United States Department of Labor
Employees' Compensation Appeals Board

T.T., Appellant	)	
and	)	**Docket No. 14-2013**
	)	**Issued: July 7, 2015**
U.S. POSTAL SERVICE, POST OFFICE, Burlingame, CA, Employer	)	

Appearances:
Hank Royal, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On September 18, 2014 appellant, through her representative, filed a timely appeal from a May 14, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (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 established that her wage-earning capacity should be modified.

FACTUAL HISTORY

On August 17, 2004 appellant, then a 33-year-old letter carrier, filed an occupational disease claim for her right forearm conditions which he alleged were the result of repetitively sorting and delivering mail. OWCP accepted the claim for right forearm strain, right lateral epicondylitis, right radial styloid tenosynovitis, and lesion of the right ulnar nerve. It paid

[1] 5 U.S.C. § 8101 *et seq.*

appellant benefits, including the costs associated with a March 24, 2005 right elbow surgery. Appellant returned to full-time modified duty on November 1, 2006.

In duty status reports dated January 22 and 30, 2007, Dr. R. Thomas Grotz, an orthopedic surgeon, advised that appellant could work with restrictions of no more than four hours per day of fine manipulation, simple grasping, reaching above the shoulders, operating machinery, and driving vehicles, lifting/carrying, and pushing/pulling greater than 10 pounds. In a January 30, 2007 report, his medical assistant stated that appellant had not reached maximum medical improvement and that they were waiting for authorization for right wrist surgical repair.

On March 12, 2007 appellant accepted a full-time modified city letter carrier position. The position required her to deliver express mail 120 minutes, do redbook/carrier labels for 60 minutes, do collections/lobby director/passports for 120 minutes, and case mail/nixie mail for 4 hours per day. The physical requirements of the modified city letter carrier position included ability to drive, write, read, and follow instructions, case mail on routes, and collect mail on collections. The work hours were 7:30 a.m. to 4:00 p.m. with days off as Sunday/rotating and the position had a salary of $45,963.00 per year.

On April 16, 2007 Dr. Grotz completed a duty status report. On this form appellant's supervisor confirmed the work requirements for a full-time, unmodified city carrier position. It was specifically noted that the position required continuous lifting up to 35 pounds, and intermittent lifting from 10 to 70 pounds. Dr. Grotz noted that appellant could not perform the work requirements set forth by the supervisor on the form. He stated that she could only lift a maximum of 10 pounds, and could do no continuous activity as she required a 10- to 15-minute break every hour.

Dr. Grotz further found, in a July 9, 2007 report, that appellant had reached maximum medical improvement with residual paresis and dysesthesias. He opined that she was unable to perform her date-of-injury position, but fortunately she had entered the training program to become a supervisor and would be able to manage those job tasks well. Dr. Grotz opined that appellant was able to work 8 hours a day with no overhead reaching of the right arm and no more than 30 minutes of casing or lifting objects weighing more than 15 pounds at a time.

By decision dated July 30, 2007, OWCP found the modified city carrier position which appellant had performed since March 12, 2007 fairly and reasonably represented her wage-earning capacity resulting in no loss in wage-earning capacity (LWEC).

In a report dated November 3, 2008, Dr. Joseph R. Meyers, a Board-certified orthopedic surgeon, noted the history of injury and that appellant was able to return to work after her surgical recovery and that she had been working in a modified-duty capacity as an acting supervisor. Appellant advised Dr. Meyers that, when she returned to work, she was limited to lifting 10 to 15 pounds and pushing and pulling 20 to 30 pounds and that her job entailed instructing letter carriers, doing reports, talking to customers, and doing some computer work.[2]

Dr. Meyers indicated in his July 16, 2012 report and duty status report that appellant had been working in a modified-duty capacity for eight hours a day, five days per week with no

[2] After Dr. Grotz retired, OWCP authorized appellant to be treated by Dr. Meyers.

significant problems performing her work duties, taking care of the right elbow when lifting, pushing, and pulling. He noted examination findings and stated that she was able to continue working in a safe and effective manner.

In an October 1, 2012 report, Dr. Meyers advised that appellant could work full duty five days per week with the following restrictions: she could not deliver regular mail which required her to travel door to door while carrying heavy loads of mail as this would exacerbate her upper extremity injuries; she could deliver express mail which required driving to specific homes as this does not represent any excessive repetitive or strenuous activity; she could take mail to carriers; she could case mail for only one hour per day; she could answer telephones; and she could act as a lobby director.

In an October 3, 2012 report, Dr. Meyers noted examination findings of the right elbow, which showed no tenderness along the course of the incision to palpation, no significant scarring at the skin/subcutaneous level, no AP instability at the right elbow, no varus or valgus instability at the right elbow, smooth range of motion of right elbow, with flexion to 135 degrees and extension to zero, good upper extremity strength, and good motor and sensory reflexes. He stated that appellant could continue working in a modified-duty level. In an October 3, 2012 CA-17 form, Dr. Meyers provided increased limits on appellant's work activities.

Appellant filed Form CA-7, claims for compensation, for wage loss commencing February 18, 2013. She also filed several CA-7 and CA-7a forms indicating wage loss from October 16, 2012. The forms indicated that appellant had taken leave beginning October 16, 2012 as no work was available under her medical restrictions. The employing establishment indicated that at that time she remained detailed as 204B (acting supervisor), that her medical limitations had changed, and that work within her restrictions was no longer available as part of the National Reassessment Process (NRP).

In a March 25, 2013 letter, OWCP advised Dr. Meyers that clarification on the change in appellant's restrictions was needed as his reports did not cite any objective evidence to support a change in restrictions. It noted that medical evidence must clearly establish a change in objective findings in order to support a change in restrictions and the medical evidence must also indicate, with findings and medical rationale, how the accepted condition worsened. Dr. Meyers was provided 30 days to submit the requested information.

Progress reports from Dr. Meyers dated April 22 and June 5, 2013 indicate that appellant was able to work in a slightly modified-duty capacity and that there were no changes in her right elbow symptoms and examination findings of the right upper extremity were unchanged from prior examinations. Duty status reports dated April 22 and June 5, 2013, however, indicated an increase in appellant's restrictions. A May 10, 2013 offer of modified assignment was also provided.

In a June 25, 2013 letter, OWCP advised appellant that her claim for wage-loss compensation beginning October 16, 2012 was being treated as a request for modification of her July 30, 2007 LWEC decision and informed her of the criteria necessary for modifying such decision. Appellant was provided 30 days to submit evidence to support modification of the LWEC determination.

In a July 2, 2013 letter, appellant indicated that her work had been given to other limited light-duty employees and, therefore, there was no work available within her restrictions.

Dr. Meyers noted, in a July 2, 2013 letter, that he had reviewed OWCP's June 25, 2013 letter and noted that he had not received any communication from OWCP pertaining to appellant's work restrictions. Copies of his October 1 and 3, 2012 letters and Forms CA-17 were provided.

In a July 22, 2013 letter, appellant's representative argued that the July 30, 2007 LWEC should be modified as it was based on makeshift or odd-lot work.

By decision dated August 27, 2013, OWCP found that appellant had not met her burden of proof to modify the July 30, 2007 wage-earning capacity determination. It determined that the March 12, 2007 modified job offer, upon which the LWEC was based, was not composed of makeshift or odd-lot work as the job offer contained specific duties, physical requirements, a work schedule, and was considered permanent with a specified salary. Appellant thus had not established that the original wage-earning capacity determination was in error, there was no evidence that she had been retrained or vocationally rehabilitated, and there was no probative medical evidence showing the residuals of her accepted work injury had materially changed. OWCP also determined that the evidence of record was consistent with the procedures outlined in FECA Bulletin No. 09-05.

Appellant requested an oral hearing before an OWCP hearing representative, which was held on February 27, 2014. She testified that, at the time she returned to full-time work, she was performing the type of limited-duty job activities described in the rated job. Appellant advised that she continued to work until about November 2012 when the employing establishment advised they could not accommodate her limitations. No new evidence was submitted.

In a March 25, 2014 letter, the employing establishment disputed that appellant's work was given to other injured employees. It stated that she had been a 204B (supervisor in training) for the last five years and when they got a regular supervisor, they did not need a 204B. Also, the collections went back to the carriers on the route, not to injured carriers.

In a March 28, 2014 letter, appellant's representative indicated that, although the March 12, 2007 job offer represented appellant's duties at work, Dr. Grotz was unaware that appellant had been provided the March 12, 2007 job offer and Dr. Grotz and later Dr. Meyers, in addition to the vocational rehabilitation counselor, understood that appellant was in training as a 240B (acting supervisor). He argued that the provisions of FECA Bulletin No. 09-05 should be more specifically addressed.

By decision dated May 14, 2014, an OWCP hearing representative affirmed OWCP's August 27, 2013 decision.

On appeal appellant's representative contends that OWCP failed to obtain any written documentation from the employing establishment to confirm that the offered position upon which the LWEC was based was an actual bona fide position at the time of rating and, therefore, failed to fully follow the guidelines in FECA Bulletin No. 09-05.

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. OWCP procedures provide that factors to be considered in determining whether the claimant's work fairly and reasonably represents 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.[3] Further, a makeshift or odd-lot position designed for a claimant's particular needs will not be considered suitable.[4]

Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.[5] OWCP procedures at Chapter 2.1501 contain provisions regarding the modification of a formal loss of wage-earning capacity.[6] 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.[7]

FECA Bulletin No. 09-05, however, 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.[8]

ANALYSIS

The Board finds that the May 14, 2014 decision is not in posture for decision as OWCP failed to comply with the development requirements set forth in FECA Bulletin No. 09-05.

OWCP accepted that appellant sustained right forearm strain, right lateral epicondylitis, right radial styloid tenosynovitis, and lesion of the right ulnar nerve. Appellant underwent a March 24, 2005 right elbow surgery. On March 12, 2007 the employing establishment offered, and appellant accepted, a full-time modified city letter carrier position. On July 30, 2007 OWCP issued a formal wage-earning capacity decision, finding that appellant's modified city letter carrier position fairly and reasonably represented her wage-earning capacity.

The Board has previously noted that whether a position fairly and reasonably represents one's wage-earning capacity is based on a number of factors.[9] While OWCP procedures outline

[3] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Case/Disability Management*, Chapter 2.815.5.c(1) (June 2013).

[4] *Id.* at Chapter 2.815.5.c(2)(a).

[5] *Katherine T. Kreger*, 55 ECAB 633 (2004).

[6] *Supra* note 3 at *Modification of Loss of Wage-Earning Capacity*, Chapter 2.1501 (June 2013).

[7] *Id.* at Chapter 2.1501.3(a).

[8] FECA Bulletin No. 09-05 (issued August 18, 2009)

[9] *M.N.*, Docket No. 11-1462 (issued February 1, 2012).

various factors that focus on the type of appointment and whether it is part-time, temporary, or seasonal work, any limited-duty assignment must be consistent with the injured employee's then-current medical restrictions.[10]

The March 12, 2007 job offer required that appellant deliver express mail 120 minutes, do redbook/carrier labels for 60 minutes, do collections/lobby director/passports for 120 minutes, and case mail/nixie mail for 4 hours per day. Appellant was required to drive, write, read, follow instructions, case mail on routes, and collect mail on collections. The duty status report that was signed by Dr. Grotz on April 16, 2007, however, noted the full-time specific physical requirements of the position. The supervisor noted that the position required continuous lifting up to 35 pounds and intermittent lifting up to 70 pounds. Driving was also required up to eight hours a day. Dr. Grotz completed this form noting that appellant could not perform the position described as she could lift only a maximum of 10 pounds and required a 10- to 15-minute break every hour. On July 9, 2007 he indicated that appellant had improved, but he also indicated that appellant could not perform any overhead reaching with her right arm, no more than 30 minutes of casing and no more than 15 pounds of lifting. Again, Dr. Grotz's restrictions were inconsistent with those set forth in the position description.

Furthermore, the record indicates that prior to the July 30, 2007 wage-earning capacity determination appellant began training as a supervisor. It is not clear whether the modified assignment was the position appellant worked as part of the training program to become a supervisor. An LWEC determination is erroneous if it is based upon a position the employee no longer holds.[11]

FECA Bulletin No. 09-05 requires OWCP to develop the evidence to determine whether a modification of the LWEC decision is appropriate. 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.[12] It requires OWCP to review whether a current medical report supports work-related disability and to further develop the evidence from both the claimant and the employing establishment if the case lacks current medical evidence.[13] 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 the employing establishment to 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 to direct a review of its files for contemporaneous evidence concerning the position.[14]

OWCP was required to inquire of the employing establishment, in writing, whether appellant was employed in the modified city letter carrier position or whether she was in fact

[10] *Id.*; *see also E.C.*, 59 ECAB 401 (2008).

[11] *See C.H.*, Docket No. 11-1711 (issued February 15, 2012).

[12] A position that is makeshift in nature is not appropriate for a loss of wage-earning capacity determination. *See Selden H. Swartz*, 55 ECAB 272 (2004).

[13] FECA Bulletin No. 09-05 §§ I.A.1-2.

[14] *Id*. at § I.A.3; *see also P.B.*, Docket No. 12-0799 (issued December 11, 2012).

working in a makeshift supervisor in training position consistent with her medical restrictions. Submissions by the employing establishment largely document that appellant worked in a supervisor-in-training position for over five years. The record, therefore, is unclear as to whether appellant was working in the position upon which her LWEC was determined. The Board therefore remands the case for OWCP to follow the procedures set forth by FECA Bulletin No. 09-05.[15]

CONCLUSION

The Board finds that this case is not in posture for decision.[16]

ORDER

IT IS HEREBY ORDERED THAT the May 14, 2014 decision of the Office of Workers' Compensation Programs is remanded for action consistent with this decision.

Issued: July 7, 2015
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

[15] *Supra* note 6.

[16] Due to the disposition of this case, the remainder of appellant's arguments before OWCP and on appeal will not be addressed.