

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

S.G., Appellant

and

**U.S. POSTAL SERVICE, MAIN POST OFFICE,
St. Paul, MN, Employer**

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**Docket No. 15-1321
Issued: December 10, 2015**

Appearances:
Charles M. Cochrane, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 26, 2015 appellant, through counsel, filed a timely appeal from a December 2, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 has met her burden of proof to establish that the April 13, 2009 loss of wage-earning capacity determination should be modified.

FACTUAL HISTORY

This case has previously been before the Board. The facts relevant to the current appeal will again be set forth.

¹ 5 U.S.C. § 8101 *et seq.*

On October 25, 2005 appellant, then a 42-year-old full-time mail processor, filed an occupational disease claim (Form- CA-2) alleging that she sustained a back injury due to factors of her federal employment. OWCP accepted the claim for herniated discs at L4-5 and L5-S1. On June 22, 2006 appellant underwent an authorized discectomy at L4-5 and decompression of lateral recess stenosis. She returned to modified employment on September 25, 2006.

On December 31, 2008 appellant accepted an offer of modified employment with the employing establishment. The duties of the mail processing clerk, included casing mail for six hours a day, riffling and culling letters for two hours a day, sweeping a letter case for 30 minutes a day, and working “[a]s directed within restrictions” for eight hours a day. The job required lifting letter trays under 15 pounds for one hour per day, casing letters in a manual case up to eight hours per day, walking and lifting up to four hours per day, bending and stooping up to one-half hour per day, and using hand dexterity for two hours per day.

By decision dated April 13, 2009, OWCP found that appellant’s actual earnings as a full-time modified mail processing clerk fairly and reasonably represented her wage-earning capacity. It reduced her compensation to zero after determining that her earnings met or exceeded that of the job held when injured.

On May 26, 2010 appellant filed a recurrence of disability claim (Form CA-2a), commencing on May 14, 2010, causally related to her accepted employment injury. She advised that the employing establishment withdrew her job under the National Reassessment Process (NRP) because there was no work available. Appellant also filed a claim for compensation (Form CA-7) on May 21, 2010 requesting compensation beginning May 10, 2010.²

On June 15, 2010 appellant asserted that she believed that the original loss of wage-earning capacity determination was in error as she was sent home on May 15, 2010 without accommodation. She indicated that the nature and extent of her disability due to her employment injury had not changed.

In a decision dated July 20, 2010, OWCP denied modification of the April 13, 2009 loss of wage-earning capacity determination. It determined that appellant had not established a material change in her injury-related condition.

On August 18, 2010 appellant requested a hearing before an OWCP hearing representative. By letter dated October 12, 2010, counsel argued that the position provided by the employing establishment was created for her and not available for other employees.

On December 1, 2010 the employing establishment advised that appellant had worked in the same limited-duty position since 2005. Appellant performed necessary work but in 2010 bid employees began performing the duties due to a loss of mail volume.

² In a report dated July 7, 2010, Dr. Charles J. Hipp, a Board-certified internist, found that appellant required modified duty due to continued low back and radicular symptoms from her work injury. He stated, “Her medical condition has been stable and has not worsened nor has it improved.” Dr. Hipp found that appellant should continue with the same work restrictions.

A hearing was held on December 28, 2010. By decision dated March 16, 2011, OWCP's hearing representative affirmed the July 20, 2010 decision denying modification of the loss of wage-earning capacity determination. He found that the position was not makeshift as it required casing mail and as the employing establishment described it as necessary work.

Appellant appealed to the Board. In a decision dated September 13, 2012, the Board set aside the March 16, 2011 OWCP decision.³ The Board found that OWCP had analyzed the case under the customary criteria for modifying a wage-earning capacity determination rather than applying specific details under FECA Bulletin No. 09-05 pertinent to cases where limited-duty positions are withdrawn pursuant to NRP.⁴ The Board remanded the case for OWCP to properly follow the guidelines in FECA Bulletin No. 09-05 in determining whether the loss of wage-earning capacity determination should be modified.

By letter dated June 11, 2013, OWCP requested that appellant submit supporting medical evidence if she believed that her accepted condition of a herniated disc had worsened such that she could not perform her work duties.⁵

On August 27, 2013 the employing establishment noted that appellant worked several years in limited-duty positions prior to the December 31, 2008 modified job offer. It stated, "The duties of that job had to be done by other employees if she could not." The employing establishment advised that as a result of lower mail volume, the duties appellant performed "reverted to their original units and/or bids."

By decision dated September 13, 2013, OWCP denied modification of the April 13, 2009 loss of wage-earning capacity determination. It found that the medical evidence did not establish that appellant's condition materially worsened or that the position was other than a *bona fide* position.

On October 8, 2013 appellant again requested an oral hearing. At the telephone hearing, held on June 11, 2014, she related that she had worked without restrictions before her injury. Although appellant had accepted the December 31, 2008 job offer to case letters, riffle mail, and sweep flats, she claimed that she had not performed such duties in her usual position of mail processing clerk. Counsel asserted that OWCP did not properly apply the provisions of FECA Bulletin 09-05 and that the position was makeshift.

³ Docket No. 11-1588 (issued September 13, 2012).

⁴ FECA Bulletin No. 09-05 (issued August 18, 2009); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501.7 (June 2013).

⁵ In a report dated March 25, 2013, Dr. Hipp evaluated appellant for employment-related neck and back injuries. He provided work restrictions of occasional lifting and carrying up to 15 pounds, bending, reaching below the knee, reaching above the shoulder, squatting, kneeling, climbing stairs, standing, and walking and frequently sitting. On August 5, 2013 Dr. Hipp advised that appellant should not lift more than 10 to 15 pounds and take a break every hour and a half. In a report dated September 22, 2014, he diagnosed cervical and lumbar degenerative disc disease following a cervical fusion and lumbar discectomy. On September 29, 2014 Dr. Hipp provided work restrictions.

By decision dated December 2, 2014, OWCP's hearing representative affirmed the September 13, 2013 decision. He found that the evidence from the employing establishment supported that the position was *bona fide*.

On appeal counsel contends that the December 31, 2008 job offer was makeshift in nature, noting that it did not have a job title, did not indicate that it was permanent, and had different duties than a usual bid position. He cited *A.J.*⁶ in support of his contentions. Counsel also noted that OWCP's procedures indicate that a post-injury position must be equivalent to the preinjury position to support a wage-earning capacity finding.

LEGAL PRECEDENT

Once the wage-earning capacity of an injured employee is determined, a modification of such 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, in fact, erroneous.⁷ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁸

FECA Bulletin No. 09-05 outlined OWCP procedures when limited-duty positions were withdrawn pursuant to NRP. If a formal wage-earning capacity decision had been issued, OWCP was to develop the evidence to determine whether a modification of that decision is appropriate.⁹ When a loss of wage-earning capacity decision has been issued, FECA Bulletin No. 09-05 required OWCP to develop the evidence to determine whether a modification of the decision was appropriate.¹⁰ To this end, FECA Bulletin No. 09-05 asked OWCP to confirm that the file contained documentary evidence supporting that the position was an actual *bona fide* position. It required OWCP to review whether a current medical report supported work-related disability and established that the current need for limited duty or medical treatment was a result of injury-related residuals, and to further develop the evidence from both the claimant and the employing establishment if the case lacked current medical evidence.¹¹

ANALYSIS

OWCP accepted that appellant sustained herniated discs at L4-5 and L5-S1 due to factors of her federal employment. Appellant underwent a discectomy at L4-5 on June 22, 2006 and resumed limited-duty employment on September 25, 2006. On December 31, 2008 she accepted an offer of modified employment casing mail for six hours per day, riffling and culling letters for two hours per day, sweeping a letter case for 30 minutes a day, and working as directed within

⁶ Docket No. 10-619 (issued June 29, 2010).

⁷ *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Tamra McCauley*, 51 ECAB 375, 377 (2000).

⁸ *Id.*

⁹ *Supra* note 4.

¹⁰ *Id.*

¹¹ *Id.*; *see also B.W.*, Docket No. 13-1598 (issued September 22, 2014).

her restrictions. Based on this job offer, on April 13, 2009, OWCP found that her actual earnings as a modified mail processor effective December 31, 2008 fairly and reasonable represented her wage-earning capacity.

The employing establishment reassessed appellant's position under NRP and determined that it no longer had work available. Appellant filed a claim for compensation beginning May 21, 2010, the date her position was terminated. She alleged, through counsel, that OWCP's loss of wage-earning capacity determination had been erroneous because it had been based on a makeshift position. Appellant did not contend that her condition had materially changed such that she was unable to perform the duties of the modified mail processing clerk.

Following the Board's remand decision,¹² OWCP obtained an August 27, 2013 statement from the employing establishment addressing appellant's modified position. It indicated that the job offer was within her restrictions and that the duties of the position would have been done by another employee if she had not been able to perform the tasks.

FECA Bulletin No. 09-05 provided that the determination of whether a loss of wage-earning capacity was based on an actual *bona fide* position may be evidenced by a job offer, SF-50, a classified position on a formal position description, or other documentary evidence. Based on these guidelines, OWCP properly found that the position of modified mail processing clerk was *bona fide* and not a makeshift or odd-lot position. The December 31, 2008 job offer, which appellant accepted, described the physical requirements of the position, indicated the occupational code for the job, and set forth the duties of the position. The position had a set schedule and there was no indication that it was temporary. Appellant successfully performed that position from December 2008 to May 21, 2010.

On appeal counsel argues that the December 31, 2008 offered position was makeshift in nature and cited *A.J.*, in support of his allegation. He asserts that the position did not have a title, did not indicate that it was a permanent position and had different duties than a usual bid position, and thus was not equivalent to appellant's preinjury position.

The Board finds that this case is distinguishable from *A.J.*¹³ In *A.J.*, the Board discussed several factors that would support a finding that an offered position was makeshift or odd-lot in nature. These factors included: (1) the position did not have an official title or formal position description; (2) there were strict 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.¹⁴ In this case, the position, while not formally setting forth the title, provided the occupational code as mail processing clerk. The limitations of position were not unduly strict and required the performance of meaningful tasks, including casing mail for six hours per day. The position was not temporary and appellant

¹² *Supra* note 3.

¹³ *See supra* note 6.

¹⁴ *See also V.H.*, Docket No. 13-2076 (issued March 5, 2014).

served in that position from December 2008 to May 21, 2010. The Board finds that the position was not makeshift or odd-lot and¹⁵ thus finds that appellant has not established modification of the April 13, 2009 loss of wage-earning capacity decision.

Appellant may request modification of the loss of wage-earning capacity determination, supported by new evidence of argument, at any time before OWCP.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that the April 13, 2009 loss of wage-earning capacity determination should be modified.

ORDER

IT IS HEREBY ORDERED THAT the December 2, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 10, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁵ See *K.A.*, Docket No. 13-1652 (issued January 6, 2014) (position serving as the basis for the wage-earning capacity determination was not makeshift or odd-lot because it had a detailed job description, was performed without overly strict physical restrictions and involved meaningful tasks).