

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

A.P., Appellant

and

**U.S. POSTAL SERVICE, CORVALLIS POST
OFFICE, Corvallis, OR, Employer**

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**Docket No. 11-2015
Issued: May 8, 2012**

Appearances:
Ron Watson, for the appellant
No appearance, for the Director

Oral Argument March 27, 2012

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 7, 2011 appellant, through his representative, filed a timely appeal of the August 1, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying modification of a wage-earning capacity determination. Pursuant to the Federal Employees' Compensation Act¹ (FECA) 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 OWCP properly determined that appellant's actual earnings as a modified city letter carrier fairly and reasonably represented his wage-earning capacity.

On appeal, appellant's representative contended that OWCP's December 14, 2010 loss of wage-earning capacity determination was erroneous as the modified position constituted sheltered and temporary employment based on the employing establishment's employment policy.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On July 24, 2006 OWCP accepted that on November 30, 2005 appellant, then a 23-year-old city full-time letter carrier, sustained a sprain of the right knee and articular cartilage disorder of the right ankle and foot when he stepped in a hole and rolled his ankle. It authorized right ankle lateral ligament reconstruction and osteotomy which were performed on September 18, 2006. Following surgery, on March 14, 2007, appellant returned to part-time work in a modified city letter carrier position.

By letter dated November 13, 2007, OWCP referred appellant, together with a statement of accepted facts and his medical record, to Dr. Stephen J. Thomas, Jr., a Board-certified orthopedic surgeon, for a second opinion. In a December 13, 2007 medical report, Dr. Thomas advised that appellant had a right ankle sprain and exogenous obesity. Appellant was status post repair anterior talofibular ligament and calcaneal osteotomy with suspect nonunion calcaneal osteotomy. Dr. Thomas noted that the objective findings established that appellant had continuing residuals of his accepted conditions. Appellant could not return to his regular work duties. He could work 40 hours a week in a position that did not require him to sit or stand more than one-half hour each, lift more than 10 pounds and climb.

The employing establishment provided appellant with work, four hours a day.

By letter dated September 12, 2008, OWCP again referred appellant to Dr. Thomas for a second opinion. In an October 16, 2008 report, Dr. Thomas reiterated his prior diagnoses of right ankle sprain, status post repair anterior talofibular ligament and calcaneal osteotomy with suspect nonunion calcaneal osteotomy and exogenous obesity. He reiterated that appellant continued to have residuals of his accepted conditions based on his objective findings and was unable to perform his regular work duties. Dr. Thomas advised that appellant could work eight hours a day with restrictions, which included no walking or standing more than 30 minutes, squatting and climbing.

In reports dated March 5 and April 20, 2009, Dr. William G. Barish, an attending family practitioner, advised that appellant could not drive more than 30 minutes due to degenerative arthritis in his right ankle. This condition prevented him from keeping his foot and ankle in one position for an extended period of time.

In a May 28, 2009 report, Dr. Thomas agreed with Dr. Barish's driving restriction. He stated that appellant could only hold his right foot in one position for a short time before it caused too much pain as he had a calcaneal osteotomy on that foot.

On March 15, 2010 the employing establishment offered appellant a full-time modified city letter carrier position within his medical limitations. Appellant accepted the job offer on that date.

In an August 25, 2010 decision, OWCP granted appellant a schedule award for 16 percent impairment of the right lower extremity. The period of the award ran from May 24, 2010 to April 11, 2011.

On October 18, 2010 appellant filed a claim for a recurrence of disability (Form CA-2a) commencing October 6, 2010. On October 1, 2010 the employing establishment provided him with a job offer dated September 29, 2010 for a limited-duty letter carrier position, one hour a day due to the National Reassessment Program (NRP).²

By letter dated November 10, 2010, OWCP accepted that appellant sustained a recurrence of disability due to his November 30, 2005 employment injuries. It stated however that no wage-loss compensation would be paid since he was receiving compensation and a schedule award. OWCP advised appellant to claim compensation for any lost time from work after his schedule award payments ended.

On December 14, 2010 OWCP issued a decision, retroactively reducing appellant's compensation to zero based on its finding that his actual earnings as a modified city letter carrier, effective on March 15, 2010, fairly and reasonably represented his wage-earning capacity. It stated that the decision was issued in response to the filing of a CA-2a form by appellant. OWCP determined that his actual earnings met or exceeded his wages at the time of his injury. It stated that the October 6, 2010 job offer under the NRP showed that appellant's work hours had been reduced to one hour per day. However, the job duty of casing mail remained unchanged. OWCP therefore concluded that appellant's modified city letter carrier position duties had not changed.

In a letter also dated December 14, 2010, OWCP advised appellant of the grounds needed to establish modification of its wage-earning capacity decision.

By letter dated January 10, 2010, appellant, through his representative, requested an oral hearing. In a May 3, 2011 letter, appellant's representative requested a review of the written record instead of an oral hearing.

In an August 1, 2011 decision, an OWCP hearing representative affirmed the December 14, 2010 retroactive wage-earning capacity decision. The hearing representative found that appellant had failed to establish that the December 14, 2010 wage-earning capacity determination warranted modification.

LEGAL PRECEDENT

Section 8115(a) of FECA³ 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.⁴ 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.⁵ In addition, the Federal (FECA) Procedure Manual

² The record indicates that appellant accepted the September 29, 2010 job offer on October 6, 2010 under protest.

³ 5 U.S.C. §§ 8101-8193.

⁴ *Id.* at § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

⁵ *Lottie M. Williams*, 56 ECAB 302 (2005).

provides that OWCP can make a retroactive wage-earning capacity determination if appellant worked in the position for at least 60 days, the position fairly and reasonably represented his wage-earning capacity and the work stoppage did not occur because of any change in the injury-related condition affecting the ability to work.⁶ The Board has concurred that OWCP may establish a retroactive wage-earning capacity determination in accordance with its procedures.⁷

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.⁸ This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction in force), or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.⁹

When an employee who is disabled from the job he held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that he can perform the limited-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and to show that he cannot perform such limited-duty work. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the limited-duty job requirements.¹⁰

ANALYSIS

The Board finds that OWCP improperly determined that the position of modified city letter carrier fairly and reasonably reflected appellant's wage-earning capacity. Appellant stopped work on October 6, 2010 and on November 10, 2010, OWCP accepted that he sustained a recurrence of disability commencing October 6, 2010 due to his November 30, 2005 employment injuries. On December 14, 2010 OWCP issued a retroactive wage-earning capacity determination reducing his compensation to zero after finding that his actual earnings in the modified position as of March 15, 2010 fairly and reasonably represented his wage-earning capacity. As noted that OWCP procedure manual provides that, a retroactive determination may be made where the claimant worked in the position for at least 60 days, the employment fairly and reasonably represents his wage-earning capacity and the work stoppage did not occur

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) and 2.814.7(d) (October 2009); *K.S.*, Docket No. 08-2105 (issued February 11, 2009).

⁷ See *Tamra McCauley*, 51 ECAB 375 (2000).

⁸ 20 C.F.R. § 10.5(x).

⁹ *Id.*

¹⁰ *Albert C. Brown*, 52 ECAB 152, 154-55 (2000); *Barry C. Petterson*, 52 ECAB 120 (2000); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

because of any change in the claimant's injury-related condition.¹¹ In accepting appellant's recurrence of disability claim prior to the issuance of its wage-earning capacity determination, OWCP found that his work stoppage commencing October 6, 2010 occurred due to a change in his accepted employment-related conditions. The Board notes that there is no evidence of record that OWCP rescinded its November 2010 acceptance of the recurrence claim prior to the issuance of the December 14, 2010 loss of wage-earning capacity determination. The Board finds that the wage-earning capacity determination issued in this case was erroneous as the record establishes that OWCP issued the decision after it had accepted that appellant sustained a recurrence of disability due to a change in his injury-related conditions.

CONCLUSION

The Board finds that OWCP improperly determined that appellant's actual earnings as a modified city letter carrier fairly and reasonably represented his wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the August 1, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: May 8, 2012
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

¹¹ *Supra* note 6.