



Department & Division News

When OWCP Denies Compensation Based On a Previous Lost Wage Earning Capacity (LWEC) Determination

Some employees who have had their medically suitable job withdrawn by the Postal Service as a result of the National Reassessment Process (NRP) are being denied wage loss compensation by OWCP because of a previous LWEC decision. How does this happen?

OWCP procedures establish that after an employee with an accepted claim has returned to work for at least 60 days, the claims examiner (CE) will determine if the salary that the claimant is being paid, fairly and reasonably represents that employee's actual wage earning capacity. If the CE determines that the employee's pay does represent his or her actual ability to earn a wage, then a formal LWEC decision is issued.

When injured Postal Service employees return to full time work following their injuries, whether returning without restrictions, or to a limited duty or rehabilitation job (OWCP calls such medically restricted jobs "light duty"), the Postal Service pays them the salary that they would have acquired had there been no injury or disability (See *Chapter 546.143.e. of the ELM*).

Therefore, they have been restored to their normal wage and have not lost any capacity to earn a wage. In such cases the CE will normally determine that there is no loss of wage earning capacity and will issue a formal decision indicating that the employee has a 0% LWEC.

The Employees' Compensation Appeals Board (ECAB) has ruled repeatedly that once a formal LWEC has been issued, it can only be changed in three circumstances:

- The original LWEC rating was in error;
- The claimant's medical condition has changed; or

- The claimant has been vocationally rehabilitated, i.e. is working in a new job which pays at least 25% more than the current pay of the job he or she was working when the original LWEC was performed.

So, as a result of these policies this is what can happen. An employee returns to work following a disabling workplace injury and is working in a modified job at his or her regular salary. After a period of time the employee receives a 0% LWEC as described above. Then, as a result of the NRP the modified job is withdrawn. Because of the loss of the medically suitable assignment, this employee has once again become disabled, and files a *CA-2a, Notice of Recurrence* and a *CA-7, Claim for Compensation*.

A FECA Bulletin (*No.09-05*) was issued by the Director for Federal Employees' Compensation on August 18, 2009, with instructions for CEs regarding the processing of these types of claims. The instructions state that if a formal LWEC has previously been issued, then the CE must develop the evidence to determine whether modification of that LWEC is appropriate.

In these circumstances, before making a formal decision, the CE would normally send a LWEC modification development letter to the claimant (and to the Postal Service) asking if any of the three circumstances that could result in the modification of the LWEC are present. The claimant would then have an opportunity to respond and request that the LWEC be modified.

In most NRP cases the claimant's request for modification is not going to be based on a change in the medical condition, but would be based on the argument that the original LWEC rating was done in error. For examples of arguments to make in support of a request for modification, please see the "[Guide for Requesting Modification of a LWEC Determination](#)"

Whether there is a development letter sent to the claimant or not, if the CE ultimately issues a formal decision denying modification of the previous LWEC determination, the claimant would then have to use the OWCP appeal process in an effort to overturn the CE's decision. The claimant's appeal rights would accompany the formal decision. For suggestions regarding an appeal of such a denial, please see the "[Guide for Appealing a Formal Decision Denying Modification](#)."

It is our opinion that the most appropriate appeal option would be a "**Review of the Written Record**". Be careful of the time limits for this appeal. It must be made within 30 days from the date of the decision.

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