

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

W.D., Appellant)
and) Docket No. 11-157
U.S. POSTAL SERVICE, PARK HILL POST) Issued: September 8, 2011
OFFICE, Denver, CO, Employer)

)

Appearances:

Ron Watson, for the appellant

Office of Solicitor, for the Director

Oral Argument June 22, 2011

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 26, 2010 appellant, through his representative, filed a timely appeal of a September 24, 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, the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether appellant has met his burden of proof to modify the October 11, 1995 wage-earning capacity determination.

FACTUAL HISTORY

On January 30, 1990 appellant, then a 40-year-old letter carrier, filed a traumatic injury claim alleging that he injured his back and neck falling from a stool on that date. OWCP accepted his claim for cervical and low back strain on February 12, 1990. He returned to

¹ 5 U.S.C. § 8101 *et seq.*

light-duty work on February 24, 1990 and full duty on June 10, 1990. Appellant filed a recurrence of disability claim on September 12, 1990 alleging that he sustained total disability on September 10, 1990. OWCP accepted this claim on March 21, 1991 and authorized compensation for intermittent periods of total disability. Appellant continued to perform light-duty work.

On March 20, 1995 appellant accepted a light-duty position casing and splitting a route carrying mail for one hour. He also answered the telephone, worked mail and performed other office duties as assigned by his supervisor within his restrictions.

Appellant's attending physician, Dr. J. Tashof Bernton, Board-certified in physical medicine, completed duty status reports on May 1 and 22, 1995. He decreased appellant's restrictions on May 22, 1995 to find that appellant could lift up to 55 pounds for four hours a day, sit for six hours, standing for eight hours and walk for eight hours. Appellant was also capable of climbing and kneeling for six hours and bending, stooping, twisting, pushing and pulling for eight hours each. He could drive a motor vehicle for six hours. Dr. Bernton stated that he hoped that appellant could progress to full duty.

The employing establishment rescinded the March 20, 1995 position and offered appellant a light-duty position on May 9, 1995 effective May 15, 1995 as a modified letter carrier. This position required him to case mail for four hours, carry mail for one hour as well as answering the telephone, working computerized forwarding system (CFS) mail and other office duties as assigned by his supervisor. Appellant was required to lift up to 50 pounds for one hour, stand for four hours, walk for two hours, stoop for one hour, bend for one hour and sit for six hours. He also operated a motor vehicle, twisted, carried, pushed and pulled for one hour and reached above the shoulder carrying for four hours. Appellant accepted this position on June 8, 1995.

Dr. Bernton indicated on June 26, 1995 that appellant experienced an increase in back pain and diagnosed "flare-up of sacroiliac strain and some cervical strain." On July 3, 1995 appellant accepted a light-duty position casing mail and carrying mail for one hour. Computer entry and other duties assigned by a supervisor within his restrictions. Appellant was to lift up to 50 pounds three hours a day, sit for six hours, operate a vehicle for one hour and stand, walk, stoop, bend, twist, carry, push, pull and reach above the shoulders for eight hours a day.

Dr. Bernton decreased appellant's work restrictions to full duty on August 14, 1995 on a provisional basis indicating that he would evaluate appellant in two weeks. He noted that there was a new route available that appellant wanted to try. Dr. Bernton noted that he was not certain that appellant could tolerate full duty. On August 21, 1995 appellant accepted a limited-duty position casing and carrying route 3934 with no restrictions.

In a report dated August 31, 1995, Dr. Bernton stated that the new full-duty route resulted in significant exacerbation of appellant's back pain with marked discomfort in the lower lumbar region and radiation into the gluteal area. He increased appellant's work restrictions, limiting lifting to 55 pounds four hours a day. Dr. Bernton also limited standing and walking to four hours a day. He indicated that appellant could kneel, bend, stoop, twist, pull and push for one

hour per day each. Appellant was to drive a motor vehicle for one hour a day. Dr. Bernton confirmed these restrictions on September 19 and December 12, 1995.

In a letter dated September 14, 1995, the employing establishment requested that OWCP provide a wage-earning capacity determination as appellant had worked in his light-duty position since May 15, 1995.

By decision dated October 11, 1995, OWCP issued a wage-earning capacity decision finding that appellant was reemployed as a modified letter carrier on May 15, 1995 and that this position fairly and reasonably represented his wage-earning capacity.

Appellant filed a notice of recurrence of disability on November 10, 2009 alleging that the employing establishment withdrew his limited-duty position on November 6, 2009. He filed a claim for compensation requesting wage-loss compensation beginning November 6 through 20, 2009 indicating that the employing establishment provided him with four hours of work a day.

In a letter dated December 9, 2009, OWCP informed appellant that in order to receive compensation he was to submit evidence to establish modification of the October 11, 1995 wage-earning capacity determination. Appellant submitted claims for compensation through February 26, 2010. He responded to OWCP's request and contended that the original wage-earning capacity determination was in error. Appellant submitted his current position description working four hours a day. The employing establishment offered him a limited-duty position on April 30, 2009 working eight hours a day which he refused.

By decision dated March 9, 2010, OWCP denied modification of the 1995 wage-earning capacity, finding that appellant had not submitted sufficient evidence in support of his allegation that the original wage-earning determination was in error.

Appellant requested an oral hearing on March 9, 2010. At the oral hearing on July 15, 2010, counsel argued that the original wage-earning capacity decision was in error as appellant did not work in the May 15, 1995 position for 60 days, the position was not permanent and because the position was sheltered and makeshift work.

On September 24, 2010 an OWCP hearing representative denied modification of the October 1995 wage-earning capacity, finding that appellant returned to work in a light-duty position in May 1995 and continued to work in this position.

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.² Compensation for loss of wage-earning capacity is based upon loss of the capacity to

² 5 U.S.C. § 8115(a); *K.R.*, Docket No. 09-415 (issued February 24, 2010); *Lee R. Sires*, 23 ECAB 12, 14 (1971) (the Board held that actual wages earned must be accepted as the measure of a wage-earning capacity in the absence of evidence showing they do not fairly and reasonably represent the employee's wage-earning capacity).

earn and not on actual wages lost.³ Compensation payments are based on the wage-earning capacity determination, which remains undisturbed until properly modified.⁴ OWCP's procedures provide that a determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity should be made after an employee has been working in a given position for more than 60 days.⁵

Modification of a standing wage-earning capacity 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 erroneous.⁶ OWCP's procedure manual provides that, if a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of 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.⁷ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.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 OWCP's 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

Appellant returned to work limited duty shortly after his January 30, 1990 employment injury. He accepted a new light-duty position on March 10, 1995. The employing establishment rescinded the March 10, 1995 position and offered appellant a light-duty position on May 9,

³ *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984); *Roy Matthew Lyon*, 27 ECAB 186, 190 (1975); *K.R.*, *id.*

⁴ See *Sharon C. Clement*, 55 ECAB 552, 557 (2004).

⁵ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-earning Capacity*, Chapter 2.814.7(c) (December 1993). *E.C.*, 59 ECAB 397 (2008).

⁶ *Sue A. Sedgwick*, 45 ECAB 211, 215-16 (1993); *Elmer Strong*, 17 ECAB 226, 228 (1965).

⁷ Federal (FECA) Procedure Manual, *supra* note 5, Chapter 2.814.9(a) (December 1995). See also FECA Transmittal 10-01 (issued October 5, 2009).

⁸ *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

⁹ *K.R.*, *supra* note 2; *K.R.*, Docket No. 09-28 (issued September 16, 2009); *Debbie A. Titus*, Docket No. 05-360 (issued June 3, 2005).

¹⁰ Federal (FECA) Procedure Manual, *supra* note 5, *Recurrences*, Chapter 2.1500.7(A)(5) (October 2005). See also FECA Transmittal 10-01 (issued October 5, 2009).

1995 effective May 15, 1995, which he accepted on June 8, 1995. This position required him to work eight hours a day casing mail for four hours, carrying mail for one hour as well as answering the telephone, working CFS mail and other office duties as assigned by his supervisor. The physical requirements were lifting up to 50 pounds for one hour, standing for four hours, walking for two hours, stooping for one hour, bending for one hour and sitting for six hours. Appellant also operated a motor vehicle, twisted, carried, pushed and pulled for one hour and reached above the shoulder carrying for four hours.

The employing establishment offered appellant a new light-duty position working eight hours a day which he accepted on July 3, 1995. This position required him to case mail and carry mail for one hour as well as performing computer entry and other duties assigned by a supervisor within his restrictions. The physical requirements were lifting up to 50 pounds three hours a day, sitting for six hours, operating a vehicle for one hour and standing, walking, stooping, bending, twisting, carrying, pushing, pulling and reaching above the shoulders for eight hours a day.

On August 21, 1995 appellant accepted another, position casing and carrying route 3934 with no restrictions. His physician, Dr. Bernton, released appellant to full duty on August 14, 1995 on a provisional basis. He stated that appellant wished to attempt a new route, but that he was not certain that appellant could tolerate full duty. Dr. Bernton completed a report on August 31, 1995 and stated that appellant was unable to tolerate full duty due to significant exacerbation of appellant's back pain. He listed appellant's work restrictions limiting lifting to 55 pounds four hours a day, standing and walking to four hours a day and kneeling, bending, stooping, twisting, pulling and pushing to one hour. Dr. Bernton repeated these restrictions on September 19 and December 12, 1995.

By decision dated October 11, 1995, OWCP issued a wage-earning capacity decision finding that appellant was reemployed as a modified letter carrier based on the May 15, 1995 limited duty. It found that his earnings in this position fairly and reasonably represented his wage-earning capacity.

The Board finds that the October 11, 1995 wage-earning capacity determination was in error. OWCP failed to follow its procedures in determining that appellant had worked in the position for at least 60 days. The record establishes that he accepted the May 15, 1995 position on June 8, 1995. The employing establishment subsequently provided appellant with different positions on July 3 and August 21, 1995 with varying duties and physical requirements. After his return to full duty in August 1995, Dr. Bernton increased appellant's work restrictions advising that he was not capable of performing the August 21, 1995 position.

There is no evidence in the record supporting that appellant worked in any position offered by the employing establishment after May 9, 1995 for more than 60 days prior to the October 11, 1995 OWCP decision. He did not begin the May 15, 1995 position until June 8, 1995 and the employing establishment provided him with a different light-duty position on July 3, 1995, less than 60 days later. Appellant then attempted a return to full-duty work on August 21, 1995. Dr. Bernton found that he could not perform full duty on August 31, 1995 less than two weeks after accepting the full-duty position. Given the variety of positions offered and the limited time worked in each position, the Board finds that the May 15, 1995 position did not

fairly and reasonably represented appellant's wage-earning capacity. Appellant had not performed this or other positions for a reasonable period of time to establish that the position was within his work capacity.

CONCLUSION

The Board finds that appellant has met his burden of proof to modify the October 11, 1995 wage-earning capacity decision on the grounds that the original decision was in error as he had not worked in the May 1995 or any subsequent position for 60 days before OWCP issued the October 11, 1995 wage-earning capacity decision.

ORDER

IT IS HEREBY ORDERED THAT September 24, 2010 decision of Office of Workers' Compensation Programs is reversed.

Issued: September 8, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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