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

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| **S.S., Appellant** | ) | |
| **and** | ) | **Docket No. 07-1376** |
| | ) | **Issued: June 18, 2008** |
| **U.S. POSTAL SERVICE, MAIN POST OFFICE, Cincinnati, OH, Employer** | ) | |

*Appearances:*
*Appellant, pro se*
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

### ***JURISDICTION***

On April 25, 2007 appellant filed an appeal from merit decisions of the Office of Workers' Compensation Programs dated June 13 and October 4, 2006. He also appealed a nonmerit decision dated February 22, 2007. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

### ***ISSUES***

The issues are: (1) whether appellant's actual earnings as a modified general expediter fairly and reasonably represented his wage-earning capacity; (2) whether appellant met his burden of proof to establish that modification of the April 11, 2006 wage-earning capacity decision was proper; and (3) whether the Office properly refused to reopen appellant's case for further review pursuant to 5 U.S.C. § 8128(a).

### ***FACTUAL HISTORY***

On July 2, 1984 appellant, then a 31-year-old clerk, sustained an employment-related acute lumbar strain and herniated disc at L4-5. On July 29, 1991 the Office accepted that on February 9, 1991 he sustained aggravation of a preexisting lumbosacral strain and a right

shoulder strain. The claim was expanded to include right shoulder tendinitis and impingement. Appellant stopped work on July 2, 1992 and underwent right shoulder surgery on October 7, 1992. He returned to four hours of modified duty as a cleaner on April 20, 1993 and increased to eight hours daily by July 29, 1993.[1]

By decision dated April 21, 1994, the Office determined that appellant's actual earnings as a modified cleaner fairly and reasonably represented his wage-earning capacity with no loss of wage-earning capacity.

On March 1, 1995 appellant underwent a second surgical procedure on his right shoulder, and returned to four hours of work on September 1, 1995 as a modified distribution clerk and on September 30, 1995 began working eight hours per day.[2] On February 8, 2000 he injured his left knee in an employment-related motor vehicle accident.[3]

On July 9, 2003 appellant, then working in the modified clerk position, sustained an employment-related cervical and lumbar strain when his postal vehicle was rear-ended. He stopped work that day and returned on July 11, 2003. On November 19, 2003 appellant's attending Board-certified orthopedic surgeon, Dr. Francis X. Florez, advised that he could only work four hours a day. Appellant began receiving wage-loss compensation for four hours a day. On June 18, 2004 the Office accepted that he sustained an aggravation of right shoulder tendinitis. In reports dated October 20, 2004, Dr. Florez advised that appellant's restrictions had not changed and he could work four hours a day.

By letter dated December 14, 2004, the Office referred appellant to Dr. Rudolph A. Hofmann, Board-certified in orthopedic surgery, for a second opinion evaluation. In a January 4, 2005 report, Dr. Hofmann reviewed the medical record, statement of accepted facts, and appellant's complaints. Physical findings included tenderness over the cervical and lumbosacral regions, right shoulder and left knee with decreased cervical and shoulder range of motion. Sitting and supine straight-leg raising caused low back discomfort. Dr. Hofmann opined that none of the accepted conditions had resolved, noting continued symptoms of low back, right shoulder, left knee and cervical spine pain which, he advised, were documented in the medical records and consistent with clinical findings. He advised that appellant could perform the duties of general expediter which required driving four hours with intermittent stops, stuffing

[1] The February 2, 1991 injury was adjudicated by the Office under file number 090364001 which became the master file. On May 21, 2007 Office file numbers 090324453, 090334958, 090352635 and 092035650 were doubled into 090364001.

[2] In decisions dated July 21, 1996, September 3, 1997 and November 27, 2002, appellant's claims for an additional schedule award were denied. In a March 19, 1998 decision, his claim for wage-loss compensation for the period August 24 through 30, 1997 was denied, and in a nonmerit January 17, 2003 decision, appellant's request for reconsideration of the November 27, 2002 decision was denied. In a May 25, 2004 decision, the Office denied appellant's claim for compensation for the period January 3 through May 14, 2004, and in a June 18, 2004 nonmerit decision, denied his request for reconsideration. The Office noted that his current disability was due to the July 9, 2003 motor vehicle accident, adjudicated under file number 092035650, which was doubled into the instant case on May 21, 2007. *Id.*

[3] This claim was adjudicated by the Office under file number 090463277 and was accepted for left knee contusion.

envelopes, labeling mail and other related use of hands for another four hours per day. Dr. Hofmann indicated that maximum medical improvement had been reached and provided permanent restrictions that appellant could sit up to eight hours a day if allowed to get up and move about at his discretion, could stand and walk at one-half hour intervals for a combined six hours a day, that he could not reach or reach, push or pull above the shoulder on the right, squat, kneel or climb, could occasionally bend and stoop, and had a 10-pound weight restriction on pushing and pulling.

Beginning approximately February 1, 2005, appellant began work as a modified general expediter with duties and responsibilities of recording information regarding the arrival and departure of trucks either manually or into a computer system with no word per minute requirement. Additional duties were casing mail where he could sit or stand as needed and use simple grasping to sort letter mail into modified letter cases. The physical restrictions were standing or walking combined to six hours a day, no reaching or reaching above shoulder with occasional bending or stooping, no pushing, pulling or lifting greater than 10 pounds and no squatting kneeling or climbing. In March 2005, appellant filed for retirement. He retired effective May 23, 2005.

The Office determined that a conflict in medical evidence arose between the opinions of Drs. Florez and Hofmann regarding whether appellant could work four or eight hours of modified duty per day. On October 28, 2005 appellant was referred to Dr. John W. Wolf, Jr., a Board-certified orthopedic surgeon, for an impartial evaluation. In a November 18, 2005 report, Dr. Wolf noted the history of appellant's employment injuries and his review of the record. He advised that appellant exaggerated his symptoms a bit and gave less than 100 percent effort. Physical findings included tenderness to palpation over the posterior cervical spine and right upper trapezius with complaints of pain on all motions of the cervical spine. Right shoulder examination demonstrated decreased external and internal rotation with mild discomfort on impingement testing and no significant weakness. There was tenderness to palpation over the entire lumbar spine and sciatic notch bilaterally. Dr. Wolf opined that straight-leg raising, done while distracted, was reasonably well performed, but if appellant were aware of the testing, he complained of low back and left knee pain. Examination of the left knee demonstrated mild tenderness to palpation with full range of motion and unequal calf circumference, the right being 15-5/8 inches and the left 14-1/8 inches. Dr. Wolf advised that appellant continued to have residuals of his accepted low back, right shoulder and left knee conditions and that it would be difficult for him to perform any physically demanding activity for more than four hours a day but that he could perform sedentary work for four hours a day if he could get up and move around as needed, and that he could use his hands in front of him but would have difficulty reaching overhead with his right hand due to right shoulder pain. He completed a work capacity evaluation on January 23, 2006, advising that appellant was hindered by pain in his neck, lumbar spine and right shoulder and was unable to sit for more than four hours. Dr. Wolf provided permanent restrictions that appellant could sit for four hours daily, walk for two to three, stand for two, reach for one, reach above the shoulder, twist, bend and stoop for less than one hour, push, pull, lift, squat and kneel for two hours and climb for one hour daily. In a supplementary report dated April 3, 2006, he reviewed the general expediter position which required that appellant drive around for about four hours a day pulling mailboxes open and dropping test mail in and opined that he could not perform this position without aggravating his shoulder symptomatology.

In reports dated September 21, 2004 through February 21, 2006, Dr. Rajbir S. Minhas, a Board-certified internist, described appellant's symptoms and treatment regimen. He diagnosed cervical, arm and shoulder strain, low back pain, degenerative disc disease, and chronic pain syndrome and advised that there were no changes in appellant's work restrictions. On May 24, 2005 Dr. Wolf noted that appellant had retired.

By decision dated April 11, 2006, the Office determined that appellant's actual wages in the modified expediter position fairly and reasonably represented his wage-earning capacity, with a 50 percent loss of wage-earning capacity.

On April 21, 2006 appellant requested reconsideration of the April 11, 2006 decision, stating that he was not trained on a computer and that his modified duty consisted of sitting in a corner for four hours daily. He submitted a May 4, 2006 report in which Dr. Florez noted continued conservative treatment of appellant's right shoulder. In reports dated May 9 and June 13, 2006, Dr. Minhas reiterated his prior findings and conclusions.

On June 1, 2006 the employing establishment advised that, other than not being trained on the computer, appellant had performed the duties of a modified general expediter before he retired in May 2005. In a June 13, 2006 decision, the Office denied modification of the prior decision.

On July 13, 2006 appellant requested reconsideration, again stating that he did nothing but sit in a chair for four hours a day. He submitted reports dated July 13 and August 22, 2006, in which Dr. Minhas repeated his findings.[4] In an August 3, 2006 report, Dr. Florez advised that appellant could not continue to work at the employing establishment because he could not open and close trailer doors due to his shoulder disability and had "extreme difficulty" working in a cold environment.

By decision dated October 4, 2006, the Office denied modification of the prior decisions.[5]

On January 3, 2007 appellant requested reconsideration of the wage-earning capacity decision, contending that his modified job duties prior to his retirement required him to open and close truck trailer doors and load and unload trucks, but he again stated that he did nothing but sit in a corner. He submitted additional reports from Dr. Minhas dated April 4, 2006 to January 16, 2007. Dr. Minhas again reported appellant's treatment regimen. In a December 6, 2006 report, Dr. Florez noted that appellant was seen for further work-up, and on December 13, 2006, he completed an impairment rating, finding only moderate to severe pain of the lower extremity and constant moderate to severe right upper extremity pain with decreased shoulder range of motion.

In a nonmerit decision dated February 22, 2007, the Office denied appellant's reconsideration request.

[4] Appellant also submitted reports from Steven D. Kinzer, a physician's assistant who works with Dr. Florez.

[5] Appellant did not file an appeal with the Board from an October 16, 2006 decision denying his claim for a schedule award.

## ***LEGAL PRECEDENT -- ISSUE 1***

Section 8115(a) of the Federal Employees' Compensation Act[6] provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity.[7] Generally, wages actually earned are the best measure of a wage-earning capacity, and in the absence of showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such a measure.[8] The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,[9] has been codified at 20 C.F.R. § 10.403. The Office calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury job.[10] Office procedures provide that the Office can make a retroactive wage-earning capacity determination if the claimant worked in the position for at least 60 days, the position fairly and reasonably represented his or her wage-earning capacity and the work stoppage did not occur because of any change in his injury-related condition affecting the ability to work.[11]

Section 8123(a) of the Act provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[12] When the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[13]

## ***ANALYSIS -- ISSUE 1***

The Board finds that the Office properly determined that appellant's actual earnings as a modified general expediter fairly and reasonably represented his wage-earning capacity. The record supports that following appellant's second employment injury in July 2003, his employment-related condition worsened such that he began working four hours a day and receiving wage-loss compensation for four hours a day. In February 2005 he began working a more sedentary position, with duties and responsibilities of recording information regarding the

[6] 5 U.S.C. §§ 8101-8193.

[7] 5 U.S.C. § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

[8] *Lottie M. Williams*, 56 ECAB 302 (2005).

[9] *Albert C. Shadrick*, 5 ECAB 376 (1953).

[10] 20 C.F.R. § 10.403(c).

[11] Federal (FECA) Procedure Manual, *id.* at Chapter 2.814.7(a) (July 1997); *Selden H. Swartz*, 55 ECAB 272 (2004).

[12] 5 U.S.C. § 8123(a); *see Geraldine Foster*, 54 ECAB 435 (2003).

[13] *Manuel Gill*, 52 ECAB 282 (2001).

arrival and departure of trucks either manually or into a computer system with no word per minute requirement. Additional duties were casing mail where he could sit or stand as needed and use simple grasping to sort letter mail into modified letter cases. The physical restrictions were standing or walking combined to six hours a day, no reaching or reaching above shoulder with occasional bending or stooping, no pushing, pulling or lifting greater than 10 pounds and no squatting kneeling or climbing. Appellant continued in this position for four hours daily until he voluntarily retired in May 2005. He thus worked more than 60 days at this modified position, and there is no evidence that the position was seasonal, temporary or make-shift work designed for his particular needs.[14]

The medical evidence contemporaneous with appellant's retirement in May 2005 establishes that he had the physical capability of performing the modified expediter position that he held from February 2005 until his retirement.[15] On October 20, 2004 Dr. Florez, an attending orthopedic surgeon, advised that he could work four hours a day, and his attending internist, Dr. Minhas advised on December 28, 2004 that there was no change in appellant's restrictions. In a January 4, 2005 report, Dr. Hofmann, who performed a second opinion evaluation for the Office, advised that appellant could continue his general expediter position where he drove four hours a day and could work up to eight hours a day with a 10-pound lifting restriction and restrictions on reaching, pushing and pulling above the shoulder, squatting, kneeling and climbing. Dr. Minhas provided a number of medical reports in which he noted appellant's complaints and treatment regimen. He, however, did not opine that appellant should discontinue working but merely noted in a May 24, 2005 report that appellant had retired.

The Office found a conflict in the medical evidence arose between Dr. Florez and Dr. Hoffman regarding whether appellant could work four or eight hours a day. It referred appellant to Dr. Wolf for an impartial evaluation. He provided a comprehensive report in which he reviewed all of appellant's accepted injuries and concluded that he continued to have residuals of his accepted low back, right shoulder and left knee conditions and that he could perform sedentary work for four hours a day if he could get up and move around as needed, and reach, twist, bend, stoop, push, pull, lift, squat, kneel and climb for one to two hours daily. While Dr. Wolf also advised that appellant could not perform a general expediter position that required appellant to drive for four hours daily pulling mail boxes open and dropping test mail in, this was not the modified position that appellant was performing from February to May 2005 that served as the basis for the Office's April 11, 2006 wage-earning capacity decision.

The Board finds the opinion of Dr. Wolf is sufficiently rationalized to establish that appellant was capable of performing what was an essentially sedentary job for four hours a day and is entitled to the special weight accorded to an impartial specialist.[16] At the time appellant retired in May 2005, the medical evidence of record does not show that he was incapable of

[14] *J.C.*, 58 ECAB ____ (Docket No. 07-1165, issued September 21, 2007).

[15] The Board notes that the reports from Mr. Kinzer, a physician's assistant who works with Dr. Florez do not constitute competent medical evidence. A physician's assistant is not a physician as defined under the Act. Therefore, any report from such individual does not constitute competent medical evidence which, in general, can only be given by a qualified physician. *George H. Clark*, 56 ECAB 162 (2004).

[16] *Philip H. Conte*, 56 ECAB 213 (2004).

performing the modified general expediter position for four hours a day. There is no evidence that appellant's wages in the clerk position did not fairly and reasonably represent his wage-earning capacity and they must be accepted as the best measure of his wage-earning capacity.[17]

Appellant's actual earnings in the position of modified expediter for four hours a day fairly and reasonably represent his wage-earning capacity. The Board must determine whether the Office properly calculated his wage-earning capacity based on his actual earnings. The full-time weekly earnings as a modified general expediter of $860.13 exceeded the full-time weekly wages of appellant's position on the date of injury, July 9, 2003, or $843.13. The Board finds that the Office properly determined that appellant had a 50 percent loss of wage-earning capacity based on his actual earnings of $430.07.

## ***LEGAL PRECEDENT -- ISSUE 2***

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.[18] The Office's procedure manual provides that, "[i]f a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In this instance the [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity."[19] 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.[20] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[21]

In addition, Chapter 2.814.11 of the Office's procedure manual contains provisions regarding the modification of a formal loss of wage-earning capacity. 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 changed; or (3) the claimant has been vocationally rehabilitated. Office 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.[22]

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[17] *See Loni J. Cleveland, supra* note 7.

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

[19] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

[20] *Stanley B. Plotkin*, 51 ECAB 700 (2000).

[21] *Id.*

[22] *See* Federal (FECA) Procedure Manual, *supra* note 19 at Chapter 2.814.11 (July 1997); *see Sharon C. Clement*, 55 ECAB 552 (2004).

## ***ANALYSIS -- ISSUE 2***

In this case, appellant requested reconsideration on April 21 and July 13, 2006, and in merit decisions dated June 13 and October 4, 2006, the Office denied modification of the April 11, 2006 wage-earning capacity decision. He contended that he was not trained on a computer and that his modified duty consisted of sitting in a corner for four hours daily. While he submitted additional reports from Dr. Minhas, the physician merely described appellant's complaints, physical findings and treatment regimen. Dr. Minhas did not provide any opinion regarding appellant's ability to work other than noting that he had retired. In an August 3, 2006 report, 15 months after appellant's retirement, Dr. Florez advised that appellant could not continue to work because he could not open and close trailer doors and had extreme difficulty working in a cold environment. The employing establishment acknowledged that appellant was not trained on the computer; however, the modified job description noted that he could perform the duties manually. The employing establishment noted that he had filed for retirement in March 2005 and performed the other, essentially sedentary duties of the modified expediter position until he retired in May 2005.

It was not until August 3, 2006, 17 months after appellant retired, that Dr. Florez advised that appellant could not continue working because he could not open and close trailer doors due to his shoulder disability and had extreme difficulty working in a cold environment. The record, however, establishes that appellant was not opening and closing trailer doors, and Dr. Florez did not advise that appellant should not work in a cold environment but merely advised that he had difficulty. Dr. Florez' August 3, 2006 report is not fully rationalized nor based on a complete and accurate factual and medical background and therefore of diminished probative value.[23]

The Board finds the medical evidence insufficient to establish 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.[24] As noted above, the burden of proof is on the party attempting to show a modification of the wage-earning capacity. In this case, appellant has not submitted sufficient medical evidence to establish a material change in the nature and extent of his employment-related conditions.[25]

## ***LEGAL PRECEDENT -- ISSUE 3***

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.[26] Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in

[23] *Cecelia M. Corley*, 56 ECAB 662 (2005).

[24] *Stanley B. Plotkin*, *supra* note 20.

[25] *Id.*

[26] 5 U.S.C. § 8128(a).

section 10.606(b)(2).[27] This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.[28] Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[29]

## ***ANALYSIS -- ISSUE 3***

In his January 3, 2007 request for reconsideration, appellant merely reiterated that his modified job prior to his requirement consisted of sitting in a corner. He therefore did not allege or demonstrate that the Office erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).[30]

With respect to the third above-noted requirement under section 10.606(b)(2), while appellant submitted additional medical reports from Dr. Minhas, the physician merely reiterated his findings and conclusions as stated in medical reports that had previously been reviewed by the Office. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[31] This evidence is insufficient to warrant merit review. Appellant also submitted a December 6, 2006 report in which Dr. Florez noted that appellant was seen for further work-up and a December 13, 2006 impairment rating. The merit issue here is whether appellant established that the April 11, 2006 wage-earning capacity decision should be modified. As neither of Dr. Florez' reports address this issue, his December 2006 reports are irrelevant as evidence that does not address the particular issue involved does not constitute a basis for reopening a case.[32] Appellant therefore did not submit sufficient evidence to warrant merit review.

## ***CONCLUSION***

The Board finds that the Office met its burden of proof to establish that appellant's actual wages in a modified expediter position fairly and reasonably represented his wage-earning capacity and that he did not meet his burden of proof to establish that the wage-earning capacity

[27] 20 C.F.R. § 10.608(a).

[28] *Id.* at § 10.608(b)(1) and (2).

[29] *Id.* at § 10.608(b).

[30] *Id.* at § 10.606(b)(2).

[31] *Freddie Mosley*, 54 ECAB 255 (2002).

[32] *See Jaja K. Asaramo*, 55 ECAB 200 (2004).

determination should be modified. The Board also finds that the Office properly denied appellant's request for a merit review pursuant to section 8128(a) of the Act.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated February 22, 2007 and October 4 and June 13, 2006 be affirmed.

Issued: June 18, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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