

In a decision dated January 14, 1998, the Office determined that appellant's actual wages in this modified letter carrier position fairly and reasonably represented his wage-earning capacity. As the wages either met or exceeded the pay rate of the job he held when he was injured on February 24, 1997, the Office found that he had no loss of wage-earning capacity and no further entitlement to wage-loss compensation after June 4, 1997, with the exception of specific intermittent hours claimed and paid after that date.

On November 20, 2002 the Office notified appellant that it was accepting a temporary aggravation of left hand arthritis and was authorizing exploratory surgery. Appellant received compensation for temporary total disability beginning May 27, 2002 and was placed on the periodic rolls effective November 3, 2002. He underwent wrist surgery on March 28, 2003.

Appellant was released to modified duty with no use of the left hand. On April 11, 2003 he returned, with his physician's approval, to a modified assignment answering telephones and customer complaints at the door. Restrictions stated: "One-handed work only."

On July 2, 2003, three months after surgery, appellant complained of aching and throbbing in his left wrist. On October 29, 2003, seven months after surgery, appellant reported that he was not getting better. On January 21, 2004, 10 months after surgery, he stated that the pain at his left ulnar wrist was worse. The Office authorized biofeedback and pain management therapy.

On March 29, 2004 Dr. Kendrick E. Lee, the orthopedic surgeon who performed the March 28, 2003 surgery, reported that appellant could work modified duty with no use of the left hand a maximum of six hours a day. On May 24, 2004 he reported that these should be considered permanent limitations.

On May 25, 2004 appellant filed a claim for compensation beginning April 3, 2004, when he began using leave without pay about two hours a day. The Office acknowledged a claim of recurrence of disability and informed appellant of the evidence he needed to submit to establish this claim:

"1. You were working in a light[-]duty job eight hours a day. If you contend that the light[-]duty assignment changed (became more demanding) such that it no longer met the restrictions set by your doctor, then you must furnish a statement in full explanation to this office. Other evidence, such as coworker statements or copies of memo[ram]s which support your statement, will help you in proving your claim.

"2. If you reduced your hours because of a worsening in your employment-related condition, you must have your doctor send a complete narrative report to this office. Your doctor must describe the objective findings which convinced him your condition had worsened and explain how you can no longer perform the duties you were performing when you were working eight hours a day. Your modified duties did not require use of your left hand so your doctor should explain with objective findings why you are only able to work six hours a day.

Reports on forms such as CA-17 or CA-20 will not suffice. You should show this letter to your doctor so he understands what we need.

“3. If you stopped work for any other reason you should explain fully in writing to this office.”

On July 2, 2004 Dr. Lee reported that he had reviewed appellant’s medical records. He stated:

“I recommended a decrease in the work hours from eight per day to six per day based on the patient’s subjective pain report. I do not have any changes in objective findings which lead to the recommendation for decreased work hours. The recommendation was to treat the subjective pain experienced by the patient.”

In a decision dated September 2, 2004, the Office denied appellant’s claim for compensation on the grounds that the evidence of record failed to establish his partial disability for the claimed period was causally related to the February 24, 1997 injury. The Office explained that pain was a symptom, not a condition, and that the medical evidence must be based on objective findings, because subjective complaints alone were not sufficient.

In a decision dated November 30, 2005, an Office hearing representative affirmed the denial of appellant’s May 25, 2004 claim for compensation. The hearing representative found that the issue was a claimed recurrence of partial disability as of April 3, 2004. Citing the law applicable to recurrences of disability for light-duty positions,¹ the hearing representative found that Dr. Lee’s reports were not sufficient to meet appellant’s burden of proof to establish a recurrence of partial disability beginning April 3, 2004.

LEGAL PRECEDENT

The United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of his duty.² “Disability” means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.³ In determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity.⁴

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 Office will need to evaluate the request according to the customary criteria for

¹ *Terry R. Hedman*, 38 ECAB 222 (1986).

² 5 U.S.C. § 8102(a).

³ 20 C.F.R. § 10.5(f) (1999).

⁴ 5 U.S.C. § 8115(a).

modifying a formal loss of wage-earning capacity.⁵ The Board has held that this rule applies equally when the claimant requests compensation for partial disability. If there is a claim for increased disability that would prevent a claimant from performing the position that was the basis for a wage-earning capacity decision, then clearly there is an issue of whether modification is appropriate.⁶

ANALYSIS

On January 14, 1998 the Office issued a wage-earning capacity determination finding that appellant's wages in the modified letter carrier position to which he returned on June 4, 1997 fairly and reasonably represented his wage-earning capacity. The Office left this rating in place, even as it expanded its acceptance of the claim in 2002 to include temporary aggravation of left hand arthritis, and as it authorized surgery and paid compensation for temporary total disability on the periodic rolls. When appellant filed a claim for compensation beginning April 3, 2004, and when Dr. Lee reported that the six-hour restriction was a permanent limitation, the issue raised was not whether appellant sustained a recurrence of partial disability, as the hearing representative found. The issue properly was whether the Office's January 14, 1998 determination of wage-earning capacity should be modified.

The Board will set aside the Office's November 30, 2005 decision and remand the case to the Office for proper adjudication. Following such further development as may be necessary, the Office shall issue an appropriate final decision on the issue of modification of wage-earning capacity.

CONCLUSION

The Board finds that this case is not in posture for decision. The Office misidentified the issue to be adjudicated. The case must be remanded for further action.

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

⁶ *Katherine T. Kreger*, 55 ECAB ____ (Docket No. 03-1765, issued August 13, 2004).

ORDER

IT IS HEREBY ORDERED THAT the November 30, 2005 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.

Issued: August 29, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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