United States Department of Labor
Employees' Compensation Appeals Board

K.H., Appellant	)	
and	)	**Docket No. 08-2392**
	)	**Issued: April 21, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Warminster, PA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 2, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decisions dated November 20, 2007 and June 20, 2008.[1] Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

[1] The Board notes that, the Office's November 20, 2007 decision denied appellant's recurrence claim. On June 20, 2008 the Office hearing representative found that it improperly adjudicated appellant's claim as one for a recurrence of disability and that his claim raised the issue of whether a modification of the November 8, 2006 wage-earning decision was warranted. *See Katherine T. Kreger*, 55 ECAB 633 (2004). 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. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity,* Chapter 2.814.11(a) (October 2005).

ISSUE

The issue is whether the Office hearing representative properly denied modification of the November 8, 1996 loss of wage-earning capacity determination.

FACTUAL HISTORY

On January 26, 1994 appellant, then a 39-year-old letter carrier, filed an occupational disease claim for an alleged work-related elbow condition. The Office accepted his claim for right elbow epicondylitis and paid all appropriate compensation benefits. On May 15, 1997 appellant underwent approved right lateral epicondylar release surgery.

In a report dated June 7, 1996, appellant's treating physician, Dr. David J. Bozentka, a Board-certified orthopedic surgeon, opined that appellant was able to work full time with restrictions. He recommended that repetitive activities with the right upper extremities be limited and that appellant be restricted from lifting, pushing or pulling more than 25 pounds.

The record contains a description of a modified carrier position, which was approved by Dr. Bozentka on September 20, 1996. Duties included filing change of address cards; collecting mail from the throw back case, delivering express mail and AARP, collecting mail and publication notification. Physical requirements of the position included intermittent standing, walking and sitting for eight hours per day, intermittent lifting up to 25 pounds four hours per day and intermittent bending, squatting and kneeling four hours per day.

On October 12, 2006 appellant returned to full-time limited-duty work as a modified letter carrier at a wage of $36,551.00 per year. In a decision dated November 8, 1996, the Office determined that on September 6, 1996, the employing establishment made a formal job offer, which was approved by appellant's attending physician on September 20, 1996. It found that this position fairly and reasonably represented his wage-earning capacity and that his actual wages met or exceeded the wages of the job he held when injured. Therefore, the Office reduced appellant's compensation benefits to zero.

In a letter dated June 21, 2004, the employing establishment informed appellant that, due to changing workloads and conditions, it had become necessary to reevaluate and update his current limited-duty position. In that a new Postal Automated Redirect System (PARS) was being implemented, there would no longer be a need to file change of address cards at the local level. The establishment provided an offer of a modified carrier position. Restrictions included sitting, standing and driving up to 7.5 hours per day and lifting up to 25 pounds. On July 23, 2004 appellant objected to any modification of his limited-duty job, contending that his current position was within his medical restrictions.

On December 14, 2004 Dr. Bozentka opined that appellant was capable of working 40 hours per week, with no overtime and that he was not limited in his ability to sit, stand, walk or twist, so long as he did not work more than eight hours per day. He recommended against repetitive activities with the right upper extremity. Other restrictions included a maximum of four hours of intermittent pushing, pulling, bending, stooping, kneeling or simple grasping and

fine manipulation with the right upper extremity. Dr. Bozentka also recommended against lifting or carrying more than 25 pounds and from lifting over the shoulder.

On December 29, 2004 the employing establishment offered appellant a modified position which required him to sit, stand and drive up to eight hours and to lift up to 25 pounds. Appellant objected to the position and the Office disapproved it, as vague and failing to identify physical requirements. A January 18, 2005 offer of modified duty required appellant to sit, stand, twist, bend, stoop, kneel and drive up to four hours and lift up to 25 pounds intermittently. He accepted the position under protest.

On January 28, 2005 Dr. Bozentka stated that appellant should not be driving for seven to eight hours at a time and that his driving should be limited to four hours per day. He noted that limiting his driving time would permit recovery of his recent back injury. On May 18, 2005 Dr. Bozentka indicated that appellant had a partial biceps tendon tear on the left. Noting that all of the positions offered by the employing establishment would increase his work activities, he opined that appellant should continue in his current position.

In a January 30, 2007 report, Dr. Bozentka stated that he had been treating appellant since 1996 for right lateral epicondylitis and since 2002 for a left distal biceps injury. He reiterated earlier restrictions, which included working 40 hours with no overtime; no repetitive activity with the right upper extremity and no over-the-shoulder lifting. Dr. Bozentka also recommended that appellant be limited to performing the following tasks intermittently for a maximum of four hours per day: bending, stooping, kneeling, simple grasping and fine muscle manipulation, pushing, pulling and lifting or carrying up to 25 pounds.

On March 16, 2007 the employing establishment again offered appellant a modified-duty assignment, which provided for a 40-hour workweek, with no overtime. The position required that appellant deliver mail, walk, drive a maximum of four hours per day and that he lift no more than 25 pounds. On March 19, 2007 he rejected the modified-duty offer.

In a letter dated March 22, 2007, the Office indicated that it had reviewed the March 16, 2007 job offer. It questioned why the employing establishment was issuing appellant another job offer, noting that a determination had already been made as to the type of work the claimant is able to perform, pursuant to the November 8, 1996 wage-earning capacity decision.

On August 3, 2007 the employing establishment made another offer of modified duty. Required duties included four hours of mail delivery, with combined walking and driving, lifting up to 25 pounds, up to four hours of fine manipulation and simple grasping; answering telephones, and intermittent walking, stooping and bending. Appellant rejected the modified-duty offer on August 3, 2007. On August 7, 2007 Dr. Bozentka recommended against accepting a position that required repetitive activities of the right upper extremity.

On August 11, 2007 appellant filed a claim for a recurrence of disability, beginning August 3, 2007, when he received an offer of a modified-duty job. He alleged that the employing establishment denied his request for time to obtain approval from the Office and his physician and that, when he refused to accept the position, he was told to go home. The record

reflects that appellant filed a grievance contending that he should be allowed to retain the limited-duty job that he was assigned.

The Office referred appellant to Dr. Steven J. Valentino, a Board-certified osteopath, specializing in orthopedic surgery, for a second opinion examination and a reasoned medical opinion as to whether appellant's current condition was causally related to the work injury. In an October 23, 2007 report, he provided a history of injury and treatment, indicating that appellant began working full time on October 12, 1996 in the modified carrier position, which the Office found to be within his medical restrictions. Appellant informed him that he stopped working on August 3, 2007, when the employing establishment withdrew his light-modified position and offered him another modified job, which required him to carry mail for four hours per day. A neurologic examination showed 4/5 weakness about the left biceps with findings consistent with proximal biceps tear. Deep tendon reflexes were intact, motor and sensory examinations were normal and there were no pathologic reflexes. Examination of the upper extremities revealed full range of motion about the shoulders, elbows, wrists and hands. Circumferential measurements of the elbows were symmetric at 9½ inches. There was mild tenderness over the right lateral epicondylar region. Forearm and wrist examinations were normal, with circumferential measurements about the forearms symmetric at 10 inches. Mien's, Wright's, Roos', Phalen's, reverse Phalen's, ulnar stretch tests and Tinel's signs were negative. There was no evidence of reflex sympathetic dystrophy. Brachial plexus and thoracic outlet examinations were normal. Dr. Valentino diagnosed right lateral epicondylitis. He opined that appellant had no residuals from the accepted injury and stated that he could work full-time with permanent restrictions in order to avoid a recurrence of injury, particularly the association between repetitive activities involving the right upper extremity and recurrence of lateral epicondylitis.

In a decision dated November 20, 2007, the Office denied appellant's recurrence claim, finding that the evidence did not establish that the claimed recurrence resulted from the accepted work injury. It found that appellant had refused a suitable light-duty position, which was acceptable to his treating physician and Dr. Valentino.

On December 12, 2007 appellant requested an oral hearing, which was held on April 10, 2008. At the hearing, he reiterated his contention that he had sustained a recurrence of disability when the employing establishment withdrew his light-duty assignment and insisted that he accept a position with requirements that exceeded his restrictions.

In a letter dated January 23, 2008, the Office of Personnel Management (OPM) informed appellant that he was found to be disabled from his position as a full-time letter carrier due to lateral epicondylitis of the right elbow, degenerative disc disease of the lumbar spine, stress and anxiety.

In a letter dated March 11, 2008, Dr. Bozentka stated that appellant had severe lateral epicondylitis that had been unresponsive to treatment. After reviewing the list of appellant's job duties as mail carrier for 16 years, a copy of the modified job offer and the job description for a mail carrier from the National Association of Letter Carriers, Dr. Bozentka opined that appellant would not be capable of performing the duties of a letter carrier.

By decision dated June 20, 2008, the Office hearing representative found that the Office had erroneously adjudicated the issue of whether appellant had established a recurrence of disability. Rather, the representative determined that the issue was whether the evidence established that the November 8, 1996 loss of wage-earning capacity (LWEC) decision should be modified. The hearing representative found that the evidence did not establish that the original LWEC was erroneously issued, that appellant's medical condition had changed or that appellant had been vocationally rehabilitated. Accordingly, he affirmed and modified the November 20, 2007 decision to reflect that the evidence was insufficient to establish that the November 8, 1996 zero LWEC should be modified.[2]

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.[3] Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.[4]

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.[5] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[6]

ANALYSIS

The Board finds that appellant failed to meet his burden of proof to establish that the November 8, 1996 wage-earning capacity decision should be modified. Therefore the Office hearing representative's June 20, 2008 decision should be affirmed.

The Office accepted that appellant developed right elbow epicondylitis due to employment activities and approved right lateral epicondylar release surgery. On November 8, 1996 it determined that his actual earnings as a modified letter carrier fairly and reasonably represented his wage-earning capacity. Appellant claimed a recurrence of disability as of August 3, 2007 due to the Office's withdrawal of his limited-duty position. In a decision dated November 20, 2007, it found that the medical evidence was insufficient to show an employment-related recurrence of disability. On June 20, 2008 an Office hearing representative affirmed and

[2] The Board notes that the record on appeal contains additional evidence which was not before the Office at the time it issued its December 1, 2006 decision. The Board has no jurisdiction to review this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c). *See also Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).

[3] *See* 5 U.S.C. § 8115 (determination of wage-earning capacity).

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

[5] *Tamra McCauley*, 51 ECAB 375, 377 (2000).

[6] *Id.*

modified the November 20, 2007 decision to reflect that the evidence was insufficient to establish that the November 8, 1996 zero LWEC should be modified. The Board finds that the hearing representative properly evaluated appellant's claim as a request for modification of the 1996 LWEC decision. 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.[7] If a claimant is seeking modification, he must establish that the original rating was in error or that the injury-related condition has worsened.[8]

Appellant did not allege that the original LWEC determination was erroneous. In fact, he has repeatedly objected to any change of the modified carrier position, which he accepted and performed for 16 years and which was approved by his treating physician, contending that its duties were within his medical restrictions. There is also no evidence that the position was part-time, seasonal or temporary or that the wages received were not equal to or greater than his wages on the date of injury. The issue, therefore, is whether appellant has established a material change in the nature and extent of his injury-related condition warranting modification of the November 8, 1996 wage-earning capacity determination.

The modified carrier position, which the Office found to fairly and reasonably represent appellant's wage-earning capacity, was approved by Dr. Bozentka on September 20, 1996. Duties included filing change of address cards, collecting mail from the throw back case, delivering express mail and AARP, collecting mail and publication notification. Physical requirements of the position included intermittent standing, walking and sitting for eight hours per day, intermittent lifting up to 25 pounds four hours per day and intermittent bending, squatting and kneeling four hours per day. There is no probative medical evidence of record establishing that appellant's accepted condition had worsened by August 3, 2007 to the degree that he was unable to perform the duties of the modified position.

Appellant's treating physician consistently opined that appellant was capable of performing the duties of the modified position on which the 1996 LWEC decision was based. Following the employing establishment's notification of its intent to revise his modified position, several modified offers were made to appellant, which included additional physical requirements, including driving. On January 28, 2005 Dr. Bozentka stated that appellant should not be driving for seven to eight hours at a time and that his driving should be limited to four hours per day. Noting that all of the positions offered by the employing establishment would increase his work activities, Dr. Bozentka opined that appellant should continue in his current position. On January 30, 2007 he reiterated earlier restrictions, which included working 40 hours with no overtime, no repetitive activity with the right upper extremity and no over-the-shoulder lifting. Dr. Bozentka also recommended that appellant be limited to intermittent bending, stooping, kneeling, simple grasping and fine muscle manipulation, pushing and pulling for a maximum of four hours per day and lifting or carrying up to 25 pounds. These restrictions were

[7] *Tamra McCauley*, *supra* note 5.

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11(b) (October 2005).

not inconsistent with those provided in 1996. Moreover, the report did not provide findings on examination from which a determination could be made as to appellant's ability to perform the functions of the modified position.

On August 7, 2007 Dr. Bozentka recommended against accepting a position that required repetitive activities of the right upper extremity. The Board notes, however, that none of his reports identifies or supports appellant's inability to perform, the specific physical requirements of the modified carrier position approved by the Office in 1996. The fact that appellant may arguably be unable to perform another position offered by the employing establishment, which has different physical requirements, is not relevant to the issue at hand, namely, whether appellant has established a material change in the nature and extent of his injury-related condition such that he is unable to perform the duties of the job on which the November 8, 1996 wage-earning capacity determination was based.

On March 11, 2008 Dr. Bozentka stated that appellant had severe lateral epiondylitis that had been unresponsive to treatment. After reviewing the list of appellant's job duties as mail carrier for 16 years, a copy of the modified job offer and the job description for a mail carrier from the National Association of Letter Carriers, Dr. Bozentka opined that appellant would not be capable of performing the duties of a letter carrier. However, he did not identify the specific duties that would exceed appellant's restrictions nor did he explain how the accepted condition would prevent him from performing those duties. The Board also notes that it is unclear whether Dr. Bozentka's opinion that appellant would not be capable of performing the duties of a letter carrier, relates to the modified position approved in 1996, a subsequent modified job offer or the job description for a mail carrier from the National Association of Letter Carriers. For all of these reasons, Dr. Bozentka's report is of diminished probative value.

Dr. Valentino's second opinion report undermines appellant's claim that his condition has worsened since the Office issued its November 8, 1996 LWEC decision. He provided a history of injury and treatment, indicating that appellant began working full time on October 12, 1996 in the modified carrier position, which the Office found that to be within his medical restrictions. Dr. Valentino diagnosed right lateral epicondylitis. He opined that appellant had no residuals from the accepted injury and stated that he could work full-time with permanent restrictions in order to avoid a recurrence of injury.[9] Dr. Valentino's finding that the accepted condition had resolved does not support, but rather refutes, appellant's claim that his condition had worsened.

Appellant contends that he is entitled to compensation after August 3, 2007, when the employing establishment withdrew its limited-duty position. However, the issue is not whether the employing establishment improperly withdrew the limited-duty assignment, but rather whether the LWEC decision should be modified. Office procedures provide that when the employing establishment has withdrawn a light-duty assignment, which accommodated the claimant's work restrictions and a formal LWEC decision has been issued, the decision will remain in place, unless one of the three accepted reasons for modifying LWEC applies.[10] In this

[9] The Board has consistently held that the possibility of a future injury does not form a basis for the payment of compensation under the Federal Employees' Compensation Act. *See Manual Gill*, 52 ECAB 282 (2001).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.7(a)(5) (October 2005).

case, it was appellant's burden to establish either that the original rating was in error or that there has been a material change in the nature and extent of appellant's injury-related condition such that he is unable to perform the duties of the approved modified position. The Board finds the evidence does not demonstrate that the original LWEC decision was in error or that appellant's condition has worsened such that he can no longer perform the duties of the approved modified position. Therefore, appellant has failed to meet his burden of proof to establish that the November 8, 1996 wage-earning capacity determination should be modified.

CONCLUSION

The Board finds that the medical evidence of record is insufficient to warrant modification of the Office's November 8, 1996 wage-earning capacity determination.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 20, 2008 is affirmed.

Issued: April 21, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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