

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

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L.N., Appellant )

and )

**DEPARTMENT OF VETERANS AFFAIRS,**  
**VETERANS ADMINISTRATION MEDICAL**  
**CENTER, Danville, IL, Employer** )

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**Docket No. 06-1981**  
**Issued: March 19, 2007**

*Appearances:*  
*Stephen D. Scavuzzo, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

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

**JURISDICTION**

On August 24, 2006 appellant, through his attorney, filed a timely appeal from a May 31, 2006 decision of a hearing representative of the Office of Workers' Compensation Programs affirming a wage-earning capacity decision and finding that he did not establish a recurrence of disability. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant has established that the Office's December 16, 2004 wage-earning capacity determination should be modified.

**FACTUAL HISTORY**

This case is before the Board for the second time. On October 6, 2004 the Board reversed a September 30, 2003 decision which found that appellant had not established a recurrence of disability on October 19, 2002 warranting modification of the established loss of

wage-earning capacity (LWEC) determination.<sup>1</sup> The Board noted that appellant stopped work on October 19, 2001 and filed a claim requesting compensation for wage loss beginning that date. In a decision dated November 15, 2001, the Office issued a retroactive LWEC determination.<sup>2</sup> On August 19, 2002 appellant filed a recurrence of disability claim beginning October 19, 2001 causally related to his accepted employment injury. By decision dated October 2, 2002, the Office found that he had not established a recurrence of disability on October 19, 2001 such that he was unable to perform the position of mail processing equipment operator. On September 30, 2003 an Office hearing representative affirmed the October 2, 2002 decision on the grounds that appellant had not shown that he sustained a recurrence of disability on October 19, 2001 warranting modification of the November 15, 2001 LWEC determination. On appeal, the Board found that appellant had established that the November 15, 2001 decision should be modified as it was erroneously issued. The Board noted that the Office had issued its November 15, 2001 retroactive LWEC determination after appellant stopped work and alleged that the work stoppage occurred due to a change in his injury-related condition. The Board found that prior to issuing its November 15, 2001 LWEC decision, the Office should have adjudicated whether he stopped work due to an employment-related recurrence of disability. The Board thus concluded that appellant had established modification of the November 15, 2001 LWEC. The findings of fact and conclusions of law from the prior decision are hereby incorporated by reference.

By decision dated December 16, 2004, the Office reduced appellant's compensation effective March 19, 2001 based on its finding that his actual earnings as a mail processing equipment operator fairly and reasonably represented his wage-earning capacity. The Office noted that it had previously found in decisions dated October 2, 2002 and September 30, 2003 that he did not establish a recurrence of disability on October 19, 2001.

On January 10, 2005 appellant, through his representative, requested an oral hearing. On March 24, 2006 he changed his request to a review of the written record.

In a decision dated May 31, 2006, the Office hearing representative affirmed the December 16, 2004 decision. The hearing representative determined that appellant had not submitted sufficient evidence to show either that his condition materially worsened on October 19, 2001 or that the December 16, 2004 LWEC was erroneous. The hearing representative further found that appellant had not established an employment-related recurrence of disability on October 19, 2001.

### **LEGAL PRECEDENT**

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

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<sup>1</sup> Docket No. 04-569 (issued October 6, 2004).

<sup>2</sup> In a decision dated June 5, 2002, an Office hearing representative affirmed the November 15, 2001 wage-earning capacity determination.

or the original determination was in fact erroneous.<sup>3</sup> The burden of proof is on the party attempting to show the award should be modified.<sup>4</sup>

Section 8115(a) of the Federal Employees' Compensation Act provides that, 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.<sup>5</sup> Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.<sup>6</sup> In addition, the Federal (FECA) Procedure Manual provides that the Office can make a retroactive wage-earning capacity determination if appellant worked in the position for at least 60 days, the position fairly and reasonably represented his wage-earning capacity and "*the work stoppage did not occur* because of any change in his injury-related condition affecting the ability to work."<sup>7</sup> (Emphasis in the original.) The Board has concurred that the Office may perform a retroactive wage-earning capacity determination in accordance with its procedures.<sup>8</sup>

In cases where appellant ceases work after reemployment and the Office has not issued a formal LWEC determination, the Office's procedure manual provides as follows:

"If no formal LWEC decision has been issued, the CE [claims examiner] must ask the claimant to state his or her reasons for ceasing work and make a suitability determination on the job in question. If the job is considered suitable, the CE then advises the claimant that he or she has the burden of proving total disability ... after return to work and invite the claimant to submit a Form CA-2a.

"(1) *If the reasons stated by the claimant* amount to an argument for a recurrence, the CE should develop and evaluate the medical and factual evidence upon receipt of Form CA-2a...."<sup>9</sup> (Emphasis in the original.)

### ANALYSIS

In the previous appeal, the Board found that the Office erred in issuing a retroactive LWEC determination prior to determining whether appellant stopped work due to a change in his injury-related condition. The Board noted that the hearing representative properly determined

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<sup>3</sup> *David L. Scott*, 55 ECAB 330 (2004); *Tamra McCauley*, 51 ECAB 375 (2000).

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

<sup>5</sup> 5 U.S.C. § 8115(a); *James Henderson, Jr.*, 51 ECAB 268 (2000).

<sup>6</sup> *Selden H. Swartz*, 55 ECAB 272 (2004); *Bette L. Kvetensky*, 51 ECAB 346 (2000).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (May 1997).

<sup>8</sup> *See Tamra McCauley*, *supra* note 3.

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(b) and 9(b)(1), respectively (December 1995).

that the issue was whether appellant had established modification of the wage-earning capacity determination. The Board concluded, however, that, as the original LWEC was issued in error, appellant had established that the LWEC should be modified. The Board thus reversed the September 30, 2003 decision of a hearing representative.

By decision dated December 16, 2004, the Office again issued a retroactive LWEC reducing appellant's compensation effective March 19, 2001 based on its finding that his actual earnings as a mail processing equipment operator fairly and reasonably represented his wage-earning capacity. The Office noted that, by decision dated October 2, 2002 and September 30, 2003, it had found that he had not established a recurrence of disability on October 19, 2001. On May 31, 2006 a hearing representative affirmed the December 16, 2004 decision. The hearing representative also found that appellant had not established a recurrence of disability.

As discussed by the Board in the prior appeal, the Office's procedure manual provides that a retroactive LWEC determination may be made where the claimant worked in the position for at least 60 days, the employment fairly and reasonably represents his wage-earning capacity and the work stoppage did not occur because of any change in the claimant's injury-related condition.<sup>10</sup> On December 16, 2004 the Office again issued a retroactive LWEC decision prior to determining whether appellant's work stoppage occurred because of a change in his condition due to the accepted employment injury. While the Office noted that it had previously adjudicated the issue of recurrence of disability in decisions dated October 2, 2002 and September 30, 2003, the Board on prior appeal had reversed the September 30, 2003 hearing representative's decision which affirmed the October 2, 2002 decision. Consequently, at the time it issued its December 16, 2004 LWEC determination, the Office had not adjudicated the issue of whether appellant's work stoppage occurred due to a recurrence of disability. The Board has held that it is inappropriate to issue a retroactive wage-earning capacity determination when there is a pending claim for compensation from the time of the work stoppage.<sup>11</sup>

Following the issuance of a formal LWEC determination, the Office's procedure manual directs the claims examiner to consider the criteria for modification when the claimant requests compensation for total disability.<sup>12</sup> The hearing representative, in his May 31, 2006 decision, concluded that appellant had not established modification of the December 16, 2004 LWEC. The Board finds, however, that the December 16, 2004 LWEC decision was improperly issued, as appellant had stopped work and filed a notice of recurrence of disability which the Office had not adjudicated. Consequently, appellant has established that the December 16, 2004 LWEC determination should be modified.

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<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(e) (May 1997).

<sup>11</sup> *Juan A. DeJesus*, 54 ECAB 721 (2003).

<sup>12</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(b) (December 1995).

**CONCLUSION**

The Board finds that the Office improperly denied modification of its loss of wage-earning capacity determination as it erroneously issued a retroactive LWEC decision after appellant stopped work and filed a claim for compensation for total disability.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 31, 2006 is reversed.

Issued: March 19, 2007  
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