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C.M., Appellant)	
)	
and)	Docket No. 11-892
)	Issued: November 8, 2011
DEPARTMENT OF DEFENSE, EDUCATION)	
ACTIVITY, Savannah, GA, Employer)	
)	

Case Submitted on the Record

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

On February 22, 2011 appellant filed a timely appeal from the September 20, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for modification of an OWCP 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.

The issue is whether appellant met his burden of proof to modify OWCP's March 26, 2007 wage-earning capacity determination.

¹ 20 C.F.R. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on February 7, 2006 appellant, then a 49-year-old maintenance mechanic, sustained displaced cervical discs at C5-6 and C6-7, brachial neuritis/radiculitis and aggravation of cervical degenerative disc at C4 when, while bending over a sink to remove a faucet, he turned a wrench and felt a sharp pain in the right middle side of his back. On March 16, 2006 appellant underwent a discectomy, spinal canal decompression and interbody fusion at C5-6 and C6-7. The surgery was authorized by OWCP.

On August 1, 2006 Dr. Kenneth Burkus, an attending Board-certified orthopedic surgeon, released appellant to return to work with permanent restrictions of reaching above the shoulders less than 2.6 hours per day and bending/stooping less than 5.2 hours per day. Appellant could not lift more than 40 pounds and had to be able to take 15-minute breaks as needed.

On August 2, 2006 appellant returned to his position of maintenance mechanic with the permanent restrictions indicated by Dr. Burkus. Shortly thereafter, the employing establishment advised OWCP that there was a reduction-in-force (RIF) action coming that might involve appellant. Appellant was later advised that he would be subject to a RIF action. The employing establishment offered appellant the position of custodial worker supervisor. However, Dr. Burkus indicated that this position was “not approved” and appellant refused the job offer. Effective December 4, 2006, appellant was removed from his position by a RIF. He filed a Form CA-7 claiming wage-loss compensation beginning December 4, 2006 due to the RIF.

In a March 26, 2007 decision, OWCP determined that appellant’s actual earnings as a maintenance mechanic effective August 2, 2006 fairly and reasonably represented his wage-earning capacity.

Appellant, through his counsel at the time, disagreed with the March 26, 2007 decision and requested a hearing with an OWCP hearing representative. At the June 29, 2007 hearing, counsel indicated that appellant returned to the maintenance mechanic position on August 2, 2006, but only two to three weeks later he received word that the position was being abolished. He asserted that this circumstance was clearly known ahead of time and posited that appellant should not have been allowed to return to the position with the knowledge that it was not going to continue. Counsel stated that appellant was offered a different position and alleged that this was evidence of the employing establishment’s knowledge that the maintenance mechanic was not going to continue. He noted, however, that the alternate position was not within appellant’s restrictions as certified by Dr. Burkus.

Counsel alleged that the employing establishment extended appellant’s job so that it would meet the 60-day requirement for proceeding with an adjustment of wage-earning capacity. He claimed that the maintenance mechanic position could not represent appellant’s wage-earning capacity because when it was offered to him it did not effectively exist. Counsel asserted that there were duties of the position that appellant could not perform but that he was kept in the position so that the 60-day requirement could be reached. He indicated that the maintenance mechanic position was supposed to be abolished in October 2006 but the position was extended until December 4, 2006 when appellant was terminated.

In a September 20, 2010 decision, OWCP determined that appellant did not meet his burden of proof to modify its March 26, 2007 wage-earning capacity determination.

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.² 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 appellant 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."³

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.⁴ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁵

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) appellant's medical condition has changed; or (3) appellant 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. If OWCP is seeking modification, it must establish that the original rating was in error, that the injury-related condition has improved or that appellant has been vocationally rehabilitated.⁶

Section 8115(a) of 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."⁷ 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

² *Katherine T. Kreger*, 55 ECAB 633 (2004).

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

⁴ *Stanley B. Plotkin*, 51 ECAB 700 (2000).

⁵ *Id.*

⁶ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.11 (June 1996).

⁷ 5 U.S.C. § 8115(a).

as such measure.”⁸ 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.⁹ OWCP procedures direct that a wage-earning capacity determination based on actual wages be made following 60 days of employment.¹⁰

OWCP procedures provide that when the employing establishment has withdrawn a light-duty assignment, which accommodated appellant’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.¹¹

ANALYSIS

In a March 26, 2007 decision, OWCP adjusted appellant’s compensation based on its determination that his actual earnings as a maintenance mechanic beginning August 2, 2006 fairly and reasonably represented his wage-earning capacity. Appellant later claimed that this wage-earning capacity determination should be modified.

The Board finds that OWCP’s March 26, 2007 determination was consistent with section 8115(a) of FECA which 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.¹² OWCP properly noted that appellant had received actual earnings as a maintenance mechanic for more than 60 days in that he worked in the position from August 2 to

⁸ *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 an 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.

⁹ 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. *Id.* In determining whether a given job is makeshift, the Board has looked to such factors as whether the job has detailed work duties and a set schedule. See *A.J.*, Docket No. 10-619 (issued June 29, 2010).

¹⁰ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7c (December 1993).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.7(a)(5) (October 2005). OWCP procedures further provide for a retroactive determination where an employee has worked for at least 60 days, the employment fairly and reasonably represents the claimant’s wage-earning capacity, and work stoppage did not occur due to any change in the claimant’s injury-related condition. See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7e (December 1993).

¹² See *supra* notes 7 and 8.

December 4, 2006. There is no evidence that appellant's earnings in the maintenance mechanic position did not fairly and reasonably represent his wage-earning capacity.¹³

Appellant, through his counsel at the time, asserted that the maintenance mechanic position on which his wage-earning capacity was based did not effectively exist as the employing establishment knew that his job would soon be eliminated in a RIF action. However, counsel did not submit evidence supporting this argument and there is nothing in the record suggesting that the employer specifically knew that appellant would be affected by the RIF. Appellant indicated that he was offered a different position after the start of the RIF process which ultimately led to his removal and alleged that this was evidence of the employing establishment's knowledge that the maintenance mechanic position was not going to continue. The record reveals that the alternate position was offered as a courtesy to appellant and its offering by the employing establishment does not evidence any special knowledge by the employing establishment.

Appellant worked as a maintenance mechanic from August 2 to December 4, 2006, *i.e.*, for well over the 60-day requirement for earning actual wages before a wage-earning capacity determination may be made. As noted above, OWCP procedures provide that when the employing establishment has withdrawn a light-duty assignment, which accommodated appellant'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.¹⁴

The evidence does not show that appellant's actual earnings as a maintenance mechanic did not fairly and reasonably represent his wage-earning capacity and OWCP properly adjusted his compensation based on this wage-earning capacity determination.¹⁵ For these reasons, appellant has not shown that OWCP's original determination with regard to his wage-earning capacity was erroneous.

Appellant alleged that there was a material change in the nature and extent of his employment-related condition. However, the evidence of record does not contain a rationalized medical opinion explaining why an employment-related condition prevented appellant from performing the maintenance mechanic position or otherwise establish that OWCP improperly determined his wage-earning capacity.¹⁶

Appellant submitted a number of medical reports indicating that he continued to complain of pain, including chronic cervical and thoracic pain, but none of the reports show any notable increase in injury-related symptoms. For example, in a September 17, 2008 report, Dr. Burkus indicated that diagnostic testing of appellant's neck showed good cervical decompression and minimal adjacent segment degeneration. There was no significant canal or

¹³ Appellant alleged that the duties of the maintenance mechanic were outside the permanent work restrictions imposed by Dr. Burkus, an attending Board-certified orthopedic surgeon.

¹⁴ See *supra* note 11.

¹⁵ OWCP properly applied the principles enunciated in *Albert C. Shadrick*, 5 ECAB 376 (1953), in order to calculate the adjustment in appellant's compensation.

¹⁶ See *Norman F. Bligh*, 41 ECAB 230, 237-38 (1989).

foraminal stenosis. Dr. Burkus indicated that appellant had some median nerve and ulnar nerve symptoms, but he provided no opinion that appellant suffered a material change in an injury-related condition or that he was otherwise unable to perform the duties of the maintenance mechanic position due to work-related residuals. The medical reports do not contain a rationalized medical opinion demonstrating that appellant's injury-related medical condition worsened such that he was precluded from performing the duties of the maintenance mechanic position.

Therefore, the medical evidence does not show that appellant experienced a material worsening of his injury-related condition which prevented him from being able to perform the duties of the maintenance mechanic position in which he was rated. In addition, appellant did not present evidence that he vocationally rehabilitated himself such that he now had a higher wage-earning capacity than was previously established. For these reasons, appellant did not show that OWCP's March 26, 2007 wage-earning capacity determination should be modified.

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 his burden of proof to modify OWCP's March 26, 2007 wage-earning capacity determination.

ORDER

IT IS HEREBY ORDERED THAT the September 20, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 8, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board