



## **FACTUAL HISTORY**

OWCP accepted that on August 11, 2003 appellant, then a 39-year-old part-time flexible city carrier, sustained left knee and leg sprains and a torn medial meniscus of her left knee due to a fall on stairs at work.<sup>2</sup> On September 13, 2004 she underwent a partial synovectomy of her left leg which was authorized by OWCP. Appellant stopped working at the time of her surgery and returned to limited-duty work on a part-time basis on November 1, 2004. She increased to full-time limited-duty work on January 5, 2005 with walking and standing limited to two hours per day.

On March 3, 2005 the employing establishment offered appellant a job as a modified part-time flexible city carrier to be effective March 19, 2005.<sup>3</sup> The position's duties included casing mail (which involved sorting mail to a letter case with multiple pigeonholes and destination cells); collecting mail from street letter boxes (which involved, on an as needed basis, intermittently withdrawing collection mail from street letter boxes for delivery back to the employing establishment and further processing); delivering express mail (which involved, on an as needed basis, intermittently delivering, *via* a postal vehicle, individual and/or multiple pieces of express mail to the designated postal customers); and processing damaged and undeliverable mail and checking mail returned by carriers for accurate change of address and annotating the mail for rerouting. The physical requirements of the position included intermittently lifting and pushing up to 35 pounds for one to eight hours per day; intermittently sitting for one to eight hours per day, intermittently standing and walking for one to two hours per day and intermittently driving for one to four hours per day.<sup>4</sup>

Appellant accepted the modified part-time flexible city carrier job under protest on March 8, 2005 and began working in the job on March 19, 2005.

In an August 17, 2005 decision, OWCP found that appellant's actual earnings in the limited-duty position of modified part-time flexible city carrier fairly and reasonably represented her wage-earning capacity with no loss of wage-earning capacity when compared to her date-of-injury salary.

Effective February 13, 2010, the employing establishment withdrew appellant's job as a modified part-time flexible city carrier under the National Reassessment Process (NRP). It offered her a position, starting February 13, 2010, as a modified letter carrier with duties of setting up a mail route for one hour per day, five days per week. Appellant began working in this position on February 13, 2010.<sup>5</sup>

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<sup>2</sup> On days that appellant worked, her work schedule was from 8:30 a.m. to 5:00 p.m.

<sup>3</sup> The job involved working an average of 38 hours per week.

<sup>4</sup> On March 14, 2005 Dr. Fred Nelson, an attending Board-certified orthopedic surgeon, indicated that appellant could work for eight hours per day for five days per week. He recommended restrictions including no carrying, lifting, pushing or pulling more than 20 pounds, no walking for more than two hours per day and no standing for more than two hours per day.

<sup>5</sup> Appellant later began working in a limited-duty position for four hours per day, five days per week.

On February 25, 2010 appellant filed a Form CA-7 claiming wage-loss compensation beginning February 13, 2010, because the employer withdrew her limited-duty assignment under NRP and drastically reduced her work hours. She later filed other CA-7 forms for additional periods of claimed wage-loss compensation.

OWCP initially paid appellant wage-loss compensation from February 13 to May 21, 2010 but later notified her in a July 22, 2010 letter that, because of the August 17, 2005 wage-earning capacity decision, she had to establish that this prior decision should be modified in order to receive additional wage-loss compensation after May 21, 2010.

In a December 8, 2010 decision, OWCP denied modification of its August 17, 2005 wage-earning capacity decision and denied wage-loss compensation beginning May 22, 2010. It found that the evidence did not establish that appellant sustained a material change in her condition, that she was retrained or vocationally rehabilitated or that the original wage-earning capacity decision was erroneous.

Appellant requested a telephone hearing that was held on April 13, 2011. At the hearing, she appeared with her representative and indicated that she sought to modify the prior wage-earning capacity determination because the job upon which it was based was makeshift and therefore the prior wage-earning capacity decision was erroneous. Appellant's representative asserted that the March 3, 2005 job offer was comprised of work assembled from both the carrier craft and the clerk craft and was developed to accommodate her medical restrictions. Appellant indicated that two of the duties in the March 3, 2005 job offer (delivering express mail and collecting mail from letter boxes) were too arduous for her condition and were later withdrawn as part of her duties and replaced with more clerical duties.

Following the hearing, OWCP received a May 5, 2011 letter from appellant's representative along with additional medical evidence. Appellant's representative asserted that appellant's current injury-related knee condition was worsening and causing her to be totally disabled for work beginning in April 2011.

In an April 29, 2011 report, Dr. Nelson stated that he examined appellant on that date. He noted that he had followed appellant for degenerative arthritis of her knees and indicated that she had the more typical form of arthritis where the cartilage surface of the bone was wearing out. Dr. Nelson stated that, based on appellant's clinical course and physical findings over the past five years, she had reached a point where she could no longer work more than one hour in a seated job or more than one hour of standing work in the field. Appellant also could not work in a job that required using steps. She submitted other reports of Dr. Nelson indicating that her knee condition had declined. In an April 14, 2011 report, Dr. Nelson indicated that appellant was totally disabled beginning April 11, 2011.

In a July 5, 2011 decision, an OWCP hearing representative affirmed OWCP's December 8, 2010 decision. He indicated that the job offered to appellant was not makeshift in nature and found that she did not show that OWCP's August 17, 2005 wage-earning capacity determination was erroneous. The hearing representative stated that, following the April 13,

2011 telephone hearing, appellant submitted new medical evidence indicating that she became totally disabled beginning April 11, 2011 due to a knee condition. He stated:

“However, the case fails to contain sufficient medical evidence which establishes that the earlier claimed wage loss beginning May 22, 2010 was due to a material change in the nature and extent of the injury-related condition. The medical evidence submitted following the hearing indicating that appellant’s left knee osteoarthritis worsened causing her to become totally disabled for work beginning April 11, 2011 will have to be further developed by the [d]istrict Office but this does not establish that the [d]istrict Office’s prior decision of December 8, 2010 was incorrect as the change in the condition referenced by this medical evidence occurred after OWCP’s prior decision.”

### **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.<sup>6</sup> Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn and not on actual wages lost.<sup>7</sup> Compensation payments are based on the wage-earning capacity determination, which remains undisturbed until properly modified.<sup>8</sup>

Modification of a standing wage-earning capacity determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was erroneous.<sup>9</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>10</sup>

FECA Bulletin No. 09-05 outlines OWCP procedures when limited-duty positions are withdrawn pursuant to NRP. If, as in the present case, a formal wage-earning capacity decision has been issued, OWCP must develop the evidence to determine whether a modification of that decision is appropriate.<sup>11</sup>

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<sup>6</sup> 5 U.S.C. § 8115(a); *K.R.*, Docket No. 09-415 (issued February 24, 2010); *Lee R. Sires*, 23 ECAB 12, 14 (1971) (the Board held that actual wages earned must be accepted as the measure of a wage-earning capacity in the absence of evidence showing they do not fairly and reasonably represent the employee’s wage-earning capacity).

<sup>7</sup> *K.R.*, *supra* note 6; *Roy Matthew Lyon*, 27 ECAB 186, 190 (1975). *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

<sup>8</sup> *See Sharon C. Clement*, 55 ECAB 552, 557 (2004).

<sup>9</sup> *Sue A. Sedgwick*, 45 ECAB 211, 215-16 (1993); *Elmer Strong*, 17 ECAB 226, 228 (1965).

<sup>10</sup> *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

<sup>11</sup> FECA Bulletin No. 09-05 (issued August 18, 2009).

## ANALYSIS

OWCP accepted that on August 11, 2003 appellant sustained left knee and leg sprains and a torn medial meniscus of her left knee. She began working as a modified part-time flexible city carrier on March 19, 2005 and, in an August 17, 2005 wage-earning capacity decision, OWCP found that her actual earnings as a modified part-time flexible city carrier fairly and reasonably represented her wage-earning capacity with no loss of wage-earning capacity. The employing establishment withdrew appellant's limited-duty position under NRP effective February 13, 2010. Appellant sought modification of the August 17, 2005 wage-earning capacity determination on the grounds that the prior decision was erroneous because the position upon which the decision was based was makeshift and made to accommodate her medical restrictions.<sup>12</sup>

OWCP analyzed this case under the customary criteria for modifying a loss of wage-earning capacity determination, but did not 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 NRP.<sup>13</sup>

When a loss of wage-earning capacity decision has been issued, FECA Bulletin No. 09-05 requires OWCP to develop the evidence to determine whether a modification of the decision is appropriate.<sup>14</sup> To this end, 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. It requires OWCP to review whether a current medical report supports work-related disability and establishes that the current need for limited duty or medical treatment is a result of injury-related residuals, and to further develop the evidence from both the claimant and the employing establishment if the case lacks current medical evidence.<sup>15</sup>

Further FECA Bulletin No. 09-05 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 of the rating and to direct the employing establishment to review its files for contemporaneous evidence concerning the position.<sup>16</sup>

As OWCP failed to follow the guidelines in FECA Bulletin No. 09-05, the Board will set aside OWCP's July 5, 2011 decision and remand the case for further consideration. After proper

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<sup>12</sup> Appellant was paid for loss of wage-earning capacity through May 21, 2010 and effectively claimed entitlement to compensation for loss of wage-earning capacity beginning May 22, 2010.

<sup>13</sup> See *M.A.*, Docket No. 12-316 (issued July 24, 2012).

<sup>14</sup> FECA Bulletin No. 09-05, *supra* note 11.

<sup>15</sup> *Id.* at §§ I.A.1-2.

<sup>16</sup> *Id.* at § I.A.3.

compliance with FECA Bulletin No. 09-05 guidelines, OWCP shall issue an appropriate *de novo* decision on appellant's entitlement to wage-loss compensation beginning May 22, 2010.<sup>17</sup>

**CONCLUSION**

The Board finds that this case is not in posture for determination on whether modification of OWCP's August 17, 2005 loss of wage-earning capacity determination is appropriate. Further action by OWCP is warranted.

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 5, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action.

Issued: September 17, 2012  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>17</sup> See *M.A.*, *supra* note 13; *M.E.*, Docket No. 11-1416 (issued May 17, 2012).