



federal duties. He did not stop work. The claim was accepted for a herniated disc at L3-4.<sup>1</sup> On October 6, 2000 Dr. Arthur R. Cushman, a Board-certified neurosurgeon, performed decompressive surgery and appellant returned to work on December 11, 2000. Appellant missed intermittent periods thereafter for which he received leave buy-back. On January 26, 2005 he filed a schedule award claim and on June 10, 2005 was granted a schedule award for a 12 percent permanent partial impairment of the left leg.<sup>2</sup>

By decision dated May 31, 2006, the Office found that appellant's earnings as a modified fossil mechanic technician (in the guard shack) fairly and reasonably represented his wage-earning capacity, finding that he had no loss of wage-earning capacity as his weekly wages of \$1,116.54 exceeded his weekly wages of \$921.56, effective on the date of injury.<sup>3</sup> On March 13, 2007 appellant requested reconsideration, stating that he had been notified that he was being terminated. He submitted an undated report that he identified as a fitness-for-duty examination that was signed by a nurse practitioner and a January 19, 2005 report in which Dr. Cushman advised that appellant was totally disabled from December 8, 2004 to the present because he had been told by a physical therapist that he was unable to return to work. In an emergency room report dated March 16, 2006, Dr. Charles Ruark, Board-certified in emergency medicine, noted a history of a fall at work. He advised that appellant had extensive x-rays and diagnosed sprain and contusion of the left wrist, left ankle, left knee, left hip, the entire spine, left shoulder, left ribs, right knee, right hip, right shoulder and left elbow.<sup>4</sup> An unidentified employing establishment form medical report dated November 8, 2006 advised that appellant should work sedentary work only, no work along and no work where loss of consciousness could endanger himself or others. The report also stated that he could not drive himself to or from work. In form reports dated December 8 and 22, 2006, Dr. Joseph Trubia, a Board-certified orthopedic surgeon, advised that appellant could continue to work with the same restrictions. Appellant also submitted a May 16, 2007 treatment note signed by a nurse practitioner.

In an April 5, 2007 letter, William W. Morrison, maintenance manager at the employing establishment, advised that, due to appellant's medical history for both work and nonwork-related conditions, he was assigned limited duty in March 2005, but that safety issues had arisen.

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<sup>1</sup> Appellant has two additional accepted claims. Under Office file number 062056198, date of injury March 21, 2002, a claim was accepted for medial meniscal tear of the left knee. On September 11, 2003 he was granted a schedule award for a two percent permanent impairment of the left leg. In a January 28, 2004 decision, Docket No. 04-5, the Board remanded the case for the Office to consider appellant's preexisting lateral meniscal tear in determining his impairment rating. By decision dated March 17, 2004, appellant was granted an additional 8 percent permanent impairment, for a total 10 percent impairment of the left lower extremity. Under Office file number 062161422, date of injury March 16, 2006, the Office accepted that appellant sustained multiple contusions, strains and sprains when he fell while entering the employing establishment on his way to work. Appellant returned to work on May 29, 2006. The instant claim was adjudicated under file number 062013862.

<sup>2</sup> It does not appear from the record that any regard was given to the schedule awards granted under file number 062056198. *See id.*

<sup>3</sup> The job description included work restrictions provided by Dr. Cushman. The job was described as very sedentary with restrictions that appellant could stand one hour per day, walk one hour per day, could not climb stairs or ladders, could not work at heights, with lifting limited to 25 pounds and was required to use a cane.

<sup>4</sup> *Supra* note 1.

Mr. Morrison advised that in January 2006 appellant sustained leg sores caused by scooting in his work chair, in March 2006 he fell and sustained injuries while entering the security building, in October 2006 he fell while scooting in his chair. He stated that appellant underwent a fitness-for-duty examination in October 2006 and that, as a result of the fitness-for-duty examination, on November 8, 2006 appellant was placed on additional medical restrictions that prevented the employing establishment from providing him work assignments. Mr. Morrison opined that the restrictions were not due to employment-related conditions.

By decision dated June 6, 2007, the Office denied modification of the May 31, 2006 wage-earning capacity decision on the grounds that the medical evidence did not establish a material change in appellant's accepted conditions.

### **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 and it remains undisturbed until properly modified.<sup>5</sup> 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."<sup>6</sup> 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.<sup>7</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>8</sup>

In addition, Chapter 2.814.11 of 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. If the Office is seeking modification, it must establish that the original rating was in error, that the injury-related condition has improved or that the claimant has been vocationally rehabilitated.<sup>9</sup>

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<sup>5</sup> *Katherine T. Kreger*, 55 ECAB 633 (2004).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

<sup>7</sup> *Stanley B. Plotkin*, 51 ECAB 700 (2000).

<sup>8</sup> *Id.*

<sup>9</sup> See Federal (FECA) Procedure Manual, *supra* note 6 at Chapter 2.814.11 (June 1996).

## ANALYSIS

On March 13, 2007 appellant requested that the Office modify the May 31, 2006 wage-earning capacity decision because he was being terminated from employment. Applicable case law and Office procedures require that, once a formal wage-earning capacity decision is in place, 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 erroneous.<sup>10</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>11</sup>

Appellant did not submit evidence showing that the Office's May 31, 2006 wage-earning capacity determination was erroneous. Rather, he requested compensation for total wage loss because he had been notified that he was being terminated. Because a formal decision of appellant's loss of wage-earning capacity was in place, the Office properly adjudicated the case as a request for modification of his loss of wage-earning capacity.<sup>12</sup> The Board finds that he has not met his burden of proof. There is no evidence of record that the May 31, 2006 wage-earning capacity decision was in error or that appellant was retrained or otherwise vocationally rehabilitated and he submitted no medical evidence to show that there was a material change in the nature and extent of the injury-related condition beginning in March 2007.

The reports compiled by a nurse practitioner do not constitute competent medical evidence as registered nurses, licensed practical nurses and physicians' assistants are not "physicians" as defined under the Federal Employees' Compensation Act. As such, their opinions are of no probative value.<sup>13</sup> The reports of Dr. Cushman dated January 19, 2005 and Dr. Ruark dated March 16, 2006 are too distant in time to constitute probative medical evidence regarding appellant's condition in March 2007 and, in his reports dated December 8 and 22, 2006, Dr. Trubia merely advised that appellant could continue work with the same restrictions.

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 any medical evidence to establish a material change in the nature and extent of his employment-related conditions.<sup>14</sup>

## CONCLUSION

The Board finds that the Office properly denied modification of the May 31, 2006 wage-earning capacity determination.

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<sup>10</sup> *Stanley B. Plotkin, supra* note 7.

<sup>11</sup> *Id.*

<sup>12</sup> *Katherine T. Kreger, supra* note 5; *Sharon C. Clement, 55 ECAB 552* (2004); Federal (FECA) Procedure Manual, *supra* note 6.

<sup>13</sup> *Roy L. Humphrey, 57 ECAB \_\_\_\_* (Docket No. 05-1928, issued November 23, 2005).

<sup>14</sup> *Stanley B. Plotkin, supra* note 7.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated June 6, 2007 is affirmed.

Issued: January 16, 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