

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT E. LOVELACE and U.S. POSTAL SERVICE,
POST OFFICE, Tacoma, WA

*Docket No. 02-1021; Submitted on the Record;
Issued January 10, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant has established that his June 26, 1981 loss of wage-earning capacity determination should be modified.

On December 21, 1972 appellant, then a 42-year-old mailhandler, filed a traumatic injury claim alleging that he injured his back while in the performance of duty.¹ The Office of Workers' Compensation Programs accepted the claim for back sprain. Appellant was referred for vocational rehabilitation and began employment as a recreation assistant at Fort Lewis Army base effective September 26, 1973 with no loss of wage compensation.

By decision dated June 26, 1981,² the Office found that appellant had no loss of wage-earning capacity due to residuals of his accepted December 19, 1972 employment injury. Specifically, the Office found that appellant was earning a weekly wage as a GS-4, step 10 of \$171.98 and that the weekly pay rate for his date-of-injury position as a level 4, step 2 postal worker was \$157.20. As appellant was earning more in his light-duty position the Office found no evidence to recompute the loss of wage-earning capacity subsequent to September 26, 1973.

In a letter dated May 21, 2001, appellant requested reconsideration of the Office's finding that he had no loss of wage-earning capacity and submitted evidence in support of his request. Appellant contended that the June 26, 1981 loss of wage-earning capacity failed to take into consideration all of appellant's injuries, including those of December 19, 1971, December 19, 1972 and January 9, 1973. He submitted a May 22, 2000 report by Dr. Mitchell H. Geiger, a Board-certified orthopedic surgeon, statements dated December 19, 1971, December 19, 1972 and January 9, 1973,³ a May 24, 1973 letter from the Office placing appellant on the automatic

¹ This was assigned claim number A14-77337.

² The Board notes that the compensation order is dated June 26, 1980, which appears to be a typographical error.

³ In his January 9, 1973 statement, he indicated that he injured his left shoulder while "braking (sic) down raw mail."

rolls for temporary total disability, a disability certificate for the period April 12 to May 19, 1973, treatment notes for the period November 3, 1972 through May 30, 1980, a December 19, 1972 emergency room report, x-ray and magnetic resonance imaging reports dated June 6, 2000, appellant's statement rebutting a report dated June 26, 1980, job evaluation reports dated November 21 and December 10, 1971 and February 19, 1972 and a July 22, 1980 report by Dr. William P. Morgan.

In the July 22, 1980 report, Dr. Morgan noted that he treated appellant for his back problems and that appellant was doing well in his light-duty position of recreation assistant.

In a May 22, 2000 report, Dr. Geiger based upon a physical examination, review of appellant's medical and employment injury history, concluded appellant's "three left shoulder injuries resulted in this patient's disability, inability to work in his work environment and eventual loss of employment as a postal worker. Thus, I attributed this patient's left shoulder pain due to his work-related injury."

By decision dated October 12, 2001, the Office denied appellant's request to modify the May 26, 1981 loss of wage-earning capacity determination.

The Board finds that the Office properly denied modification of appellant's loss of wage-earning capacity determination.

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 modification.⁵ In this case, appellant sought modification of the Office's wage-earning determination. He bears the burden to show a material change in the nature and extent of his injury-related condition or to show the original determination was erroneous.

In this case, appellant did not submit sufficient evidence to show that the Office's original determination with regard to his wage-earning capacity was erroneous. In a June 26, 1981 decision, the Office determined appellant had no loss of wage-earning capacity based upon his earning a higher wage as a recreation assistant than he would have earned in his date-of-injury position as a mailhandler.

The Federal Employees' Compensation Act⁶ provides that wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity.⁷ The Board has recognized that actual wages earned are the

⁴ *Stanley B. Plotkin*, 51 ECAB 700 (2000); *Derrick Higgin*, 50 ECAB 213 (1998).

⁵ *See James D. Champlain*, 44 ECAB 438, 440 (1993).

⁶ 5 U.S.C. §§ 8101-8193.

⁷ 5 U.S.C. § 8115(a); *Lawrence D. Price*, 47 ECAB 120-21 (1995).

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.⁸

Appellant has not provided sufficient rationalized medical evidence to support that as of June 26, 1981 he developed a material change in the nature or extent of his injury-related conditions, which would affect his wage-earning capacity determination. Dr. Geiger opined that appellant had developed a left shoulder condition due to three employment injuries sustained while he was working for the employing establishment, which resulted in his total disability from performing his postal employment. Dr. Geiger's opinion is insufficient to support a material change in condition as the physician does not address how appellant's disability is due to his accepted December 19, 1972 back sprain. His opinion is also insufficient to establish that the accepted condition has changed or that the original wage-earning determination was erroneous. Appellant also submitted treatment notes for the period, but none of these reports address his ability to perform the limited-duty position. For these reasons, appellant has not shown a material change in the nature or extent of his accepted condition.⁹

⁸ *Linda K. Blue*, 53 ECAB ___ (Docket No. 01-1169, issued July 10, 2002); *Clarence D. Ross*, 42 ECAB 556, 561-62 (1991).

⁹ Appellant on appeal has requested review of claim numbers A14-77337, A14-0265371 and A14-0288631, in addition to his appeal of the Office's denial of his request for modification of his loss of wage-earning capacity. The Board's jurisdiction is limited to considering and deciding appeals from final decisions of the Office issued within one year prior to the filing of the appeal. *See* 20 C.F.R. §§ 501.2(c), 501.3(d)(2). The Board does not have the jurisdiction to perform the review requested by appellant as there are no final Office decisions of these claims in the records before us.

The October 12, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.¹⁰

Dated, Washington, DC
January 10, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

¹⁰ With his appeal appellant submitted additional evidence. However, the Board may not consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c).