

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

B.C., Appellant

and

**U.S. POSTAL SERVICE, LAKELAND
DISTRICT, Palatine, IL, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 12-809
Issued: September 13, 2012**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 29, 2012 appellant filed a timely appeal from the September 12, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for modification of a wage-earning capacity decision. 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 appellant met his burden of proof to modify OWCP's June 1, 2007 wage-earning capacity decision.

FACTUAL HISTORY

On May 16, 2001 appellant, then a 49-year-old manual distribution clerk, filed a claim alleging that he sustained injury on May 9, 2001 when he was lifting boxes weighing between 15

¹ 5 U.S.C. §§ 8101-8193.

to 35 pounds. He felt pain in his right arm and elbow. Appellant's claim was accepted for right lateral epicondylitis and right brachial neuritis. He underwent right ulnar surgery on September 23, 2005 and right lateral epicondylectomy and radical tunnel release surgery on January 9, 2006.

Consistent with his permanent work restrictions, appellant returned to work full time as a modified distribution clerk on February 22, 2007. By decision dated June 1, 2007, OWCP determined that his actual earnings as a modified distribution clerk fairly and reasonably represented his wage-earning capacity with no wage loss.

On July 12, 2010 appellant filed a claim for compensation (Form CA-7) for wage loss beginning July 12, 2010.² The information received noted that the employing establishment made a determination that no work was available as part of the National Reassessment Process (NRP).

In a July 19, 2010 letter, OWCP advised appellant that, in order to be entitled to compensation, his wage-loss claim beginning July 12, 2010 must be treated as a claim for modification of its June 1, 2007 wage-earning capacity decision. Appellant was informed of the three criteria necessary for modifying such decisions and afforded 30 days to provide evidence substantiating that he had met any of the criteria. A separate letter was sent to the employing establishment on July 19, 2010 requesting relevant information pertaining to his claim for wage loss.

Appellant submitted a May 26, 2010 report in which Dr. Bassam Osman, an attending Board-certified neurologist, stated that appellant's diagnoses were a recurrence of right radical tunnel syndrome, musculoskeletal etiology, carpal tunnel syndrome and polyneuropathy. In a June 10, 2010 report, Dr. Robert J. Fink, an attending Board-certified orthopedic surgeon, indicated that appellant reported that he sustained a lifting injury at work on May 9, 2010. On August 16, 2011 he completed a form report which contained work restrictions which were similar to those recommended prior to appellant's work stoppage in July 2010.

In a September 1, 2010 decision, OWCP denied appellant's request for modification of its June 1, 2007 wage-earning capacity decision. It found that the medical evidence did not show that he underwent a material change in his injury-related condition.

Appellant submitted a June 7, 2011 report in which Dr. Jacob Salomon, an attending Board-certified orthopedic surgeon, indicated that appellant had work-related bilateral carpal tunnel syndrome. He also submitted diagnostic test results from February 2011.

In a September 12, 2011 decision, OWCP affirmed its September 1, 2010 decision denying appellant's request for modification of its June 1, 2007 wage-earning capacity decision. It again determined that the medical evidence did not show that he underwent a material change in his injury-related condition.

² Appellant later filed CA-7 forms for additional periods of claimed wage loss.

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.³

OWCP procedures provide that, if 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.⁴

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 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. If OWCP 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.⁵

The Board has held that OWCP may accept a limited period of disability without modifying a standing wage-earning capacity determination. 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. 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.⁶

FECA Bulletin No. 09-05 outlines very specific procedures for light-duty positions withdrawn pursuant to NRP. Regarding claims for total disability when a wage-earning capacity decision has been issued, OWCP should develop the evidence to determine whether a modification of that loss of wage-earning capacity position is appropriate.⁷

³ *Katherine T. Kreger*, 55 ECAB 633 (2004).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

⁵ *Id.* at Chapter 2.814.11 (June 1996).

⁶ *K.R.*, Docket No. 09-415 (issued February 24, 2010).

⁷ See FECA Bulletin No. 09-05 (issued August 18, 2009). See also *M.D.*, Docket No. 11-733 (issued July 11, 2012).

ANALYSIS

The Board finds this case is not in posture for decision. Appellant was a full-time manual distribution clerk when OWCP accepted his initial claim for right lateral epicondylitis and right brachial neuritis in 2001. He had surgery on his arms on September 23, 2005 and January 9, 2006 and returned to work in a modified distribution clerk position on February 22, 2007. By decision dated June 1, 2007, OWCP found that appellant's actual earnings in the modified position fairly and reasonably represented his wage-earning capacity with zero loss.

Appellant continued working a modified distribution clerk until July 12, 2010 when he was laid off due to NRP. He filed claims for disability commencing on July 12, 2010 and continuing. By letter dated July 19, 2010, OWCP advised appellant that he had a loss of wage-earning capacity in place and informed him of the criteria for modifying the June 1, 2007 wage-earning capacity determination.

In September 1, 2010 and September 12, 2011 decisions, OWCP denied appellant's claim for modification of its June 1, 2007 wage-earning capacity decision, on the grounds that the medical evidence was insufficient to meet the requirements for modification. It noted that the medical evidence did not reflect that the accepted conditions had materially changed. OWCP did not discuss whether the original determination was erroneous or whether appellant had been retrained or vocationally rehabilitated and did not indicate that it had assessed his case in accordance with FECA Bulletin No. 09-05 which discusses the proper procedures to be followed when a wage-earning capacity decision is in place and the dismissal of a claimant is due to NRP.⁸

The Board therefore finds the case is not in posture for decision and must be remanded to OWCP. On remand OWCP should follow the procedures found in FECA Bulletin No. 09-05 to determine if appellant met his burden to modify the June 1, 2007 wage-earning capacity determination. Following remand, it should render an appropriate decision on the merits of his claims for compensation beginning July 12, 2010.

CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant met his burden of proof to modify OWCP's June 1, 2007 wage-earning capacity decision.

⁸ See note 7 and accompanying text.

ORDER

IT IS HEREBY ORDERED THAT the September 12, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for proceedings consistent with this decision of the Board.

Issued: September 13, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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