U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAVID CHAMPION and U.S. POSTAL SERVICE,
POST OFFICE, Memphis, TN

Docket No. 01-1976; Oral Argument Held March, 5, 2003;
Issued December 31, 2003

Appearances: *Leo Spann,* for appellant; *Thomas G. Giblin, Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly denied modification of appellant's wage-earning capacity determination.

On May 9, 1991 appellant, then a 37-year-old full-time toggle operator, filed a claim for traumatic injury alleging that he injured his back on April 21, 1991 while pulling a mail cart for dispatch. On September 6, 1991 the Office accepted appellant's claim for a lumbar strain and paid appropriate compensation. Appellant returned to work on July 21, 1997, working five hours per day light duty in a modified position.

On September 16 and October 3, 1997 appellant filed claims alleging that he sustained recurrences of back pain causally related to the work-related injury of April 21, 1991. The Office accepted appellant's claim for recurrence of disability beginning August 4, 1997 and that appellant sustained a temporary aggravation of a degenerative bulging disc at L4-5. He was paid appropriate compensation.

On February 9, 1999 the employing establishment offered appellant a modified part-time full (PTF) mail handler position that complied with the restrictions set forth by the impartial medical specialist. The position was to be for four hours per day for two weeks and then increase to six hours per day. On March 8, 1999 appellant accepted the job offer and began work on March 13, 1999. The record reflects that from March 13 to 26, 1999 appellant worked four hours per day and on March 27, 1999 began working six hours per day.

In a decision dated April 30, 1999, the Office notified appellant that he had been recently reemployed as a modified mail handler with wages of $391.75 per week for four hours per day,[1] and then $587.67[2] per week for six hours per day.[3] The Office noted that it was reducing appellant's compensation to reflect that he had returned to work in the modified mail handler position. This reduction was effective March 13, 1999 and again effective March 27, 1999 and was based on actual earnings.

In a formal wage-earning capacity determination dated June 14, 1999, the Office noted that appellant had been reemployed as a modified PTF mail handler six hours per day with wages of $587.61 per week for over 60 days effective March 27, 1999. The Office noted that the duties of his position reflected appellant's work tolerance limitations established by the impartial medical adviser. Additionally, appellant's training, education and work experience had been considered in determining the suitability of this job.

In a letter dated January 14, 2000, appellant requested modification of the loss of wage-earning capacity determination.

By decision dated March 22, 2001, the Office denied modification of the Office decision dated June 14, 1999 on the grounds that appellant did not submit sufficient medical evidence to show that the original rating was incorrect or that appellant's medical condition changed.

On June 12, 2001 appellant again requested reconsideration of the Office decision dated March 22, 2001.

In a decision dated July 25, 2001, the Office again denied modification.[4]

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

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

[1] The record reflects that the Office granted a temporary loss of wage-earning capacity determination for the period of March 13 to 26, 1999 for four hours per day.

[2] This amount appears to be typographical error and should be $587.61.

[3] The record reflects that the Office granted a loss of wage-earning capacity determination for the period of March 27, 1999 for six hours per day.

[4] The record also contains a decision dated January 21, 2000 in which the Office denied compensation for intermittent periods between March 30 and August 3, 1999.

or the original determination was in fact erroneous.[5] The burden of proof is on the party attempting to show the award should be modified.[6]

The Board finds that the Office improperly denied modification of the loss of wage-earning capacity determination. The Office issued a formal loss of wage-earning capacity decision on June 14, 1999 finding that appellant's actual earnings for six hours of work a day represented loss of wage-earning capacity. Thereafter on March 22 and July 25, 2001 the Office denied modification of the loss of wage-earning capacity determination on the grounds that appellant had not established that the June 14, 1999 loss of wage-earning capacity was incorrect or that his medical condition had changed. Appellant appealed this case on August 7, 2001; therefore the Board only has jurisdiction over the March 22 and July 25, 2001 denial of modification decisions.

Section 2.814.7 of the Office procedure manual states:

> "7. *Determining WEC [wage-earning capacity] Based on Actual Earnings*. When an employee cannot return to the date of injury job because of disability due to work-related injury or disease, but does return to alternative employment with an actual wage loss, the CE [claims examiner] must determine whether the earnings in the alternative employment fairly and reasonably represent the employee's WEC. Following is an outline of actions to be taken by the CE when a partially disabled claimant returns to alternative work:
>
> > a. *Factors Considered*. To determine whether the claimant's work fairly and reasonably represents his or her WEC, the CE should consider [such factors as] whether…."
>
> * * *
>
> > > (1) *The job is part time* (unless the claimant was a part-time worker at the time of injury) or sporadic in nature;
> > >
> > > (2) *The job is seasonal* in an area where year-round employment is available. If an employee obtains seasonal work voluntarily in an area where year-round work is generally performed, the CE should carefully determine whether such work is truly representative of the claimant's WEC; or
> > >
> > > (3) *The job is temporary* where the claimant's previous job was permanent."[7]

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

[6] *Jack E. Rohrabaugh*, 38 ECAB 186, 190 (1986); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity,* Chapter 2.814.11(a) (July 1997). .

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity,* Chapter 2.814.7(a) (July 1997).

The Office of Personnel Management (OPM) recognizes four kinds of appointments: (1) career; (2) career conditional (essentially a probationary period); (3) term (not to exceed four years and with no career status); and (4) temporary (not to exceed one year, with a one-year extension possible and with no career status). OPM also recognizes five kinds of tours of duty: (1) full time (40 hours per week); (2) part time (16 to 32 hours per week); (3) intermittent (no regularly scheduled hours); (4) seasonal (less than 12 months a year, with either a full-time, part- time or intermittent schedule); and (5) on call (usually at least six months a year on an as-needed basis, with either a full-time or part-time schedule).[8]

The record shows that appellant was originally employed in a permanent position as a full-time toggle operator. Following his return to work on July 21, 1997, appellant sustained a recurrence of disability in August 1997 and thereafter returned to work on February 9, 1999 as a modified PTF mail handler for four hours per day increasing to six hours per day as of March 27, 1999. This position was modified to accommodate the physical restrictions of appellant, it was, however, not a full time position,[9] rather this position was six hours per day. The Board therefore finds that the evidence in this case is insufficient to support that appellant's appointment and tour of duty as a part-time modified PTF mail handler position were equivalent to that of his date-of-injury position as a full-time toggle operator. The first appointment was full-time, eight hours per day, permanent position and the second appointment was a part-time, six-hour per day, permanent position. The evidence clearly shows that the position accepted in 1999 and commencing March 27, 1999 six hours per day was not the equivalent of the date-of-injury position. Before the Office accepted these earnings as the best measure of his wage-earning capacity, the Office was required to determine whether appellant's part-time position fairly and reasonably represented his wage-earning capacity. The Office made no such finding in this case. The Office erred by not evaluating whether the part-time position fairly and reasonably represented appellant's wage-earning capacity in the June 14, 1999 decision. The Office improperly denied modification of the June 14, 1999 decision on March 27 and July 25, 2001 of its determination of appellant's wage-earning capacity.

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.3.a (December 1995).

[9] *See Richard M. Knight*, 42 ECAB 320 (1991).

The July 25 and March 22, 2001 decisions of the Office of Workers' Compensation Programs are hereby reversed.

Dated, Washington, DC
December 31, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member