United States Department of Labor
Employees' Compensation Appeals Board

G.M., Appellant	)	
	)	**Docket No. 08-44**
and	)	**Issued: December 3, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Garland, TX, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 3, 2007 appellant filed a timely appeal from a February 1, 2007 Office of Workers' Compensation Programs' wage-earning capacity decision and a July 3, 2007 decision denying further merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether the Office properly made a retroactive determination that appellant's modified part-time position from October 4, 2004 to February 3, 2005 represented his wage-earning capacity; and (2) whether the Office properly denied appellant's request for reconsideration.

FACTUAL HISTORY

On November 28, 2001 appellant, then a 38-year-old letter carrier, sustained injury to both shoulders in a motor vehicle accident involving his mail truck. The Office accepted appellant's claim for a right shoulder injury and lumbar strain and sprain and right shoulder impingement syndrome, right shoulder rotator cuff strain/sprain and left shoulder and upper arm

sprain/strain. Appellant stopped work on November 28, 2001 and returned to a modified part-time position on October 4, 2004. He received appropriate compensation benefits for all periods of disability.[1]

A December 26, 2001 magnetic resonance imaging (MRI) scan of the right shoulder revealed mild supraspinatus tendinopathy, marked bony and capsular hypertrophic changes in the acromioclavicular joint and a slap lesion of the superior glenoid labrum. A January 24, 2002 lumbar spine MRI scan revealed mild straightening of the normal lumbar lordosis, no compression fracture or spondylolisthesis and a diffuse annular disc bulge at L3-4 and L4-5. On February 12, 2002 Dr. Kenneth S. Bayles, a Board-certified osteopath, noted the history of injury and diagnosed lumbar intervertebral disc disorder, lumbar myalgia and myofasciitis. He recommended physical therapy and work hardening and advised that appellant would be able to resume work. On February 25, 2002 Dr. John C. McConnell, a Board-certified orthopedic surgeon, performed an arthroscopic repair of the right rotator cuff, repair of the glenohumeral instability of the right shoulder, repair and shrinkage of the acromioclavicular ligament of the right shoulder, arthroscopic excision/arthroplasty of the acromioclavicular joint (partial), arthroscopic debridement of the right shoulder and acromioplasty of the right shoulder. Thereafter, Dr. McConnell noted that appellant experienced pain and stiffness in the right shoulder. On June 3, 2002 he performed a repeat arthroscopy of the right shoulder, surgical capsulorraphy, surgical repair of the superior glenoid labrum lesion and arthroscopic debridement of the right shoulder. Dr. McConnell recommended physical therapy and opined that appellant was totally disabled.

On January 3, 2003 appellant underwent arthroscopic surgery performed by Dr. Sumant Krishnan, a Board-certified orthopedic surgeon, who performed right shoulder arthroscopic debridement, arthroscopic rotator interval anterior and inferior capsular releases, right shoulder subacromial decompression and right shoulder distal clavicle resection. Dr. Krishnan diagnosed right shoulder impingement, acromioclavicular joint arthrosis, secondary capsulitis of the shoulder and retained hardware. An electromyogram (EMG) dated March 10, 2003 revealed suprascapular neuropathy on the right and mild ulnar neuropathy at the cubital tunnel. Appellant submitted a work capacity evaluation prepared by Dr. Baxter D.D. Greer, an osteopath, dated October 24, 2003, who noted that appellant could sit, walk, stand and twist for eight hours per day with limitations on reaching, operating a motor vehicle, pushing, pulling, lifting, climbing and performing repetitive movements of the wrist and elbow. The Office subsequently referred appellant to several second opinion physicians and an impartial medical examiner.[2]

[1] On November 30, 2004 the Office granted appellant a schedule award for 24 percent permanent impairment of the right upper extremity and a 10 percent impairment of the left upper extremity. The period of the award was from October 3, 2004 to October 15, 2006. Appellant later accepted a lump-sum settlement for the schedule award in the amount of $33,080.46 for the period December 26, 2004 to October 15, 2006.

[2] On May 4, 2004 the employing establishment offered appellant a modified limited-duty position as a casual carrier for four hours per day. On June 4, 2004 appellant accepted the position. In a decision dated June 14, 2004, the Office terminated appellant's compensation on the grounds that he refused suitable work. On June 24, 2004 it reinstated appellant on the periodic rolls and referred him to an impartial medical adviser to resolve a conflict over appellant's work capacity.

Appellant submitted a work capacity evaluation from Dr. Greer on June 25, 2004. Dr. Greer noted that appellant could work four hours per day with a graduated schedule to achieve eight hours per day by August 30, 2004. He noted restrictions for the right arm of no reaching or reaching above the shoulder, no operating a vehicle, no pushing, pulling or lifting and squatting limited to four hours. With regard to the left arm, he noted that appellant was limited to four hours of reaching, reaching above the shoulder and pushing, pulling and lifting.

On July 11, 2004 the employing establishment offered appellant a limited-duty position as a casual carrier, four hours per day increasing to eight hours per day by August 30, 2004, effective July 11, 2004. The duties of the position included monitoring the lobby, answering the telephone, janitorial duties and handling certified second notice mail and missent mail. The physical requirements of the position include walking two to four hours, lifting zero pounds one to two hours per day, sitting two to four hours per day and writing one to two hours per day. On August 13, 2004 appellant accepted the position.

Appellant reported for work October 4, 2004.[3]

Appellant submitted reports from Dr. Bayles dated December 9 and 30, 2004 who noted that appellant experienced increasing left shoulder pain and numbness. Dr. Bayles advised that appellant could continue to work eight hours per day with restrictions; however, appellant reported that he was required to carry heavy packages beyond his lifting restrictions. On February 3, 2005 appellant presented with acute increasing left shoulder pain and low back pain and noted having difficulty performing his limited-duty position. Dr. Bayles noted that appellant was taken off work. Dr. Ralph C. Saunders, a Board-certified orthopedic surgeon, diagnosed postsurgical changes of the right shoulder, labral defect, bicipital tendinitis and acromioclavicular joint neuropathy. On June 1, 2005 he performed an arthroscopic-assisted rotator cuff repair of the left shoulder, arthroscopic subacromial decompression and anterior labral resection. Dr. Saunders diagnosed a large rotator cuff tear of the left shoulder, acromioclavicular joint arthritis on the left, impingement syndrome on the left, bursitis of the left shoulder and labral tear of the left shoulder. He advised that appellant was totally disabled.

On June 29, 2005 the employing establishment submitted a notification of personnel action indicating that appellant was terminated as a noncareer employee effective June 29, 2005.

On July 14, 2005 appellant filed a CA-7, claim for compensation, for the period February 3 to July 15, 2005.

In a decision dated July 27, 2005, the Office denied appellant's claim for compensation for the period February 3 to July 15, 2005. It noted that he received a lump-sum settlement of a schedule award for the period October 3, 2004 to October 15, 2006 and, therefore, compensation was not payable for the duration of the schedule award.

[3] In an e-mail dated December 20, 2004, the employing establishment noted that appellant began working six and half hours per day on December 13 and 14, and December 15 to 17, 2004 he worked seven hours per day.

On August 1, 2005 appellant requested an oral hearing. He submitted a report from Dr. Saunders dated September 1, 2005, who released him to full-time limited-duty work subject to restrictions.

On November 8, 2005 appellant filed a claim for an occupational disease alleging that the employing establishment required him to work outside his work restrictions which caused an aggravation of his left shoulder condition. He became aware of his condition on December 5, 2004. The Office accepted this claim for left shoulder rotator cuff tear, acromioclavicular joint arthritis and impingement syndrome. It authorized the arthroscopic surgery which was performed on June 1, 2005. On December 29, 2005 the Office combined claim file number xxxxxx525 and xxxxxx065.

In a decision dated January 19, 2006, the Office denied appellant's claim for compensation beginning February 3, 2005, noting that the schedule award covered this period and that he was not entitled to dual benefits.

An oral hearing was held on June 1, 2006. Appellant submitted reports from Dr. Saunders dated March 17, 2005 to October 19, 2006. Dr. Saunders noted that appellant was progressing well postoperatively but remained symptomatic. He diagnosed adhesive capsulitis and advised that appellant could continue to work light duty. A May 16, 2006 MRI scan of the left shoulder revealed interval postoperative changes from rotator cuff repair, high grade partial thickness intrasubstance tearing within the distal supraspinatus tendon, moderate infraspinatus tendinopathy and mild subscapularis tendinopathy. A functional capacity evaluation dated June 21, 2006 noted appellant's ability to perform sedentary work.

In a decision dated October 13, 2006, the hearing representative affirmed the January 19, 2006 decision.

By decision dated January 24, 2007, the Office reduced appellant's compensation effective October 16, 2006 based on his actual wages as a part-time modified letter carrier. It noted that appellant was employed in the position on October 4, 2004 and his weekly salary at the position was $260.00 based on his ability to work 20 hours per week. The Office indicated that appellant had been employed in the position for over 60 days. It concluded that the position of part-time modified letter carrier represented appellant's wage-earning capacity.

Appellant submitted a report from Dr. Bayles dated January 23, 2007 who noted appellant's complaints of persistent bilateral shoulder pain and occasional back pain. Dr. Bayles noted that appellant had not returned to work but was a candidate for vocational rehabilitation and could perform sedentary work. He advised that he had no further treatment options to offer appellant and released him from his care.

On February 1, 2007 the Office issued a revised wage-earning capacity determination which superseded the January 24, 2007 decision. It reduced appellant's compensation effective October 4, 2004 based on his ability to earn wages as a part-time modified letter carrier. The Office noted that appellant was employed in the position on October 4, 2004 and his weekly salary at the position was $260.00 based on his ability to work 20 hours per week. Appellant had

been employed in the position for over 60 days. The Office concluded that the position of part-time modified letter carrier represented appellant's wage-earning capacity.

On June 11, 2007 appellant requested reconsideration, contending that his date of injury for claim file number xxxxxx065 should be changed to February 3, 2005. Appellant submitted reports from Dr. Bayles dated May 9, 2004 to May 23, 2006 and a May 3, 2005 MRI scan of the left shoulder, previously of record.

In a letter dated July 3, 2007, the Office noted that appellant filed two claims for injuries to the upper extremities that were accepted by the Office in file numbers xxxxxx525 and xxxxxx065. It further noted that on November 30, 2004 appellant was paid a schedule award for 24 percent permanent impairment to the right upper extremity and 10 percent impairment to the left upper extremity and was paid a lump-sum settlement for the period October 3, 2004 to October 15, 2006. The Office noted that appellant filed a CA-7 form for the period beginning February 3, 2005; however, it determined that appellant was not entitled to compensation benefits for disability during the time that he received a lump-sum schedule award settlement.

In a decision dated July 3, 2007, the Office denied appellant's request for reconsideration on the grounds that his request neither raised substantive legal questions nor included new and relevant evidence and was therefore insufficient to warrant review of the prior decision.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[4]

Under section 8115(a) of the Federal Employees' Compensation Act,[5] titled "Determination of Wage-Earning Capacity" states in pertinent part: "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." 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.[6]

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."[7]

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[4] *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

[5] 5 U.S.C. § 8115.

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

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

ANALYSIS -- ISSUE 1

On June 25, 2004 Dr. Greer, appellant's treating physician, released her to work four hours per day with a graduated schedule to achieve eight hours per day by August 30, 2004 with certain physical restrictions. Appellant returned to part-time modified duty on October 4, 2004 at a job within his work restrictions at the weekly rate of $260.00. There is no evidence that the position was an odd-lot or makeshift position.[8] Appellant remained employed until February 3, 2005. However, the Board notes that he filed a claim for compensation as of the date he stopped working and alleged that he was totally disabled as of February 3, 2005 due to his employment-related conditions. Appellant alleged that his work stoppage was a result of a change in his employment-related condition.[9] As the Board noted in *William M. Bailey*, it is inappropriate for the Office to issue a retroactive wage-earning capacity determination when there is a pending claim for compensation from the time of the work stoppage.[10] The Board notes that the procedure manual directs the claims examiner to request information from the claimant regarding the work stoppage and develop the record appropriately.[11]

Appellant stopped work alleging that residuals from his employment injuries caused disability. The contemporaneous medical evidence indicates that there was a material change in appellant's physical condition during this time. Appellant submitted medical evidence demonstrating that he was unable to perform the position of limited-duty casual carrier due to his accepted employment injuries in February 2005. He was treated by Dr. Bayles on December 9 and 30, 2004, who noted that appellant experienced increasing left shoulder pain and numbness and reported that he was required to carry heavy packages beyond his lifting restrictions. On February 3, 2005 appellant presented with acute increasing left shoulder pain and low back pain and noted difficulty performing his limited-duty position. Dr. Bayles took appellant off work. On June 1, 2005 Dr. Saunders performed arthroscopic repair of the left shoulder, rotator cuff, arthroscopic subacromial decompression and anterior labral resection. Dr. Saunders noted that appellant remained totally disabled. On November 8, 2005 appellant filed a claim alleging that his left shoulder injury was aggravated when he was required to work outside his work restrictions. The Office accepted this claim for left shoulder rotator cuff tear, acromioclavicular joint arthritis and impingement syndrome.

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[8] *Joseph M. Popp*, 48 ECAB 624 (1997); *James D. Champlain*, 44 ECAB 438, 440-41 (1993).

[9] *See Selden H. Swartz*, 55 ECAB 272 (2004) (where the Board found that Office procedures provide that the Office can make a retroactive wage-earning capacity determination if the claimant worked in the position for at least 60 days, the position fairly and reasonably represented his or her wage-earning capacity and the work stoppage did not occur because of any change in his injury-related condition affecting the ability to work).

[10] *William M. Bailey*, 51 ECAB 197 (1999) (appellant had filed a claim for recurrence of disability prior to the wage-earning capacity determination).

[11] If the reasons for the work stoppage constitute an argument for a recurrence of disability, appropriate development and evaluation of the medical evidence will be undertaken. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(b) (December 1995). The Board notes, however, that no compensation would be payable for any period covered by appellant's schedule award. *See James E. Earle*, 51 ECAB 567 (2000).

The evidence of record demonstrates that the position of casual carrier was unsuitable based on appellant's residuals from his accepted employment injuries. The medical record reflects a material change in the nature and extent of his injury-related condition at the time of work stoppage in February 2005.

CONCLUSION

The Board finds that the Office improperly determined that appellant's light-duty position fairly and reasonably represented his wage-earning capacity.[12]

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated July 3 and February 1, 2007 are reversed.

Issued: December 3, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[12] In view of the Board's disposition of the first issue, the second issue is moot.