

**United States Department of Labor
Employees' Compensation Appeals Board**

J.K., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Van Nuys, CA, Employer**

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**Docket No. 11-159
Issued: August 19, 2011**

Appearances:
Ron Watson, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 26, 2010 appellant filed a timely appeal from the May 17, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) denying her request for modification of OWCP's wage-earning capacity determination. Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met her burden of proof to establish that modification of OWCP's wage-earning capacity decision was warranted.

FACTUAL HISTORY

OWCP accepted that by August 1994 appellant, then a 30-year-old city letter carrier, sustained right shoulder impingement syndrome and right acromioclavicular joint hypertrophy

¹ 5 U.S.C. §§ 8101-8193.

due to her repetitive work duties. In August 1995 Dr. Domenick J. Sisto, an attending Board-certified orthopedic surgeon, performed arthroscopic right shoulder surgery which was authorized by OWCP. Appellant received compensation for periods of total disability. On September 19, 1995 Dr. Sisto released her to modified duty on a full-time basis with restrictions from frequently lifting more than 5 pounds or intermittently lifting more than 10 pounds.

On October 1, 1995 appellant returned to work for the employing establishment as a modified letter carrier on a full-time basis. The position involved sitting at a desk and certifying central forwarding system (CFS) mail and did not require repetitive lifting of more than 10 pounds. Dr. Sisto found that appellant could perform the modified position.²

In a March 28, 1996 decision, OWCP adjusted appellant's wage-loss compensation effective October 1, 1995 to reflect that her actual earnings as a modified letter carrier fairly and reasonably represented her wage-earning capacity. It noted that there was no loss of wage-earning capacity as appellant earned the same salary as of the date-of-injury position.

On July 17, September 15 and 26 and October 22, 2009, appellant filed CA-7 forms claiming total wage-loss benefits from August 1 to October 10, 2009.³ The employing establishment advised that work within appellant's medical restrictions could not be identified.

By letter dated August 11, 2009, OWCP informed appellant that her wage-loss claim was not payable as a wage-earning capacity decision was issued in 1996. It advised her regarding the standards for modifying a wage-earning capacity determination.

In an August 24, 2009 report, Dr. Sisto detailed findings on examination and diagnostic testing and described appellant's complaints. He concluded that there had been no change in her work status.

In a September 30, 2009 decision, OWCP denied appellant's request for modification of the March 28, 1996 wage-earning capacity determination. It found that she had not shown that the original determination was erroneous or that she sustained a material change in her injury-related condition.

On October 17, 2009 appellant accepted a modified position as a city letter carrier. In an October 8, 2009 report, Dr. Sisto detailed recent magnetic resonance imaging (MRI) scan findings and provided a diagnosis of impingement syndrome of the right shoulder. He reported that appellant was quite symptomatic and noted that her prognosis was guarded. Dr. Sisto recommended that she remain on temporary partial disability.

In an October 26, 2009 report, Dr. Sisto noted that appellant was doing poorly with persistent, progressively worsening pain. He indicated that a right shoulder MRI scan from October 8, 2009 demonstrated a full-thickness tear of the mid-supraspinatus tendon and a small partial thickness tear of the anterior edge of the infraspinatus tendon. In reports dated between

² In December 1995 Dr. Sisto indicated that appellant could not repetitively lift more than 10 pounds.

³ Appellant stopped work on August 1, 2009.

January and March 2010, Dr. Sisto noted that appellant continued with complaints of right shoulder pain. He diagnosed impingement syndrome, calcification and villonodular synovitis of the right shoulder.

At a December 30, 2009 hearing before OWCP's hearing representative, appellant's representative argued that the March 28, 1996 wage-earning capacity determination was in error. Counsel contended that her injury-related conditions had worsened such that she was totally disabled and that the modified letter carrier position was a sheltered position specifically tailored to appellant's specific needs. He asserted that the duties of the modified position were not found in any of the employing establishment's standard position descriptions.

In a May 17, 2010 decision, OWCP's hearing representative affirmed the September 30, 2009 decision.

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.⁴ OWCP'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."⁵

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.⁶ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁷ The Board has held that a new injury does not constitute a material change in the nature and extent of the original injury-related condition such that a wage-earning capacity determination should be modified.⁸

In addition, Chapter 2.814.11 of the 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

⁴ *Katherine T. Kreger*, 55 ECAB 633 (2004).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

⁶ *Stanley B. Plotkin*, 51 ECAB 700 (2000).

⁷ *Id.*

⁸ *M.E.*, Docket No. 07-2306 (issued March 24, 2008).

claimant's medical condition has changed; or (3) the claimant has been vocationally rehabilitated. OWCP 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.⁹

Section 8115(a) of the FECA 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."¹⁰ 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."¹¹ 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.¹² 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.¹³ OWCP procedures direct that a wage-earning capacity determination based on actual wages be made following 60 days of employment.¹⁴

ANALYSIS

In the present case, appellant sustained work-related right shoulder impingement syndrome and right acromioclavicular joint hypertrophy due to her repetitive work duties. After a period off work, she began working on October 1, 1995 in a modified letter carrier position for the employing establishment on a full-time basis. The position involved sitting at a desk and certifying central forwarding system mail and did not require repetitive lifting of more than 10 pounds. In a March 28, 1996 decision, OWCP adjusted appellant's compensation effective October 1, 1995 based on its determination that her earnings as a modified letter carrier fairly and reasonably represented her wage-earning capacity. Appellant subsequently requested modification of this wage-earning determination.

⁹ See Federal (FECA) Procedure Manual, *supra* note 5 at Chapter 2.814.11 (June 1996).

¹⁰ 5 U.S.C. § 8115(a).

¹¹ *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 a employee's wage-earning capacity, OWCP applies the principles enunciated in *Albert C. Shadrick*, 5 ECAB 376 (1953), in order to calculate the adjustment in the employee's compensation.

¹² 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) (July 1997). In *Jeffery T. Hunter*, 52 ECAB 503 (2001), the Board found that the duties of "regular" employment are covered by a specific job classification and such duties would have been performed by another employee if the employee did not perform them. The test is not whether the tasks that the employee performs would have been done by someone else, but instead whether he occupied a regular position that would have been performed by another employee.

¹³ Federal (FECA) Procedure Manual, *supra* note 12.

¹⁴ See *id.* at Chapter 2.814.7c (December 1993).

Appellant has not established that OWCP's original wage-earning determination was erroneous. The Board finds that OWCP's determination that her actual earnings as a modified letter carrier beginning October 1, 1995 fairly and reasonably represented her wage-earning capacity was consistent with section 8115(a) of FECA which provides that the wage-earning capacity of an employee is determined by her actual earnings if her actual earnings fairly and reasonably represent her wage-earning capacity.¹⁵ OWCP properly noted that appellant had received actual earnings as a modified letter carrier for more than 60 days in that she had been working in the position since October 1, 1995 when OWCP issued its March 28, 1996 decision. There is no evidence that her earnings in this position did not fairly and reasonably represent her wage-earning capacity. The position was not a temporary or part-time position.¹⁶

Appellant claimed that the modified letter carrier position was an odd-lot or make-shift position designed for her particular needs, but the Board finds that she has not established this assertion.

Appellant did not submit sufficient evidence to show that the modified letter carrier position was not reasonably available on the open labor market or could not have been performed by another employee. There is no evidence establishing that the duties were assigned to her merely to keep her employed or that the duties and/or the position was created especially for her to fill until such time as it could be determined whether she could physically return to another position or alternative status.¹⁷ While the record does reflect that appellant later was offered and accepted a new position, the evidence does not establish that the modified letter carrier would not have continued to be available to her or another employee.

Appellant has not shown that the original wage-earning capacity determination was erroneous. On appeal, appellant's representative asserts that OWCP's loss of wage-earning capacity determination was issued in error, but the Board finds that error has not been established by the evidence of record.

Appellant alleged a material change in the nature and extent of her employment-related condition. However, the medical evidence does not contain a rationalized medical opinion explaining why her employment-related condition prevented her from performing the modified letter carrier position or otherwise establish that OWCP improperly determined her wage-earning capacity.¹⁸

Appellant submitted several reports of Dr. Sisto. On August 24, 2009 Dr. Sisto stated that appellant's work status had not changed. In October 2009 reports, he further described her right shoulder condition but noted that it had worsened; however, Dr. Sisto did not adequately

¹⁵ See *supra* note 11.

¹⁶ See *supra* notes 13 and 14. Moreover, the modified letter carrier position had been approved by Dr. Sisto, an attending Board-certified orthopedic surgeon.

¹⁷ See *supra* note 12.

¹⁸ See *Norman F. Bligh*, 41 ECAB 230, 237-38 (1989).

address how her right shoulder condition had changed during this period or was related to work factors.

The Board notes there is no indication in the record that appellant sought any medical treatment for her right shoulder between mid 2007 and mid 2009. While Dr. Sisto stated that her condition continued to worsen after his evaluation of August 2009, he did not provide a rationalized medical opinion explaining how her condition was causally related to the accepted conditions or a result of the accepted work factors.¹⁹ Such medical rationale is particularly necessary in the present case as appellant was able to work from 1995 to 2009. Dr. Sisto has not explained how the accepted conditions resulted in her work stoppage in August 2009. For these reasons, appellant did not show a material change in the nature and extent of her injury-related condition.

Moreover, appellant has not been retrained or otherwise vocationally rehabilitated such that her work as a modified letter carrier would not be representative of her wage-earning capacity. For these reasons, she did not meet her burden of proof to establish that modification of OWCP's wage-earning capacity decision was warranted.

Appellant may request modification of the wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that modification of OWCP's wage-earning capacity decision was warranted.

¹⁹ In his October 26, 2009 report, Dr. Sisto noted that a right shoulder MRI scan test from October 8, 2009 demonstrated a full-thickness tear of the mid-supraspinatus tendon and a small partial thickness tear of the anterior edge of the infraspinatus tendon. He did not indicate that this condition was due to a work-related condition.

ORDER

IT IS HEREBY ORDERED THAT the May 17, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 19, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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