

Office later accepted post-traumatic ejaculatory dysfunction as a consequence of the lumbar surgeries.¹

In February 1997, appellant accepted a permanent rehabilitation position as a modified distribution clerk at retained pay. The assigned tasks required lifting up to 10 pounds, intermittent sitting and standing, simple grasping and fine manipulation.

By decision dated March 17, 1999, the Office found that appellant's actual earnings in the modified distribution clerk position fairly and reasonably represented his wage-earning capacity. It reduced his compensation to zero as his actual earnings equaled those of the grade and step of his date-of-injury position.² Appellant continued to work as a modified clerk through 2007. He remained under medical treatment.

On December 10, 2007 appellant filed a claim for compensation (Form CA-7) for 5.76 hours on November 23, 2007. He submitted November 23 and December 11, 2007 timekeeping forms showing that managers sent him home on November 23, 2007 as there was no work available within his medical restrictions.

In a January 2, 2008 letter, the Office advised appellant that his claim for wage loss on November 23, 2007 constituted a request to modify the March 17, 1999 wage-earning capacity determination. It explained that in order to receive wage-loss compensation, he must first establish that the wage-earning capacity determination required modification. The Office afforded appellant 30 days to submit evidence showing the original rating was in error, his medical condition had changed or he had been vocationally rehabilitated.

In a January 9, 2008 letter, the employing establishment stated that appellant was sent home by management on November 23, 2007 as there was no work available within his restrictions. The employing establishment explained that, due to automation and reduced mail volume, there was less work available for employees with physical limitations.³

By decision dated March 17, 2008, the Office denied modification of the March 17, 1999 wage-earning capacity determination. It found that appellant had not established that the original wage-earning capacity determination was in error, that his medical condition had changed or that he had been vocationally rehabilitated. The Office therefore found that appellant was not entitled to compensation "for intermittent disability on November 23 2007."

¹ The Office issued schedule awards on September 19, 2000, February 4, 2003 and April 7, 2006 for a total 21 percent impairment of the right lower extremity and 68 percent impairment of the penis.

² On July 18, 2001 appellant, through his attorney, filed an appeal with the Board regarding a June 19, 2001 decision denying modification of a September 19, 2000 schedule award decision for impairment of the penis. This appeal was docketed as File No. 01-2021. By order issued June 26, 2002, the Board dismissed the appeal at the request of appellant's attorney.

³ In a January 23, 2008 telephone memorandum, appellant noted that some of the tasks he performed since February 1997 varied slightly from the original job description. He stated that he was able to perform these duties.

In a March 20, 2008 letter, appellant requested an oral hearing, held July 14, 2008. At the hearing, appellant's attorney asserted that the withdrawal of appellant's light-duty job on November 23, 2007 constituted a recurrence of disability independent of the wage-earning capacity determination.⁴ The attorney emphasized that appellant was not asserting a change either in his medical condition or in his light-duty job requirements.

By decision dated and finalized September 29, 2008, an Office hearing representative affirmed the March 17, 2008 decision. The hearing representative found that appellant did not submit evidence warranting modification of the March 17, 1999 wage-earning capacity determination. Appellant did not assert or establish that the original determination was in error, that his condition had changed or that he had been vocationally rehabilitated. The hearing representative found that the standing wage-earning capacity decision quashed appellant's claim for wage-loss compensation on November 23, 2007.

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. Compensation payments are based on the wage-earning capacity determination, which remains undisturbed until properly modified.⁵ Modification of a standing wage-earning capacity 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 erroneous.⁶ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁷

The Office's procedure manual provides that, if 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.⁸ The Office may accept a limited period of employment-related disability without modifying the wage-earning capacity determination.⁹

⁴ Appellant also asserted that management sent him home on January 17, 2008 as no light-duty work was available within his restrictions. However, he did not submit evidence regarding a January 17, 2008 work absence. The Board notes that there is no formal claim of record for wage loss on January 17, 2008. As the Office did not issue a decision directly addressing wage-loss compensation for January 17, 2008, this issue is not before the Board on the present appeal.

⁵ See *Sharon C. Clement*, 55 ECAB 552 (2004).

⁶ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

⁷ *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

⁹ See *Katherine T. Kreger*, 55 ECAB 633 (2004).

ANALYSIS

Beginning in February 1997, appellant worked as a permanent modified distribution clerk within the restrictions necessitated by his accepted lumbar injuries. On March 17, 1999 the Office issued a wage-earning capacity determination based on appellant's actual earnings as a modified clerk. He remained in the job through 2007. On November 23, 2007 the employing establishment sent appellant home as there was no light-duty work available that day within his medical restrictions. Appellant filed a claim for wage loss for November 23, 2007. By decisions dated March 17 and September 29, 2008, the Office found that he was not entitled to wage-loss compensation because he had not established that the March 17, 1999 wage-earning capacity required modification.

The Board finds that appellant did not establish that the March 17, 1999 wage-earning capacity determination should be modified. As his attorney stated at the July 14, 2008 hearing, appellant did not allege or establish a change in the accepted medical condition, his job requirements or that he had been vocationally retrained. Therefore, appellant did not meet his burden of proof to modify the wage-earning capacity determination.¹⁰ There remains, however, the issue of whether appellant is entitled to wage-loss compensation on November 23, 2007 due to a recurrence of disability.¹¹

The Office may accept a limited period of employment-related disability without modifying the wage-earning capacity determination.¹²

Appellant claimed a limited period of disability due to the temporary withdrawal of his light-duty position on November 23, 2007. The Act's regulations provide that withdrawal of a light-duty assignment made specifically to accommodate an employee's work-related physical limitations constitutes a recurrence of disability.¹³ The Office, however, did not develop the recurrence of disability issue. Therefore, the case will be remanded to the Office to determine if appellant has established a recurrence of disability on November 23, 2007 due to the temporary withdrawal of his light-duty position. Following this and other development deemed necessary, the Office will issue an appropriate decision in the case.

On appeal, appellant contends that the Office's March 17 and September 29, 2008 decisions were contrary to fact and law. As set forth above, the Office did not properly address

¹⁰ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

¹¹ 20 C.F.R. § 10.5(x); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3.b(a)(1) (May 1997). See also *Philip L. Barnes*, 55 ECAB 426 (2004).

¹² See *Katherine T. Kreger*, *supra* note 9.

¹³ Title 20 C.F.R. § 10.5(x) provides: that a recurrence "also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force), or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations." See also *K.C.*, 60 ECAB ____ (Docket No. 08-2222, issued July 23, 2009).

appellant's entitlement to wage-loss compensation for November 23, 2007. The case will be remanded to the Office for further development.

CONCLUSION

The Board finds that the case is not in posture for a decision.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 29 and March 17, 2008 are set aside and the case remanded for further development consistent with this decision.

Issued: September 30, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board