



earning capacity determination was warranted. The facts and history contained in the prior appeal are incorporated by reference. The facts and history germane to the present appeal include several reports from Dr. Fred M. Ruefer, a Board-certified orthopedic surgeon, who performed a second opinion examination and found him capable of working on a part-time basis. In a November 2, 2000 report, Dr. Ruefer opined that appellant was unable to work and not likely to return to work in the foreseeable future. Dr. Ruefer reiterated that appellant was unemployable in a report dated September 28, 2001.

In a December 10, 2001 report, Dr. Ruefer opined that appellant had residual weakness and neurologic defect of the right upper extremity. He explained that appellant related that whenever he sat in one position for a period of time, (greater than 30 minutes), he would have to get up and move around. Dr. Ruefer noted that appellant also related that, when he used the right arm or dispatching arm, he would develop radicular symptoms; however, he could not confirm or verify this. He opined that this was consistent with appellant's disease process and would "disable the patient for any type of significant work or dispatching as was his former job description."

In an October 2, 2002 report, Dr. Ruefer diagnosed residual cervical radiculopathy and pain in his neck secondary to cervical surgery as well as from a severely frozen shoulder and continued pain in the shoulder. He did not feel that appellant was employable as appellant was unable to remain in any single position for any prolonged period of time. In October 7, 2003 and October 14, 2004 reports, Dr. Ruefer repeated his opinion that appellant was not employable.

By decision dated October 27, 2005, the Office denied modification of appellant's October 26, 1992 loss of wage-earning capacity decision. The Office determined that the evidence supported that appellant would have continued as a modified mobile equipment operator, were it not for the reduction-in-force (RIF).

### **LEGAL PRECEDENT**

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.<sup>2</sup>

The Office's procedure manual provides that, 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.<sup>3</sup> The procedure manual further indicates that under these circumstances, the claims examiner will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity decision.<sup>4</sup>

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<sup>2</sup> See *Katherine T. Kreger*, 55 ECAB \_\_\_\_ (Docket No. 03-1765, issued August 13, 2004).

<sup>3</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

<sup>4</sup> *Id.*

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.<sup>5</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>6</sup>

### ANALYSIS

The Office determined that appellant was unable to return to his date-of-injury position. The employing establishment offered appellant a part-time limited-duty position as a mobile equipment dispatcher. Appellant worked three hours per day, four days a week. Appellant returned to work in this position on August 10, 1992. The Office reduced his compensation benefits based on his actual earnings as a mobile equipment dispatcher on October 26, 1992, more than 60 days after appellant returned to work. Appellant continued to work in this position until September 26, 1998 when he lost his position due to a RIF. Appellant requested a resumption of compensation for total wage loss on December 6, 2004 by filing a notice of recurrence of disability. Although he did not identify a specific date of recurrence, appellant questioned why he continued to have 48 hours of pay deducted from his continuing compensation payments. Appellant alleged that the Office physician had found him unemployable for the last four years.

There is no indication in the record that the original wage-earning capacity determination was erroneous. Appellant worked in this position for more than six years after the Office determined that these wages fairly and reasonably represented his wage-earning capacity. Furthermore, there is no evidence in the record that appellant was retrained or otherwise vocationally rehabilitated.

The record reflects that appellant worked as a modified mobile equipment dispatcher until the RIF on September 26, 1998. Appellant has not shown that he was unable to continue working in this position due to residuals of his employment-related condition.<sup>7</sup>

Appellant submitted reports from Dr. Ruefer to support his claim of total disability. However, they are insufficient to establish a material change in his injury-related condition.

In November 2, 2000 and September 28, 2001 reports, Dr. Ruefer advised that appellant was unemployed since he was last seen. He noted that appellant's symptoms were basically unchanged with the exception that the right side had worsened and related that appellant continued to have complaints of neck, shoulder and arm pain. Dr. Ruefer opined that appellant was unable to return to work in the foreseeable future and at no time would he be able to work.

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<sup>5</sup> *Tamra McCauley*, 51 ECAB 375, 377 (2000).

<sup>6</sup> *Id.*

<sup>7</sup> *See Joseph D. Duncan*, 54 ECAB 471 (2003); *Don J. Mazurek*, 46 ECAB 447 (1995) (a RIF or termination of employment following a temporary appointment does not, of itself, rise to a compensable disability unless there is a showing that residuals of the employment injury, from a medical standpoint, prevented the employee from continuing in his or her employment).

In a December 10, 2001 report, he attempted to explain that appellant had residual weakness and neurological deficit in the right upper extremity. Dr. Ruefer noted that appellant described his symptoms, which he could not confirm or verify. He opined that appellant's symptoms were consistent with his disease process and would disable appellant from any type of significant work or dispatching, as was his former job description. However, in the aforementioned reports, he did not explain how appellant's accepted conditions would cause appellant to be totally disabled for work as a mobile equipment operator, the position he held at the time of his loss of wage-earning determination.

As noted, the burden of proof is on the party attempting to show a modification of the wage-earning capacity. In this case, appellant has not submitted sufficient medical evidence to establish a material change in the nature and extent of his injury-related conditions. Dr. Ruefer's reports are insufficient to establish a worsening of appellant's employment-related condition after he returned to work in the light-duty position.

**CONCLUSION**

The Board finds that appellant did not meet his burden of proof to establish that modification of the wage-earning capacity determination was warranted.

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 27, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 20, 2006  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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