

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

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C.H., Appellant )

and )

U.S. POSTAL SERVICE, PROCESSING & )  
DISTRIBUTION CENTER, Little Rock, AR, )  
Employer )

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**Docket No. 11-1711  
Issued: February 15, 2012**

*Appearances:*  
*James W. Stanley, Jr., 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  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On July 18, 2011 appellant's counsel timely appealed the June 27, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied modification of a wage-earning capacity determination. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant established a basis for modifying the June 12, 2003 wage-earning capacity determination.

**FACTUAL HISTORY**

On July 9, 1999 appellant, then a 43-year-old mail handler, sustained a left knee injury while pulling a bulk mail container. OWCP accepted his claim for internal derangement of the

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

left knee and left chondromalacia patella. Appellant underwent surgery on July 26, 1999 and again on April 10, 2001. Dr. Thomas P. Rooney, a Board-certified orthopedic surgeon, performed both procedures.<sup>2</sup> OWCP paid appellant appropriate wage-loss compensation. Appellant also received multiple schedule awards totaling 50 percent impairment of the left lower extremity.<sup>3</sup>

Because of his employment-related left knee injury, appellant was unable to resume his regular duties as a mail handler. However, he was capable of working in a limited-duty capacity. Following his second surgery, appellant returned to work on June 26, 2001 as a modified mail handler, which Dr. Rooney approved. His duties included sitting at a table repairing damaged or torn mail and writing out notices to customers. The physical requirements of the position were eight hours sitting and simple grasping. Dr. Rooney later requested that appellant be allowed to use a cane at work. However, the employing establishment had a policy that precluded the use of a cane on the workroom floor because of the potential risk of injury from motorized equipment, such as forklifts.

On March 25, 2002 the employing establishment offered appellant another modified mail handler position. Although the job title remained the same, the “[a]mended” position entailed checking employee identification badges at the employee entrance. This position was off the workroom floor in the access control room. The physical requirements were eight hours sitting and simple grasping.<sup>4</sup> Appellant accepted the position on March 26, 2002.<sup>5</sup>

On June 12, 2003 OWCP determined that appellant’s reemployment as a modified mail handler effective June 26, 2001 fairly and reasonably represented his wage-earning capacity. Because appellant had performed the position for more than 60 days, OWCP considered it suitable to his partially disabled condition. Furthermore, his then current actual earnings of \$730.44 per week met or exceeded the current wages of his date-of-injury position. As such, appellant had zero loss in wage-earning capacity. Although he was not entitled to wage-loss compensation, he remained eligible for injury-related medical benefits.

Appellant underwent another OWCP-approved surgery on November 9, 2004.<sup>6</sup> He received wage-loss compensation for temporary total disability through February 8, 2005, at

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<sup>2</sup> Dr. Rooney initially performed a partial lateral meniscectomy and debridement of the median femoral condyle, followed by a left high tibial osteotomy.

<sup>3</sup> Appellant also receives benefits from the Department of Veterans Affairs (VA) for a service-connected right knee condition.

<sup>4</sup> At the time, Dr. Rooney restricted appellant to eight hours of sitting, with a 15-pound weight restriction intermittently. Appellant could also stand for 30 minutes per day, but no walking, climbing, kneeling, bending/stooping and no twisting. He could push/pull 35 pounds intermittently over an eight-hour day, and could perform simple grasping for eight hours, with a 5- to 10-pound weight restriction intermittently. Dr. Rooney also limited reaching above shoulder to one to two hours. Lastly, he noted that appellant should be allowed to use a cane at work.

<sup>5</sup> The employer extended a similar job offer on September 18, 2002. Appellant had been working the day shift, however, effective September 21, 2002, his new tour of duty was 3:00 p.m. to 11:50 p.m.

<sup>6</sup> Dr. Rooney performed a left knee partial medial meniscectomy and open UniSpacer arthroplasty.

which time he returned to his limited-duty position as a modified mail handler/security officer.<sup>7</sup> Over the next five years, appellant followed up with Dr. Rooney at six-month intervals and received updated duty status reports (Form CA-17). His work restrictions essentially remained unchanged since March 2005.<sup>8</sup>

Appellant continued to perform his modified mail handler/security officer duties until August 17, 2010 when the employing establishment abolished his limited-duty assignment pursuant to the National Reassessment Process (NRP). The employer did not provide any other limited-duty work and, therefore, he filed a claim for recurrence of disability (Form CA-2a) beginning August 17, 2010.

On October 6, 2010 OWCP advised appellant that compensation benefits would not be paid absent a basis for modifying the June 12, 2003 loss of wage-earning capacity (LWEC) determination. It outlined the criteria for modification and afforded appellant 30 days to submit any additional evidence or argument.

Dr. Rooney's latest duty status report, dated September 22, 2010, mirrored the previous work restrictions that had been in place for several years. In an October 20, 2010 report, he reviewed his prior treatment of appellant dating back to July 1999, including multiple surgeries. Dr. Rooney noted that he continued to follow appellant periodically and that appellant had persistent left knee motion deficits, sometimes in extension, but consistently in flexion. He also noted atrophy of the left thigh in comparison to the opposite side. Additionally, Dr. Rooney reported that appellant used a cane intermittently. When he last examined appellant on September 22, 2010, Dr. Rooney noted a loss of two to three degrees of terminal extension and full flexion. There was also a definite mild effusion. Dr. Rooney stated that appellant had restrictions on climbing, kneeling, bending and stooping with a maximum carrying weight of 15 pounds.

On November 12, 2010 Yulanda R. Dedrick, an employing establishment health and resource management specialist, commented that the June 12, 2003 LWEC determination appeared to have been issued in error. She stated that appellant's limited-duty job was not a real job, but in fact a "'make work,' 'sheltered' or 'odd lot' position...."

In a decision dated December 8, 2010, OWCP denied appellant's claim for additional wage-loss compensation. It found that he had not established a basis for modifying the June 12, 2003 LWEC determination. Appellant had not claimed to have been retrained or otherwise vocationally rehabilitated and Dr. Rooney's latest reports did not establish a material change in his employment-related condition. OWCP also found that appellant had not demonstrated that

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<sup>7</sup> On March 3, 2005 Dr. Rooney provided permanent work restrictions that included lifting/carrying of 15 pounds intermittently, up to 30 minutes each of continuous sitting and standing, up to 15 minutes of continuous walking, and no climbing, kneeling or bending/stooping. Twisting and pushing/pulling were permitted, but only from a nonstanding position. Appellant could also perform simple grasping intermittently up to seven to eight pounds. There were no restrictions with respect to fine manipulation or reaching above shoulder.

<sup>8</sup> Beginning April 10, 2008, Dr. Rooney increased the amount of time appellant could continuously walk from 15 to 30 minutes. Appellant's other restrictions remained undisturbed.

the original LWEC determination was erroneous despite Ms. Dedrick's characterization of his limited-duty job as a "make work," 'sheltered' or 'odd lot' position...."

Appellant requested an oral hearing, which was held on April 12, 2011. OWCP received additional medical evidence, which included his VA treatment records covering the period of January 2009 through October 2010. Appellant had been treated for a variety of medical conditions, including lumbar radiculopathy, major depression and erectile dysfunction. The latest VA treatment notes, dated October 13, 2010, indicated that he walked daily, rode his bike daily and ran stairs occasionally.

Appellant also submitted March 24, 2011 treatment notes from Dr. Rooney, who, who noted that appellant reported pain in the left knee ranging from zero to five. Dr. Rooney also noted that appellant was trying to exercise regularly, and that he seemed to be in fairly good shape. Physical examination revealed no effusion in the knee. Appellant still lacked internal extension, two or three degrees, but flexion was full and there was no instability. His left thigh remained a one half-inch smaller in circumference than the right. Dr. Rooney reported that appellant's x-rays looked fine, with no change. Lastly, he noted that appellant was able to walk 18 holes, but could not currently play golf due to an unspecified left shoulder problem the VA was taking care of.

By decision dated June 27, 2011, the Branch of Hearings and Review affirmed OWCP's December 8, 2010 decision.

### **LEGAL PRECEDENT**

A wage-earning capacity determination is a finding that a specific amount of earnings, either actual earnings or earnings from a selected position, represents an injured employee's ability to earn wages.<sup>9</sup> Actual wages earned is generally the best measure of wage-earning capacity.<sup>10</sup> In the absence of evidence showing that actual earnings do not fairly and reasonably represent the injured employee's wage-earning capacity, such earnings must be accepted as representative of the individual's wage-earning capacity.<sup>11</sup> A determination regarding whether actual earnings fairly and reasonably represents one's wage-earning capacity should be made only after an employee has worked in a given position for more than 60 days.<sup>12</sup>

Factors to be considered in determining if a position fairly and reasonably represents the injured employee's wage-earning capacity include: (1) whether the kind of appointment and tour of duty are at least equivalent to those of the date-of-injury job; (2) whether the job is part-time (unless the employee was a part-time worker at the time of injury) or sporadic in nature; (3) whether the job is seasonal in an area where year-round employment is available; and

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<sup>9</sup> 5 U.S.C. § 8115(a); see *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

<sup>10</sup> *Hayden C. Ross*, 55 ECAB 455, 460 (2004).

<sup>11</sup> *Id.*

<sup>12</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (October 2009).

(4) whether the job is temporary where the claimant's previous job was permanent.<sup>13</sup> Additionally, a make shift or odd lot position designed to meet an injured employee's particular needs will not be considered representative of one's wage-earning capacity.<sup>14</sup>

Once OWCP has determined an injured employee's LWEC, modification of an LWEC determination is unwarranted 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.<sup>15</sup> The burden of proof is on the party seeking modification of the wage-earning capacity determination.<sup>16</sup>

OWCP may accept a limited period of disability without modifying an existing wage-earning capacity determination.<sup>17</sup> This is appropriate where there is a demonstrated temporary worsening of a medical condition that is of insufficient duration and severity to warrant modification of a wage-earning capacity determination.<sup>18</sup> However, this narrow exception does not apply to a situation where there is a wage-earning capacity determination in place and the employee claims additional compensation due to the withdrawal of light-duty work.<sup>19</sup>

A recurrence of disability includes an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his work-related injury or illness is withdrawn -- except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force (RIF).<sup>20</sup> Absent a formal wage-earning capacity determination and assuming the position was not withdrawn for cause or because of a RIF, the employee would be entitled to compensation based upon a showing of continuing injury-related disability for regular duty.<sup>21</sup> But when a formal wage-earning capacity determination is in place, the subsequent withdrawal of a light-duty assignment is not treated like a recurrence of disability.<sup>22</sup> Under those particular circumstances, OWCP shall review the claim for additional compensation as a request for modification of the wage-earning capacity

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<sup>13</sup> *Id.* at Chapter 2.814.7(a).

<sup>14</sup> *A.J.*, Docket No. 10-619 (issued June 29, 2010) (a makeshift/odd-lot position generally lacks a position description with specific duties, physical requirements and a work schedule).

<sup>15</sup> *Tamra McCauley*, 51 ECAB 375, 377 (2000); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11.

<sup>16</sup> *Tamra McCauley*, *id.*

<sup>17</sup> *Katherine T. Kreger*, 55 ECAB 633, 635 (2004).

<sup>18</sup> *Id.*

<sup>19</sup> *K.R.*, Docket No. 09-415 (issued February 24, 2010); *K.H.*, Docket No, 08-2392 (issued April 21, 2009).

<sup>20</sup> 20 C.F.R. § 10.5(x).

<sup>21</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.7(a)(4) (October 2009).

<sup>22</sup> *Id.* at Chapter 2.1500.7(a)(5).

determination and apply the above-noted criteria in determining whether modification is warranted.<sup>23</sup>

### ANALYSIS

After his second surgery in April 2001, appellant returned to work on June 26, 2001 as a modified mail handler. His duties included sitting at a table repairing damaged or torn mail and writing out notices to customers. Dr. Rooney approved this position, which only required appellant to sit for eight hours and perform simple grasping. He subsequently requested that appellant be allowed to use a cane at work. For safety reasons, the employing establishment would not accommodate appellant's use of a cane on the workroom floor. Therefore, on March 25, 2002 appellant's employer offered him another modified mail handler position that involved checking employee badges at the employee entrance. Appellant accepted this position on March 26, 2002. With the exception of a three-month period of temporary total disability following his November 2004 surgery, appellant continued to perform his March 25, 2002 modified mail handler/security officer position until August 17, 2010 when it was abolished under NRP.

By the time OWCP issued its June 12, 2003 LWEC determination, appellant had been back at work for almost two years. The LWEC determination was based on his employment as a modified mail handler, which "was effective on [June 26, 2001]." OWCP also noted that appellant earned \$730.44 per week as a modified mail handler. The LWEC determination further noted that "[s]ince he [had] demonstrated the ability to perform the duties of this job for two months or more, this position [was] considered suitable to [appellant's] partially disabled condition."

The Board finds that the initial LWEC determination was erroneous because it was based on a June 26, 2001 modified mail handler position that had been withdrawn approximately 15 months prior to OWCP's June 12, 2003 decision. Although the job titles were the same, the modified mail handler position appellant initially performed beginning June 26, 2001 was different than the one he accepted in March 2002 and was, in fact, performing at the time OWCP issued its June 12, 2003 LWEC determination. Unless circumstances dictate the issuance of a retroactive LWEC determination,<sup>24</sup> OWCP cannot issue an LWEC determination based on a position the employee did not hold at the time. The analysis is not simply limited to a comparison of earnings. OWCP must also evaluate the suitability of the work currently being performed.<sup>25</sup> It is evident that OWCP's June 12, 2003 LWEC determination merely focused on appellant's then-current earnings and not his particular job duties at the time. Otherwise, OWCP would have referenced the March 25, 2002 job offer rather than his June 26, 2001 modified mail handler position. The hearing representative attempted to cure this problem by focusing her analysis on appellant's March 25, 2002 job offer, which she considered a "bona fide job that would be reasonabl[y] available to the community at large." The hearing representative found

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<sup>23</sup> *Id.*; *K.R.*, *supra* note 19; *K.R.*, Docket No. 09-28 (issued September 16, 2009).

<sup>24</sup> *See Juan A. DeJesus*, 54 ECAB 721, 722-23 (2003).

<sup>25</sup> *See supra* notes 13 and 14.

that the original determination was not in error. However, she cannot retroactively cure the defects in the initial LWEC determination.<sup>26</sup>

Because the June 12, 2003 LWEC determination was based on a June 26, 2001 modified mail handler position appellant no longer held, the Board finds that the original determination was erroneous. Accordingly, appellant has established a basis for modifying the June 12, 2003 LWEC determination. As such, the prior LWEC determination does not bar an award of wage-loss compensation based on the employer's NRP-related withdrawal of appellant's limited-duty assignment effective August 17, 2010.

**CONCLUSION**

Appellant established a basis for modifying OWCP's June 12, 2003 wage-earning capacity determination.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 27, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: February 15, 2012  
Washington, DC

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

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

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

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<sup>26</sup> The hearing representative also erroneously attempted to justify the June 12, 2003 LWEC determination based on a subsequent October 5, 2006 "Rehab Clerk" position that appellant declined.