United States Department of Labor
Employees' Compensation Appeals Board

C.B., Appellant	)	
and	)	**Docket No. 09-2185**
	)	**Issued: August 5, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Salt Lake City, UT, 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 September 1, 2009 appellant filed a timely appeal from an August 17, 2009 merit decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether the Office properly rescinded its acceptance of a recurrence of disability; and (2) whether the Office properly rescinded a wage-earning capacity determination.

On appeal, appellant asserts that he would have kept his light-duty job if he knew that he would not receive wage-loss compensation when he voluntarily reduced his work hours. He contends that the Office penalized him under 5 U.S.C. § 8106(c) for refusing suitable work.

FACTUAL HISTORY

This case has previously been before the Board. By order issued September 24, 2008,[1] the Board set aside a May 9, 2007 decision of the Office affirming the termination of wage-loss compensation predicated on a recurrence of disability, later found not to have occurred. The Board also set aside June 18 and September 5, 2007 nonmerit decisions denying reconsideration. The Board remanded the case to the Office as to whether it properly rescinded acceptance of the recurrence of disability. The facts of the case as set forth in the Board's order are incorporated by reference. The relevant procedural history is set forth below.

The Office accepted that appellant, then a 55-year-old part-time regular city carrier, sustained an acromioclavicular arthrosis of the left shoulder in the performance of duty.[2] Prior to the injury, appellant worked 6 hours a day, five days a week for a total of 30 hours. Effective July 2, 2002, he accepted a light-duty job offer as a lobby greeter, working 6 hours a day, five days a week, for a total 30 hours. The job was within prescribed medical restrictions necessitated by the accepted condition.

In August 2002, the employing establishment abolished all delivery routes. All carriers bid on a new system of 4-hour days, 20-hour-a-week routes. Appellant bid on and won a 20-hour city carrier route effective August 24, 2002. He relinquished his light-duty greeter job on August 23, 2002 to begin work as a letter carrier.

On October 17, 2002 appellant claimed a recurrence of disability commencing August 23, 2002 as the employing establishment abolished his 30-hour position. By decision dated February 6, 2003, the Office accepted a recurrence of disability commencing August 23, 2002.

In March 6 and October 17, 2003 letters, the employing establishment contended that it did not eliminate appellant's light-duty position in August 2002. Rather, he voluntarily bid on a new route, reducing his tour hours from 30 to 20 hours a week.

By decision dated May 20, 2004, the Office determined that appellant had a loss of wage-earning capacity based on his actual earnings as a city collection carrier, effective August 23, 2002. It paid appellant wage-loss compensation for 10 hours a week, retroactive to August 26, 2002 and continuing.

Appellant requested reconsideration on September 7, 2004, asserting a pay rate error in the wage-earning capacity calculation. By decision dated April 24, 2005, the Office denied modification, finding the May 20, 2004 decision was issued in error as appellant voluntarily reduced his work hours.

[1] Docket No. 08-577 (issued September 24, 2008).

[2] The Office initially denied the claim by October 11, 2002 decision. Following further development, it accepted the claim in December 2002.

By notice dated April 24, 2005 and finalized June 15, 2005, the Office terminated appellant's monetary compensation as he had no compensable wage loss. During a November 21, 2005 telephonic hearing held at appellant's request, he asserted the employing establishment abolished his light-duty position. By decision dated February 7, 2006, an Office hearing representative affirmed the June 15, 2005 decision. Appellant again requested reconsideration on February 5, 2007, asserting a pay rate error in the wage-earning capacity determination. By decision dated May 9, 2007, the Office denied modification as appellant was not entitled to wage-loss compensation.[3] Appellant again requested reconsideration on June 20 2007, alleging pay rate errors. In a September 5, 2007 decision, the Office denied reconsideration as appellant's contentions were irrelevant to the claim.

As noted, the Board set aside the Office's May 9, June 18 and September 5, 2007 decisions. It remanded the case to clarify whether the Office rescinded acceptance of the August 23, 2002 recurrence of disability.

By notice dated December 11, 2008, the Office advised appellant that it proposed to rescind its acceptance of the August 23, 2002 recurrence of disability and the May 20, 2004 loss of wage-earning capacity determination. Appellant was afforded 30 days to submit additional evidence or argument. He telephoned the Office on December 17, 2008, asserting pay rate errors in the wage-earning capacity determination.

In a January 15, 2009 decision, the Office rescinded the February 6, 2003 acceptance of the recurrence of disability and the May 20, 2004 wage-earning capacity determination. It found that appellant voluntary changed jobs and reduced his work hours. This did not constitute a recurrence of disability related to his accepted shoulder condition. The Office further found that the wage-earning capacity decision was erroneous as it was based on a recurrence which did not occur.[4]

In a February 13, 2009 letter, appellant requested a telephonic oral hearing, held June 2, 2009. During the hearing, he contended that the Office penalized him for refusing suitable work under 5 U.S.C. § 8106. He acknowledged that he bid voluntarily on the 20-hour route. Following the hearing, appellant retired from the employing establishment, effective September 3, 2009.

By decision dated and finalized August 17, 2009, an Office hearing representative affirmed the January 15, 2009 decision rescinding acceptance of an August 23, 2002 recurrence of disability and the May 20, 2004 wage-earning capacity determination. The hearing representative found no evidence supporting a change in the nature and extent of the accepted condition on or about August 23, 2002. Instead, appellant voluntarily changed jobs and reduced his work hours. The hearing representative further found that the May 20, 2004 wage-earning capacity determination was issued in error as it was predicated on a recurrence of disability which had not occurred.

[3] On June 18, 2007 the Office denied appellant's May 15, 2007 request for reconsideration as it did not identify the grounds for the request.

[4] On February 10, 2009 the employing establishment provided information about appellant's pay rate.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. This holds true where the Office later decides that it has erroneously accepted a claim for compensation.[5] The Board has upheld the Office's authority to reopen a claim at any time on its own motion under 5 U.S.C. § 8128 and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.[6] The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.[7] In establishing that its prior acceptance was erroneous, the Office is required to provide a clear explanation of its rationale for rescission.[8]

Acceptance of a claim for recurrence of disability is predicated on a claimant establishing an inability to work after he returned to work, caused by a spontaneous change in a medical condition, which resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[9] This term also means an inability to work when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his 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 her established physical limitations.[10] When a claimant stops work for reasons unrelated to the accepted employment injury, there is no disability within the meaning of the Federal Employees' Compensation Act.[11]

ANALYSIS -- ISSUE 1

The Office accepted the August 23, 2002 recurrence of disability based on appellant's voluntary reduction of his work hours. Appellant chose a 20-hour-a-week mail route, rather than continue in the 30-hour-a-week light-duty position provided to accommodate an accepted shoulder condition. He thereby reduced his work schedule from 30 hours to 20 hours a week.

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[5] *See* 20 C.F.R. § 10.610.

[6] *Eli Jacobs*, 32 ECAB 1147 (1981).

[7] *Doris J. Wright*, 49 ECAB 230 (1997); *Shelby J. Rycroft*, 44 ECAB 795 (1993).

[8] *Delphia Y. Jackson*, 55 ECAB 373 (2004).

[9] 20. C.F.R. § 10.5(x).

[10] *Id.* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(b) (May 1997). *Hubert Jones, Jr.*, 57 ECAB 467 (2006) (the Board held that elimination of the claimant's light-duty position due to a reduction-in-force did not constitute a recurrence of disability). *See also Steven A. Andersen*, 53 ECAB 367 (2002) (the employee, a purchase and hire employee, was not eligible to receive wage-loss compensation following his termination due to lack of funding for his crew). *Cf. Jackie D. West*, 54 ECAB 158 (2002) (the Board held that the employing establishment created a recurrence of disability by withdrawing the claimant's light-duty position because he was medically unable to perform it due to accepted injuries).

[11] *John I. Echols*, 53 ECAB 481 (2002).

The employing establishment did not withdraw or eliminate the light-duty job. Appellant acknowledged that he chose the 20-hour-a-week route rather than continue working in the 30-hour-a-week light-duty position.

The Board finds that the reduction in appellant's work hours was not due to the accepted left shoulder condition or withdrawal of his light-duty position.[12] Rather, appellant voluntarily bid on and accepted a position for fewer hours. The present case is similar to the circumstances in *John I. Echols*.[13] The employee claimed a recurrence of disability when he voluntarily retired from federal employment rather than request a light-duty assignment to accommodate an accepted injury. The Board held that he did not sustain a recurrence of disability as he was not forced to retire but voluntarily chose to stop working. In the present case, appellant chose a job requiring 10 fewer hours a week than his light-duty assignment. This does not constitute a recurrence of disability. The reduction of hours is not due to the residuals of his accepted shoulder condition. Therefore, appellant was not entitled to wage-loss compensation. The Office's August 17, 2009 decision affirming the rescission of acceptance of the August 23, 2002 recurrence of disability was correct under the law and the facts of this case.

On appeal, appellant asserts that he would have kept his light-duty job if he knew that he would not receive wage-loss compensation when he chose a new job and reduced his work hours. The record demonstrates that the job change was his voluntary choice and did not result in compensable wage loss. Appellant also contends that the Office penalized him under 5 U.S.C. § 8106(c) for refusing suitable work. However, the Office did not invoke this provision of the Act to the facts of this case.

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, which remains undisturbed until properly modified.[14]

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.[15] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[16]

[12] *Jackie D. West*, 53 ECAB 158 (2002).

[13] *Supra* note 11.

[14] *See Sharon C. Clement*, 55 ECAB 552 (2004).

[15] *Sue A. Sedgwick*, 45 ECAB 211 (1993).

[16] *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

ANALYSIS -- ISSUE 2

The Office issued the May 20, 2004 wage-earning capacity determination based on an August 23, 2002 recurrence of disability that caused a 10-hour weekly wage loss. As set forth above, it rescinded acceptance of the recurrence. Therefore, the Office relied on the third criterion for modification, finding that the wage-earning capacity determination was erroneous.

In its January 15 and August 17, 2009 decisions, the Office determined that appellant had no compensable loss of wage-earning capacity. Appellant chose to change jobs from the 30-hour-a-week light-duty position to a 20-hour-a-week full-duty letter carrier position. He voluntarily reduced his work hours and thereby reduced his wages. Appellant's wage loss was unrelated to the accepted shoulder condition. The Office has therefore met its burden of proof to rescind the May 20, 2004 wage-earning capacity determination.

CONCLUSION

The Board finds that the Office properly rescinded its acceptance of a recurrence of disability. The Board further finds that the Office properly rescinded its May 20, 2004 wage-earning capacity determination as it was issued in error.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 17, 2009 is affirmed.

Issued: August 5, 2010
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