

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

A.T., Appellant

and

**U.S. POSTAL SERVICE, SUNSET STATION,
Pueblo, CO, Employer**

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**Docket No. 14-82
Issued: July 15, 2014**

Appearances:
Timothy Quinn, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 15, 2013 appellant, through his attorney, filed a timely appeal from a September 10, 2013 decision of the Office of Workers' Compensation Programs (OWCP) that denied modification of a wage-earning capacity determination. Pursuant to the Federal Employees' Compensation Act¹ (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 an April 23, 2008 wage-earning capacity decision should be modified.

On appeal, appellant's attorney asserted that the criteria for modifying the wage-earning capacity determination were met because the decision was in error and appellant's medical condition worsened.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

This case has previously been before the Board. In a September 19, 2012 decision, the Board set aside an October 7, 2010 OWCP decision that denied modification of the April 23, 2008 wage-earning capacity determination. The Board noted that, OWCP analyzed the 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09-05 or fully follow the procedures outlined therein for claims, such as this, in which limited-duty positions were withdrawn pursuant to the National Reassessment Policy (NRP).² The facts of the previous Board decision are incorporated herein by reference.

On July 23, 2009 appellant filed a claim for compensation for the period July 10 to 13, 2009. He attached a brief July 13, 2009 report from his attending physician, Dr. Michael E. Dallenbach, who practices occupational medicine, who advised that appellant was unable to work for this period secondary to significant bilateral knee pain. In a duty status report dated July 13, 2009, Dr. Dallenbach provided restrictions to appellant's physical activity. In reports dated August 10 and 26, 2009, he noted appellant's report that his pain had increased and it had become harder to continue working. Dr. Dallenbach provided physical examination findings and reiterated his diagnosis, stating that appellant remained at maximum medical improvement with no new impairment.

While the prior appeal was pending before the Board, Dr. Robert B. Goos, a Board-certified psychiatrist with the Department of Veterans Affairs, submitted an August 18, 2008 mental health treatment note. He stated that appellant, a veteran, had been exposed to a traumatic event in which he received a beating at gunpoint by a group of marines. Dr. Goos diagnosed recurrent, moderate post-traumatic stress disorder and panic disorder. On November 2, 2010 Dr. Dallenbach noted appellant's complaint of chronic right knee pain, described findings and advised that appellant was restricted to sitting 100 percent of the time. In a treatment note dated October 27, 2011, he indicated that he last saw appellant on November 2, 2010 and described physical examination findings. Dr. Dallenbach noted appellant's complaint of constant right knee pain and that he was now retired. He diagnosed chronic right knee pain secondary to patellofemoral syndrome. On January 30, 2012 Dr. Dallenbach reiterated his findings and conclusions. Appellant also submitted an undated, unsigned mental impairment questionnaire.

By letter dated October 2, 2012, OWCP asked the employing establishment to provide all current medical evidence, copies of a job description and other documentation related to the position appellant had been working at the time he was sent home under NRP, whether his 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.

² Docket No. 11-375 (issued September 19, 2012). On September 10, 2003 appellant, a letter carrier, was injured when he tripped over a pallet jack. OWCP accepted right patellar sprain, left shin contusion, other joint derangement of the right lower leg, other derangement of the right lateral meniscus and traumatic arthropathy of the right lower leg.

In response, the employing establishment provided the December 14, 2007 permanent modified job offer that appellant accepted on January 17, 2008. The offer stated:

“This position is tailored to meet your personal physical limitations. This job does not qualify as a position which requires assignment through competitive seniority bidding. All positions requiring assignment by seniority contain duties with different job descriptions which are contrary to your physical condition. Therefore, although you have and gain seniority, you cannot successfully bid on other preferred assignments unless you can meet all requirements of the position, including the physical requirements.”

The employing establishment also submitted a notification of personnel action that appellant was reassigned effective February 2, 2008 and a July 8, 2010 work capacity evaluation in which Dr. Dallenbach provided permanent restrictions to appellant’s physical activity.

In a February 28, 2013 decision, OWCP denied appellant’s claim for wage-loss compensation beginning on July 24, 2010 finding that the evidence submitted was insufficient to modify the July 6, 2009 wage-earning capacity determination. It reviewed the evidence in accordance with FECA Bulletin No. 09-05 and found that the record established that he had not been retrained or otherwise vocationally rehabilitated, that the position on which the wage-earning capacity decision was not sheltered, odd-lot or a makeshift position and that there had not been a material change in the nature or extent of the injury-related condition.

Counsel timely requested a hearing. He submitted a pleading asserting that appellant’s accepted condition had worsened and that the job on which the wage-earning capacity decision was based was makeshift and tailored to meet appellant’s specific needs. Counsel noted that even though appellant was receiving wage-loss compensation under the left knee claim, he wanted the record to show that appellant was also entitled to wage-loss compensation for his right knee. At the July 10, 2013 the hearing, appellant testified that his job duties changed after the April 23, 2008 wage-earning capacity determination. He had to case mail more and drive the route less. Appellant also had to stand as it was impossible to sit on the round stool provided for casing mail.

The evidence submitted at the hearing included an August 26, 2009 medical certification for the Family and Medical Leave Act from Dr. Dallenbach, who diagnosed chronic bilateral knee pain, right greater than left and advised that the condition was permanent. In correspondence dated August 6, 2013, appellant indicated that a route he delivered in 2008 required some walking. He stated that it was impractical to sit on the stool provided to case mail. By letter dated August 8, 2013, counsel maintained that the medical evidence established a material worsening of the accepted condition and that the job offer on which the wage-earning capacity determination was based was inadequate.

In a September 10, 2013 decision, an OWCP hearing representative affirmed the February 28, 2013 decision. He found that the position on which the wage-earning capacity determination was based was a *bona fide* job, that appellant had not been retrained or vocationally rehabilitated and that the medical evidence did not establish that his condition had

materially worsened. The hearing representative noted that appellant was receiving wage-loss compensation under his left knee claim.

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.³ OWCP procedures at Chapter 2.1501 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) the claimant's medical condition has materially changed; or (3) the claimant has been vocationally rehabilitated.⁵ 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.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 OWCP 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

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 tour of duty, that is, whether it is part time or full time.¹⁰ Further, a makeshift or odd-lot position designed for a claimant's particular needs will not be considered suitable.¹¹

³ *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).

⁵ *Id.* at § 2.1501.3(a).

⁶ *Id.* at § 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, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity*, Chapter 2.1501.4 (June 2013).

¹⁰ *Id.* at Chapter 2.815.5.c(1).

¹¹ *Id.* at Chapter 2.815.5.c(2)(a).

ANALYSIS

The Board finds that the September 16, 2013 decision must be reversed. The modified position on which the April 23, 2008 wage-earning capacity determination was based was makeshift in nature. Appellant has established that modification of the wage-earning capacity determination is warranted.

OWCP accepted that appellant sustained a right patellar sprain, left shin contusion, other derangement of the right lower leg, other derangement of the right lateral meniscus and traumatic arthropathy of the right lower leg. Surgery was performed on appellant's right knee in March 2004, April 2005 and August 2006. On December 14, 2007 the employing establishment offered him a permanent modified position, which he accepted under protest. On April 23, 2008 OWCP issued a formal wage-earning capacity decision, finding that appellant's modified position fairly and reasonably represented his wage-earning capacity. Appellant continued working modified duties until November 2009 when he was sent home under NRP.

When a loss of wage-earning capacity decision has been issued, as provided in Chapter 2.1501 of the procedure manual, FECA Bulletin No. 09-05 is to be consulted if a position has been withdrawn under NRP.¹² FECA Bulletin No. 09-05 requires OWCP to develop the evidence to determine whether a modification of the decision is appropriate.¹³ 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.¹⁴

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 of the wage-earning capacity decision and direct the employing establishment to review its files for contemporaneous evidence concerning the position.

OWCP wrote the employing establishment on October 2, 2012 requesting that it provide all current medical evidence, copies of a job description and other documentation related to the position appellant had been working at the time he was sent home under NRP, whether his 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

¹² *Supra* note 7.

¹³ *Supra* note 8.

¹⁴ *Id.*

the time of the determination. The record contains forwarded copies of the December 14, 2007 job offer, a February 2, 2008 notice of personnel action and a July 8, 2010 report from Dr. Dallenbach.

A review of the December 14, 2007 job offer establishes that it was makeshift in nature. The offer stated that the position was tailored to meet appellant's personal physical limitations and did not qualify as a position which required assignment through competitive seniority bidding. It continued that, although appellant had seniority, he could not bid on other preferred assignments unless he could meet all requirements of the position, including the physical requirements. The Board finds the position was makeshift.

A basis for modifying a wage-earning capacity decision is to establish that the original decision was in error.¹⁵ The Board finds under the facts of this case that the modified assignment upon which the April 23, 2008 wage-earning capacity determination was made was makeshift in nature. It was created to accommodate appellant's restrictions and the duties outlined do not constitute a *bona fide* job that would be available to him in the community at large. The position, therefore, does not fairly and reasonable represent appellant's wage-earning capacity and the April 23, 2008 determination was erroneous. Accordingly, the September 10, 2013 decision will be reversed.¹⁶ As the position on which the April 23, 2008 decision was based was makeshift in nature, appellant met his burden of proof to establish that the decision should be modified.

Lastly, the Board also notes that the employing establishment did not provide current medical evidence that it may have possessed and the medical evidence that is in the record indicates that appellant continued to have residuals of the accepted right knee condition.

CONCLUSION

The Board finds that appellant has established that modification of the April 23, 2008 wage-earning capacity determination is warranted.

¹⁵ *Supra* note 9.

¹⁶ A.J., Docket No. 10-619 (issued June 29, 2010).

ORDER

IT IS HEREBY ORDERED THAT the September 10, 2013 decision of the Office of Workers' Compensation Programs is reversed.¹⁷

Issued: July 15, 2014
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

¹⁷ Richard J. Daschbach participated in the preparation of the decision but was no longer a member of the Board after May 16, 2014.