, of the National Association of Letter Carriers (NALC).

⁶ The correspondence explained that during the test, employees assigned to the SRT would perform a variety of sales and marketing related duties including, but not limited to: contacting customers for follow-up outreach after a sale, customer retention support, and telesales up-selling with previously identified customers.

The representative asserted that the modified position offered appellant in the Fox Valley SRT site was not a bona fide position because it was a test program solely for injured workers, and had always been considered a nonclassified, temporary employment which the employing establishment could cancel at any time. He continued that, when a postal employee was formally assigned to a classified position, the employing establishment would issue a PS Form 50, Notification of Personnel Action, not a PS Form 1723, which was a notification for a temporary six-month assignment. The representative maintained that this reflected the temporary nature of the SRT assignment and did not meet the qualifications for which a loss of wage-earning capacity decision could be applied. He noted that appellant's PS Form 50's reflected that he was still employed at the Bloomingdale, Illinois post office, and provided copies of appellant's PS Form 50's dated February 25, 2013 through November 15, 2014. As such, the representative asserted that the April 1, 2014 decision was in error and should be modified.

In a merit decision dated August 30, 2016, OWCP denied modification of the April 1, 2014 determination. It found that the January 6, 2014 position was not makeshift, was not designed to meet appellant's specific needs, and that there was no evidence that it could or would be arbitrarily eliminated.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of his or her duty.⁷ Disability means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.⁸

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.⁹ OWCP procedures at section 2.1501 contain provisions regarding the modification of a formal loss of wage-earning capacity.¹⁰ 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.¹¹

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

⁷ 5 U.S.C. § 8102(a).

⁸ 20 C.F.R. § 10.5(f).

⁹ *Katherine T. Kreger*, 55 ECAB 633 (2004).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity*, Chapter 2.1501 (June 2013).

¹¹ *Id.* at § 2.1501.3(a).

tour of duty, that is, whether it is part time or full time.¹² Further, a makeshift or odd-lot position designed for a claimant's particular needs will not be considered suitable.¹³

ANALYSIS

The Board finds that the April 1, 2014 wage-earning capacity determination must be reversed because, at the time the employing establishment offered appellant the SRT position on October 3, 2013, he had no expectation that the position was permanent.¹⁴

As noted above, OWCP's procedures provide that one of the factors to be considered in determining whether a claimant's work duties fairly and reasonably represents his or her wage-earning capacity includes whether the position was temporary.¹⁵ With the present appeal and oral argument, appellant's representative asserts that, as the SRT position was temporary, the April 1, 2014 LWEC decision was erroneous. He did not assert that appellant's medical condition had materially changed or that he had been vocationally rehabilitated.

The evidence of record includes employing establishment correspondence explaining that the SRT concept was a pilot program, including at the Fox Valley site. October 19, 2012 correspondence indicated that the team would be staffed with supervisory personnel and employees on FECA's periodic compensation rolls whose duty station of record was within the local commuting area of a pilot program location. The program was scheduled to begin in January 2013 and continue for approximately one year. This correspondence establishes that when the employing establishment began the SRT program, it was temporary in nature. As late as May 29, 2014, well after the position was offered appellant on October 3, 2013, the employing establishment indicated that the SRT program continued as a pilot program. The record does not establish that the SRT assignment was formally classified as permanent.¹⁶

Employing establishment PS 1723 forms (temporary assignment forms), signed by appellant on January 6 and July 7, 2014, September 18, 2015, and February 28 and August 15, 2016, reflect that each of these forms was for a position that lasted six months. While the employing establishment indicated that these forms were merely assignment orders that were required every six months, even though the assignment could be for an indefinite period of time, the record also includes employing establishment notices of personnel action dated March 8, September 9, and November 15, 2014. Each of these indicated that appellant's duty station was the Bloomington, Illinois, post office and not the Fox Valley SRT site.

A basis for modifying an LWEC determination is to establish that the original decision was in error.¹⁷ The Board finds that, under the facts of this case, as the modified assignment

¹² *Id.* at Chapter 2.815.5.c(1).

¹³ *Id.* at Chapter 2.815.5.c(2)(a).

¹⁴ *See D.M.*, Docket No. 16-0244 (issued April 5, 2016).

¹⁵ *Id.* at Chapter 2.815.5.c(1).

¹⁶ *See M.I.*, Docket No. 14-1784 (issued August 21, 2015).

¹⁷ *Id.* at § 2.1501.3(a); *see P.G.*, Docket No. 14-1797 (issued September 16, 2015).

upon which the LWEC determination was made was temporary in nature, the April 1, 2014 LWEC decision was erroneous and did not fairly and reasonably represent appellant's wage-earning capacity. Thus, appellant met his burden of proof to establish that the April 1, 2014 LWEC decision should be modified.

The Board, however, notes that since appellant's salary in the SRT position was greater than his weekly pay rate when injured, he has no disability as defined under FECA.¹⁸

CONCLUSION

The Board finds that, as the position on which the April 1, 2014 LWEC was based was erroneous, appellant met his burden of proof to establish that the LWEC decision should be modified.¹⁹

ORDER

IT IS HEREBY ORDERED THAT the August 30, 2016 decision of the Office of Workers' Compensation Programs is reversed, as modified.

Issued: October 27, 2017
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

¹⁸ Under FECA, the term "disability" means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury. 20 C.F.R. § 10.5(f); *see S.R.*, Docket No. 14-1154 (issued December 15, 2014).

¹⁹ Appellant's earnings in the erroneous position, however, preclude him from receiving disability compensation.