U.S. Department of Labor

Employment Standards Administration
Office of Workers' Compensation Programs
Division of Federal Employee's Compensation
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FECA BULLETIN NO. 09-05

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Subject: United States Postal Service National Reassessment Program Guidance

Background: The United States Postal Service (USPS/Postal Service) has undertaken a National Reassessment Process (NRP) affecting a large number of Federal Employees' Compensation Act (FECA) claimants who are currently working for the Postal Service but not at their date of injury position. Some of these claimants are working at a position for which they have received a loss of wage-earning capacity determination (LWEC), while other claimants working light duty positions have not received an LWEC rating. These employees are being advised that no light duty or little light duty (a few hours a day) is available. While the NRP process was piloted in certain areas serviced by a number of Division of Federal Employees' Compensation (DFEC) district offices including San Francisco and Boston, the USPS NRP is now going beyond the piloting stage to nationwide implementation.

Purpose: This bulletin offers guidance to DFEC offices in an effort to provide consistency in claims handling to address these situations:

1. Where Postal employees who have been working light duty positions are being sent home because they have been advised by the Postal Service that there are No Operationally Necessary Tasks (NONT) for them to perform or there is No Work Available (NWA).
2. Where Postal employees who have been working light duty are being required to report to work and being informed that at that point in time there are only a certain number of hours of Operationally Necessary Tasks available for them to perform.

Postal employees encountering some permutation of these scenarios are completing CA-7 forms and seeking wage loss compensation. While some of the impacted Postal Service employees completing CA-7s have formal LWEC ratings in place, other Postal employees have not received a formal LWEC determination for the light duty they are performing. In some instances where an LWEC rating was issued, the Postal employee, his or her representative, or the Postal Service may contend that the job in question was not a real job and was in fact a "make work," "sheltered" or "odd lot" position for which an LWEC rating should not have been made. Other employees may demonstrate a worsening of their accepted medical condition or submit a claim for a recurrence.

Follow the action items and consult the reference sections for additional guidance.

NOTE: A CE should forward any general inquiries concerning the NRP to DFEC management for referral to the Postal Service and should not provide advice or commentary on the NRP to claimants, particularly concerning any USPS personnel requirement that a USPS employee report to work for a given amount of time.

Action items:

When a CA-7 referencing NRP, NONT or NWA is received, each case must be assessed individually with regard to the following three criteria:

A. whether the medical evidence continues to support ongoing injury related disability;
B. whether the claimant is losing intermittent time or making a claim for total wage loss; and
C. whether a formal LWEC rating is in place.

The course of action varies depending on these three criteria.

In all scenarios:

Review the CA-7 carefully to determine exactly what is being claimed (sick or annual leave, administrative leave, LWOP, etc.), and if it is unclear, request clarification from the agency. Note that no changes have been made to the usual leave buy back procedures, and payment cannot be made for any time in which the claimant was on administrative leave.

Once it has been determined that payment should be made, cases should be reviewed individually to determine whether the claimant is entitled to a recurrent pay rate.

- If the recurrence begins more than six months after the injured employee resumed regular full-time employment, payment may then be made at a recurrent pay rate based on a CA-7. As long as the claimant was working a regular full time job when the light duty was withdrawn, the claimant would be entitled to a recurrent pay rate. A full duty return to work is not required; however, if the claimant did not return to regular full-time employment (for example, an individual who is receiving an LWEC based on working four hours a day, 20 hours per week), a recurrent pay rate would not be appropriate. See Reference on recurrent pay rates.
- Note that if a formal LWEC is modified because the original position was determined to be "make work," "sheltered" or "odd lot," the claimant would not be entitled to a recurrent pay rate since the work was by virtue of this finding not "regular" work.

If a claimant is in receipt of a Schedule Award, and a determination has been made to pay the claim, the award should be interrupted so that the claimant can be placed on the periodic roll for temporary total disability or intermittent payments can be made, whichever is applicable.

I. Claims for TOTAL DISABILITY

A. LWEC decision HAS been issued -

If a formal LWEC decision has been issued, the CE must develop the evidence to determine whether a modification of that LWEC is appropriate.

1. All Postal Service cases where CA-7s are received that involve LWEC ratings based on actual positions should be reviewed to confirm that the file contains evidence that the LWEC rating was based on an actual bona fide position. This evidence may include a job offer, an SF 50, a classified position, a formal Position Description or other documentary evidence of file. If it is determined that the LWEC rating was without any factual or legal basis at the time it was issued, the file should be properly documented and the LWEC rating should be formally modified. The CE should then proceed to the action items for cases without LWEC decisions in the file.
2. The CE should review the file to determine whether any medical benefits have been paid in the case and whether a current medical report is on file that supports work-related disability and establishes that the current need for limited duty or medical treatment is a result of injury related residuals. If the case lacks current medical evidence (within the last 6 months), the claimant should be requested, as part of the standard LWEC modification development process, to provide a narrative medical report within 30 days that addresses the nature and extent of any employment-related residuals of the original injury. The Postal Service should also be requested to provide any medical evidence in its possession that would assist OWCP in determining whether there is a medical basis to modify the LWEC. This will provide information on the claimant's current medical condition, and it is essential where employees may not have been requested to provide recent medical evidence because they have a zero LWEC rating or have not recently sought medical care for the employment-related condition.
3. In an effort to proactively manage these types of cases, OWCP may also undertake further non-medical development. OWCP may request the Postal Service to address in writing whether the position on which the LWEC rating was based was a bona fide position at the time of the LWEC rating. The Postal Service should be directed to review its files for contemporaneous evidence concerning the position. The Postal Service should be granted 30 days to submit evidence and advised that failure to submit evidence may result in OWCP issuing a decision based on the evidence of file, including the evidence submitted by the claimant. **No payment should be made during this period of development.**
4. If after development and review, the evidence establishes that the LWEC rating was proper and none of the criteria were met to modify the LWEC, then the claimant is not entitled to compensation, and a formal decision denying modification of the LWEC and the claimed compensation should be issued.
5. If the medical evidence establishes that the employment-related residuals of the injury have ceased, a proposed decision to both modify the LWEC and terminate benefits should be issued because (a) the claimant's medical condition has changed and that is one of the reasons to modify an LWEC and, (b) the medical evidence of file now supports no ongoing residuals related to the work injury. The two issues are linked and both must be addressed in a situation like this.

6. If the evidence establishes the LWEC decision was correct, but the medical evidence establishes that the original accepted condition has worsened, then the LWEC rating meets a *Strong* criterion for modification (see Reference on modification), and the CE should issue a decision modifying the LWEC and authorize payment based on the CA-7 (after determining the appropriate pay rate).
7. If the CE evaluates the available evidence and finds that the employee or the employer has presented persuasive evidence that the position was odd lot or sheltered, then the LWEC rating meets another *Strong* criterion for modification (that the original rating was in error). If that is the case, the CE should issue a decision modifying the LWEC determination and authorize payment based on the CA-7 (after determining the appropriate pay rate).
8. If the LWEC is modified, payment can be made for total wage loss and the claimant can be placed on the periodic roll. The case will then fall into the Disability Management universe. Since these cases stem from the NRP process, placement with the previous employer is not a reasonable option, so other disability management efforts must be pursued with actions leading to a vocational rehabilitation referral. While not required, in some cases nurse referrals may be useful to arrange functional capacity evaluations, or to clarify work tolerance limitations or some other medical aspect of the case. In many instances though, CE medical management will likely be the first disability management action. These actions may include development to the treating physician or referrals for second opinion and, if needed, referee examinations. Once work tolerance limitations are received that represent the weight of medical evidence in the case, a referral for vocational rehabilitation should be made. All vocational rehabilitation options should be considered, including work hardening and Assisted Reemployment.

B. LWEC decision HAS NOT been issued –

1. If the claimant has been on light duty due to an injury related condition without an LWEC rating (or the CE has set aside the LWEC rating as discussed above), payment for total wage loss should be made based on the CA-7 as long as the following criteria are met:
   - the current medical evidence in the file (within the last 6 months) establishes that the injury related residuals continue;
   - the evidence of file supports that light duty is no longer available; and
   - there is no indication that a retroactive LWEC determination should be made. (Note - Retroactive LWEC determinations should not be made in these NRP cases without approval from the District Director.)
2. If the medical evidence is not sufficient, the CE should request current medical evidence from both the Postal Service and the claimant. As with the previous scenario, the claimant should be requested to provide a narrative medical report within 30 days that addresses the nature and extent of any employment-related residuals of the original injury.
3. If payment is made and the claimant is placed on the periodic roll, the case must then be entered into Disability Management with appropriate action as outlined in the above section.

II. Claims for INTERMITTENT PARTIAL DISABILITY

A. LWEC decision HAS been issued -

If a formal LWEC decision has been issued, the CE must develop the evidence to determine whether a modification of that LWEC is appropriate. Since the initial actions are identical to those found in Section I. Claims for TOTAL DISABILITY / LWEC decision HAS been issued, the CE should follow steps 1 though 5 in that section and then proceed with the following for claims for intermittent partial disability:

1. If the evidence establishes the LWEC decision was correct, but the medical evidence establishes that the original accepted condition has worsened, then the LWEC rating meets a *Strong* criterion for modification (see Reference on modification), and the CE should issue a decision modifying the LWEC and authorize payment for the intermittent hours on the CA-7 in conformity with #3 below.
2. If the CE evaluates the available evidence and finds that the employee or the employer has presented persuasive evidence that the position was odd lot or sheltered, then the LWEC rating meets another *Strong* criterion for modification (that the original rating was in error). If that is the case, the CE should issue a decision modifying the LWEC determination and authorize payment for the intermittent hours on the CA-7 in conformity with #3 below.
3. If the LWEC has been modified and it has been determined that payment can be made for intermittent hours based on the CA-7, the CE must be careful to pay only for the hours when light duty was not available. The evidence must establish that a certain number of hours of light duty have been withdrawn, thereby establishing a recurrence of disability for those hours for which light duty is not available.

   Note - The penalty provision of termination for refusal or abandonment of suitable work can **not** be utilized in any case where USPS is making ongoing and/or daily determinations of how many hours of work are available. OWCP will not consider such offers as potential offers of suitable employment within the meaning of FECA, as they do not meet the regulatory and procedural criteria for that provision.
4. Like claims for total disability, a payment in these cases will also result in a Disability Management record (DM code PLP) requiring action. While not required, in some cases nurse referrals may be useful to arrange functional capacity evaluations, or to clarify work tolerance limitations or some other medical aspect of the case. In many instances though, CE medical management will likely be the first disability management action. These actions may include development to the treating physician or referrals for second opinion and, if needed, referee examinations.
   - If after some period of time all light duty is withdrawn, the CE must be sure to close this Disability Management record (CRN) and create a new record based on the total disability status.

B. LWEC Decision HAS NOT been issued –

1. If the claimant has been on light duty due to an injury related condition without an LWEC rating (or the CE has set aside the LWEC rating as discussed above), payment for intermittent wage loss should be made based on the CA-7, as long as the following criteria are met:

- the current medical evidence in the file (within the last 6 months) establishes that the injury related residuals continue;
- the evidence of file supports that a certain number of hours of light duty are no longer available; and
- there is no indication that a retroactive LWEC determination should be made. (Note - Retroactive LWEC determinations should not be made in these NRP cases without approval from the District Director.)

2. If the medical evidence is not sufficient, the CE should request current medical evidence from both the Postal Service and the claimant. As with the previous circumstances, the claimant should be requested to provide a narrative medical report that addresses the nature and extent of any employment-related residuals of the original injury.
3. As outlined above, the CE must be careful to pay only for the hours when light duty was not available. The evidence must establish that a certain number of hours of light duty have been withdrawn, thereby establishing a recurrence of disability for those hours for which light duty is no longer available.

   Note - The penalty provision of termination for refusal or abandonment of suitable work can **not** be utilized in any case where USPS is making ongoing and/or daily determinations of how many hours of work are available. OWCP will not consider such offers as potential offers of suitable employment within the meaning of FECA, as they do not meet the regulatory and procedural criteria for that provision.
4. If payment is made for intermittent hours, the case must then be entered into the Disability Management universe with appropriate action as outlined above in this section.

References:

1. **Wage-Earning Capacity**. Determinations of wage-earning capacity are made in accordance with the criteria of 5 U.S.C. 8115(a), the applicable regulations and the precedent of the Employees' Compensation Appeals Board (ECAB) in this area. In cases such as *Bettye F. Wade*, 37 ECAB 556 (1986), *Leonard L. Rowe*, Docket No. 88-1179 (issued September 27, 1988) and *Alfred A. Moss*, Docket No. 89-846 (issued July 26, 1989), the ECAB pointed out that "wage-earning capacity" is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injuries and the degree of physical impairment, his usual employment, his age and vocational qualifications, and the availability of suitable employment. Once the claims examiner determines that the selected position is appropriate, the principles set forth in *Albert C. Shadrick*, 5 ECAB 376 (1953), are applied so as to result in the percentage of the claimant's loss of wage-earning capacity.

2. **Actual Earnings LWEC**. In *Lee R. Sires*, 23 ECAB 12 (1971), which is the leading case on this issue, the ECAB expressed the following principles on the proper interpretation of § 8115(a): "Generally, wages actually earned are the best measure of a wage-earning capacity [pursuant to § 8115(a)], *and in the absence of evidence showing they do not fairly and reasonably represent the injured employee's wage-earning capacity*, must be accepted as such measure." [emphasis supplied] The ECAB has found that actual earnings are not the "best measure" of a claimant's wage-earning capacity when there is "evidence showing they do not fairly and reasonably represent" his or her wage-earning capacity. For example, in the case of *Elizabeth E. Campbell*, 37 ECAB 224 (1985), the ECAB held that the claimant's actual earnings as a "cover

sorter" did not fairly and reasonably represent her wage-earning capacity because the evidence suggested that the work was both seasonal in nature and constituted make-shift work designed for her particular needs. In *Mary Jo Colvert*, 45 ECAB 575 (1994), the ECAB set aside a determination that the claimant's actual earnings as a part-time clerk fairly and reasonably represented her wage-earning capacity because her hours varied widely and the medical evidence of record established that she was, in fact, totally disabled.

However, in the event that a proper formal LWEC determination is in place, the fact that the employing agency has withdrawn a light duty position does not automatically entitle the claimant to continuing ongoing compensation; in order for compensation to be payable, the evidence must establish a basis for modification of the LWEC. *See FECA Procedure Manual*, Chapter 2-1500-7 (a) (5).

3. **Modification of LWEC.** The ECAB established the following criteria for modifying a formal LWEC decision in *Elmer Strong*, 17 ECAB 226 (1965): (1) The original LWEC rating was in error; (2) The claimant's medical condition has changed; or (3) The claimant has been vocationally rehabilitated. The party seeking modification of the LWEC decision has the burden to prove that one of these criteria has been met. If the claimant is seeking modification on the basis of an increase in wage loss, he or she must establish that the original rating was in error or that the injury-related condition has worsened.

4. **Intermittent Claims for Wage Loss Where an LWEC Rating is in Place.** See *J.J.*, Docket No. 2008-1286, issued March 10, 2009; *Tamara Lum*, Docket No. 2005-0111, issued December 6, 2005. In both of these cases, the Board specifically held that the OWCP is not precluded from adjudicating a limited period of disability following the issuance of a loss of wage-earning capacity decision; indeed, in the *Lum* case, the Board found that the claimant had established disability for work on particular dates. If the CE deems it appropriate under the facts and circumstances of an individual case based on the cases noted above, limited compensation for a particular period may be paid based on CA-7 submissions even where an LWEC rating is in place. For example, intermittent wage loss may be paid where a claimant has a demonstrated need for surgery. **Claimants may <u>not</u> be placed on the periodic roll in such circumstances.**

5. **Recurrence of Disability - Burden of Proof Standard When a Claimant Has Been Working on Light Duty.** To the extent that an employee is claiming a recurrence of disability on the ground that light duty is no longer available, the principles of *Terry R. Hedman*, 38 ECAB 222 (1986) apply. The ECAB stated in *Hedman*: "When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he can perform the light-duty position, the employee has the burden of establishing by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he cannot perform such light duty. As part of his burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements." See 20 C.F.R. 10.5(x), which provides a definition of recurrence of disability that includes the situation where the employing agency has withdrawn light duty.

6. **Where An Employee's Light-Duty Job Is Eliminated Due To Downsizing Or A Reduction In Force.** As noted in 20 C.F.R. 10.509, an employee generally will not be considered to have experienced a compensable recurrence of disability as defined in § 10.5(x) merely because his or her employer has eliminated the employee's light-duty position in a reduction-in-force or some other form of downsizing. When this occurs, OWCP will determine the employee's wage-earning capacity based on his or her actual earnings in such light-duty position if this determination is appropriate on the basis that such earnings fairly and reasonably represent the employee's wage-earning capacity and such a determination has not already been made. For the purposes of 10.509, a light-duty position means a classified position to which the injured employee has been formally reassigned that conforms to the established physical limitations of the injured employee and for which **the employer has already prepared a written position description** such that the position constitutes federal employment. In the absence of a "light-duty position" as described in this paragraph, OWCP will assume that the employee was instead engaged in non-competitive employment which does not represent the employee's wage-earning capacity, i.e., work of the type provided to injured employees who cannot otherwise be employed by the Federal Government or in any well-known branch of the general labor market. (In order for 10.509 to be potentially applicable, the USPS must confirm that the position is being eliminated in a "reduction-in-force or some other form of downsizing.")

7. **Application of 5 U.S.C. 8106 (c) (2) Penalty Provision for Refusal, Abandonment or Neglect of Suitable Employment.** Under the FECA, its implementing regulations, procedures and case law, OWCP alone can make a determination that a particular position is suitable within the meaning of 5 U.S.C. 8106. The ECAB has described 5 U.S.C. 8106 (c) (2) as a penalty provision that must be narrowly construed, noting OWCP must consider preexisting and subsequently developed conditions (including non-employment related conditions) in considering whether a position is suitable employment within the meaning of this section. *See Richard P. Cortes*, 56 ECAB 200 (2004). The ECAB has long rejected the contention that employment may be considered suitable based on a general representation by the agency that work is available within medical restrictions. *See Clara M. Jackson*, 33 ECAB 1782 (1982); *Harry B. Topping*, 33 ECAB 341 (1981). Moreover, longstanding FECA procedures do not permit any position of less than 4 hours to be considered suitable for this penalty provision. For these reasons, where claimants are working less than 4 hours a day, OWCP has determined as a threshold matter that it will not consider any application of this penalty provision to this situation. Nor will this provision be applied to circumstances where light duty employment is being sporadically offered for 4 hours or more. This is true even where the USPS contends that it "has provided suitable work," or the claimant contends that the work that is being offered or provided is "not suitable." Suitability determinations implicating the penalty provision in claims affected by the NRP will only be performed in cases that meet all of OWCP's established criteria for such cases; suitability determinations will be performed with strict adherence to all the requirements of the statute, regulations, procedures and case law.

8. Recurrent Pay Rates. Pay rate formulations for compensation are based on the pay rate as determined under section 8101(4) which defines "monthly pay" as: "[T]he monthly pay at the time of injury or the monthly pay at the time disability begins or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater...." 5 U.S.C.

8101(4). To be eligible for a recurrent pay rate, there need not be a "continuous" six months of full-time employment prior to the recurrence of disability. *See Johnny Muro*, 19 ECAB 104 (1967); *Carolyn E. Sellers*, 50 ECAB 393 (1999) [citing *Muro* for the proposition that the return to regular full-time employment need not be continuous; a claimant need only work cumulatively for the required six months in regular full-time employment]. However, to be eligible for a recurrent pay rate, the claimant must have returned to "regular" full-time employment. The ECAB has defined "regular" employment, as "established and not fictitious, odd-lot or sheltered," contrasting it with a job created especially for a claimant. The ECAB has also noted that the duties of "regular" employment are covered by a specific job classification, pointing out that the legislative history of the 1960 amendments to FECA, which added the alternative provisions to section 8101(4), demonstrating that " Congress was concerned with the cases in which the injured employee had 'recovered' or had 'apparently recovered' from the injury." *See Jeffrey T. Hunter*, Docket No. 99-2385 (issued September 5, 2001) [Finding a claimant was not entitled to a recurrent pay rate—he did not return to "regular" employment as he worked only limited duty, as opposed to the full duties of a mail handler after his return to work following his employment injury]. The test is not whether the tasks that appellant performed during his limited duty would have been done by someone else, but instead whether he occupied a regular position that would have been performed by another employee. *See also Eltore D. Chinchillo*, 18 ECAB 647 (1967) [ECAB noted in remanding the case for further development that if the employee only returned to work in a temporary position designed to keep him on the payroll until his future ability to perform shipfitter duties was ascertained, the employee did not resume "regular" full-time employment within the meaning of the statute.]

Disposition: This Bulletin is to be retained in Part 2, Claims, Federal (FECA) Procedure Manual, until further notice or until incorporated into Part 2 of the Procedure Manual.

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