

December 2, 2005. In a letter dated January 6, 2006, the Office advised that appellant's claim was also accepted for sprain and strain left rotator cuff and left rotator cuff tear.

Appellant returned to full-time work as a mail processor clerk within the restrictions recommended by his attending physician on January 27, 2006. On May 1, 2006 the employing establishment made his light-duty position permanent.

By decision dated June 7, 2006, the Office reduced appellant's compensation benefits to zero finding that his actual earnings in the light-duty position beginning January 27, 2006 fairly and reasonably represented his wage-earning capacity. It found that appellant had no loss of wage-earning capacity as his actual earnings met or exceeded the current wages of the position he held when injured.¹

On July 13, 2006 appellant filed a claim for compensation for leave without pay used on July 6 and 7, 2006. He requested compensation from July 8 through 21, 2006. On July 5, 2006 Dr. James P. VanWagner, an osteopath, indicated that appellant was totally disabled. In a report dated July 24, 2006, he diagnosed rotator cuff tear and opined that appellant was totally disabled beginning July 5, 2006. Appellant filed an additional claim for wage-loss compensation covering July 22 through August 17, 2006.

Dr. VanWagner completed a report on August 15, 2006 listing appellant's history of left shoulder injury. He indicated that appellant had sustained an additional left shoulder "jamming injury" on May 6, 2006, which lead to more pain and weakness. Dr. VanWagner completed an addendum to his report noting the October 24, 2005 surgery and stated that on June 14, 2006 appellant sustained an additional "pulling[-]type" injury. He noted that appellant's rotator cuff was intact, but that appellant had significant muscle atrophy. Dr. VanWagner opined that appellant could no longer perform his employment duties. He released appellant to return to work five hours a day on August 15, 2006 with no lifting over five pounds. Dr. VanWagner continued to support these work restrictions on November 14, 2006 and February 20, 2007.

The Office of Personnel Management approved appellant's request for disability retirement on March 14, 2007.

On March 21, 2007 appellant requested reconsideration through a checkmark on an appeal request form. By decision dated May 31, 2007, the Office declined to reopen appellant's claim for consideration of the merits finding that he had not submitted new or relevant evidence, legal argument or medical evidence establishing entitlement to wage loss under this claim.

¹ Appellant filed a claim for occupational disease on July 13, 2006 alleging on June 14, 2006 while performing the duties of his light-duty position his shoulder began to hurt as he lifted and pulled trays. In a letter dated July 20 and August 11, 2006, the Office requested additional factual and medical evidence regarding appellant's occupational disease claim. By decision dated September 1, 2006, it denied appellant's claim as the circumstances of his injury were unclear. The Office could not determine whether appellant sustained a new traumatic injury or occupational disease. Appellant requested an oral hearing regarding this claim on September 22, 2006. This claim is not before the Board on appeal. See 20 C.F.R. § 501.2(c).

Appellant appealed this decision to the Board and in an Order Remanding Case dated November 15, 2007,² the Board determined that he was seeking modification of the July 7, 2006 wage-earning capacity determination rather than requesting reconsideration. The Board remanded the case for the Office to consider whether appellant's wage-earning capacity determination should be modified.

By decision dated November 29, 2007, the Office denied modification of the July 7, 2006 decision. It stated that the medical evidence established that appellant had sustained a new injury and that he had filed a new claim. The Office stated, "While this medical evidence shows a change in his condition and his ability to work, it is not a result of this injury but the disability is a result of the employee's new injury. As such, the criteria to modify the [z]ero WEC [wage-earning capacity] had not been established."

LEGAL PRECEDENT

Section 8115(a) of the Federal Employees' Compensation Act³ provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by actual earnings if actual earnings fairly and reasonably represent the wage-earning capacity. Generally, wage 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.⁴

The Office's procedure manual states that when an employee cannot return to the date-of-injury job because of disability due to a work-related injury or disease, but does return to alternative employment, the claims examiner must determine whether the earnings in the alternative employment fairly and reasonably represent the employee's wage-earning capacity.⁵

The Office's 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."⁶

The formula for determining loss of wage-earning capacity based on actual earnings,⁷ was which developed in *Albert C. Shadrick*,⁸ has been codified by regulation at 20 C.F.R.

² Docket No. 07-1744 (issued November 15, 2007).

³ 5 U.S.C. §§ 8101-8193, § 8115(a).

⁴ *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (July 1997).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7.e (July 1997).

⁷ *Hayden C. Ross*, 55 ECAB 455, 460 (2004).

⁸ 5 ECAB 376 (1953).

§ 10.403.⁹ Subsection (d) of this regulation provides that the employee's wage-earning capacity in terms of percentage is obtained by dividing the employee's actual earnings by the current pay rate for the job held at the time of injury.¹⁰

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless the original rating was in error, there is a material change in the nature and extent of the injury-related condition or that the employee has been retrained or otherwise vocationally rehabilitated. The burden of proof is on the party attempting to show a modification of the wage-earning capacity.¹¹

ANALYSIS

Appellant requested modification of his June 7, 2006 wage-earning capacity determination. The first criteria for modifying a wage-earning capacity determination is premised on whether the original rating was in error. Appellant returned to work on January 27, 2006 as a light-duty mail processor clerk. The Office found that his actual earnings fairly and reasonably represented his wage-earning capacity. Appellant had successfully worked in this position for more than 60 days at the time of the Office's June 7, 2006 decision. The Office found that he had no loss of wage-earning capacity as his actual earnings met or exceeded the current wages of the position he held when injured. Appellant has submitted no evidence establishing error on the part of the Office in making this wage-earning capacity decision. He also failed to submit argument or evidence in support of the third criteria for modification of a wage-earning capacity determination, that he had been retrained or otherwise vocationally rehabilitated. Therefore, appellant has failed to meet the first and third criteria for modifying his June 7, 2006 wage-earning capacity determination.

The second criteria for modifying a wage-earning capacity determination is a material change in the nature and extent of the injury-related condition. Appellant submitted reports from Dr. VanWagner, an osteopath, dated July 5 and 24, 2006. Dr. VanWagner diagnosed rotator cuff tear and opined that appellant was totally disabled beginning July 5, 2006. These reports are not sufficient to establish a change in the nature and extent of the injury-related condition. The Office accepted appellant's claim for rotator cuff tear of the left shoulder and he underwent surgical repair of the rotator cuff tear on October 24, 2005. In his July 2006 reports, Dr. VanWagner did not offer any explanation of how appellant's accepted rotator cuff tear had changed such that he could no longer perform the duties of his modified position. Without medical explanation of how appellant sustained a change in the nature and extent of his accepted employment injury, these reports are not sufficient to meet his burden of proof.

Dr. VanWagner completed a report on August 15, 2006 listing appellant's history of left shoulder injury. He indicated that appellant had sustained an additional left shoulder injury on May 6, 2006 which led to pain and more weakness. Dr. VanWagner subsequently addressed the

⁹ 20 C.F.R. § 10.403.

¹⁰ *Id.* at § 10.403(d).

¹¹ *Harley Sims, Jr.*, 56 ECAB 320, 323-24 (2005).

October 24, 2005 surgery and stated that on June 14, 2006 appellant sustained an additional “pulling[-]type” injury. He advised that appellant’s rotator cuff was intact, but that appellant had significant muscle atrophy. Dr. VanWagner opined that appellant could no longer perform his employment duties. Appellant has filed an additional claim for these injuries, contending that additional lifting and pulling in the performance of his light-duty position resulted in his current disability.¹² The Board has held that a new injury is not a material change in the nature and extent of the original injury-related condition such that a wage-earning capacity determination warrants modification.¹³

Appellant did not meet his burden of proof in establishing that there was a material change in the nature and extent of his May 10, 2005 injury-related condition, that the original determination was in fact erroneous or that he was vocationally rehabilitated. He has failed to establish that the June 7, 2006 wage-earning capacity determination should be modified.

CONCLUSION

The Board finds that appellant did not meet his burden of proof in modifying the June 7, 2006 wage-earning capacity determination.

¹² An occupational disease or illness means a condition produced by the work environment over a period longer than a single workday or shift. 20 C.F.R. § 10.5(q). As described in footnote number 1, there is no final decision in the record from the Office on this issue.

¹³ *M.A.*, Docket No. 07-2306 (issued March 24, 2008).

ORDER

IT IS HEREBY ORDERED THAT the November 29, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 3, 2008
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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