

**United States Department of Labor
Employees' Compensation Appeals Board**

R.J., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Milledgeville, GA, Employer**

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**Docket No. 07-1449
Issued: December 21, 2007**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 7, 2007 appellant filed a timely appeal from the April 6, 2007 merit decision of the Office of Workers' Compensation Programs, which denied modification of a wage-earning capacity determination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the denial of modification.

ISSUE

The issue is whether appellant has met his burden of proof to establish a modification of the Office's December 1, 2005 determination of wage-earning capacity.

FACTUAL HISTORY

On September 24, 2003 appellant, then a 39-year-old city carrier,¹ sustained an injury in the performance of duty: "Truck pull out in front of me. Lady fail to yield right away. Light was green for me and she pull out in to me." The Office accepted his claim for aggravation of

¹ Appellant worked in this position since August 1993.

herniated discs at C5-6 and C6-7. The Office approved surgery² and paid compensation for wage loss.

On August 1, 2005 Dr. George S. Stefanis, the attending neurosurgeon, released appellant to full-time limited duty within the guidelines of a functional capacity evaluation. On August 2, 2005 appellant accepted an offer to work in the retained-pay position of city carrier (modified). He returned to work the following day.

In a progress report covering the period July 25 through August 25, 2005, the Office's field nurse noted that appellant had returned to limited duty but that this was not a permanent job offer. She stated that, according to the postmaster, "a permanent job offer is being developed for this claimant." Further, the employing establishment's injury compensation specialist verified that appellant was not currently working in a permanent limited-duty position: "She states she will immediately begin working on a permanent limited[-]duty job offer."

In a progress report, covering the period August 25 through September 24, 2005, the Office field nurse reported: "The injury compensation specialist states a permanent job offer has not been made as yet due to the [p]ostmaster trying to come up with duties that will make the claimant continue to feel 'good' about his job."

In a decision dated December 1, 2005, the Office found that appellant's actual earnings in the position of city carrier (modified) fairly and reasonably represented his wage-earning capacity. The employing establishment's injury compensation specialist represented that the position "can be considered permanent in nature," as the employing establishment would continue to accommodate appellant's restrictions.³ Explaining that continued earnings in other than seasonal employment for two or more months supported a finding that the position fairly and reasonably represented an employee's wage-earning capacity, the Office found that appellant had no loss of wage-earning capacity because his actual earnings met or exceeded the current wages of the job he held when he was injured.

On December 11, 2005 appellant requested reconsideration. He explained that he had continued wage loss because he sustained an injury on October 4, 2005 while performing the limited duties of his position.

In a decision dated March 10, 2006, the Office denied modification of its December 1, 2005 decision. The Office found that the medical evidence did not support a material worsening of his injury-related condition in October 2005. The Office also found that the medical evidence was not sufficient to show that the December 1, 2005 determination was erroneous. The Office noted that appellant had described a new injury on October 4, 2005 and that a new case was created under file number 062159053 and was currently under development.

² On March 10, 2004 appellant underwent an anterior cervical discectomy and decompression at C5-6, an interbody fusion of C5-6 and an internal fixation of C5 to C6. On January 14, 2005 he underwent the same basic procedures at C6-7.

³ This representation appears on a loss of wage-earning capacity worksheet the Office completed on December 1, 2005, the date of its final decision.

On January 12, 2007 appellant requested reconsideration of the Office's March 10, 2006 decision. Arguing that his condition materially worsened, he explained that x-rays taken of his neck showed a successful surgery in January 2005 but that later tests showed no fusion at C6-7.

In a decision dated April 6, 2007, the Office denied modification of its March 10, 2006 decision. The Office found that none of the medical evidence clearly showed a material worsening of the accepted work-related condition, but rather supported a new injury after appellant's return to work in a modified job.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of his duty.⁴ "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.⁵

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, the wage-earning capacity of the employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity.⁶ To determine whether the employee's work fairly and reasonably represents his wage-earning capacity, the Office should consider whether the kind of appointment and tour of duty are at least equivalent to those of the job held on date of injury. Unless they are, the Office may not consider the work suitable. The reemployment may not be considered suitable when the job is temporary where the employee's previous job was permanent.⁷

Once the 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 condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous. The burden of proof is on the party attempting to show modification of the award.⁸

ANALYSIS

The position that appellant accepted on August 2, 2005 was not permanent. The offer did not identify the position as permanent and after appellant returned to work, both the postmaster and the employing establishment's injury compensation specialist verified that he was not

⁴ 5 U.S.C. § 8102(a).

⁵ 20 C.F.R. § 10.5(f) (1999).

⁶ 5 U.S.C. § 8115(a).

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

⁸ *Daniel J. Boesen*, 38 ECAB 556 (1987).

working a permanent assignment. Although both stated that a permanent job offer was being developed, no such offer ever materialized.

Office procedures are clear. When determining whether earnings in alternative employment fairly and reasonably represent the employee's wage-earning capacity, the Office may not consider the work suitable when the job is temporary and the employee's previous job was permanent. Appellant worked as a city carrier since 1993. Because the record establishes that the position to which he returned on August 3, 2005 was not permanent, the Office may not consider the work suitable for a determination of wage-earning capacity.

The injury compensation specialist's representation -- that the position could be considered permanent because the employing establishment would continue to accommodate appellant -- does not establish the August 2, 2005 offer into one of permanent employment. It does not erase the representations made by the postmaster, and the injury compensation specialist herself, that appellant was not in fact working permanent limited duty. It is no substitute for the permanent job offer that was being developed. There is no evidence of record that establish when the position was considered to have "changed" into a permanent one and, therefore, no way to determine whether appellant worked in the changed position for a sufficient period of time to demonstrate his capacity to earn wages. For this reason, the December 2, 2005 wage-earning capacity was erroneous.

The Board will reverse the Office's April 6, 2007 decision denying modification.

CONCLUSION

The Board finds that appellant has met his burden of proof. The record shows that the Office's December 1, 2005 determination of wage-earning capacity was, in fact, erroneous. The kind of appointment to which appellant returned on August 3, 2005 was not at least equivalent to that of the job he held on date of injury, and therefore the employment was not suitable for a determination of wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the April 6, 2007 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 21, 2007
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board