United States Department of Labor
Employees' Compensation Appeals Board

P.M., Appellant	)	
and	)	**Docket No. 09-1521**
	)	**Issued: March 2, 2010**
U.S. POSTAL SERVICE, BURLINGTON STATION, Knoxville, TN, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On May 12, 2009 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs' finalized on April 13, 2009. 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 July 5, 2005 wage-earning capacity decision that reduced his compensation to zero should be modified.

On appeal, appellant alleged that he was not working at the time the Office issued the July 5, 2005 decision; that the Office had accepted a recurrence of disability on November 17, 2005; and that he had been paid compensation from June 24 to November 17, 2005. He also alleged that no wage-earning capacity decision had been issued after his return to work in November 2005.

FACTUAL HISTORY

On April 2, 2002 appellant, then a 52-year-old rural letter carrier, sustained an employment-related right shoulder impingement syndrome and sustained a similar injury on January 12, 2004 when he stopped work. The cases were administratively doubled and on March 9, 2004 he was granted a schedule award for a six percent loss of use of the right upper extremity, for 18.72 weeks, to run from March 4 to July 13, 2003. Appellant returned to modified duty on June 21, 2004.

On June 2, 2005 the Office ascertained that appellant was performing a permanent, modified position that began on June 21, 2004. By decision dated July 5, 2005, it determined that his employment as a modified rural carrier, effective June 21, 2004, fairly and reasonably represented his wage-earning capacity. The Office found that, as appellant's actual earnings met or exceeded the current wages of the job held when injured, his compensation was reduced to zero. Under a separate claim, on July 7, 2005 appellant filed a claim for wage loss beginning June 24, 2005 due to the withdrawal of his light-duty position.[1] On November 19, 2005 the Office paid him compensation for the period June 24 through October 29, 2005 under the instant claim and he was placed on the periodic rolls. Appellant returned to full-time modified duty on November 18, 2005 at the hours of 5:00 a.m. to 1:30 p.m.[2]

An April 4 and 5, 2007 functional capacity evaluation (FCE) demonstrated that appellant could not perform the job requirements of the regular rural letter carrier position but could perform sedentary or light duty, concluding that he could remain in his current sedentary job indefinitely. In an April 12, 2007 treatment note, Dr. E. Michael Holt, a Board-certified orthopedic surgeon, advised that he agreed with the FCE findings and advised that appellant should continue his sedentary position. In a May 5, 2007, Dr. George R. Baddour, Jr., Board-certified in orthopedic surgery, advised that appellant had permanent restrictions with lifting limited to 30 pounds at waist level and 10 pounds overhead.

In July 2007, the employing establishment offered appellant a modified rural carrier position with duties of stamping PARS return to sender letters for eight hours daily, effective July 31, 2007. The physical requirements were described as full use of both hands, ability to move upper body extremities including twisting and walking less than five minutes at a time for less than one hour per day. The work hours were from 10:30 a.m. to 7:00 p.m. On August 3, 2007 appellant stated, "I do not refuse nor do I accept the above job offer pending outcome of my doctor's opinion and review by the USDOL/OWCP." By letter dated September 21, 2007, the employing establishment informed the Office that appellant had not worked since August 3, 2007 when the new job offer was made. The new job was made for the needs of the service and merely changed the work hours, noting that the duties and salary would remain the same.

[1] Appellant filed the claim under Office file number xxxxxx353, accepted for aggravation of osteoarthritis of both knees.

[2] The modified rural carrier position was described as sedentary work only, hand stamping letters and flats, no lifting greater than 40 pounds and no lifting overhead greater than 10 pounds.

On November 20, 2007 appellant filed a Form CA-7 claim for compensation beginning August 7, 2007 and continuing. In an October 24, 2007 report, Dr. Douglas K. Hembree, an internist, advised that appellant had reported the proposed shift change. He stated that, because appellant was a diabetic and had other problems dealing with sleep apnea, peripheral neuropathy, B-12 deficiency and mixed hyperlipidemia, he felt the change would cause "an adverse and disruptive impact" on his health. Appellant also submitted statements from three coworkers who advised that he was a great help to them in performing their duties and an August 6, 2007 statement in which Thomas P. Trent, Sr., a coworker, advised that on Monday August 6, 2007 he witnessed a discussion between appellant and his supervisor, Tim Dison, who told appellant that he had to either accept or decline the job offer or be put off work.

On December 18, 2007 the Office informed appellant that the evidence submitted was insufficient to support temporary total disability and advised him of the elements needed to modify a wage-earning capacity determination. In an Office telephone memorandum dated December 26, 2006, he stated that his job duties would not have changed with the new offer, only the hours and this was made in retaliation for him working as a union representative and filing an Equal Employment Opportunity Commission claim. In a January 14, 2008 letter, appellant asserted that there was no justification for the new job offer other than reprisal and that it was not in accordance with his work limitations. He attached an August 7, 2007 statement in which Randy Vaughan, a coworker, discussed his disagreement with the management at the employing establishment.

By decision dated March 4, 2008, the Office denied modification of the July 5, 2005 wage-earning capacity decision. In correspondence dated September 2 and 15, 2008, the employing establishment informed the Office that the July 2007 job offer merely changed appellant's hours and not his duties, which he had performed for a long period to time, noting that his hours were changed to accommodate supervision and that the position was still available to appellant. On April 13, 2009 the Office reissued the March 4, 2008 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. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.[3] Office procedures provide that the Office can make a retroactive wage-earning capacity determination if the claimant worked in the position for at least 60 days, the position fairly and reasonably represented his or her wage-earning capacity and the work stoppage did not occur because of any change in his injury-related condition affecting the ability to work.[4]

The procedures further provide that, "[i]f a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of

[3] *Katherine T. Kreger*, 55 ECAB 633 (2004).

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (July 1997); *Selden H. Swartz*, 55 ECAB 272 (2004).

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-earning capacity."[5] 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.[6] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[7]

In addition, Chapter 2.814.11 of the procedure manual contains provisions regarding the modification of a formal loss of wage-earning capacity. The relevant part provides that a formal loss of wage-earning capacity will be modified when: (1) the original rating was in error; (2) the claimant's medical condition has changed; or (3) the claimant has been vocationally rehabilitated. Office procedures further provide that the party seeking modification of a formal loss of wage-earning capacity decision has the burden to prove that one of these criteria has been met. If the Office is seeking modification, it must establish that the original rating was in error, that the injury-related condition has improved or that the claimant has been vocationally rehabilitated.[8]

ANALYSIS

Applicable case law and Office procedures require that once a formal wage-earning capacity decision is in place, 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.[9] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[10]

The Board finds that appellant did not submit sufficient evidence to show that the Office's July 5, 2005 wage-earning capacity determination was erroneous.[11] While appellant noted on appeal that he was not working on July 5, 2005, he did not file a claim for compensation until July 7, 2005 and received disability compensation for this work stoppage until he returned to work. Furthermore, there is no evidence of record that the decision was in error or that he was retrained or otherwise vocationally rehabilitated.

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[5] Federal (FECA) Procedure Manual, *supra* note 4, Chapter 2.814.9(a) (December 1995).

[6] *Stanley B. Plotkin*, 51 ECAB 700 (2000).

[7] *Id.*

[8] *See* Federal (FECA) Procedure Manual, *supra* note 4, Chapter 2.814.11 (June 1996).

[9] *Stanley B. Plotkin*, *supra* note 6.

[10] *Id.*

[11] *Katherine T. Kreger*, *supra* note 3; *Sharon C. Clement*, 55 ECAB 552 (2004); Federal (FECA) Procedure Manual, *supra* note 4.

The Board further finds that the medical evidence submitted is insufficient to show that there was a material change in the nature and extent of the injury-related condition. The Office accepted that appellant sustained injuries to his right shoulder under this claim and under separate claims aggravation of osteoarthritis of both knees and an Achilles tendon rupture. The medical evidence includes an FCE dated April 4 and 5, 2007 that advised that he could remain in his current job indefinitely and on April 12, 2007 Dr. Holt advised that he agreed with the FCE. While Dr. Baddour advised on May 5, 2007 that appellant could not lift greater than 30 pounds on November 9, 2004 he advised that appellant could lift 40 pounds and the November 18, 2005 job offer comported with these restrictions and the duties of the position were described as sedentary. He did not explain why he was changing the weight restriction or whether this was due to a worsening on an accepted condition. Appellant performed the position for a number of years; the July 2007 job offer was also for a sedentary position; and the employing establishment explained that his job duties and salary had not changed, merely his hours and that this was for the needs of the service and accommodate supervision. Dr. Hembree stated that the change in hours would have an adverse and disruptive impact on appellant's health because he was a diabetic and had other problems dealing with sleep apnea, peripheral neuropathy, B-12 deficiency and mixed hyperlipidemia. He, however, did not mention any of appellant's accepted conditions. The Board finds that, as none of the report establishes a worsening of appellant's injury-related condition, the medical evidence is insufficient to establish that the July 5, 2005 wage-earning capacity decision should be modified.[12] The Office, therefore, properly denied modification of the July 5, 2005 wage-earning capacity determination.[13]

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that a July 5, 2005 wage-earning capacity decision that reduced his compensation to zero should be modified.

[12] *See Darletha Coleman*, 55 ECAB 143 (2003).

[13] *T.M.*, 60 ECAB ____ (Docket No. 08-975, issued February 6, 2009).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs finalized on April 13, 2009 is affirmed.

Issued: March 2, 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