

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOEL M. ROSE, III and U.S. POSTAL SERVICE,
POST OFFICE, Jacksonville, FL

*Docket No. 02-442; Submitted on the Record;
Issued June 25, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied modification of its determination of appellant's wage-earning capacity based on his ability to work as a modified letter carrier.

This is the second appeal in the present case. In the prior appeal, the Board issued a decision and order¹ on June 14, 2001 in which it affirmed the October 15, 1999 Office decision in part on the grounds that the Office properly determined that the position of modified letter carrier fairly and reasonably represented appellant's wage-earning capacity.² The Board also set aside the October 15, 1999 Office decision in part and remanded the case to the Office for further development of the medical evidence with respect to the issue of whether appellant's wage-earning capacity should be modified. The Board found that the medical reports, submitted from Dr. Susan White-Spunner, a Board-certified orthopedic surgeon who served as an Office referral physician, lent support to appellant's claim that his employment-related condition had worsened

¹ Docket No. 00-959.

² On April 14, 1994 appellant, then a 43-year-old postal clerk, sustained a lumbosacral strain and herniated disc at L4-5 when he slipped backwards on a concrete curb. The Office paid appellant appropriate compensation. On January 23, 1995 appellant was released to return to full duty with no lifting greater than 40 pounds and standing and sitting as tolerated. On January 17, 1995 appellant began working eight hours per day as a modified letter carrier for the employing establishment; the position involved the delivery of mail and required appellant to lift up to 35 pounds. He continued to work in this position and on September 19, 1996 the Office determined that the modified letter carrier position provided him with a wage-earning capacity equal to the wages earned at the time of injury.

and that he could no longer perform the physical requirements of the modified carrier position.³ The Board remanded the case to the Office to develop the evidence as appropriate regarding appellant's proper loss of wage-earning capacity to be followed by a *de novo* decision on this aspect of appellant's claim. The facts and circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

On remand, the Office referred appellant to Dr. Raymond Fletcher, a Board-certified orthopedic surgeon, for evaluation of his functional capacity. In reports dated August 13 and September 18, 2001, Dr. Fletcher determined that appellant could work as a modified letter carrier, a position which required lifting of up to 35 pounds.⁴ By decision dated October 24, 2001, the Office denied modification of its determination of appellant's wage-earning capacity based on his ability to work as a modified letter carrier.

The Board finds that the Office properly denied modification of its determination of appellant's wage-earning capacity based on his ability to work as a modified letter carrier.

Once a loss of wage-earning capacity is determined, a modification of such a 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.⁵ The burden of proof is on the party attempting to show that the award should be modified.⁶

The opinion of Dr. Fletcher shows that appellant did not sustain a material change in the nature and extent of the injury-related condition. In his August 13, 2001 report, Dr. Fletcher detailed appellant's factual and medical history and reported the findings on examination. He indicated that motor and sensory examination was intact in the lower extremities and diagnosed "chronic mechanical lumbar pain" and degenerative disc disease at L4-5 and L5-S1. He concluded that appellant was capable of working as a modified letter carrier, a position which was characterized as "light [to] medium" in its duties and required lifting of up to 35 pounds. In a report dated September 18, 2001, Dr. Fletcher indicated that he had reviewed the findings of an August 30, 2001 functional capacity evaluation. He noted that there were such inconsistencies in appellant's results during the August 30, 2001 evaluation that the findings of a functional capacity evaluation performed on March 13, 1996 were more indicative of appellant's physical capacity. In that evaluation, it was determined that appellant could perform "light [to] medium"

³ In June 17 and 29, 1999 reports, Dr. White-Spunner indicated that appellant could continue on limited duty but raised his lifting limitation from 35 pounds to 20 pounds. Dr. White-Spunner also recommended a lumbar fusion and provided reasoning to support her opinion that appellant's accepted herniated disc had caused an aggravation and exacerbation of his underlying degenerative arthritis. By decision dated October 15, 1999, the Office denied modification of its prior wage-earning capacity determination. It does not appear that appellant underwent back surgery.

⁴ Appellant continued to work as a modified letter carrier for the employing establishment during this period.

⁵ *George W. Coleman*, 38 ECAB 782, 788 (1987); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

⁶ *Jack E. Rohrbaugh*, 38 ECAB 186, 190 (1986).

work and lift up to 35 pounds. Moreover, it should be noted that appellant continued to work in his modified letter carrier position during this period.⁷

For these reasons, the Office properly denied modification of its determination of appellant's wage-earning capacity based on his ability to work as a modified letter carrier.

The October 24, 2001 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
June 25, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

⁷ The Federal Employees' Compensation Act provides that "wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity." 5 U.S.C. § 8115(a). 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 as such measure." *Floyd A. Gervais*, 40 ECAB 1045, 1048 (1989); *Clyde Price*, 32 ECAB 1932, 1934 (1981).