

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

J.D., Appellant

and

**DEPARTMENT OF THE ARMY, McALESTER
ARMY AMMUNITION PLANT, McAlester, OK,
Employer**

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**Docket No. 12-1026
Issued: October 18, 2012**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 16, 2012 appellant filed a timely appeal from a February 13, 2012 decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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 met his burden of proof to establish that a November 2, 2006 wage-earning capacity decision should be modified.

On appeal, appellant generally asserts that the wage-earning capacity determination was in error.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On March 18, 1992 appellant, then a 47-year-old explosives worker, filed a traumatic claim alleging injury to his back and right knee when he slipped and fell at work the previous day. He stopped work. OWCP accepted a right knee contusion and cervical and lumbar strains. Appellant returned to part-time modified duty on November 9, 1992. He received wage-loss compensation for two hours a day and again stopped work on July 1, 1993. By decision dated June 7, 1994, OWCP's hearing representative set aside an August 27, 1993 OWCP decision denying appellant's claim for total disability. On July 21, 1994 appellant filed a second traumatic injury claim, alleging that on June 28, 1993 he injured his right knee, neck and lower back when he fell down steps. The claim was accepted for right knee sprain and cervical strain. Appellant received wage-loss compensation under both claims.

Appellant returned to work as a tool room attendant on March 13, 1996. In a July 18, 1996 decision, OWCP determined that his actual earnings in that position fairly and reasonably represented his wage-earning capacity with zero loss. In decisions dated February 5 and July 25, 1997, it denied modification of the July 18, 1996 decision. In a November 19, 1997 decision, OWCP vacated the prior decisions, finding that the evidence established that appellant was entitled to continuing compensation benefits as a result of the June 28, 1993 employment injury.²

In October 2005, OWCP determined that a conflict in medical opinion arose between Dr. Guy Grooms, an attending Board-certified orthopedic surgeon, and Dr. Robert C. Thompson, an orthopedic surgeon, who provided a second-opinion evaluation for OWCP, regarding appellant's work capabilities. It referred appellant to Dr. C.L. Soo, Board-certified in orthopedic surgery, for a referee opinion. Dr. Soo furnished reports dated November 21, 2005 and February 1, 2006.

On January 3, 2006 the employing establishment offered appellant a temporary, light-duty position as an explosives worker, for six hours a day, four days a week. On February 16 and 23, 2006 the temporary appointment offer was modified to eight hours a day, four days a week. On March 6, 2006 a conference was held with appellant, a claims examiner, and employing establishment personnel participating. The memorandum of conference noted that the February 23, 2006 job offer was based on the opinion of Dr. Soo regarding appellant's work restrictions. Appellant advised that he would accept the offered position, to begin on March 20, 2006. He later began working 10 hours a day, 4 days a week. Appellant's temporary appointment was terminated effective October 10, 2006, based on "workload."

By decision dated November 2, 2006, OWCP found that appellant's position as a light-duty explosives worker, effective March 20, 2006, fairly and reasonably represented his wage-earning capacity with zero loss. On October 22, 2007 appellant requested reconsideration, and in a November 7, 2007 decision, OWCP denied his request for a review on the merits.

² The March 17, 1992 injury was adjudicated by OWCP under File No. xxxxxx223 and the June 28, 1993 injury under File No. xxxxxx537. The claims were doubled in November 1997, with the former becoming the master file.

On January 24, 2011 appellant filed a recurrence claim, stating that he sustained a recurrence of disability on October 10, 2006.³ In an April 27, 2011 decision, OWCP denied his claim that he sustained a recurrence of disability on October 10, 2006.

Appellant timely requested a review of the written record. In an August 23, 2011 decision, OWCP's hearing representative affirmed the April 27, 2011 decision as modified to reflect that appellant did not establish that the November 2, 2006 wage-earning capacity decision should be modified.

On November 7, 2011 appellant requested reconsideration. In a merit decision dated February 13, 2012, OWCP denied modification of the prior decisions.

LEGAL PRECEDENT

Section 8115(a) of FECA provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by the employee's actual earnings if the actual earnings fairly and reasonably represent the employee's wage-earning capacity.⁴ Generally, wages actually earned are the best measure of a wage-earning capacity, and in the absence of showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such a measure.⁵ However, if actual earnings are derived from a make-shift position designed for the employee's particular needs⁶ or when the job constitutes part-time, sporadic, seasonal or temporary work,⁷ actual earnings may not represent wage-earning capacity.

The procedures further provide that, "[i]f 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."⁸ 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.⁹ The burden of

³ On March 10, 2011 appellant was granted a schedule award for a three percent impairment of the right lower extremity.

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

⁵ *Lottie M. Williams*, 56 ECAB 302 (2005).

⁶ *William D. Emory*, 47 ECAB 365 (1996).

⁷ See *Monique L. Love*, 48 ECAB 378 (1997).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity* Chapter 2.814.9(a) (October 2009).

⁹ *Stanley B. Plotkin*, 51 ECAB 700 (2000).

proof is on the party attempting to show a modification of the wage-earning capacity determination.¹⁰

In addition, Chapter 2.814.11 of the procedure manual contains provisions regarding the modification of a formal loss of wage-earning capacity. The relevant part provides that a formal loss of wage-earning capacity will be modified when: (1) the original rating was in error; (2) the claimant's medical condition has changed; or (3) the claimant has been vocationally rehabilitated. OWCP procedures further provide that the party seeking modification of a formal loss of wage-earning capacity decision has the burden to prove that one of these criteria has been met. If OWCP is seeking modification, it must establish that the original rating was in error, that the injury-related condition has improved or that the claimant has been vocationally rehabilitated.¹¹

ANALYSIS

In its August 23, 2011 and February 13, 2012 decisions, OWCP denied modification of a November 2, 2006 wage-earning capacity determination that found that a temporary modified explosives worker position fairly and reasonably represented appellant's wage-earning capacity. As noted above, 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.¹² The Board finds that the November 2, 2006 wage-earning capacity determination was erroneous when issued.

Appellant had been employed in a regular position as an explosives worker at the time he became totally disabled due to his accepted conditions on June 28, 1993. He assumed the temporary modified explosives worker job, which was the basis of the November 2, 2006 wage-earning capacity determination, on March 20, 2006 and continued in that position until he was terminated effective October 10, 2006. OWCP issued its wage-earning capacity decision on November 2, 2006.

OWCP procedures provide that OWCP can make a retroactive wage-earning capacity determination if the claimant worked in the position for at least 60 days, the position fairly and reasonably represented his or her wage-earning capacity and the work stoppage did not occur because of any change in his injury-related condition affecting the ability to work.¹³ Appellant worked in the modified explosives worker position for at least 60 days when he was terminated effective October 10, 2006. The record, however, supports that the modified position on which

¹⁰ *Id.*

¹¹ Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 2.814.11 (October 2009).

¹² *Stanley B. Plotkin, supra* note 9.

¹³ Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 2.814.7(a) (October 2009); *Selden H. Swartz*, 55 ECAB 272 (2004).

the November 2, 2006 wage-earning capacity determination was based did not fairly and reasonably represent his wage-earning capacity.

OWCP procedures provide that if actual earnings are derived from a temporary position, actual earnings may not represent wage-earning capacity where the claimant's previous job was permanent.¹⁴ In this case there is no evidence to establish that the explosives worker position appellant held at the time he was injured, initially in 1992 and again in 1993, was other than permanent. The evidence of record also notes that the position on which the November 2, 2006 decision was based was temporary. In job offers dated January 3, February 16 and 23, 2006, the offered position is identified as temporary. The e-mail correspondence of October 17, 2006 between OWCP and the employing establishment noted the position was temporary. On that day, Dana Wofford of the employing establishment indicated that appellant had been terminated due to workload. She stated, "the fact is that the claimant was on a temporary appointment and the understanding is made clear at the beginning of this type of appointment that it can be ended at anytime either by the employee or management without adverse effects."

The Board finds that OWCP failed to follow its established procedures as it based the November 2, 2006 wage-earning capacity determination on a temporary explosives position that appellant accepted on March 20, 2006.¹⁵

CONCLUSION

The Board finds that appellant met his burden of proof to modify the November 2, 2006 wage-earning capacity decision as it was based on a temporary position. Accordingly, OWCP improperly denied modification of the November 2, 2006 decision in its February 12, 2012 decision.

¹⁴ *Id.* at Chapter 2.814.7(a)(3); see *Monique L. Love*, *supra* note 7.

¹⁵ See *D.P.*, Docket No. 12-55 (issued July 6, 2012).

ORDER

IT IS HEREBY ORDERED THAT the February 13, 2012 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 18, 2012
Washington, DC

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

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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