

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

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| L.D., Appellant   | ) |  |
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| U.S. POSTAL SERVICE, PROCESSING &<br>DISTRIBUTION CENTER, Indianapolis, IN,<br>Employer | ) | Docket No. 09-1808<br>Issued: May 10, 2010 |
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*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 July 7, 2009 appellant filed a timely appeal from the June 29, 2009 merit decision of the Office of Workers' Compensation Programs, which denied modification of a wage-earning capacity determination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of his case.

**ISSUE**

The issue is whether the Office properly denied modification of its November 13, 2002 wage-earning capacity determination.

**FACTUAL HISTORY**

On March 17, 1996 appellant, then a 44-year-old mail handler, filed a claim alleging that he sustained a pinched nerve and carpal tunnel syndrome in the performance of duty from lifting large sacks and boxes of mail and pushing and pulling equipment. The Office accepted his claim for aggravation of bilateral carpal tunnel syndrome and cervical sprain.

Appellant sustained other employment injuries. On July 1, 1997 he filed a claim alleging that his herniated disc at C5-6 was causally related to his federal employment, which the Office accepted. On August 17, 1999 appellant filed a claim alleging a left shoulder injury on June 2, 1997, which the Office also accepted for left shoulder impingement syndrome. He received a schedule award for a 10 percent impairment of his left upper extremity.

Pursuant to a July 25, 2002 permanent rehabilitation job offer, appellant returned to work as a modified full-time mail handler effective August 10, 2002. On November 13, 2002 the Office found that his actual earnings in that position fairly and reasonably represented his wage-earning capacity. As his actual earnings were equal to the current pay rate of his date-of-injury position, it found that appellant had no loss of wage-earning capacity.

Appellant worked in this modified position until April 10, 2009, when he was sent home because, according to the employer, no necessary and productive work was available within his restrictions. Appellant indicated that his supervisor required him, without explanation, to file claims for compensation for wage loss beginning April 10, 2009.

In a decision dated June 29, 2009, the Office denied compensation for wage loss. The Office found that appellant failed to submit evidence sufficient to warrant a modification of the November 13, 2002 determination of his wage-earning capacity.

On appeal, appellant states the employer gave him no reason in writing for being sent home and no reason he had to submit claims for compensation for wage loss. He states that he did not want to complete or submit the claims for compensation for wage loss.<sup>1</sup>

### **LEGAL PRECEDENT**

The Federal Employees' Compensation Act provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of his duty.<sup>2</sup> "Disability" means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.<sup>3</sup>

If the disability is partial, the United States shall pay the employee during the disability monthly monetary compensation based on the difference between his monthly pay and his monthly wage-earning capacity.<sup>4</sup>

In determining compensation for partial disability, the wage-earning capacity of an employee is determined by the employee's actual earnings if the employee's actual earnings

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<sup>1</sup> Appellant requested oral argument before the Board. On July 15, 2009 the Clerk of the Board advised him that oral arguments were held only in Washington, DC and at his expense, and that the Board could not consider new evidence. The Clerk of the Board asked appellant to inform the Board no later than July 30, 2009 if he still desired the oral argument. The Clerk of the Board notified appellant: "If your response is not received by the above-stated date, the Board will decide your appeal on the record without oral argument." Appellant did not respond.

<sup>2</sup> 5 U.S.C. § 8102(a).

<sup>3</sup> 20 C.F.R. § 10.5(f).

<sup>4</sup> 5 U.S.C. § 8106(a).

fairly and reasonably represent his or her wage-earning capacity.”<sup>5</sup> Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing that they do not fairly and reasonably represent the injured employee’s wage-earning capacity must be accepted as such measure.<sup>6</sup>

Once the wage-earning capacity of an injured employee is properly determined, it remains undisturbed regardless of actual earnings or lack of earnings.<sup>7</sup> 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. The burden of proof is on the party attempting to show modification of the award.<sup>8</sup>

### ANALYSIS

Regardless of the reason appellant filed his claims for wage loss, the issue that arises is whether he is entitled to compensation for wage loss beginning April 10, 2009 because his employer, citing the lack of any necessary and productive work within his restrictions, sent him home from work.

Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn, not on actual wages lost.<sup>9</sup> There is a distinction. When appellant performed his modified full-time mail handler position in 2002 and continuing, he demonstrated that he had the capacity to earn the same wages he was receiving at the time of injury. He showed that his employment injuries were no longer incapacitating him from earning those wages. Therefore, on November 13, 2002 the Office formally determined that he had returned to his preinjury capacity to earn wages. When work was no longer available for appellant in 2009, he stopped receiving wages. However, he still had a demonstrated capacity to earn the same wages he was receiving at the time of injury.

With a formal determination of wage-earning capacity in place, an employee claiming compensation for wage loss must show either a material change in the nature and extent of his injury-related condition or that the original determination of wage-earning capacity was in fact erroneous.<sup>10</sup> Appellant has made no such showing. He explains on appeal that he did not even want to file the claims for wage loss; he was instructed to do so by his supervisor.<sup>11</sup> Therefore,

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<sup>5</sup> *Id.* at § 8115(a).

<sup>6</sup> *Don J. Mazurek*, 46 ECAB 447 (1995).

<sup>7</sup> *Ronald M. Yakota*, 33 ECAB 1629 (1982).

<sup>8</sup> *Daniel J. Boesen*, 38 ECAB 556 (1987).

<sup>9</sup> *Yakota*, *supra* note 7.

<sup>10</sup> The third basis for modifying a formal determination -- that the employee has been retrained or vocationally rehabilitation -- is a basis for the Office to reduce or terminate compensation for wage loss.

<sup>11</sup> With no work available and having sent appellant home, the employer may have simply been looking after his interests when it instructed him to apply for benefits that he might be entitled to. If appellant did not want to file the claims, if he was not seeking compensation for wage loss, it is unclear to the Board why he disagrees with the Office’s decision to deny that compensation.

appellant has presented no evidence that would allow a modification of the Office's determination of his wage-earning capacity.<sup>12</sup>

The Board finds that appellant has not met his burden to show that modification of the Office's November 13, 2002 decision is warranted. The original determination of his wage-earning capacity stands regardless of his lack of earnings beginning April 10, 2009. Appellant is not entitled to compensation for wage loss beginning that date. The Board will therefore affirm the Office's June 29, 2009 decision to deny such compensation.

### **CONCLUSION**

The Board finds that the Office properly denied modification of its November 13, 2002 wage-earning capacity determination.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the June 29, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 10, 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

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<sup>12</sup> See *K.R.*, 60 ECAB \_\_\_ (Docket No. 09-0028, issued September 16, 2009).