

release surgery. Appellant stopped work at the time of his surgery and was placed on the periodic rolls.¹

In a December 6, 2006 report, Dr. Patrick J. Moriarty, an attending Board-certified orthopedic surgeon, advised that appellant was able to return to light duty provided that he engage only in “light, clean activities with the surgical hand.” He was restricted from working at or above shoulder level and from repetitive lifting above 20 pounds with the left arm.

On December 12, 2006 appellant accepted a job offer as a modified rural carrier. His included answering telephones, casing checks and delivering some rural route packages. Permanent restrictions included light, clean activities with the surgical hand; no repetitive pushing or pulling with the left arm; no work at or above shoulder level with the left arm.

Appellant submitted claims for lost wages commencing September 26, 2007, alleging that his limited-duty job offer was withdrawn on that date. He was told that he was disability retired and instructed to turn in his badge.

Appellant submitted an undated statement from a coworker, who witnessed a conversation between appellant and Dan Delisle, the postmaster, on September 26, 2007. Mr. Delisle informed appellant that his job status was retired as of the previous Thursday. Appellant’s job was gone, including his light-duty assignment.

In a July 24, 2007 letter, the Office of Personnel Management (OPM) advised appellant that it had received his Federal Employment Retirement System (FERS) application for disability retirement. A September 27, 2007 notice of personnel action (Form SF50) reflected that appellant retired on disability as of September 20, 2007.

The record contains a July 23, 2007 letter from appellant to “HRSSC, Retirement/Separations, P.O. Box 970500, Greensboro, NC.” Appellant requested that the agency discontinue all work on medical retirement for me. By letter dated October 30, 2007, OPM advised appellant that his application for disability retirement benefits had been withdrawn per his request.

In a November 27, 2007 letter, appellant stated that he received a “paper for retirement” after he faxed Shared Services a notice that he did not want to retire. When he informed the postmaster that he did not want to retire, he was told that it was “up to Dept of Labor to find me a job.” Appellant submitted several letters to the postmaster requesting reassignment to the limited-duty job he held in September 2007, or to a similar position.

On February 28, 2008 the Office requested information from the employing establishment regarding the limited-duty job held by appellant upon his return to work on December 12, 2006, including: whether his duties changed from the time he began working to the date he last worked; whether the job would have remained available to him had he not requested retirement; and if so, was the job temporary.

¹ On December 18, 2007 the Office granted appellant a schedule award for a 15 percent permanent impairment of the left upper extremity.

The employing establishment informed the Office that appellant asked for and accepted a formal disability retirement. After appellant's retirement, the vacated position was posted and acquired by the most senior bidder. He later changed his mind and petitioned to withdraw his application for retirement. As any other prospective employee, appellant would be required to go through the hiring process again to be considered for employment.

In a February 28, 2008 letter, the employer noted that appellant worked in a permanent modified assignment from March 9, 2006 until the date of his retirement. The position would have remained available to him if he had not retired. The employing establishment informed the Office that appellant's weekly pay rate when his disability began was \$1,043.33, which was identical to the current weekly pay rate for the job and step when injured.

By decision dated March 27, 2008, the Office found that appellant's actual wages of \$1,043.33 in his modified position, effective December 12, 2006, fairly and reasonably represented his wage-earning capacity. Appellant demonstrated an ability to perform the duties of the job for two months or more, and the position was found suitable to his partially disabled condition. The Office noted that his date-of-injury pay rate was \$1,043.33, that the current pay rate for his date-of-injury position was \$1,043.33, and that the employing establishment had advised that the position would have remained available had he not retired. As appellant's wages met or exceeded the wages of the job he held when injured, his entitlement to wage-loss compensation ceased when he was reemployed with no loss in wage-earning capacity.

In a March 28, 2008 letter, appellant contended that his request to withdraw the application for disability retirement was not received in a timely fashion, because he was given an incorrect fax number.

On April 26, 2008 appellant requested an oral hearing. He alleged that the modified job would not have remained available had he not stopped working on September 20, 2007.

In a March 16, 2009 letter, appellant's representative contended that appellant sent his request to stop the retirement process to the wrong party, as he had been given the wrong fax number. Appellant believed he had followed correct procedures, because he received a letter from OPM repealing his disability retirement and the employing establishment informed him that he would be going back to work.

Appellant submitted a copy of his July 23, 2007 letter requesting that all work on medical retirement be stopped, together with a fax coversheet directed to: HRSSC (651) 994-3543. By letter dated October 18, 2007, the employing establishment notified him that it was currently reviewing the issue as to whether he rescinded his disability retirement that was effective September 20, 2007.

At the July 17, 2009 telephonic hearing, appellant described his duties in his modified job, which included answering telephones, delivering packages and casing checks. He stated that there was no end date for his modified position. Appellant put in for retirement in May 2007, because he believed it was financially beneficial to do so. When he was informed in July 2007 that his benefits would be reduced when he attained the age of 62, he changed his mind and sent a fax telling Shared Services to stop all efforts on his retirement. Appellant's fax was not

received by Shared Services, however, because he was given the wrong fax number. Because OPM did not receive his request to stop his retirement application, the retirement was not vacated until October 30, 2007. When appellant received a September 12, 2007 letter stating that his application for retirement had been approved, he assumed it was a mistake.

Counsel argued that the employing establishment withdrew the modified carrier position. Because appellant's retirement was rescinded, he was entitled to go back to work. As the employing establishment was unable to accommodate his restrictions, he was totally disabled.

By decision dated October 19, 2009, an Office hearing representative affirmed the March 27, 2008 decision, finding that the Office properly made a retroactive determination that appellant's actual earnings in his limited-duty position effective December 12, 2006 fairly and reasonably represented his wage-earning capacity. The representative found that the reason appellant stopped work was due to the approval of his application for disability retirement, rather than to the employment injury. He further found that the job was permanent and full time, with regular job duties, and was not make-shift in nature.

LEGAL PRECEDENT

Section 8115(a) of the Federal Employees' Compensation Act provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by actual earnings if actual earnings fairly and reasonably represent the wage-earning capacity.² 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.³

The Office's procedure manual states that, when an employee cannot return to the date-of-injury job because of disability due to work-related injury or disease, but does return to alternative employment, the claims examiner must determine whether the earnings in the alternative employment fairly and reasonably represent the employee's wage-earning capacity.⁴

The procedure manual provides in relevant part that to determine whether a claimant's work fairly and reasonably represents his wage-earning capacity, the claims examiner should consider whether the kind of appointment and tour of duty are at least equivalent to those of the job held on the date of injury. Unless they are, the work may not be considered to be suitable.⁵

The Office's procedure manual provides that the Office can make a retroactive wage-earning capacity determination if appellant worked in the position for at least 60 days, the

² 5 U.S.C. §§ 8101-8193, § 8115(a).

³ *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (July 1997).

⁵ *Id.* at Chapter 2.814.7(a).

position fairly and reasonable represented his wage-earning capacity and the work stoppage did not occur because of any change in his injury-related condition affecting the ability to work.⁶

ANALYSIS

The Board finds that the Office's retroactive determination that appellant's actual earnings as a modified rural carrier fairly and reasonably represented his wage-earning capacity was proper under the circumstances of this case. The record reflects that appellant worked in his modified position for more than 60 days, the work stoppage did not occur due to any change in his injury-related condition affecting his ability to work and the employment fairly and reasonably represents his wage-earning capacity.⁷

The Office accepted appellant's claim for left shoulder impingement, left rotator cuff tear and bilateral carpal tunnel syndrome. Effective December 12, 2006, appellant accepted a modified rural carrier position, with duties and restrictions in accordance with those recommended by his treating physician. He worked in the modified position until his application for disability retirement was accepted by OPM effective September 20, 2007. The record, therefore, establishes the first of the three requirements for a retroactive wage-earning capacity determination, namely that he worked in his modified position for more than 60 days.

The record also establishes that the work stoppage did not occur because of any change in appellant's injury-related condition affecting his ability to work. Rather, the work stoppage was related to his application for disability retirement. Appellant stated that he applied for disability retirement because he believed that it was financially beneficial. There is no medical evidence to establish his disability for work commencing September 20, 2007, or any medical opinion that appellant's work stoppage was causally related to a change in his employment-related conditions.

Appellant contends that he attempted to withdraw his application when he learned that his disability retirement was not financially to his advantage, and that the process was derailed because he was given an incorrect fax number. The issue, however, is whether his work stoppage on September 20, 2007 occurred because of any change in his injury-related conditions affecting his ability to work. The evidence establishes that the work stoppage occurred because the employing establishment received notice that appellant's application for disability retirement was effective September 20, 2007.⁸ The employing establishment stated that the modified position would have continued to be available to appellant had he not retired. Appellant has not provided any evidence to the contrary. Upon notice of his retirement, the job was posted and acquired by the most senior bidder. The fact that appellant changed his mind about whether to retire does not establish that his employer withdrew the position for reasons related to his injury-related condition.

⁶ *Id.* at Chapter 2.814.7(e).

⁷ *Id.*

⁸ A determination made for disability retirement purposes is not determinative of the extent of physical disability or impairment for compensation purposes under the Act. *James E. Norris*, 52 ECAB 93 (2000).

In this case, the Office properly determined that appellant's actual wages fairly and reasonably represent his wage-earning capacity.⁹ The record reflects that the requirements and restrictions of the job were consistent with those provided by his physician. Appellant worked at the light-duty position for more than 60 days, with no probative evidence that the work stoppage was due to a change in the employment-related condition. There is no evidence that the light-duty position was part time, sporadic, seasonal or temporary work.¹⁰ As noted, actual wages earned are generally the best measure of wage-earning capacity, and the Board finds that the Office properly found that the actual earnings fairly and reasonably represented appellant's wage-earning capacity. The requirements for a retroactive wage-earning capacity determination have accordingly been met.

The actual earnings in the position are compared with the current wages of the date-of-injury position to determine loss of wage-earning capacity.¹¹ The record indicates, and appellant does not contest, that the actual wages were equal to the current date-of-injury position wages. Accordingly, the Office properly determined that appellant had no loss of wage-earning capacity.¹²

CONCLUSION

The Board finds that the requirements for a retroactive wage-earning capacity determination have been met in this case, and thus the Office properly determined that appellant had no loss of wage-earning capacity.

⁹ 5 U.S.C. § 8115(a). *Dennis E. Maddy*, 47 ECAB 259 (1995).

¹⁰ See *Monique L. Love*, 48 ECAB 378 (1997).

¹¹ *Albert C. Shadrick*, 5 ECAB 376 (1953); 20 C.F.R. § 10.303.

¹² See *Mary Jo Colvert*, 45 ECAB 575 (1974); see also Federal (FECA) Procedure Manual, *supra* note 4 at Chapter 2.814.7(a).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' October 19, 2009 decision is affirmed.

Issued: October 21, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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