

FACTUAL HISTORY

On June 13, 2003 appellant, then a 54-year-old mail processing clerk, filed an occupational injury claim alleging that the pain in his right shoulder was a result of repetitive movement while casing mail. OWCP accepted his claim for right rotator cuff sprain. In another claim,² it accepted left shoulder tendinitis.

On August 15, 2008 appellant accepted a modified assignment whose sole official duty was to rework mail at the nixie table for eight hours a day. Physical requirements included lifting no more than five pounds, sitting more than six hours, standing no more than two hours, no reaching above shoulder level, kneeling/bending/stooping no more than two hours and pulling/pushing no more than one-pound continuously or three pounds intermittently.

In an August 21, 2009 decision, OWCP determined that appellant's actual earnings in this modified assignment fairly and reasonably represented his wage-earning capacity. As appellant's actual earnings exceeded the current wages of the job he held when injured, it reduced his wage-loss compensation to zero.

Appellant claimed a recurrence of disability beginning April 21, 2010, when the employer withdrew his limited duty under the National Reassessment Policy. He alleged that the job was makeshift or odd-lot and was uniquely created to accommodate his work tolerance limitations. Appellant alleged it could not be bid on or applied for by other employees, nor was it available in the general labor market.

In decisions dated February 5, June 22 and July 23, 2010, OWCP denied modification of its wage-earning capacity determination.

At an oral hearing before an OWCP hearing representative, appellant's previous representative argued that appellant's condition had worsened since the determination of wage-earning capacity. What OWCP had accepted as a sprain/strain was now a tear. A March 17, 2010 magnetic resonance imaging (MRI) scan of the right shoulder showed chronic degenerative rotator cuff tendinopathy complicated by a focal, nonretracted moderate-grade partial thickness rotator cuff tear limited to the distal supraspinatus tendon, along with another low-grade partial-thickness rotator cuff tear of the subcapsularis tendon. There was also a Type 2 superior labral tear anterior-to-posterior of the posterosuperior labrum.

Appellant submitted a position description for nixie clerk. His previous representative argued that in practice appellant performed other duties as needed to cover for other employees.

In a decision dated February 16, 2011, OWCP's hearing representative found that the original wage-earning capacity determination was not, in fact, erroneous. The hearing representative found that the modified position was a permanent, full-time position with recognized job duties and requirements, with duties within the parameters of a regular postal service clerical position and therefore could not be considered makeshift. The hearing representative found no evidence that appellant's duties were outside his physical limitations.

² OWCP File No. xxxxxx453 (subsidiary file).

OWCP's hearing representative also found that although the medical evidence demonstrated the presence of additional bilateral shoulder conditions, it did not describe a change in the accepted conditions of right rotator cuff sprain or left shoulder tendinitis. Accordingly, the hearing representative found that evidence insufficient to establish a material change in the nature and extent of the injury-related conditions.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of his duty.³ "Disability" means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.⁴

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.⁵ The wage-earning capacity of an employee is determined by the employee's actual earnings if the employee's actual earnings fairly and reasonably represent his wage-earning capacity.⁶ While wages actually earned are generally the best measure of an injured workers' capacity for employment, such wages may not be based on makeshift or sheltered employment.⁷

Once the loss of wage-earning capacity 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. The burden of proof is on the party attempting to show modification of the award.⁸

When a formal loss of wage-earning capacity determination is in place and limited duty is withdrawn, the proper standard of review is not whether the claimant sustained a recurrence of disability, but whether OWCP should modify its decision according to the established criteria for modifying a formal wage-earning capacity determination.⁹

³ 5 U.S.C. § 8102(a).

⁴ 20 C.F.R. § 10.5(f).

⁵ *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

⁶ 5 U.S.C. § 8115(a).

⁷ *A.J.*, Docket No. 10-619 (issued June 29, 2010); *Connie L. Potratz-Watson*, 56 ECAB 316 (2005).

⁸ *Daniel J. Boesen*, 38 ECAB 556 (1987).

⁹ *D.S.*, Docket No. 11-831 (issued November 7, 2011); *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Tamra McCauley*, 51 ECAB 375, 377 (2000); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.7(a)(5) (October 2009). *But see C.A.*, Docket No. 11-556 (issued November 4, 2011) (where the employee lost his job through the National Reassessment Process and claimed compensation for total disability, the Board found that OWCP should adjudicate the claim as a recurrence, notwithstanding an existing wage-earning capacity determination, if further development showed that the period claimed was closed or limited, as the evidence suggested).

ANALYSIS

On August 21, 2009 OWCP determined that appellant's actual earnings in a modified assignment fairly and reasonably represented his wage-earning capacity. It reduced his wage-loss compensation to zero. When appellant claimed compensation for total disability following the loss of his assignment through the National Reassessment Process, OWCP properly adjudicated the claim according to the established criteria for modifying a formal wage-earning capacity determination.

Appellant did not show a material change in the nature and extent of the injury-related condition. He submitted a 2010 MRI scan report showing three right rotator cuff tears, but this diagnostic imaging report does not, by itself, establish a change in the accepted right rotator cuff sprain. Appellant did not submit a medical narrative finding that the specific right rotator cuff sprain he suffered in 2003 developed into one of the three rotator cuff tears identified on the 2010 MRI scan, with an explanation of the basis for such a finding. He currently has a right rotator cuff tear insufficient to warrant modification of OWCP's wage-earning capacity determination.

The second criterion for modification, that the employee has been retrained or otherwise vocationally rehabilitated, does not apply.

Appellant alleged that the original determination was, in fact, erroneous. He argued that his assignment was makeshift or odd-lot and was uniquely created to accommodate his work tolerance limitations. Appellant alleged it could not be bid on or applied for by other employees, nor was it available in the general labor market. He submitted no proof, however. There is no evidence that the assignment was part time, seasonal or temporary.¹⁰ The submission of an official position description supports that the job was not created specifically for appellant and that his modified assignment was a reasonably accurate reflection of the position of nixie clerk.¹¹ Appellant's testimony that he performed other duties as needed did not establish that he was required to exceed his physical limitations or that his assignment was vocationally unsuitable. He submitted no proof that such a position was not reasonably available in the general labor market.

As appellant has failed to establish one of the criteria for warranting modification of OWCP's wage-earning capacity determination, the Board finds that he has not met his burden of proof. The Board will affirm OWCP's February 16, 2011 decision affirming the denial of modification.

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

¹⁰ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (October 2009) (determining wage-earning capacity based on actual earnings).

¹¹ See generally *A.J.*, Docket No. 10-619 (issued June 29, 2010) (factors considered in finding a job makeshift).

CONCLUSION

The Board finds that OWCP properly denied modification of its August 21, 2009 wage-earning capacity determination.

ORDER

IT IS HEREBY ORDERED THAT the February 16, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 23, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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