

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JOHN TIERI and DEPARTMENT OF THE NAVY,  
PHILADELPHIA NAVAL SHIPYARD, Philadelphia, Pa.

*Docket No. 97-350; Submitted on the Record;  
Issued January 28, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issue is whether appellant has established that he is entitled to modification of his loss of wage-earning capacity determination effective September 15, 1995.

In the present case, the Office of Workers' Compensation Programs accepted that appellant sustained a fractured right ankle, a fractured left tibia and fibula and a crush injury to the left foot in the performance of duty on October 13, 1987. Appellant returned to work at four hours per day in a light-duty position on January 17, 1989.

By decision dated August 16, 1993, the Office determined that appellant's wage-earning capacity was represented by his part-time position and he began receiving compensation based on his loss of wage-earning capacity. The record indicates that appellant was notified, by letter dated May 9, 1995, that due to a reduction-in-force appellant's light-duty position was to be terminated effective September 15, 1995. On October 2, 1995 appellant filed a notice of recurrence of disability commencing September 15, 1995.

In a decision dated October 30, 1995, the Office denied modification of the loss of wage-earning capacity determination. By decision dated August 22, 1996, an Office hearing representative affirmed the October 30, 1995 decision.

The Board finds that appellant has not established that his wage-earning capacity determination should be modified.

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>1</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>2</sup>

In the present case, appellant has not established any of the criteria for modification of a loss of wage-earning capacity determination. He has not shown that the original determination was erroneous, nor has he submitted medical evidence showing that his medical condition had changed as of September 15, 1995. Appellant's argument is that since his light-duty job was no longer available, he has established a recurrence of disability in accord with the Board's finding in *Jackie B. Wilson*.<sup>3</sup> The instant case, however, is distinguishable from *Wilson* in two respects: (1) in this case a loss of wage-earning capacity determination had been made; and (2) the withdrawal of employment was due to closure of appellant's work site.

The Office's procedures state:

"A reemployed claimant may face removal from employment due to closure of an installation, cessation of special ('pipeline') funding, or termination of temporary employment or reduction-in-force. (A true reduction-in-force affects full-duty and light-duty workers alike. If it is not clear whether the claimant's situation involves a reduction-in-force or the withdrawal of light duty, the [claims examiner] should request the personnel document on which the removal was based."<sup>4</sup>

In this case, appellant indicated that the shipyard was closing as of September 15, 1995 and the May 9, 1995 letter advised appellant that it was necessary to conduct a reduction-in-force under the base realignment and closure decision of 1991. Therefore, the record establishes that the termination of employment was not due to appellant's light-duty status, but was due to a reduction-in-force affecting all workers at the work site.

The Office's procedures further indicate that "the status of an employee with an established wage-earning capacity who is removed because of a reduction-in-force or closure does not change with regard to receipt of Federal Employees' Compensation Act benefits."<sup>5</sup> Unlike in *Wilson*, where the withdrawal of employment is based on the employing establishment's inability to provide light duty within the claimants physical restrictions, the withdrawal of employment in this case is not related to the employment injury.

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<sup>1</sup> *Sue A. Sedgwick*, 45 ECAB 211 (1993).

<sup>2</sup> *Id.*

<sup>3</sup> 39 ECAB 915 (1988) (appellant established a recurrence of disability when the employing establishment no longer had a light-duty job within his physical restrictions.)

<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.12 (July 1997).

<sup>5</sup> *Id.*

As noted above, the burden of proof rests with the party attempting to modify the wage-earning capacity determination. The Board finds that appellant has not submitted sufficient evidence to meet the criteria for modifying a wage-earning capacity determination in this case. Accordingly, the Office properly denied modification effective September 15, 1995.

The decisions of the Office of Workers' Compensation Programs dated August 22, 1996 and October 23, 1995 are affirmed.

Dated, Washington, D.C.  
January 28, 1999

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member