

in the performance of duty. The Office accepted her claim for cervical and right shoulder strains. Appellant accepted a limited-duty position on October 24, 1996 working as a modified carrier.

Appellant filed a second claim on November 16, 1996 alleging that she experienced neck, right shoulder and arm pain while clearing icy ground in the performance of duty. The Office accepted her claim for a C6-7 herniated disc, contusion of the right shoulder and cervical strain. On November 14, 2007 it authorized an anterior discectomy at C6-7 with interbody fusion. Appellant underwent surgery on September 5, 1998. She underwent a right shoulder subacromial decompression on November 16, 2000. Appellant accepted a modified distribution clerk position on December 21, 2001 and returned to work light duty eight hours a day. By decision dated February 22, 2002, the Office determined that appellant's actual earnings as a modified distribution clerk effective December 22, 2002 fairly and reasonably represented her wage-earning capacity. As her earnings were equivalent to her rate of pay when injured she had no loss of wage-earning capacity. It granted appellant a schedule award for nine percent impairment of her right upper extremity on May 30, 2002.

Appellant filed a claim for compensation on November 27, 2007 and requested wage-loss compensation from November 23, 2007. She contended that there was no work available for her within her restrictions as of this date. Appellant filed subsequent claims for wage loss through January 21, 2008. By letter dated January 9, 2008, the employing establishment stated that there was no work available for appellant in her position and that her supervisor was not able to find other appropriate work for her. In a letter dated January 2, 2008, the Office informed appellant of the requirements to modify the February 22, 2002 wage-earning capacity determination and allowed her 30 days to establish that the original rating was error, that her medical condition had changed or that she had been vocationally rehabilitated.

In a report dated January 11, 2008, Dr. Edward Gabelman, a Board-certified orthopedic surgeon, noted that appellant stated that she could work eight hours a day, but that the employing establishment only provided her with one hour of work a day, five days a week.

By decision dated February 21, 2008, the Office denied appellant's claim for wage loss from November 23, 2007 through January 21, 2008. Appellant had not met her burden of proof to modify the February 22, 2002 wage-earning capacity determination. Through her representative, she requested an oral hearing on February 26, 2008. Appellant's attorney appeared at the oral hearing on June 10, 2008. He stated that appellant filed for and received unemployment compensation for the period for which she requested wage-loss compensation.

In an August 22, 2008 decision, the Office hearing representative found that appellant had not met her burden of proof to modify the February 22, 2002 wage-earning capacity determination.

LEGAL PRECEDENT -- ISSUE 1

When an employee who is disabled from the job she held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that she can perform the limited-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total

disability and to show that she cannot perform such limited-duty work. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the limited-duty job requirements.¹ Office procedure provides that a recurrence of disability can be caused by withdrawal of a light-duty assignment made specifically to accommodate an employee if the withdrawal is not due to misconduct or nonperformance of job duties.²

ANALYSIS -- ISSUE 1

Appellant claimed that she sustained a recurrence of total disability beginning November 23, 2007 as there was no work available for her within her restrictions as of that date. In a letter dated January 9, 2008, the employing establishment advised the Office that there was no work available for appellant in her position and that her supervisor was not able to find other appropriate work for her. There is no indication that appellant's light-duty assignment was withdrawn due to misconduct or nonperformance of job duties. Therefore, the Board finds that appellant has established that she sustained an employment-related recurrence of total disability when her modified work was withdrawn by her employer on November 23, 2007.³

LEGAL PRECEDENT -- ISSUE 2

The general test for determining loss of wage-earning capacity is whether the injury-related residuals prevent the employee from performing the kind of work he or she was doing when injured. When the medical evidence establishes that the residuals of an employment injury prevent the employee from continuing in his or her employment, the employee is entitled to compensation for any resulting loss of wage-earning capacity.⁴

Section 8115(a) of the Federal Employees' Compensation Act⁵ 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 reasonable represent the wage-earning capacity. 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.⁶

The Office's procedure manual states that 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 claims examiner must determine whether the earnings in the

¹ *Joseph D. Duncan*, 54 ECAB 471, 472 (2003); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

² *K.S.*, 60 ECAB ____ (Docket No. 08-2105, issued February 11, 2009).

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3b(1)(c) (January 1995).

⁴ *Elsie L. Price*, 54 ECAB 734 (2003).

⁵ 5 U.S.C. §§ 8101-8193, § 8115(a).

⁶ *Selden H. Swartz*, 55 ECAB 272 (2004).

alternative employment fairly and reasonably represent the employee's wage-earning capacity.⁷ The procedure manual provides in relevant part as follows:

"Factors Considered. To determine whether the claimant's work fairly and reasonably represents his or her wage-earning capacity, the claims examiner should consider whether the kind of appointment and tour of duty ... are at least equivalent to those of the job held on the date of injury. Unless they are, the [claims examiner] may not consider the work suitable.

"For instance, reemployment of a temporary or casual worker in another temporary or casual [U.S. Postal Service] position is proper, as long as it will last at least 90 days and reemployment of a term or transitional [U.S. Postal Service] worker in another term or transitional position is likewise acceptable."⁸

In addition, 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 her wage-earning capacity and "the work stoppage did not occur because of any change in her injury-related condition affecting the ability to work."⁹

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.¹⁰

ANALYSIS -- ISSUE 2

Appellant returned to a limited-duty position on December 22, 2001. The Office issued a wage-earning capacity determination on February 22, 2002 finding that her actual earnings in her modified position fairly and reasonably represented her wage-earning capacity and that she had no loss of earnings in the position. Appellant continued to work at the employing establishment such capacity until November 23, 2007, when she filed a claim for compensation alleging that there was no work available for her at the employing establishment.

Appellant has not argued and the record does not suggest that the original wage-earning capacity determination was in error, appellant further has not alleged that her employment-related condition had deteriorated such that she can no longer perform the duties of the limited-

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

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7a (July 1997).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7.e (July 1997).

¹⁰ *Harley Sims, Jr.*, 56 ECAB 320, 323-24 (2005).

duty position. Appellant's attending physician, Dr. Gabelman, a Board-certified orthopedic surgeon, stated that appellant could work eight hours a day, but that the employing establishment only provided her with one hour of work per day five days a week. Thus the medical evidence does not support a change in her injury-related condition. Finally, there is no evidence that appellant is vocationally rehabilitated. Appellant has not established that the February 22, 2002 wage-earning capacity determination should be modified and she is therefore not entitled to compensation for the period claimed.

CONCLUSION

The Board finds that appellant met her burden of proof to establish that she sustained an employment-related recurrence of total disability commencing November 23, 2007. The Board further finds that appellant has not met her burden of proof to modify the February 22, 2002 wage-earning capacity determination.

ORDER

IT IS HEREBY ORDERED THAT the August 22, 2008 decision of the Office of Workers' Compensation Programs is reversed with respect to appellant's claim for recurrence of total disability effective November 23, 2007. The decision is affirmed with respect to appellant's request for modification of the Office's February 22, 2002 wage-earning capacity determination.

Issued: September 25, 2009
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