

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

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| S.M., Appellant |) | |
| |) | |
| and |) | Docket No. 10-2382 |
| |) | Issued: September 28, 2011 |
| U.S. POSTAL SERVICE, POST OFFICE, Philadelphia, PA, Employer |) | |
| |) | |

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On September 29, 2010 appellant filed a timely appeal from a June 17, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3(e), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly denied modification of a July 23, 2009 wage-earning capacity determination.

FACTUAL HISTORY

Appellant, a 25-year-old clerk, injured his right knee on December 14, 2000. He filed a claim for benefits, which OWCP accepted for right knee sprain, patella subluxation and dislocation of the right patella. OWCP paid compensation benefits for total disability.

¹ 5 U.S.C. § 8101 *et seq.*

On January 12, 2002 appellant accepted a full-time modified rehabilitation position as a carrier technician. The job was tailored to his physical restrictions and allowed him to work for eight hours per day, with sitting not exceeding two hours, walking, standing and operating a motor vehicle not exceeding one hour, lifting/pushing/pulling not exceeding 30 pounds, and no squatting, kneeling or climbing. By decision dated April 26, 2002, OWCP issued a formal wage-earning capacity decision. It found that appellant had worked more than 60 days in the modified position and that the actual wages he earned in the modified position of carrier technician, \$715.90 per week, fairly and reasonably represented his wage-earning capacity.

A statement of accepted facts dated May 31, 2007 indicates that appellant worked in a new modified position, starting March 26, 2007, for four hours a day primarily casing and transporting mail. The record does not include a formal position description. Appellant worked intermittently at his modified job until September 18, 2007, when he underwent a right knee arthroscopy which was authorized by OWCP. OWCP reinstated his compensation for temporary total disability as of September 18, 2007 until October 25, 2007, when he returned to part-time duty at a modified position. The record does not document the duties of this position.

In a work capacity evaluation dated May 5, 2008, Dr. Paul H. Stanfield, Board-certified in orthopedic surgery and appellant's treating physician, stated that appellant could work an eight-hour day with the following work restrictions: walking not exceeding two hours; standing not exceeding four hours; pushing, pulling and lifting not exceeding 20 pounds for six hours; and no bending, stooping, squatting, kneeling or climbing.

A statement of accepted facts dated September 8, 2008 indicated that the employing establishment had not been able to accommodate Dr. Stanfield's physical restrictions for an eight-hour day, five days a week position.

In order to clarify his restrictions and ascertain his current condition, appellant was referred to Dr. Robert Draper, Board-certified in orthopedic surgery, for a second opinion examination. In a February 24, 2009 report, Dr. Draper stated that appellant was capable of performing modified-duty work for no more than six hours per day, with restrictions on frequent lifting exceeding 25 pounds, climbing ladders and walking on uneven terrain. He noted that appellant was currently working light duty for four hours per day and had reached maximum medical improvement.

By decision dated July 23, 2009, OWCP issued a formal wage-earning capacity decision. It found that the wages he actually earned in the modified carrier technician job, \$515.74, fairly and reasonably represented his wage-earning capacity. OWCP stated that he had recently been employed as a carrier technician for the employing establishment with wages for four hours per day, 20 hours per week, and that this employment became effective on October 25, 2007. It determined that, because appellant had demonstrated the ability to perform the duties of this job for 60 days or more, this position was considered suitable to his partially disabled condition. OWCP noted that while Dr. Draper's February 19, 2009 report indicated that he was capable of working six hours per day, the employing establishment could only accommodate four hours per day. It further found that there was no evidence that the position was temporary.

By letter dated July 31, 2009, appellant's attorney requested reconsideration. Counsel asked OWCP to review the weekly pay utilized in its July 23, 2009 loss of wage-earning capacity (LWEC) decision. He noted that appellant's date-of-injury pay rate was \$916.85.

On August 28, 2009 appellant filed a Form CA-2a claim, alleging that he sustained a recurrence of disability as of August 26, 2009. He stated that the employing establishment informed him on that date that his light-duty position had been withdrawn because they no longer had work available within his medical restrictions. On September 14, 2009 appellant filed a Form CA-7 claim for wage-loss compensation from August 29 to September 11, 2009. He subsequently filed several other Form CA-7 claims from September through November 2009.

By letter dated September 21, 2009, OWCP advised appellant that he could either appeal the LWEC decision or present evidence sufficient to warrant modification of the LWEC decision by demonstrating that the original rating was in error, that he had been self-rehabilitated or that his medical condition had worsened.

By decision dated October 8, 2009, OWCP denied modification of its July 23, 2009 LWEC decision. It found that the evidence was insufficient to warrant modification of the decision on the grounds that appellant's pay rate had been incorrectly calculated.

On November 2, 2009 appellant accepted a modified job from the employing establishment as a modified carrier, within his medical restrictions.

By decision dated December 1, 2009, OWCP denied modification of its July 23, 2009 LWEC decision. It denied appellant's claims for wage-loss compensation, finding that he failed to submit evidence sufficient to establish one of the three criteria required to modify the LWEC decision.

By letter dated December 4, 2009, appellant's attorney requested a hearing, which was held on March 31, 2010. Appellant testified at the hearing that following his 2000 work injury he performed mostly sedentary work for four hours per day from July 2001 to March 2007. He stated that during the occasional times when he went out on his route he only did routine business drop-offs; he rarely did any deliveries which required a satchel. Appellant began to experience increased right knee pain in December 2006 and eventually had to undergo a second surgery in September 2007. When he returned to work he was working no more than four hours per day. Appellant stated that he reinjured his knee on August 26, 2009 and subsequently received a return to work offer on November 2, 2009 in accordance with the national reassignment program, which involved doing collections. He did not return to work until December 4, 2009; he asserted that, although he was capable of working six hours per day, he was only working two hours per day doing collections. Appellant's attorney argued that he sustained a recurrence of disability as of August 26, 2009 based on the employing establishment's withdrawal of light duty because there was no work available for appellant.

By decision dated June 17, 2010, an OWCP hearing representative affirmed the July 23, 2009 LWEC decision. She found that appellant had failed to establish that the July 2009 wage-earning capacity warranted modification. The hearing representative also denied the claim for recurrence of disability based on the employing establishment's withdrawal of light duty as of August 26, 2009.

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.² Section 8115(a) of FECA provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by her actual earnings if her actual earnings fairly and reasonably represent her wage-earning capacity.³ Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.⁴

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

OWCP's Procedure Manual provides that the factors to be considered in determining whether the claimant's work fairly and reasonably represented his wage-earning capacity include the kind of appointment and the tour of duty. The manual states that reemployment may not be considered suitable when the actual earning job is part time, unless the claimant was a part-time worker at the time of injury.⁷

ANALYSIS

OWCP has denied modification of the July 23, 2009 LWEC determination. Appellant's counsel contends that the LWEC determination should be modified as it was erroneous when issued.

The Board finds that the July 23, 2009 wage-earning capacity determination was erroneous when issued.

Appellant had been employed in a full-time position at the time of injury. He assumed the part-time job duties which were the basis of the July 23, 2009 LWEC when he returned to work on October 25, 2007 following knee surgery. OWCP's own procedures state that a part-time position may not be suitable as the basis of an LWEC determination if appellant was a full-time employee at the time of injury. Appellant was a full-time employee on the date of injury,

² See *Katherine T. Kreger*, 55 ECAB 633 (2004). See 5 U.S.C. § 8115 (determination of wage-earning capacity).

³ See 5 U.S.C. § 8115 (determination of wage-earning capacity).

⁴ 5 U.S.C. § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

⁵ *Sharon C. Clement*, 55 ECAB 552 (2004).

⁶ *T.M.*, Docket No. 08-975 (issued February 6, 2009); *Tamra McCauley*, 51 ECAB 375, 377 (2000).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (September 2011).

appellant's treating physician, Dr. Stanfield reported on May 5, 2008 that appellant could work eight hours a day, and second opinion physician, Dr. Draper, reported on February 24, 2009 that appellant could work six hours a day. OWCP's July 23, 2009 determination that appellant's four-hour-a-day wages represented his wage-earning capacity was therefore erroneous.

The Board finds that appellant's part-time position did not fairly and reasonably represent his wage-earning capacity.

CONCLUSION

The Board finds that the July 23, 2009 wage-earning capacity determination was erroneous, as the position upon which it was based was part time. Accordingly, the Board finds that OWCP improperly denied modification of the July 23, 2009 wage-earning capacity determination.

ORDER

IT IS HEREBY ORDERED THAT the June 17, 2010 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 28, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board