

FACTUAL HISTORY

On January 14, 2005 appellant, then a 45-year-old tractor trailer operator, filed a traumatic injury claim alleging that on that day he injured his right shoulder while unloading the van. OWCP accepted the claim for right shoulder impingement syndrome and right elbow strain and authorized right arthroscopic rotator cuff repair surgery, which occurred on March 16, 2005.

On June 16, 2005 appellant accepted a position with the employing establishment as a modified tractor trailer operator. The position required no reaching above the shoulder and repetitive movements; lifting up to five pounds; may operate a personal vehicle for transportation to and from work for 30 minutes a hour and one hour a day and an eight-hour workday with two 15-minute breaks. The duties of the position included filing, answering the dispatch telephone, hand forms to the drivers and acting as a dispatch clerk which involved intermittent standing and sitting.

By decision dated July 26, 2007, OWCP reduced appellant's compensation to zero finding that his actual earnings as a modified tractor trailer operator effective June 16, 2005 fairly and reasonably represented his wage-earning capacity. It determined that his actual earnings met or exceeded his wages at the time of his injury.

On December 11, 2009 appellant filed a recurrence of disability claim on the grounds that his rehabilitation job had been revoked and he was not working. He filed a claim for wage-loss compensation beginning November 18, 2009.

On January 8, 2010 OWCP advised appellant of the evidence required to modify a loss of wage-earning capacity determination. It noted that he was losing time from work because no work was available from the employer. OWCP provided appellant 30 days to submit rationalized medical evidence showing that he sustained a change in his injury-related condition.

On May 14, 2010 appellant requested modification of OWCP's 2007 wage-earning capacity decision and submitted evidence in support of his claim. On March 8, 2010 Dr. Arthur J. Ting, a treating Board-certified orthopedic surgeon, performed right knee arthroscopy surgery based on diagnoses of right knee oleranon bursitis and right knee degenerative joint disease. In a January 22, 2009 report, Dr. Scott Canada, a treating chiropractor, stated that he had been treating appellant since 2006 for extreme forearm pain.

By decision dated June 1, 2010, OWCP denied modification of its July 26, 2007 wage-earning capacity decision.

On June 21, 2010 appellant requested reconsideration and resubmitted the March 8, 2010 report from Dr. Ting.

By decision dated July 1, 2010, OWCP denied reconsideration.

LEGAL PRECEDENT -- ISSUE 1

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.² Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.³

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.⁴ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁵

The Board has held that OWCP may accept a limited period of disability without modifying a standard wage-earning capacity determination.⁶ This occurs when there is a demonstrated temporary worsening of a medical condition of insufficient duration and severity to warrant modification of a wage-earning capacity determination.⁷ This narrow exception is only applicable for brief periods of medical disability. It does not apply to situations where there is a wage-earning capacity determination in place and the employee claims additional wage-loss compensation due to the withdrawal of light-duty work.⁸

When a formal loss of wage-earning capacity determination is in place and light duty is withdrawn, the proper standard of review is not whether appellant sustained a recurrence of disability, but whether OWCP should modify its decision according to the established criteria for modifying a formal loss of wage-earning capacity determination.⁹ Office procedures provide that when the employing establishment has withdrawn a light-duty assignment, which accommodated the claimant's work restrictions and a formal wage-earning capacity decision has been issued, the decision will remain in place, unless one of the three accepted reasons for modification applies.¹⁰

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained employment-related right shoulder impingement syndrome and right elbow strain. Following right shoulder arthroscopic surgery, appellant

² See 5 U.S.C. § 8115 (determination of wage-earning capacity).

³ *Sharon C. Clement*, 55 ECAB 552 (2004).

⁴ *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Tamra McCauley*, 51 ECAB 375, 377 (2000).

⁵ *Id.*

⁶ See *Katherine T. Kreger*, 55 ECAB 633 (2004).

⁷ *Id.*

⁸ see generally *D.M.*, 59 ECAB 164 (2007); *K.R.*, Docket No. 09-415 (issued February 24, 2010) (the fact that a claimant voluntarily transferred to a position which provided fewer hours of work than the position for which the wage-earning capacity was based is not a basis for modification of a wage-earning capacity decision).

⁹ *K.R.*, *supra* note 8; *Katherine T. Kreger*, *supra* note 6.

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.7(a)(5) (October 2009).

returned to work as a modified tractor trailer operator with the employing establishment. By decision dated July 26, 2007, OWCP determined that he had no loss of wage-earning capacity as his actual earnings as a modified tractor trailer operator fairly and reasonably represented his wage-earning capacity.

Appellant filed a claim requesting compensation for wage loss beginning November 18, 2009 and a recurrence claim on December 11, 2009 based on the revocation of his modified job. He requested modification of the July 26, 2007 wage-earning capacity decision.

Appellant did not submit any evidence to establish that OWCP's original wage-earning capacity decision was erroneous. OWCP based its loss of wage-earning capacity determination on his actual earnings as a modified tractor trailer operator beginning June 16, 2005. It found that appellant's actual earnings fairly and reasonably represented his wage-earning capacity. OWCP's determination was consistent with section 8115(a) of FECA which provides that the wage-earning capacity of appellant is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity.¹¹ It properly noted that appellant had received actual earnings as a modified tractor trailer operator for more than 60 days at the time of its loss of wage-earning capacity determination and there is no evidence that the position was make-shift, temporary, seasonal or otherwise inappropriate for a wage-earning capacity determination.¹²

Appellant contended that he now has a loss of wage-earning capacity as he is no longer working full time as a modified tractor trailer operator. As a formal wage-earning capacity was in effect at the time that the employing establishment took away his position, he must show a basis for modification of that decision to be entitled to wage-loss compensation on or after November 18, 2009.¹³

The Board finds that appellant has not established that modification of OWCP's July 26, 2007 wage-earning capacity determination is warranted. Appellant did not allege that he was retrained or otherwise vocationally rehabilitated and, as noted, there is no evidence that the original wage-earning capacity determination was erroneous. Furthermore, the evidence does not establish a material change in his employment-related condition.

Appellant submitted a March 8, 2010 surgical report for his right knee and a January 22, 2009 report from Dr. Canada, a treating chiropractor, who related treating appellant for extreme forearm pain since 2006. Dr. Canada's opinion is insufficient to support a worsening of appellant's accepted right shoulder condition. In assessing the probative value of chiropractic evidence, the initial question is whether the chiropractor is a "physician" as defined under section 8101(2) of FECA. A chiropractor is not considered a physician unless it is established that there is a spinal subluxation as demonstrated by x-ray to exist.¹⁴ Dr. Canada did not

¹¹ *A.P.*, 58 ECAB 198 (2006); *David L. Scott*, 55 ECAB 330 (2004).

¹² *D.S.*, 58 ECAB 392 (2007); *Selden H. Swartz*, 55 ECAB 272 (2004).

¹³ *See D.S.*, *supra* note 12.

¹⁴ *Paul Foster*, 56 ECAB 208 (2004); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

diagnose a spinal subluxation as demonstrated by x-ray rather he provided an opinion on appellant's forearm. He is not a physician as defined under FECA and his opinion is of no probative medical value.

Dr. Ting's report concerned appellant's right knee a condition not accepted as employment related. He did not provide any opinion as to the status of appellant's right shoulder or elbow conditions. Dr. Ting did not address disability from work due to the accepted conditions.

Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn and not on actual wages lost.¹⁵ Absent a showing that the wage-earning capacity should be modified, appellant has no disability under FECA and is not entitled to compensation for wage loss based on the withdrawal of his limited-duty position.¹⁶ Accordingly, OWCP properly denied his claim for wage-loss compensation as he had not established modification of the established wage-earning capacity determination and properly denied modification of its July 26, 2007 wage-earning capacity decision.

On appeal, appellant contends that the modified job he accepted, which was the basis for the July 26, 2007 wage-earning capacity decision, was for four hours a day and that he actually worked an eight-hour day. Contrary to his contention, the evidence of record shows that the modified job offered, and accepted by appellant was an eight-hour a day position. Appellant argued that he was not working as a tractor trailer operator, but as a dispatcher since those duties complied with his restrictions and that his wages in the modified position did not exceed his date-of-injury wages. He did not work as a tractor trailer operator as he was unable to perform the duties of that position the employing establishment provided appellant with a modified tractor trailer operator within his restrictions and duties of a dispatcher. The issue is not the title of the position, but the duties and restrictions noted in the modified job offer. There is no evidence in the record supporting appellant's argument that the wages from his modified job did not meet or exceed the wages of his date-of-injury job. Appellant has not provided any evidence showing that the original wage-earning capacity decision was erroneous or that his accepted condition had worsened. He continued to work in the modified job until the employing establishment withdrew the job. As noted, OWCP procedures provide that when the employing establishment has withdrawn a light-duty assignment, the formal wage-earning capacity decision will remain in place unless one of the three accepted reasons for modification are met. Appellant has not established that modification is warranted as none of the accepted reasons for modification were met.

Appellant may request modification of the wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

¹⁵ *Marie A. Gonzales*, 55 ECAB 395 (2004).

¹⁶ *K.R.*, *supra* note 8.

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,¹⁷ OWCP's regulations provide that a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by it; or (3) submit relevant and pertinent new evidence not previously considered by OWCP.¹⁸ To be entitled to a merit review of OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.¹⁹ When a claimant fails to meet one of the above standards, it will deny the application for reconsideration without reopening the case for review on the merits.²⁰

ANALYSIS -- ISSUE 2

In his June 21, 2010 application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law or advance a relevant legal argument not previously considered by it. With regards to evidence, he resubmitted a March 8, 2010 report from Dr. Ting which OWCP considered in its June 1, 2010 decision denying modification of his wage-earning capacity decision. The submission of evidence which repeats or duplicates evidence that is already in the case record does not constitute a basis for reopening a case for merit review.²¹ Appellant did not provide any relevant and pertinent new evidence to the issue of whether modification of the July 26, 2007 wage-earning capacity decision was warranted.

Consequently, the evidence submitted by appellant on reconsideration does not satisfy the third criterion, noted above, for reopening a claim for merit review. Furthermore, appellant also has not shown that OWCP erroneously applied or interpreted a specific point of law or advanced a relevant new argument not previously submitted. Therefore, OWCP properly denied his request for reconsideration.

CONCLUSION

The Board finds that appellant has not established OWCP's wage-earning capacity determination should be modified and that it properly denied his request for a merit review.

¹⁷ 5 U.S.C. §§ 8101-8193. Section 8128(a) of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

¹⁸ 20 C.F.R. § 10.606(b)(2). See *Susan A. Filkins*, 57 ECAB 630 (2006); *J.M.*, Docket No. 09-218 (issued July 24, 2009).

¹⁹ *Id.* at § 10.607(a). *Robert G. Burns*, 57 ECAB 657 (2006); see *S.J.*, Docket No. 08-2048 (issued July 9, 2009).

²⁰ *Id.* at § 10.608(b). *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006); see *Y.S.*, Docket No. 08-440 (issued March 16, 2009).

²¹ *M.E.*, 58 ECAB 694 (2007); *D'Wayne Avila*, 57 ECAB 642 (2006); *A.L.*, Docket No. 08-1730 (issued March 16, 2009).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 1 and June 1, 2010 are affirmed.

Issued: August 11, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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