

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

T.B., Appellant)
)
and)
)
U.S. POSTAL SERVICE, MAIN POST OFFICE,)
Bloomington, IN, Employer)

Docket No. 09-2246
Issued: July 19, 2010

Appearances:
Alan J. Shapiro, Esq., 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 September 8, 2009 appellant filed a timely appeal of the July 15, 2009 merit decision of the Office of Workers' Compensation Programs which denied modification of a prior 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 claim.¹

ISSUE

The issue is whether appellant established a basis for modifying the Office's March 31, 2006 wage-earning capacity determination.

¹ The record on appeal contains evidence received after the Office issued its July 15, 2009 decision. The Board may not consider evidence that was not in the case record when the Office rendered its final decision. 20 C.F.R. § 501.2(c) (2009).

FACTUAL HISTORY

Appellant, a 44-year-old former rural carrier, has an accepted claim for left shoulder instability, bilateral elbow and wrist tenosynovitis, and bilateral shoulder tenosynovitis, which arose on or about April 21, 1998. The Office authorized a March 23, 2000 left shoulder arthroscopic procedure. Appellant was unable to resume her rural carrier duties. On January 17, 2006 she returned to work full time as a modified sales service/distribution associate with no loss in pay.

In a decision dated March 31, 2006, the Office determined that appellant's actual earnings as a modified sales service/distribution associate fairly and reasonably represented her wage-earning capacity. It found that appellant had performed the position for more than 60 days without incident and it was suitable to her partially disabled condition. Because there was no loss in earnings, the Office found that appellant had zero loss of wage-earning capacity. Accordingly, appellant was not entitled to wage-loss compensation.

In early March 2007, the employing establishment began a national reassessment process (NRP), which focused on reviewing all rehabilitation modified positions and limited-duty modified assignments. Appellant stopped work on March 23, 2007 in preparation for left knee surgery scheduled for March 28, 2007.² On May 8, 2007 while still at home recuperating from her recent surgery, she was advised that she would be reassigned to another position outside the Monrovia, IN facility where she last worked as a modified sales service/distribution associate. The employing establishment provided appellant a list of several available positions to choose from, but she neither accepted nor declined any of the identified positions. Rather, appellant requested a "proper job offer" in accordance with Office procedures, along with the opportunity for her physician to review any new offer.

Effective June 9, 2007, the employing establishment abolished appellant's modified sales service/distribution associate position in Monrovia, IN. Appellant was involuntarily reassigned to a clerk position at the Main Post Office in Bloomington, IN. On June 12, 2007 her physician, Dr. Todd E. Midla, advised that her work restrictions dating back to September 2000 remained in effect.

On September 11, 2007 the employing establishment extended appellant a job offer as a modified sales service/distribution associate in Bloomington, IN. Appellant declined the position on September 26, 2007, noting that the offer did not list all of her previously documented physical restrictions. She contended that the proposed duties did not meet or comply with her restrictions and that she was permanently disabled. The employing establishment ultimately abolished the position due to operational needs.

On July 1, 2008 appellant filed a claim for recurrence of disability (Form CA-2a) beginning March 23, 2007. She explained that her recurrence was the result of the employing establishment's withdrawal of her modified rehabilitation position. Appellant claimed that the

² She underwent a left knee partial lateral meniscectomy on March 28, 2007. Appellant filed a separate occupational disease claim (xxxxxx347) for her left lower extremity condition, which the Office denied. Both the Branch of Hearings and Review and the Board affirmed the denial in Docket No. 09-1428 (issued January 25, 2010).

employing establishment could not provide a suitable job offer that met all her work-related medical restrictions. She later advised that the date of recurrence was not March 23, 2007, but June 9, 2007; when the employing establishment abolished her limited-duty position in Monrovia, IN.

In a decision dated December 1, 2008, the Office denied appellant's claim for additional wage-loss compensation. It noted that the March 31, 2006 wage-earning capacity determination remained in effect regardless of her actual earnings. While appellant established that her limited-duty assignment was abolished, the Office found that she did not establish a basis for modifying the March 31, 2006 wage-earning capacity determination.

Appellant requested an oral hearing, which was held on May 12, 2009. By decision dated July 15, 2009, an Office hearing representative affirmed the December 1, 2008 decision.

LEGAL PRECEDENT

A wage-earning capacity determination is a finding that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages.³ Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.⁴ Once the wage-earning capacity of an injured employee 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 erroneous.⁵ The burden of proof is on the party seeking modification of the wage-earning capacity determination.⁶

The Office may accept a limited period of disability without modifying an existing wage-earning capacity determination.⁷ This is appropriate where there is a demonstrated temporary worsening of a medical condition that is of insufficient duration and severity to warrant modification of a wage-earning capacity determination.⁸ However, this narrow exception does not apply to a situation where there is a wage-earning capacity determination in place and the employee claims additional compensation due to the withdrawal of light-duty work.⁹

A recurrence of disability includes an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his

³ 5 U.S.C. § 8115(a) (2006); see *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

⁴ See *Katherine T. Kreger*, 55 ECAB 633, 635 (2004).

⁵ *Tamra McCauley*, 51 ECAB 375, 377 (2000).

⁶ *Id.*

⁷ See *Katherine T. Kreger*, *supra* note 4.

⁸ *Id.*

⁹ *K.R.*, Docket No. 09-415 (issued February 24, 2010); *K.H.*, Docket No. 08-2392 (issued April 21, 2009).

work-related injury or illness is withdrawn -- except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force (RIF).¹⁰ Absent a formal wage-earning capacity determination and assuming the position was not withdrawn for cause or because of a RIF, the employee would be entitled to compensation based upon a showing of continuing injury-related disability for regular duty.¹¹ When a formal wage-earning capacity determination is in place, the subsequent withdrawal of a light-duty assignment is not treated like a recurrence of disability.¹² Under those particular circumstances, the Office shall review the claim for additional compensation as a request for modification of the wage-earning capacity determination and apply the criteria for determining whether modification is warranted.¹³

ANALYSIS

At the May 12, 2009 hearing, appellant's counsel argued that his client was entitled to wage-loss compensation because the employing establishment withdrew her limited-duty assignment. Although appellant's limited-duty assignment was abolished effective June 9, 2007, this fact alone does not entitle her to additional wage-loss compensation.¹⁴ The Office's March 31, 2006 wage-earning capacity determination remained in effect when her modified sales service/distribution associate position was abolished on June 9, 2007. Because a formal wage-earning capacity determination was in effect at the time, appellant must establish a basis for modification of that decision in order to be entitled to additional wage-loss compensation on or after June 9, 2007.¹⁵ Compensation for loss of wage-earning capacity is based upon loss of one's capacity to earn, not on wages actually lost.¹⁶ The mere withdrawal of the limited-duty position does not justify resumption of wage-loss compensation for total disability.

The Board finds that appellant has not met any of the requirements for modification of the Office's March 31, 2006 wage-earning capacity determination. Appellant did not allege that she was retrained or otherwise vocationally rehabilitated or that the original March 31, 2006 wage-earning capacity determination was erroneous. Furthermore, the evidence does not establish a material change in appellant's employment-related condition. The only relevant, contemporaneous medical evidence was Dr. Midla's June 12, 2007 report, which indicated that appellant's permanent restrictions dating back to September 2000 remained in effect. This is not indicative of a material change in the nature and extent of appellant's injury-related condition. It suggests that appellant's accepted upper extremity conditions essentially remained static over the preceding seven-year period.

¹⁰ 20 C.F.R. § 10.5(x).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.7(a)(4) (October 2009).

¹² *Id.* at Chapter 2.1500.7(a)(5).

¹³ *K.R.*, *supra* note 9; *K.R.*, Docket No. 09-28 (issued September 16, 2009); *Id.*

¹⁴ Several weeks prior to her job being abolished, appellant stopped working due to a left knee condition unrelated to the current claim.

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.7(a)(5).

¹⁶ *D.S.*, 58 ECAB 392, 395 (2007).

Appellant did not meet her burden of proof to modify the March 31, 2006 wage-earning capacity determination.¹⁷ Absent a showing that the wage-earning capacity determination should be modified, she has no disability under the Federal Employees' Compensation Act. Accordingly, appellant is not entitled to wage-loss compensation due to the June 9, 2007 withdrawal of her limited-duty assignment.¹⁸

CONCLUSION

Appellant has not established a basis for modifying the Office's March 31, 2006 wage-earning capacity determination.

ORDER

IT IS HEREBY ORDERED THAT the July 15, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 19, 2010
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

¹⁷ *Tamra McCauley, supra* note 5.

¹⁸ *K.R., supra* note 9.