

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

K.R., Appellant)	
)	
and)	Docket No. 09-415
)	Issued: February 24, 2010
U.S. POSTAL SERVICE, POST OFFICE, South Euclid, OH, Employer)	
)	
)	

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 28, 2008 appellant filed a timely appeal from March 17 and September 29, 2008 decisions regarding a wage-earning capacity determination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether the Office properly denied modification of a wage-earning capacity determination.¹ On appeal, appellant's attorney asserts that the Office's September 29, 2008 decision was "contrary to fact and law."

¹ In a September 30, 2009 decision, the Board set aside the Office's March 17 and September 29, 2008 merit decisions, finding that the Office properly denied modification of a wage-earning capacity determination but failed to consider whether appellant had established a recurrence of disability due to withdrawal of his light-duty position. The Board remanded the case for a decision based on the recurrence criteria. Docket No. 09-415 (issued September 30, 2009). By order dated February 4, 2010, the Board granted the Director of the Office's petition for reconsideration and vacated the September 30, 2009 decision, finding that the Office properly denied modification of the wage-earning capacity determination and that there was no valid recurrence issue presented. Docket No. 09-415 (issued February 4, 2010).

FACTUAL HISTORY

The Office accepted that on October 13, 1994 appellant, then a 42-year-old letter carrier, sustained a herniated L4-5 disc and aggravation of a preexisting L4-5 spondylolisthesis when he stepped down from a step while carrying a heavy satchel of mail. On June 3, 1996 he underwent an L4-5 anterior discectomy and on December 16, 1996 required an L4-5 interbody fusion. The Office later accepted post-traumatic ejaculatory dysfunction as a consequence of the lumbar surgeries.²

In February 1997, appellant accepted a permanent rehabilitation position as a modified distribution clerk at retained pay. The assigned tasks required lifting up to 10 pounds, intermittent sitting and standing, simple grasping and fine manipulation.

By decision dated March 17, 1999, the Office found that appellant's actual earnings in the modified distribution clerk position fairly and reasonably represented his wage-earning capacity. It reduced his compensation to zero as his actual earnings equaled those of the grade and step of his date-of-injury position.³ Appellant continued to work as a modified clerk through 2007. He remained under medical treatment.

On December 10, 2007 appellant filed a claim for compensation (Form CA-7) for 5.76 hours on November 23, 2007. He submitted timekeeping forms showing that managers sent him home on November 23, 2007 as there was no work available within his medical restrictions.

In a January 2, 2008 letter, the Office advised appellant that his claim for wage loss on November 23, 2007 constituted a request to modify the March 17, 1999 wage-earning capacity determination. It explained that in order to receive wage-loss compensation, he must first establish that the wage-earning capacity determination required modification. The Office afforded appellant 30 days to submit evidence showing the original rating was in error, his medical condition had changed or he had been vocationally rehabilitated.

In a January 9, 2008 letter, the employing establishment stated that appellant was sent home by management on November 23, 2007 as there was no work available within his restrictions. The employing establishment explained that, due to automation and reduced mail volume, there was less work available for employees with physical limitations.⁴

By decision dated March 17, 2008, the Office denied modification of the March 17, 1999 wage-earning capacity determination. It found that appellant had not established that the original wage-earning capacity determination was in error, that his medical condition had changed or that

² The Office issued schedule awards on September 19, 2000, February 4, 2003 and April 7, 2006 for a total 21 percent impairment of the right lower extremity and 68 percent impairment of the penis.

³ On July 18, 2001 appellant, through his attorney, filed an appeal with the Board regarding a June 19, 2001 decision denying modification of a September 19, 2000 schedule award decision for impairment of the penis. This appeal was docketed as File No. 01-2021. By order issued June 26, 2002, the Board dismissed the appeal at the request of appellant's attorney.

⁴ In a January 23, 2008 telephone memorandum, appellant noted that some of the tasks he performed since February 1997 varied slightly from the original job description. He stated that he was able to perform these duties.

he had been vocationally rehabilitated. The Office therefore found that appellant was not entitled to compensation “for intermittent disability on November 23 2007.”

In a March 20, 2008 letter, appellant requested an oral hearing, held July 14, 2008. At the hearing, appellant’s attorney asserted that the withdrawal of appellant’s light-duty job on November 23, 2007 constituted a recurrence of disability independent of the wage-earning capacity determination.⁵ The attorney emphasized that appellant was not asserting a change either in his medical condition or in his light-duty job requirements.

By decision dated and finalized September 29, 2008, an Office hearing representative affirmed the March 17, 2008 decision. The hearing representative found that appellant did not submit evidence warranting modification of the March 17, 1999 wage-earning capacity determination. Appellant did not assert or establish that the original determination was in error, that his condition had changed or that he had been vocationally rehabilitated. The hearing representative found that, as appellant had not met the burden to modify the standing wage-earning capacity decision, appellant’s claim for wage-loss compensation was denied.

LEGAL PRECEDENT

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant’s ability to earn wages.⁶ Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn and not on actual wages lost.⁷ Compensation payments are based on the wage-earning capacity determination, which remains undisturbed until properly modified.⁸

Modification of a standing wage-earning capacity 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 erroneous.⁹ 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 claims examiner will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-

⁵ Appellant also asserted that management sent him home on January 17, 2008 as no light-duty work was available within his restrictions. However, he did not submit evidence regarding a January 17, 2008 work absence. The Board notes that there is no formal claim of record for wage loss on January 17, 2008. As the Office did not issue a decision directly addressing wage-loss compensation for January 17, 2008, this issue is not before the Board on the present appeal.

⁶ 5 U.S.C. § 8115(a); *Lee R. Sires*, 23 ECAB 12, 14 (1971) (the Board held that actual wages earned must be accepted as the measure of a wage-earning capacity in the absence of evidence showing they do not fairly and reasonably represent the employee’s wage-earning capacity).

⁷ *Roy Matthew Lyon*, 27 ECAB 186, 190 (1975). *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

⁸ *See Sharon C. Clement*, 55 ECAB 552, 557 (2004).

⁹ *Sue A. Sedgwick*, 45 ECAB 211, 215-16 (1993); *Elmer Strong*, 17 ECAB 226, 228 (1965).

earning capacity.¹⁰ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.¹¹

The Board has held that the Office may accept a limited period of disability without modifying a standing wage-earning capacity determination.¹² This occurs when there is a demonstrated temporary worsening of a medical condition of insufficient duration and severity to warrant modification of a wage-earning capacity determination.¹³ This narrow exception is only applicable for brief periods of medical disability. It does not apply to situations where there is a wage-earning capacity determination in place and the employee claims additional wage-loss compensation due to the withdrawal of light-duty work.¹⁴

When a formal loss of wage-earning capacity determination is in place and light duty is withdrawn, the proper standard of review is not whether appellant sustained a recurrence of disability, but whether the Office should modify its decision according to the established criteria for modifying a formal loss of wage-earning capacity determination.¹⁵ Office procedures provide that when the employing establishment has withdrawn a light-duty assignment, which accommodated the claimant's work restrictions and a formal wage-earning capacity decision has been issued, the decision will remain in place, unless one of the three accepted reasons for modification applies.¹⁶

ANALYSIS

Beginning in February 1997, appellant worked as a permanent modified distribution clerk within the restrictions necessitated by his accepted lumbar injuries. On March 17, 1999 the Office issued a wage-earning capacity determination based on appellant's actual earnings as a modified clerk. Appellant remained in the job through 2007. On November 23, 2007 the employing establishment sent him home as there was no light-duty work available that day within his medical restrictions. Appellant filed a claim for wage loss for November 23, 2007. By decisions dated March 17 and September 29, 2008, the Office found that he was not entitled to wage-loss compensation because he had not established that the March 17, 1999 wage-earning capacity required modification.

The Board finds that appellant did not establish that the March 17, 1999 wage-earning capacity determination should be modified. As counsel stated at the July 14, 2008 hearing,

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995). *See also* FECA Transmittal 10-01 (issued October 5, 2009).

¹¹ *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

¹² *See Katherine T. Kreger*, 55 ECAB 633, 636 (2004).

¹³ *Id.*

¹⁴ *K.H.*, Docket No, 08-2392 (issued April 21, 2009); *S.H.*, Docket No. 07-755 (issued November 9, 2007).

¹⁵ *K.R.*, Docket No. 09-28 (issued September 16, 2009); *Debbie A. Titus*, Docket No. 05-360 (issued June 3, 2005).

¹⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.7(A)(5) (October 2005). *See also* FECA Transmittal 10-01 (issued October 5, 2009).

appellant did not allege or establish a change in the accepted medical condition, that he had been vocationally retrained or that the original determination was in error. Therefore, appellant did not meet his burden of proof to modify the wage-earning capacity determination.¹⁷ Instead, he asserted that the temporary suspension of his light-duty job on November 23, 2007 constituted a recurrence of disability entitling him to wage-loss compensation.

As a formal loss of wage-earning capacity was in place on November 23, 2007, the proper standard of review was not whether appellant sustained a recurrence of disability but whether the Office should modify its March 17, 1999 decision according to the established criteria.¹⁸ Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn and not on actual wages lost.¹⁹ Therefore, the employing establishment's withdrawal of appellant's limited duty on November 23, 2007 was immaterial. Appellant continued to have a capacity to earn wages. Absent a showing that the wage-earning capacity determination should be modified, he has no disability under the Act and is not entitled to compensation for wage loss when light duty was withdrawn.²⁰ Accordingly, appellant's argument has no merit.

On appeal, appellant contends that the Office's March 17 and September 29, 2008 decisions were contrary to fact and law. As set forth above, he did not meet his burden of proof to demonstrate that the standing wage-earning capacity determination should be modified. Appellant did not establish a material change in the nature and extent of the accepted condition, that he had been retrained or vocationally rehabilitated or that the original determination was in error. Therefore, the Office's decisions were proper under the law and facts of this case.

CONCLUSION

The Board finds that the Office properly denied modification of a wage-earning capacity determination.

¹⁷ *Sue A. Sedgwick, supra* note 9.

¹⁸ *K.R., supra* note 15.

¹⁹ *Roy Matthew Lyon, supra* note 7.

²⁰ *K.H., supra* note 14.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 29 and March 17, 2008 are affirmed.

Issued: February 24, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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