

the right shoulder bursae and tendons. It also accepted a November 1, 2002 recurrence of disability claim.¹

On April 26, 2004 appellant accepted a position as a modified full-time distribution clerk with restrictions. The position required no repetitive lifting to the chest with the right arm; less than 5 to 10 minutes of repetitive right arm use without a rest interval; no lifting more than 35 pounds to the waist; no lifting more than 20 pounds to the chest; no reaching above the shoulder more than 5 minutes without a break and no pushing/pulling more than 50 pounds.²

By decision dated September 20, 2005, the Office determined that appellant's actual earnings as a modified full-time distribution clerk effective May 15, 2004 fairly and reasonably represented his wage-earning capacity and established that he had no loss of wage-earning capacity.³ Appellant's wage-loss benefits were reduced to zero.

On May 13, 2008 the employing establishment offered appellant a modified position as a mail processing clerk at the Oxford Carrier Annex which appellant accepted under "protest" on May 29, 2008. The duties of the position included lifting up to 30 pounds, carrying up to 25 pounds and up to 50 pounds of pushing/pulling. The work hours were during the day, but start and stop time varied during the week.

On July 9, 2008 the Office received appellant's May 6, 2008 claim for a recurrence of disability for medical treatment only in which he claimed that his condition had progressively worsened since 2004.

On July 15, 2008 appellant accepted the employing establishment's July 11, 2008 modified job offer as a clerk at the Shawnee Mission Station. The physical requirements of the position included 3.5 hours of driving, up to 8 hours of intermittent walking, up to 5 hours of intermittent sitting and up to 8 hours of pushing/pulling/bending/stooping/lifting up to 50 pounds with work hours listed as 3:00 p.m. to 11:50 p.m.

In a July 16, 2008 letter, the Office advised of the three grounds to warrant modification of a formal loss of wage-earning capacity decision: (1) the original rating was in error; (2) the claimant was self-rehabilitated; or (3) the claimant's employment-related medical condition had worsened. It further advised that, if he was claiming his employment-related medical condition had worsened, he needed to submit objective physical findings and medical reasoning from his physician demonstrating a material worsening of his accepted conditions. Appellant was afforded 30 days to submit additional evidence in support of his claim.

¹ By decision dated July 13, 2004, the Office issued a schedule award for 12 percent right upper extremity impairment.

² The employing establishment noted that the salary was \$40,556.00 annually, but in a letter dated May 4, 2005 informed appellant that the annual salary of the offered position was actually \$38,069.00 and not \$40,556.00 as noted in the job offer.

³ This was based on an annual salary of \$38,069.00.

In a July 18, 2008 report, Dr. Ann Y. Lee, a Board-certified physiatrist, indicated that appellant was capable of working with restrictions. Appellant reported that his right shoulder condition was worsening and that his pain was becoming sharper. On physical examination, Dr. Lee found mildly limited right shoulder forward flexion and adduction, but that it was within functional active range limits. She reported right shoulder tenderness on palpation and a mildly positive clunk sign. Dr. Lee stated that appellant was to continue with his current work restrictions, but added a repetitive right upper extremity restriction. This restriction limited repetitive right upper extremity motion to 15 minutes followed by resting for 45 minutes.

On July 25, 2008 appellant accepted the July 16, 2008 job offer, but with modifications to his physical restrictions. The employing establishment modified the physical restrictions of lifting, carrying and bending/twisting from up to 50 pounds to lifting up to 30 pounds and bending/twisting/carrying up to 25 pounds.

Dr. Lee, in a July 25, 2008 report, diagnosed right shoulder pain and noted work restrictions including decreasing right upper extremity repetitive motion to 50 minutes with 45-minute breaks. Appellant related that he was being made to work beyond his work restrictions.

In an August 22, 2008 report, Dr. Lee diagnosed right shoulder pain. She noted that appellant had not worked since July 31, 2008 due to the employing establishment's inability to accommodate his physician's restrictions.

By decision dated September 10, 2008, the Office denied appellant's request for modification of the September 20, 2005 loss of wage-earning capacity determination.

Subsequent to the Office's decision, it received medical records dated August 28 and September 15, 2008 from Dr. Lee and physical therapy reports. Dr. Lee diagnosed right shoulder pain.

In a September 17, 2008 letter, appellant's counsel requested a telephonic hearing before an Office hearing representative, which was held on January 15, 2009. At the hearing, appellant addressed his physical restrictions and the job offers provided in 2008. He stopped work on July 31, 2008 and returned to work on November 21, 2008.

On February 10, 2009 the employing establishment submitted comments. It noted that appellant stopped work on July 31, 2008, worked a few intermittent days in September 2008, returned to work on November 18, 2008 and stopped work again on December 8, 2008.

By decision dated April 3, 2009, the Office hearing representative found that the evidence did not establish that the original loss of wage-earning capacity decision was erroneous, that appellant's medical condition had not materially changed or that appellant had been vocationally rehabilitated. She affirmed the September 10, 2008 decision denying modification of the September 20, 2005 loss of wage-earning capacity decision.

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.⁴ Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.⁵ 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.⁶ In this instance the claims examiner will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity.⁷

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, in fact, erroneous.⁸ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁹

ANALYSIS

The Office accepted that appellant sustained a right shoulder strain, right upper arm sprain and disorder of the right shoulder bursae and tendons as a result of the September 9, 2002 employment injury. Appellant accepted the position of modified full-time distribution clerk on April 26, 2004. By decision dated September 20, 2005, the Office found his actual earnings in this position fairly and reasonably represented his wage-earning capacity. Appellant filed a claim for a recurrence of disability for medical benefits only on May 6, 2008 and stopped work on July 31, 2008, although he worked a few days in September and November 2008 before stopping again on December 8, 2008. The question is whether he established that the September 20, 2005 wage-earning capacity decision should be modified.

Appellant did not allege that the original LWEC determination was erroneous or that he had been retrained or otherwise vocationally rehabilitated. He has contended that his right shoulder condition has materially worsened since May 2008 and that the new modified job offers by the employing establishment violated his work restrictions. The Board finds that the record is devoid of any medical evidence supporting appellant's contention that his right shoulder condition had materially changed. The only relevant medical evidence submitted by appellant is from Dr. Lee, an attending Board-certified physiatrist. On July 18, 2008 Dr. Lee noted that appellant's right shoulder was within functional active range limits although she noted mildly limited right shoulder adduction and flexion and tenderness on palpitation. She did not provide any opinion that appellant's condition had changed and noted that he was to continue working

⁴ *D.M.*, 59 ECAB ____ (Docket No. 07-1230, issued November 13, 2007).

⁵ *Katherine T. Kreger*, 55 ECAB 633 (2004); *see Robert H. Merritt*, 11 ECAB 64 (1959).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995). *See Mary E. Marshall*, 56 ECAB 420 (2005).

⁷ Federal (FECA) Procedure Manual, *supra* note 6. *See Harley Sims, Jr.*, 56 ECAB 320 (2005).

⁸ *See D.M.*, *supra* note 4; *Stanley B. Plotkin*, 51 ECAB 700 (2000); *Tamra McCauley*, 51 ECAB 375 (2000); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

⁹ *Id.*; *Jack E. Rohrabough*, 38 ECAB 186, 190 (1986).

within his current restrictions. In July 25, August 22 and September 15, 2008 reports, Dr. Lee diagnosed right shoulder pain. She did not provide any opinion addressing a material change in the nature of appellant's accepted condition. None of the reports by Dr. Lee describe a change of the accepted conditions or explained how the accepted conditions had materially worsened such that appellant was unable to work at the modified jobs offered at the employing establishment. The Board finds that appellant has not submitted sufficient medical evidence to establish that the September 20, 2005 wage-earning capacity determination should be modified. Appellant has not met his burden of proof.

CONCLUSION

The Board finds that the Office properly denied modification of the established September 20, 2005 wage-earning capacity determination.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 3, 2009 and September 10, 2008 are affirmed.

Issued: March 15, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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