

¹ Appellant worked only three days per week at the time of his injury.

vehicular accident on that date. He stopped work on April 26, 2003 and the Office paid compensation for disability.²

On January 12, 2004 appellant returned to work for the employing establishment in a limited-duty position as a modified temporary carrier on a part-time basis. He worked the same number of hours as he did around the time he was injured. The duties of the modified temporary carrier position involved such duties as processing address sequence cards, filing mail, carrying case labels and delivering mail. On March 15, 2004 Dr. Michael Archdeacon, an attending Board-certified orthopedic surgeon, provided permanent restrictions of no lifting more than 10 pounds above the shoulder with the left arm, no reaching above the shoulder with the left arm for more than one hour per day and no lifting any objects weighing more than 20 pounds.³

In a June 28, 2004 decision, the Office granted appellant a schedule award for a 26 percent permanent impairment of his left arm and a 28 percent permanent impairment of his right leg. The award ran for 161.76 weeks from March 29, 2004 to May 5, 2007. In September 20, 2005 and July 14, 2006 decisions, the Office affirmed its June 28, 2004 decision.

In a March 20, 2006 decision, the Office retroactively reduced appellant's compensation to zero finding that his actual earnings as a modified temporary carrier since January 2004 fairly and reasonably represented his wage-earning capacity. It noted that Office procedure provides for a retroactive determination where, as in the present case, an employee has worked for at least 60 days, the employment fairly and reasonably represents the employee's wage-earning capacity, and work stoppage did not occur due to any change in the employee's injury-related condition.

On June 1, 2007 the Office received a Form CA-7 in which appellant claimed compensation for temporary total disability beginning May 6, 2007. Appellant indicated that his schedule award expired on May 5, 2007 and that he was disabled due to arthritis in every part of his body as a direct result of the April 26, 2003 vehicular accident.

In an April 13, 2006 note, Dr. Gregory P. Weckenbrock, an attending Board-certified family practitioner, stated that appellant was involved in a motor vehicle accident on April 26, 2003. He noted, "Since this time he has suffered from ankle, knee and wrist pain. He has developed arthritis in these areas as a direct result of this accident." In an April 19, 2006 note, Dr. Weckenbrock stated, "The arthritis pain that he suffers from in his neck, ankles, knees, left hand and wrist is a direct result of the auto[mobile] accident in which he was involved." In a December 14, 2006 functional capacities form, he indicated that appellant was totally disabled due to sporadic flare ups of arthritis that were out of his control.

In a June 11, 2007 letter, the Office advised that there were only three grounds to warrant modification of a formal loss of wage-earning capacity decision: (1) the original rating was in error; (2) the claimant was self-rehabilitated; or (3) the claimant's employment-related medical

² On April 28, 2003 appellant underwent an open reduction and internal fixation of his left proximal humerus fracture. On May 1, 2003 he underwent surgery for his right pelvis and hip fractures. The procedures were authorized by the Office.

³ The physical requirements of the modified temporary carrier position conformed to the work restrictions of Dr. Archdeacon.

condition had worsened (as in a recurrence). Appellant was further advised that, if he was claiming his employment-related medical condition had worsened, he needed to submit objective physical findings and medical reasoning from his physician demonstrating a material worsening of his accepted conditions. Appellant was afforded 30 days to submit additional evidence in support of his claim.

The employing establishment confirmed that appellant had been a temporary employee and that his temporary appointment had ended. Appellant did not renew his appointment and stopped work while receiving schedule award compensation.

In a July 19, 2007 decision, the Office denied modification of its March 20, 2006 wage-earning capacity decision. It found that appellant had not submitted medical evidence establishing that his employment-related condition had changed or worsened to the point that he was incapable of performing the modified temporary carrier position. The Office found that the reports of Dr. Weckenbrock did not show that appellant's employment-related conditions had worsened. It further found that appellant had not been retrained or otherwise vocationally rehabilitated and had not shown that the original determination was in fact erroneous. The Office found that, therefore, appellant's compensation should remain at the previously established rate.

Appellant disagreed with the Office's decision and, through his attorney, requested a telephone hearing with an Office hearing representative. The hearing was conducted on November 13, 2007. Appellant testified that following his April 26, 2003 injury he returned to work in January 2004 and worked until April 8, 2006. After his physician addressed that he had arthritis, appellant did not go back to work because he felt that the employing establishment was not following his restrictions. Appellant's attorney advised appellant to file a claim alleging that the arthritis was a consequence of his accepted condition but he had not done so. Appellant's term as a modified temporary carrier came due every May and he had time left on his term at the time he stopped work. The Office hearing representative advised appellant and his attorney that the record would be held open for 30 days to allow them the opportunity to submit additional evidence.⁴

In a January 25, 2008 decision, the Office hearing representative affirmed the July 19, 2007 decision denying appellant's request for modification of the Office's 2006 wage-earning capacity determination. The Office hearing representative found it had not been shown that there was a material change in the nature and extent of the employment-related condition, that appellant had been vocationally rehabilitated or that the original determination was in fact erroneous.

LEGAL PRECEDENT

Once a loss of wage-earning capacity is determined, a modification of such a determination is not warranted unless there is a material change in the nature and extent of the employment-related condition, the employee has been retrained or otherwise vocationally

⁴ Appellant submitted an October 2, 2003 work restrictions form and a description of the modified temporary carrier position.

rehabilitated or the original determination was in fact erroneous.⁵ The burden of proof is on the party attempting to show the award should be modified.⁶

Section 8115(a) of the Federal Employees' Compensation Act provides that 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 The Board has stated, "Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure."⁸ However, wage-earning capacity may not be based on an odd-lot or make-shift position designed for an employee's particular needs or a position that is seasonal in an area where year-round employment is available.⁹ Wage-earning capacity may only be based on a temporary or part-time position if the position held by the employee at the time of injury was a temporary or part-time position.¹⁰

ANALYSIS

The Office accepted that on April 26, 2003 appellant, then a part-time, temporary relief carrier, sustained a left humerus arm fracture, right pelvis fracture, closed dislocation of the right hip, cracked ribs and deep vein thrombosis of the right leg due to a vehicular accident on that date.¹¹ In a March 20, 2006 decision, it retroactively reduced appellant's compensation to zero finding that his actual earnings as a modified temporary carrier since January 2004 fairly and reasonably represented his wage-earning capacity.

The Board finds that appellant did not submit any evidence to show that the Office's original determination with regard to his wage-earning capacity was erroneous. In the present case, the Office based appellant's loss of wage-earning capacity on a determination that his actual earnings as a modified temporary carrier fairly and reasonably represented his wage-

⁵ *George W. Coleman*, 38 ECAB 782, 788 (1987); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

⁶ *Jack E. Rohrabough*, 38 ECAB 186, 190 (1986).

⁷ 5 U.S.C. § 8115(a).

⁸ *Floyd A. Gervais*, 40 ECAB 1045, 1048 (1989); *Clyde Price*, 32 ECAB 1932, 1934 (1981). Disability is defined in the implementing federal regulations as "the incapacity, because of an employment injury, to earn the wages the employee was receiving *at the time of injury*." (Emphasis added.) 20 C.F.R. § 10.5(f). Once it is determined that the actual wages of a given position represent an employee's wage-earning capacity, the Office applies the principles enunciated in *Albert C. Shadrick*, 5 ECAB 376 (1953), in order to calculate the adjustment in the employee's compensation.

⁹ See *James D. Champlain*, 44 ECAB 438, 440-41 (1993); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7a(1), (2) (July 1997).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7a(3) (July 1997).

¹¹ On April 28, 2003 appellant underwent an open reduction and internal fixation of his left proximal humerus fracture. On May 1, 2003 he underwent surgery for his right pelvis and hip fractures. The procedures were authorized by the Office.

earning capacity. This determination was consistent with section 8115(a) of the Act which provides that 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.¹² The Office properly noted that appellant had received actual earnings as a modified temporary carrier for more than 60 days in that he had been working in the position since beginning January 12, 2004 when the Office issued its March 20, 2006 decision. The modified temporary carrier position was not an odd-lot or make-shift position designed for appellant's particular needs or that it was seasonal in nature.¹³ The position was a part-time, temporary position but wage-earning capacity may be based on a part-time, temporary position where, as in the present case, the position the employee held when injured was also part time and temporary in nature.¹⁴ The Board finds that the evidence does not show that appellant's actual earnings as a modified temporary carrier did not fairly and reasonably represent his wage-earning capacity and the Office properly adjusted his compensation based on this wage-earning capacity determination.¹⁵ For these reasons, appellant has not shown that the Office's original determination with regard to his wage-earning capacity was erroneous.

Appellant alleged that there was a material change in the nature and extent of his employment-related condition. However, he did not submit rationalized medical evidence explaining why an employment-related condition prevented him from performing the temporary carrier position.¹⁶

Appellant submitted an April 13, 2006 note in which Dr. Weckenbrock, an attending Board-certified family practitioner, stated that he was involved in a motor vehicle accident on April 26, 2003. Dr. Weckenbrock noted, "Since this time he has suffered from ankle, knee and wrist pain. He has developed arthritis in these areas as a direct result of this accident." In an April 19, 2006 note, Dr. Weckenbrock stated, "The arthritis pain that he suffers from in his neck, ankles, knees, left hand and wrist is a direct result of the auto[mobile] accident in which he was involved."¹⁷

These reports do not establish that there was a material change in the nature and extent of appellant's employment-related condition. The Office has not accepted that appellant sustained

¹² See *supra* note 7 and 8 and accompanying text.

¹³ See *James D. Champlain*, *supra* note 9; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7a(1), (2) (July 1997).

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7a(3) (July 1997).

¹⁵ See *Clarence D. Ross*, 42 ECAB 556, 561-62 (1991). The retroactive determination was appropriate because appellant had worked for at least 60 days, the employment fairly and reasonably represented appellant's wage-earning capacity, and no work stoppage occurred due to any change in appellant's injury-related condition. See *supra* note 12 and accompanying text. The Office properly applied the principles enunciated in *Albert C. Shadrick*, *supra* note 8, in order to calculate the adjustment in appellant's compensation.

¹⁶ See *Norman F. Bligh*, 41 ECAB 230, 237-38 (1989).

¹⁷ In a December 14, 2006 functional capacities form, Dr. Weckenbrock indicated that appellant was totally disabled due to sporadic flare ups of arthritis that were out of his control.

arthritis due to the April 26, 2003 accident. Dr. Weckenbrock's opinion is of limited probative value because he did not provide a well-rationalized opinion relating appellant's arthritis to the April 26, 2003 employment injury.¹⁸ He did not provide any detailed discussion of appellant's factual and medical history, provide notable findings on examination or explain how appellant's arthritis could be employment related. Such medical rationale is especially necessary in the present case as appellant's arthritis apparently affected body parts other those injured in the April 26, 2003 accident.¹⁹

For these reasons, appellant did not meet his burden of proof to modify the Office's determination of his wage-earning capacity.

CONCLUSION

The Board finds that the Office properly denied modification of its determination of appellant's wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' January 25, 2008 and July 19, 2007 decisions are affirmed.

Issued: November 7, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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

¹⁸ See *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (finding that a medical opinion not fortified by medical rationale is of little probative value).

¹⁹ Moreover, appellant has not been retrained or otherwise vocationally rehabilitated such that his work as a modified temporary carrier would not be representative of his wage-earning capacity.