United States Department of Labor
Employees' Compensation Appeals Board

REGINALD C. WEITHERS, Appellant	)	
and	)	
U.S. POSTAL SERVICE, SOUTHERN MARYLAND PROCESSING & DISTRIBUTION CENTER, Capitol Heights, MD, Employer	)	**Docket No. 05-1416** **Issued: June 20, 2006**

Appearances:
Reginald C. Weithers, pro se
Jim C. Gordon, Jr., Esq., for the Director

Oral Argument March 16, 2006

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 27, 2005 appellant filed a timely appeal of a nonmerit April 4, 2005 decision and a July 20, 2004 merit decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review both the nonmerit and the merit decisions in this case.

ISSUES

The issues are: (1) whether the Office properly refused to modify its January 28, 2000 determination of appellant's wage-earning capacity; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits of his claim.

FACTUAL HISTORY

On May 1, 1993 appellant, then a 36-year-old general mechanic, filed a claim for compensation for a traumatic injury sustained that day when he fell and broke bones in his left arm. The Office accepted that he sustained a fracture of his left arm. Continuation of pay was

paid from May 2 to June 15, 1993, after which the Office began payment of compensation for temporary total disability.

In a July 5, 1994 report of his work tolerance limitations, appellant's attending physician, Dr. Sankara Rao Kothakota, a Board-certified orthopedic surgeon, stated that he could resume work on August 1, 1994 with very limited use of his left upper extremity. On an Office form completed on September 1, 1994 and in a telephone conversation on September 8, 1994, the employing establishment advised the Office that appellant had returned to limited duty on August 18, 1994, working five days per week. In an October 14, 1994 report, Dr. Kothakota stated that appellant could perform the duties of a modified parts clerk and radio operator, as this job did not require him to use his left upper extremity. Based on a November 28, 1995 report from Dr. Kothakota, the Office issued appellant a schedule award for a 65 percent permanent loss of use of the left arm on February 7, 1996.

On an Office form completed on April 2, 1997, appellant reported that he sustained multiple gunshot wounds on June 25, 1996 and had not yet returned to work. On March 1, 1999 appellant reported that he had returned to work as a maintenance mechanic and mechanical tripper repairman on June 19, 1998 at a rate of pay of $17.56 per hour.[1] He submitted pay stubs indicating that, beginning pay period four of 1999, his rate of pay was $36,524.00 per year. In reports dated April 12, August 5 and 25, 1999, Dr. Kothakota stated that appellant could continue to perform his prior light duty. In a November 24, 1999 response to an Office request for clarification of his work status, appellant stated that his assignment to a permanent light-duty position resulted in a loss of wage-earning capacity, as he was not able to work overtime or on holidays. He stated that his annual gross salary was $37,213.00 and his weekly gross salary was $715.63 for 40 hours of work. In January 11 and 13, 2000 telephone conversations, the employing establishment confirmed that on October 3, 1999 appellant's wages were $37,213.00 per year, and that the pay rate for the position he held when injured was $36,033.00 on October 3, 1999.

By decision dated January 28, 2000, the Office found that appellant's actual earnings as a mechanic fairly and reasonably represented his wage-earning capacity. It reduced appellant's compensation to $213.00 each four weeks, which was computed by comparing his actual earnings of $715.63 per week to the current rate of pay of the job he held when injured, as increased by night and Sunday differentials.

Appellant requested a review of the written record. By decision dated July 29, 2000, an Office hearing representative found that the position of maintenance mechanic fairly and reasonably represented appellant's wage-earning capacity. Appellant requested reconsideration and submitted September 1 and 21 and October 5, 2000 reports from Dr. Kothakota stating that he was fit for previous light duty. He contended that he was unable to earn $715.63 per week due to his left arm condition, and that he had actually earned only $21,995.00 in 1999. By decision dated November 28, 2000, the Office found that the additional evidence was not sufficient to warrant modification of its prior decisions. Appellant again requested reconsideration, contending that the position of maintenance mechanic at $715.63 per week did

[1] The employing establishment confirmed that he returned to work on June 19, 1998.

not represent his wage-earning capacity. By decision dated March 8, 2001, the Office found that appellant had not met his burden of proof to modify an existing wage-earning capacity determination. Appellant requested reconsideration on November 29, 2001 and March 4, 2002 and submitted a wage and tax statement for 1999 showing annual earnings of $21,653.43. By decisions dated February 22 and April 4, 2002, the Office found that the additional evidence was not sufficient to require a review of the merits of his case.

Appellant appealed the February 22 and April 4, 2002 decisions to the Board. While the case was pending before the Board, he submitted December 1, 2003 and May 18, 2004 reports from Dr. Kothakota to the Office. These reports indicated that appellant had swelling and pain of his left elbow after repetitive left arm use or heavy lifting and that he should lift no more than 20 pounds and avoid repetitive use of his left upper extremity. By decision dated June 1, 2004, the Board found that appellant's November 29, 2001 and March 4, 2002 requests for reconsideration sought to modify the Office's determination of his wage-earning capacity. It remanded the case to the Office for a merit decision on his request to modify the Office's wage-earning capacity determination.[2]

By decision dated July 20, 2004, the Office found that appellant had not established that the January 28, 2000 determination of his wage-earning capacity should be modified. The Office found that there was no evidence to support that appellant had periods of disability or that light duty was not available, and no evidence to support that he was not capable of performing the position in which he had actual earnings. On December 13, 2004 appellant requested reconsideration, contending that the medical evidence showed his condition had worsened leading to absenteeism from work and that light duty was no longer available on a regular basis. He submitted a statement from coworkers that to the best of their knowledge appellant was not placed on light-duty status in recent memory and a copy of an October 5, 2000 prescription for Vioxx from Dr. Kothakota. By decision dated April 4, 2005, the Office found that appellant's request for reconsideration was not sufficient to warrant review of its prior decisions.

LEGAL PRECEDENT -- ISSUE 1

The Office's procedure manual provides that, after a claimant has been working for 60 days, the Office will determine whether the claimant's actual earnings fairly and reasonably represent his or her wage-earning capacity.[3] Generally, wages actually earned are the best measure of a wage-earning capacity, and in the absence of evidence showing they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.[4]

Once loss of wage-earning capacity 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

[2] Docket No. 02-1698 (issued June 1, 2004).

[3] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7c (December 1993).

[4] *Hubert F. Myatt*, 32 ECAB 1994 (1981); *Lee R. Sires*, 23 ECAB 12 (1971).

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 the award should be modified.[6]

ANALYSIS -- ISSUE 1

Appellant has not established a material change in the nature and extent of his injury-related condition. None of the medical reports appellant submitted indicate that he could not perform the duties of the position of maintenance mechanic that the Office used as the basis of his wage-earning capacity.

Appellant also has not shown that the original determination of his wage-earning capacity was erroneous. On November 24, 1999 appellant noted that he had been assigned to a permanent light-duty position, and that his annual gross salary was $37,213.00, or $715.63 per week for 40 hours of work. On January 13, 2000 the employing establishment confirmed that on October 3, 1999 appellant's annual salary was $37,213.00. The Office properly used this rate of pay to determine his wage-earning capacity.

Appellant has submitted a wage and tax statement showing earnings of $21,653.43 for 1999. This, however, does not show that his wage-earning capacity was improperly determined by the Office on January 28, 2000. Appellant has not shown that on January 28, 2000 he had not worked the last 60 days or more at $715.63 per week. He has not submitted any evidence to support his contention that his accepted left arm condition prevented him from working 40 hours per week. Appellant has not met his burden of proof to modify the Office's January 28, 2000 determination of his wage-earning capacity.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
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> (1) end, decrease, or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."

Under 20 C.F.R. § 10.606(b)(2), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law, by advancing a relevant legal argument not previously considered by the Office, or by submitting relevant and pertinent new evidence not previously considered by the Office. Section 10.608(b)

[5] *Charles D. Thompson*, 35 ECAB 220 (1983); *Elmer Strong*, 17 ECAB 226 (1965).

[6] *Jack E. Rohrabaugh*, 38 ECAB 186 (1986).

provides that when an application for review of the merits of a claim does not meet at least one of these three requirements the Office will deny the application for review without reviewing the merits of the claim.

ANALYSIS -- ISSUE 2

Appellant's December 13, 2004 request for reconsideration did not show that the Office erroneously applied or interpreted a specific point of law, nor did it advance a relevant legal argument not previously considered by the Office. The evidence appellant submitted with his December 13, 2004 request for reconsideration was not relevant. The statement from his coworkers was vague and does not show that their recent memory of appellant's work activities extended back to the end of 1999 and beginning of 2000 when his wage-earning capacity was determined. The prescription for Vioxx from October 5, 2000 does not show his injury-related condition worsened.

CONCLUSION

The Office properly refused to modify its January 28, 2000 determination of appellant's wage-earning capacity and the Office properly refused to reopen appellant's case for further review of the merits of his claim.

ORDER

IT IS HEREBY ORDERED THAT the April 4, 2005 and July 20, 2004 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 20, 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