

compensation. In November 1998, appellant returned to limited duty as a modified city carrier technician. In June 2000, the employing establishment made appellant's limited-duty position permanent.

In an August 8, 2000 decision, the Office found that appellant's actual earnings as a modified city carrier technician fairly and reasonably represented his wage-earning capacity. It found that appellant had no loss of wage-earning capacity based on his actual earnings in the modified position. On May 19, 2003 the Office awarded appellant a schedule award for seven percent permanent impairment of his left leg.

On November 27, 2004 appellant voluntarily transferred from his job in Michigan to a part-time flexible (PTF) postal position in Puerto Rico. The PTF position did not guarantee more than four hours of work per pay period and was based on the work available in the office. Appellant subsequently claimed wage-loss compensation beginning January 6, 2005 as he was not being provided full-time employment in his PTF position in Puerto Rico. On November 2, 2005 he filed a recurrence of disability claim beginning January 6, 2005.

By decision dated December 1, 2005, the Office denied appellant's claim for a recurrence of disability as the evidence of record failed to establish that his wage-loss commencing January 6, 2005 was due to his work-related injury.

On December 7, 2005 appellant disagreed with the Office's December 1, 2005 decision and requested an oral hearing by way of a teleconference.

By decision dated February 15, 2006, an Office hearing representative set aside the December 1, 2005 decision. The Office hearing representative found that the proper issue in the case was whether there was a basis for modifying the August 8, 2000 wage-earning capacity determination. The hearing representative noted that, since the burden of proof rested with the party seeking modification, the Office should advise appellant of the necessary evidence needed to establish a basis for modification of his wage-earning capacity. The case was remanded to the Office for further development concerning appellant's request for modification of the August 8, 2000 wage-earning capacity determination. In a March 6, 2006 letter, the Office advised appellant of the criteria for modifying a formal wage-earning capacity determination as well as the necessary factual and medical evidence required to support such a request.

In a March 10, 2006 letter, appellant stated that he was an injured worker and that his August 8, 2000 wage-earning capacity determination guaranteed him eight hours of work per day. He argued that his wage-earning capacity decision should be honored and he should either be provided with full-time work in his job in Puerto Rico or paid compensation for working less than full time. Appellant stated that the original wage-earning capacity decision was not in error, his medical condition had not changed and he had not been vocationally rehabilitated or retrained.

By decision dated April 5, 2006, the Office denied modification of the August 8, 2000 wage-earning capacity decision. It found that appellant did not establish a basis for modification of his wage-earning capacity or to award compensation for wage loss.

On April 24, 2006 appellant disagreed with the Office's April 5, 2006 decision and requested a review of the written record. In an undated statement, he reiterated that he wanted to work 8 hours a day or 40 hours a week total, as guaranteed in his August 8, 2000 wage-earning capacity decision. Appellant maintained that the employing establishment had an obligation to provide him full-time work within his restrictions, regardless of his transfer to a different location. Alternatively, he maintained that the Office should pay him wage-loss compensation for the employing establishment's failure to meet that obligation. Appellant submitted CA-7 forms for days he did not work a full eight hours or did not work at all because no work was available. The employing establishment did not provide comments to his request for review of the written record.

In an August 25, 2006 decision, the hearing representative affirmed the April 5, 2006 decision. She noted that appellant had voluntarily transferred to a position in Puerto Rico where he was given fewer hours of work than he had received in the job on which the Office had based the August 8, 2000 wage-earning capacity decision.

In a September 6, 2006 letter, appellant requested reconsideration. He argued that he should not lose his earning potential because he voluntarily transferred to another location. Appellant reiterated that he was not trying to modify the wage-earning capacity decision of August 2000 and affirmed that the original determination was not in error and he had not been retrained or vocationally rehabilitated. He also reiterated arguments that, since he was a permanent rehabilitation employee who transferred positions within the employing establishment, he should be compensated for wage loss as a result of not being granted full-time work. Appellant also submitted additional evidence pertaining to his transfer request, information about the new position, correspondence from the employing establishment and the Office pertaining to his wage-loss claims, the rehabilitation assignment and permanent rehabilitation positions. He also provided Standard Form 50's from October 1993 through September 2005; notices of personnel actions as well as an eReassign Supervisor Evaluation; correspondence from the employing establishment pertaining to the rehabilitation assignment and permanent rehabilitation positions in general; and printouts from various publications as well as a copy of the Office's August 8, 2000 wage-earning capacity decision. Appellant continued to submit additional claims for wage loss.

By decision dated March 21, 2007, the Office denied modification of its August 25, 2006 decision.

LEGAL PRECEDENT

A wage-earning capacity decision is a determination that actual earnings in employment or earnings in 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.¹

¹ See *Sharon C. Clement*, 55 ECAB 552 (2004).

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. In this instance the Office will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity.² 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.³ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁴

ANALYSIS

On August 8, 2000 the Office issued a formal wage-earning capacity decision on appellant's limited-duty position as a modified city carrier technician and found no wage loss had occurred. In November 2004, appellant voluntarily transferred to a PTF position in Puerto Rico which provided fewer hours of work than the position on which appellant's wage-earning capacity was based. He subsequently claimed wage-loss compensation beginning January 6, 2005 on the basis that he was not being provided full-time employment in his PTF position in Puerto Rico. As noted above, applicable case law and Office procedures require that, once a formal wage-earning capacity decision is in place, 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.⁵ The burden of proof is on the party attempting to show modification of the wage-earning capacity determination.⁶

In the present case, appellant did not submit evidence showing that the Office's August 8, 2000 wage-earning capacity determination was erroneous. Rather, he requested wage-loss compensation on the basis that he was not being provided full-time employment in the PTF position in Puerto Rico. Because a formal wage-earning determination was in place when appellant filed the claim, the Office properly adjudicated the case as a request for modification of an established loss of wage-earning capacity.⁷ The Board finds that appellant has not met his burden of proof. Appellant opined that he did not believe that the original determination was erroneous and acknowledged that he had not been retrained or vocationally rehabilitated and that his condition did not change. There is no evidence of record to establish that appellant has been

² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11 (June 1996).

³ *Stanley B. Plotkin*, 51 ECAB 700 (2000); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

⁴ *Id.*

⁵ *Stanley B. Plotkin*, *supra* note 3.

⁶ *Id.*

⁷ *Katherine T. Kreger*, 55 ECAB ____ (2004); *Sharon C. Clement*, *supra* note 1; Federal (FECA) Procedure Manual, *supra* note 2.

retrained or otherwise vocationally rehabilitated and he has submitted no medical evidence to show that there was a material change in the nature and extent of the injury-related condition beginning January 6, 2005. In fact, he has submitted no medical evidence since he initially submitted his claim. The factual material appellant did submit fails to support any of the three criteria for modifying a wage-earning capacity decision.

Appellant's contentions on appeal do not constitute a basis for reinstatement of compensation for wage loss. Compensation under the Federal Employees' Compensation Act is payable for disability for work due to an injury or disease causally related to the employment. Appellant's claim for his left knee condition was accepted by the Office and he received appropriate benefits for his wage-loss and medical treatment. He returned to work as a modified city carrier. The August 8, 2000 decision established that residuals of appellant's left knee injury did not impair his ability to earn actual wages equal to those he received at the time of his injury.⁸ Therefore, the Office's decision established that appellant was not "disabled" as that term is used under the Act. The Board has explained, as follows:

"Disability is not synonymous with physical impairment which may or may not result in an incapacity to earn wages. An employee who has a physical impairment causally related to his or her federal employment, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in the Act and is not entitled to compensation for loss of wage-earning capacity. When, however, the medical evidence establishes that residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his or her employment, the employee is entitled to compensation for any loss of wage-earning capacity resulting from the employment."⁹

Appellant has not submitted any medical evidence to establish that his inability to earn the wages he was receiving is due to residuals of his left knee condition. The record establishes that he transferred from his job in Michigan to a part-time flexible position in Puerto Rico which did not guarantee more than four hours of work per pay period. Appellant's reasons for leaving the full-time modified-duty position in Michigan to move to Puerto Rico and accept less than full-time employment are not of record. It is evident, however, that he has not established that he left his modified-duty position in Michigan for any reason related to his accepted injury. The record does not demonstrate that appellant's inability in Puerto Rico to earn the wages he was receiving is due to any worsening of his accepted condition. Therefore, his loss of earnings must be attributed to his voluntary reduction in work hours as opposed to residuals associated with his left knee condition. By voluntarily limiting his income, appellant has no right to compensation for partial disability.¹⁰ To establish his claim for benefits under the Act, appellant must submit

⁸ Under the Act, the term "disability" means the incapacity because of an employment injury to earn the wages the employee was receiving at the time of injury. See *Cheryl L. Decavitch*, 50 ECAB 397 (1999); *George A. Compton*, 45 ECAB 154 (1993).

⁹ *Roberta L. Kaaumoana*, 54 ECAB 150 at 151-52 (2002).

¹⁰ See *Larson*, *Workers' Compensation Law* § 84.04D[2] and cases cited therein.

evidence sufficient to show that his reduction in hours is due to a change in his accepted condition. This appellant has failed to prove.

As noted above, the burden of proof is on the party attempting to show a modification of the wage-earning capacity. In this case, the record is devoid of any evidence to support any of the three criteria for modifying a wage-earning capacity decision. Moreover, the fact that appellant voluntarily transferred to a position which provided fewer hours of work than the position for which the wage-earning capacity was based is not a basis for modification of a wage-earning capacity decision. In other words, the fact that he voluntarily chose to leave the position does not affect this wage-earning capacity determination.

Appellant did not meet his burden of proof to modify his August 8, 2000 wage-earning capacity determination and compensation for the claimed wage loss is not payable.

CONCLUSION

The Board finds that appellant has failed to establish a basis for modification of the August 8, 2000 wage-earning capacity rating as a modified city carrier technician and, thus, compensation for the claimed wage loss is not payable.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated March 21, 2007, August 25 and April 5, 2006 are affirmed.

Issued: November 13, 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