

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

---

**S.L., Appellant**

**and**

**U.S. POSTAL SERVICE, RINGWOOD POST  
OFFICE, Ringwood, IL, Employer**

---

)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

**Docket No. 10-1478  
Issued: February 10, 2011**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant*

*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge

COLLEEN DUFFY KIKO, Judge

JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On May 5, 2010 appellant, through her attorney, filed a timely appeal from March 3 and 11, 2010 merit decisions of the Office of Workers' Compensation Programs denying modification of its loss of wage-earning capacity determination. Pursuant to 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 has established the Office's wage-earning capacity determination should be modified.

**FACTUAL HISTORY**

On August 14, 2007 appellant, then a 43-year-old rural mail carrier, filed an occupational disease claim alleging that she sustained herniated cervical discs and spinal cord decompression due to factors of her federal employment. She stopped work on July 12, 2007. On July 26, 2007 appellant underwent a discectomy at C5-6 and C6-7. The Office accepted the claim for cervical radiculopathy, herniated discs at C5-6 and C6-7 and cervical intervertebral disc disorder with

myelopathy and authorized the July 26, 2007 surgical procedure as necessary due to her work injury.

On November 26, 2008 appellant accepted a position with the employing establishment as a modified rural carrier. The position required sorting mail for 30 minutes, delivering small parcels for 1 hour, general office work for 4.5 hours and forwarding work for 30 minutes. By decision dated April 9, 2009, the Office reduced appellant's compensation to zero based on its finding that her actual earnings as a modified rural carrier effective November 26, 2008 fairly and reasonably represented her wage-earning capacity. It determined that her actual earnings met or exceeded her wages at the time of her injury.

On November 3, 2009 the employing establishment notified appellant that following guidelines set forth by the National Reassessment Process it did not have full-time work within her medical restrictions. On November 3, 2009 appellant accepted a part-time position as a modified rural carrier.

In a January 4, 2010 duty status report, Dr. Antonio C. Yuk, a Board-certified neurosurgeon, found that appellant could work with restrictions. In an accompanying progress report, he indicated that she had returned for clarification of her work status and had no new symptoms.

On November 20, 2009 appellant began filing claims for compensation (Forms CA-7) for intermittent wage loss beginning November 9, 2009. On the reverse side of the claim forms, the postmaster indicated that it did not have work available.

On January 6, 2010 the Office advised appellant of the evidence required to modify a loss of wage-earning capacity determination. It noted that the employing establishment withdrew her limited-duty assignment on November 4, 2009 as part of its National Reassessment Process. The Office provided appellant 30 days to submit rationalized medical evidence showing that she sustained a change in her injury-related condition.

In a statement dated January 6, 2010, appellant challenged the April 9, 2009 wage-earning capacity determination. She related that beginning November 3, 2009 a representative of the National Reassessment Process told her that her "present job offer was null and void." Appellant now worked only a few hours per day. She stated, "I strongly feel they have an obligation to their employees, especially ones that were injured performing for them." Appellant asserted that she now had a loss of wage-earning capacity due to her employment injury.

On January 7, 2010 appellant requested reconsideration of the Office's wage-earning capacity determination.

By decision dated March 3, 2010, the Office denied appellant's claim for intermittent compensation beginning November 9, 2009 after finding that she had not submitted evidence showing that the established wage-earning capacity determination should be modified. On March 11, 2010 it denied modification of its April 9, 2009 wage-earning capacity 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.<sup>1</sup> Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.<sup>2</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>3</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>4</sup>

The Board has held that the Office may accept a limited period of disability without modifying a standard wage-earning capacity determination.<sup>5</sup> This occurs when there is a demonstrated temporary worsening of a medical condition of insufficient duration and severity to warrant modification of a wage-earning capacity determination.<sup>6</sup> This narrow exception is only applicable for brief periods of medical disability. It does not apply to situations where there is a wage-earning capacity determination in place and the employee claims additional wage-loss compensation due to the withdrawal of light-duty work.<sup>7</sup>

When a formal loss of wage-earning capacity determination is in place and light duty is withdrawn, the proper standard of review is not whether appellant sustained a recurrence of disability, but whether the Office should modify its decision according to the established criteria for modifying a formal loss of wage-earning capacity determination.<sup>8</sup> Office procedures provide that when the employing establishment has withdrawn a light-duty assignment, which accommodated the claimant's work restrictions and a formal wage-earning capacity decision has been issued, the decision will remain in place, unless one of the three accepted reasons for modification applies.<sup>9</sup>

---

<sup>1</sup> See 5 U.S.C. § 8115 (determination of wage-earning capacity).

<sup>2</sup> *Sharon C. Clement*, 55 ECAB 552 (2004).

<sup>3</sup> *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Tamra McCauley*, 51 ECAB 375, 377 (2000).

<sup>4</sup> *Id.*

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

<sup>6</sup> *Id.*

<sup>7</sup> *K.R.*, 61 ECAB \_\_\_\_ (Docket No. 09-415, issued February 24, 2010).

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

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.7(a)(5) (October 2005).

## ANALYSIS

The Office accepted that appellant sustained employment-related herniated cervical discs and spinal cord decompression. Following surgery, appellant returned to work as a modified carrier with the employing establishment. By decision dated April 9, 2009, the Office determined that she had no loss of wage-earning capacity as her actual earnings as a modified rural carrier fairly and reasonably represented her wage-earning capacity.

On November 3, 2009 the employing establishment reduced appellant's work hours as part of a National Reassessment Process after determining that it did not have work available for her position. Appellant filed claims requesting compensation for wage loss beginning November 9, 2009. She further requested modification of the April 9, 2009 wage-earning capacity decision.

Appellant did not submit any evidence to show that the Office's original wage-earning capacity decision was erroneous. The Office based its loss of wage-earning capacity determination on her actual earnings that a modified rural carrier beginning November 26, 2008 fairly and reasonably represented her wage-earning capacity. Its determination was consistent with section 8115(a) of the Act which provides that the wage-earning capacity of an employee is determined by appellant's actual earnings if her actual earnings fairly and reasonably represent her wage-earning capacity.<sup>10</sup> The Office properly noted that she had received actual earnings as a modified rural carrier for more than 60 days at the time of its loss of wage-earning capacity determination and there is no evidence that the position was make-shift, temporary, seasonal or otherwise inappropriate for a wage-earning capacity determination.<sup>11</sup>

Appellant contended that she now has a loss of wage-earning capacity as she is no longer working full time as a modified rural carrier. As a formal wage-earning capacity was in effect at the time that the employing establishment took away her position, she must show a basis for modification of that decision to be entitled to wage-loss compensation on or after November 9, 2009.<sup>12</sup>

The Board finds that appellant has not met any of the requirements for modification of the Office's April 9, 2009 wage-earning capacity determination. Appellant did not allege that she was retrained or otherwise vocationally rehabilitated and, as discussed, there is no evidence that the original wage-earning capacity determination was erroneous. Furthermore, the evidence does not establish a material change in her employment-related condition. The only contemporaneous medical evidence is Dr. Yuk's January 4, 2010 report, which finds that appellant can work with restrictions. Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn and not on actual wages lost.<sup>13</sup> Absent a showing that the wage-earning capacity should be modified, appellant has no disability under the Act and is not entitled

---

<sup>10</sup> *A.P.*, 58 ECAB 198 (2006); *David L. Scott*, 55 ECAB 330 (2004).

<sup>11</sup> *D.S.*, 58 ECAB 392 (2007); *Selden H. Swartz*, 55 ECAB 272 (2004).

<sup>12</sup> *See D.S.*, *id.*

<sup>13</sup> *Marie A. Gonzales*, 55 ECAB 395 (2004); *Roy Matthew Lyon*, 27 ECAB 186 (1975).

to compensation for wage loss based on the withdrawal of her limited-duty position.<sup>14</sup> Accordingly, the Office properly denied her claim for wage-loss compensation as she had not established modification of the established wage-earning capacity determination and properly denied modification of its April 9, 2009 wage-earning capacity decision.

### **CONCLUSION**

The Board finds that appellant has not established the Office's wage-earning capacity determination should be modified.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the March 11 and 3, 2010 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 10, 2011  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

---

<sup>14</sup> *K.R.*, 61 ECAB \_\_\_\_ (Docket No. 09-415, issued February 24, 2010).