

FACTUAL HISTORY

On September 3, 2003 appellant, then a 48-year-old letter carrier, injured his left shoulder and arm when he protected himself from a rolling mail cart. The claim was initially accepted for left shoulder and left rhomboid strain. The Office subsequently accepted herniated discs at C5-6 and C6-7 and a consequential fracture of the right proximal humerus. On December 30, 2003 appellant underwent cervical decompression laminectomies and fusion. He was placed on the periodic compensation rolls. Appellant returned to modified duty on January 12, 2005. He filed a recurrence claim on November 16, 2005, stating that he sustained disability commencing October 6, 2005. By decision dated February 22, 2006, the Office denied the recurrence claim. This was affirmed by an Office hearing representative in a February 21, 2007 decision.²

By report dated February 21, 2007, Dr. Janet Limke, a Board-certified physiatrist, advised that appellant could not return to his date-of-injury position as a letter carrier but could perform work with sitting restricted to four to six hours daily; simple grasping and lifting two pounds continuously restricted to four hours daily; standing, walking with an assistive device, pulling and pushing limited to one-half hour daily; and no climbing, kneeling, bending, stooping, twisting or reaching above the shoulder. On April 17, 2007 the employing establishment offered appellant a modified position of answering telephone calls for four hours daily. The physical requirements included using hands to answer the telephone. Appellant returned to modified work answering the telephone for four hours a day on April 20, 2007.

On January 29, 2008 the Office reduced appellant's wage-loss compensation to reflect a 55 percent wage-earning capacity.

In a February 6, 2009 report, Dr. Eugenia Blank, a Board-certified neurologist, advised that appellant's neurological condition remained unchanged from a previous examination on December 17, 2008, noting that his cervical spine range of motion remained limited. She advised that he had longstanding mild weakness in the right upper and lower extremities and ambulated with a cane. In a duty status report dated April 7, 2009, Dr. Blank advised that appellant could work four hours a day and provided restrictions of one hour sitting, standing, stooping and reaching above the shoulder; one to two hours walking; less than one hour pulling and pushing; no climbing or kneeling; and five to six hours of simple grasping, with a weight restriction of less than five pounds continuous.

By decision dated June 19, 2009, the Office found that appellant had been reemployed as a modified carrier working 20 hours a week, effective April 20, 2007. It determined that his actual part-time earnings represented his wage-earning capacity and reduced his compensation accordingly.

On November 13, 2009 the employing establishment notified appellant that, following guidelines set forth by the National Reassessment Process, it did not have limited duty within his medical restrictions, and that he would be placed in leave-without-pay status effective November 28, 2009. On November 13, 2009 appellant filed a claim alleging a recurrence of disability that day when his limited duty was withdrawn. In letters dated December 21 and 30,

² The Office hearing representative also affirmed a February 15, 2006 decision denying appellant's request for additional cervical surgery.

2009, the Office informed him of the requirements for modifying the loss of wage-earning capacity determination. Appellant resubmitted Dr. Blank's February 6, 2009 report.

By decision dated March 1, 2010, the Office found that appellant submitted insufficient evidence to modify the June 19, 2009 wage-earning capacity decision and denied his claim for total disability compensation beginning November 13, 2009.³

On June 22, 2010 appellant requested reconsideration, and submitted a work capacity evaluation dated June 15, 2010 from Dr. Blank who advised that appellant had post-traumatic cervical myelopathy from a work injury. He experienced chronic pain since the accident with leg weakness as a result of unsuccessful surgery. Dr. Blank reported that appellant could not walk for long distances due to poor balance and that his chronic condition was progressive in nature. She stated that he had developed peripheral neuropathies as a result of diabetes and had restless leg syndrome. Dr. Blank restricted sitting and repetitive movements of the wrists to less than one to two hours; walking, standing, reaching, twisting, bending, stooping and pushing to less than one hour and reaching above the shoulder to two hours.

In a nonmerit decision dated August 9, 2010, the Office denied appellant's reconsideration request on the grounds that he submitted no new arguments and that the evidence submitted did not address the issue of whether he sustained a material worsening of the accepted work-related conditions.

LEGAL PRECEDENT -- ISSUE 1

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

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury, it has the burden of justifying a subsequent reduction of compensation benefits.⁵ Section 8115(a) of the Act provides that, in determining compensation for partial disability, 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.⁶ Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such a measure.⁷ The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,⁸ has been

³ Appellant continued to receive compensation based on the June 19, 2009 wage-earning capacity decision.

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

⁵ *Gregory A. Compton*, 45 ECAB 154 (1993).

⁶ 5 U.S.C. § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

⁷ *Lottie M. Williams*, 56 ECAB 320 (20050).

⁸ *Albert C. Shadrick*, 5 ECAB 376 (1953).

codified at section 10.403 of the Office's regulations. The Office calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury job.⁹

Office procedures provide that the Office can make a retroactive wage-earning capacity determination if the claimant worked in the position for at least 60 days, the position fairly and reasonably represented his or her wage-earning capacity and the work stoppage did not occur because of any change in his injury-related condition affecting the ability to work.¹⁰ The Office's procedure manual provides guidelines for determining wage-earning capacity based on actual earnings:

"a. Factors considered. To determine whether the claimant's work fairly and reasonably represents his or her WEC [wage-earning capacity], the CE [claims examiner] should consider whether the kind of appointment and tour of duty (see FECA PM 2.900.3) are at least equivalent to those of the job held on date of injury. Unless they are, the CE may not consider the work suitable.

"For instance, reemployment of a temporary or casual worker in another temporary or casual (USPS) position is proper, as long as it will last at least 90 days, and reemployment of a term or transitional (USPS) worker in another term or transitional position is likewise acceptable. However, the reemployment may not be considered suitable when:

- (1) *The job is part time* (unless the claimant was a part-time worker at the time of injury) or sporadic in nature;
- (2) *The job is seasonal* in an area where year-round employment is available....
- (3) *The job is temporary* where the claimant's previous job was permanent."¹¹

The procedures further provide: "[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."¹²

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 claimant's

⁹ 20 C.F.R. § 10.403(c).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (October 2009); *Selden H. Swartz*, 55 ECAB 272 (2004).

¹¹ *Id.* at Chapter 2.814.7(c) (October 2009).

¹² *Id.* at Chapter 2.814.9(a) (December 1995).

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.¹³

ANALYSIS -- ISSUE 1

On appeal appellant contends that the June 19, 2009 wage-earning capacity determination was erroneous. The Office accepted that appellant sustained a left shoulder and left rhomboid strain, herniated discs at C5-6 and C6-7 and a consequential fracture of the right humerus. At the time of his injury, appellant worked full time as a letter carrier. The Office paid total disability compensation beginning in November 2003.

On February 21, 2007 Dr. Limke advised that appellant could work four to six hours a day, sitting, with simple grasping and lifting two pounds continuously for four hours daily, and standing, walking with an assistive device, and pulling and pushing limited to one-half hour daily, and no climbing, kneeling, bending, stooping, twisting or reaching above the shoulder. On April 17, 2007 the employing establishment offered appellant a modified assignment answering telephone calls for four hours daily, with physical requirements of using the hands to answer the telephone. Appellant accepted the position and returned to work on April 20, 2007. By decision dated June 19, 2009, the Office reduced his compensation based on its findings that his actual part-time earnings fairly and reasonably represented his wage-earning capacity.

At the time of the June 19, 2009 decision, appellant had worked well over 60 days but earnings used to make the wage-earning capacity determination were based on a part-time position of four hours a day. The Office procedure manual provides that a formal wage-earning capacity determination is generally not appropriate where an employee works full time when injured but is reemployed in a part-time position¹⁴ In the case of *Connie L. Potratz-Watson*, the Board found that the Office must address the issue and explain why a part-time position is suitable for a wage-earning capacity determination, based on the specific circumstances of the case.¹⁵ A review of the June 19, 2009 decision shows that the Office found that appellant's actual earnings in the modified position represented his wage-earning capacity without addressing that the actual earnings were based on a part-time position when he was not a part-time employee when injured or the suitability of the part-time position.

Under the facts of this case, the modified work upon which the June 19, 2009 wage-earning capacity determination was based did not fairly and reasonably represent appellant's wage-earning capacity and was erroneous. Appellant has established that modification of the Office's June 19, 2009 wage-earning capacity determination is warranted. Accordingly, the Office decision dated March 16, 2010 will be reversed.

¹³ *Id.* at Chapter 2.814.11 (October 2009).

¹⁴ *Supra* note 11.

¹⁵ *Connie L. Potratz-Watson*, 56 ECAB 316 (2005). *Compare L.M.*, Docket No. 07-1791 (issued July 22, 2008).

In light of the Board's findings regarding the wage-earning capacity, the second issue on appeal is rendered moot.

CONCLUSION

The Board finds that the June 16, 2009 wage-earning capacity determination was erroneous, as the modified position on which it was based was part time in nature and the Office failed to explain why it was appropriate to use actual earnings in a part-time position when the evidence indicated that appellant was a full-time employee when injured. Thus, the Office improperly denied modification by its March 1, 2010 decision.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated August 9 and March 1, 2010 be reversed.

Issued: July 1, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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