

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

K.R., Appellant

and

**U.S. POSTAL SERVICE, BULK MAIL
CENTER, Richmond, CA, Employer**

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) **Docket No. 09-28**
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) **Issued: September 16, 2009**
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Appearances:

Hank Royal, for the appellant

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, 2008 appellant filed a timely appeal from decisions of the Office of Workers' Compensation Programs dated November 9, 2007 and May 19 and September 29, 2008 denying modification of its April 18, 1997 loss of wage-earning capacity determination. 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 met his burden of proof to establish that a modification of the Office's April 18, 1997 loss of wage-earning capacity determination is warranted and that he is entitled to wage-loss compensation from August 13 through October 31, 2007.

FACTUAL HISTORY

This is the second appeal in this case.¹ By decision dated November 9, 1999, the Board affirmed an April 18, 1997 Office loss of wage-earning capacity determination.² The facts and the law of the case in the Board's prior decision are incorporated herein by reference.

On June 3, 1994 appellant, then a 35-year-old mail handler, sustained a right shoulder strain while in the performance of his duties. He underwent surgery to repair a torn right rotator cuff on September 14, 1995. On October 27, 1995 appellant returned to work in a limited-duty capacity. On January 8, 1996 the Office accepted a work-related right shoulder strain sustained on October 28, 1995.³ On April 18, 1997 it issued a loss of wage-earning capacity based on his reemployment and actual earnings as a modified mail handler on October 27, 1995. On November 21, 1999 appellant began working a limited-duty position with permanent work restrictions of no pushing or pulling with the right arm, no lifting above the shoulders and no lifting over 15 pounds with the right arm.

On October 31, 2007 appellant filed a claim for lost wages from August 13 through October 31, 2007.

By decision dated November 9, 2007, the Office denied modification of its April 18, 1997 loss of wage-earning capacity decision and denied appellant's wage-loss claim for August 13 to October 31, 2007. It found that the record established that the employing establishment did not allow him to work on August 13, 2007 because he failed to provide medical documentation to support his limited-duty assignment. Appellant did not establish any of the three accepted reasons for modification of a loss of wage-earning capacity decision: that the April 18, 1997 wage-earning capacity decision was issued in error, that his medical condition had materially changed or that he was vocationally rehabilitated and his wage-earning capacity had substantially increased.

Appellant requested a hearing which was later changed to a request for review of the written record.

By decision dated May 19, 2008, the Office hearing representative denied modification of its April 18, 1997 wage-earning capacity determination or appellant's claim for wage-loss compensation for August 13 to October 31, 2007. He failed to provide sufficient evidence that modification of the loss of wage-earning capacity determination was warranted.

Appellant requested reconsideration by letter dated May 14, 2008. He alleged that he was disabled from August 13 to October 31, 2007 because the employing establishment effectively withdrew the limited-duty position that he had performed for several years by sending him home on August 13, 2007 due to a lack of current medical documentation. Appellant

¹ See Docket No. 98-767 (issued November 9, 1999).

² In its November 9, 1999 decision, the Board also affirmed a December 12, 1997 schedule award decision.

³ The Office combined the case files for the June 3, 1994 and October 28, 1995 injuries, respectively OWCP File No. xxxxxx077 and xxxxxx102.

contended that he gave his supervisor a copy of his 2003 work limitations and had no updated medical reports to provide to his supervisor on August 13, 2007, the day he was sent home for lack of medical documentation. He stated that he was not asked for updated medical reports prior to August 13, 2007 and was not given a chance to provide documentation before he was sent home on August 13, 2007.

Appellant denied seeking modification of his wage-earning capacity. He asserted that withdrawal of the limited-duty position by the employing establishment on August 13, 2007 constituted a recurrence of disability under section 10.5(x) of the Code of Federal Regulations and he was entitled to compensation for lost wages.⁴ In medical reports dated December 19, 2007 to August 20, 2008, Dr. Richard A. Nolan, an attending orthopedic surgeon, discussed appellant's right shoulder condition and treatment. He did not address the issue of whether appellant was disabled from August 13 to October 31, 2007 due to a change in the nature and extent of his accepted right shoulder strain and rotator cuff tear.

In a statement dated October 4, 2007 regarding appellant's Merit Systems Protection Board (MSPB) complaint, David Bernard, a supervisor, noted that he was assigned to identify all employees on limited and light duty and make sure their medical files and work restrictions were updated.⁵ Appellant's file contained medical documentation that was out of date, including a Family Medical Leave Act (FMLA) certification and a 1996 limited-duty job offer. Mr. Bernard stated that there was no current medical documentation. He asked Inger Wilson, an injury compensation specialist, whether appellant had an open injury compensation claim. Ms. Wilson advised that appellant did not have an open or active compensation case and should be working a full-duty position. Mr. Bernard advised management that appellant did not have an open compensation case or any current medical documentation for light-duty work. Therefore, appellant either should be working full duty or provide updated medical reports with work restrictions to support continuing light duty. Mr. Bernard told appellant that he would have to provide updated medical reports and a request for light duty or go home. Appellant responded that he anticipated difficulty in getting a physician to see him. Mr. Bernard stated that appellant was sent home on August 13, 2007 because he claimed he could not work full duty and did not submit any medical evidence establishing his current work restrictions.

By decision dated September 29, 2008, the Office denied modification of its May 19, 2008 decision.⁶ It found that the employing establishment's refusal to let appellant work on August 13, 2007 because he did not provide a current medical report describing his work limitations was an administrative issue between appellant and his employer. Appellant did not meet his burden of proof to establish one of the accepted reasons for seeking modification of the April 18, 1997 loss of wage-earning capacity decision.

⁴ 20 C.F.R. § 10.5(x).

⁵ The record shows that Mr. Bernard reviewed appellant's records in April 2007.

⁶ Subsequent to the September 29, 2008 Office decision, additional evidence was associated with the file. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

LEGAL PRECEDENT

Once a loss of wage-earning capacity 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.⁷ The burden of proof is on the party attempting to show modification of the award.⁸ When a formal decision on loss of wage-earning capacity is in place and a claimant requests compensation for total wage loss, the Office must evaluate the request according to the established criteria for modifying a formal loss of wage-earning capacity.⁹

ANALYSIS

Appellant contends that he is entitled to compensation for lost wages from August 13 to October 31, 2007 because the employing establishment refused to allow him to work without current medical documentation describing his medical limitations. He alleged that he sustained a recurrence of disability because his limited-duty position was withdrawn by the employing establishment. When a formal loss of wage-earning capacity is in place, the proper standard of review is not whether appellant sustained a recurrence of disability on August 13, 2007, but whether the Office should modify its April 18, 1997 decision according to the established criteria for modifying a formal loss of wage-earning determination.¹⁰ The evidence does not establish that there was a material change in the nature and extent of appellant's injury-related condition, he had been retrained or otherwise vocationally rehabilitated, or that the original determination was erroneous. The Board will affirm the Office's November 9, 2007 and May 14 and September 29, 2008 decisions denying modification of the April 18, 1997 loss of wage-earning capacity decision and denying his claim for compensation from August 13 to October 31, 2007.

On appeal, appellant argues that on August 13, 2007 the employing establishment withdrew his limited-duty assignment. He contends that this constitutes a recurrence of disability entitling him to compensation for lost wages. As noted, when a formal loss of wage-earning capacity is in place, the proper standard of review is not whether appellant sustained a recurrence of disability on August 13, 2007, but whether the Office should modify its April 18, 1997 decision according to the established criteria for modifying a formal loss of wage-earning determination. Accordingly, appellant's argument has no merit.

⁷ *W.G.*, 58 ECAB ___ (Docket No. 06-367, issued December 27, 2006); *Elmer Strong*, 17 ECAB 226 (1965); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9a, 11.a (December 1995).

⁸ *S.M.*, 58 ECAB ___ (Docket No. 06-536, issued November 24, 2006); *Jack E. Rohrbaugh*, 38 ECAB 186 (1986); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11.b (December 1995).

⁹ *See D.S.*, 58 ECAB ___ (Docket No. 06-1408 and 06-2061, issued March 1, 2007); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9.a (December 1995).

¹⁰ *Id.*

CONCLUSION

The Board finds that appellant has not met his burden of proof to show that a modification of the April 18, 1997 loss of wage-earning capacity determination is warranted and that he is entitled to wage-loss compensation for August 13 through October 31, 2007.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 29 and May 19, 2008 and November 9, 2007 are affirmed.

Issued: September 16, 2009
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