

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

P.L., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Charlotte, NC, Employer**

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**Docket No. 13-1803
Issued: January 15, 2014**

Appearances:

Alan J. Shapiro, Esq., for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 29, 2013 appellant, through his attorney, filed a timely appeal from a May 30, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) denying modification of his loss of wage-earning capacity determination. 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 OWCP properly denied modification of its June 19, 2002 loss of wage-earning capacity determination.

On appeal, counsel contends that OWCP's decision was contrary to fact and law.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On January 21, 1998 appellant, then a 25-year-old window clerk, filed a traumatic injury claim (Form CA-1) for an alleged employment-related back injury. OWCP accepted the claim for aggravation of preexisting herniated nucleus pulposus (HNP) at L5-S1 and paid all appropriate compensation benefits. By decision dated March 18, 1999, it denied appellant's request for a surgical procedure of L5-S1 laminectomy.

On February 1, 1999 appellant returned to part-time work with restrictions.

By decision dated August 3, 2001, OWCP determined that the actual wages appellant earned as part-time mail handler, \$730.44 weekly, fairly and reasonably represented his wage-earning capacity.

On October 4, 2001 appellant accepted a job offer from the employing establishment as a full-time modified mail processor. The duties included sorting and distributing mail. The physical requirements included: pushing up to 45 pounds; pulling up to 38 pounds; lifting up to 30 pounds; occasional squatting; sitting, standing and kneeling for 2.5 hours a day; rotating sitting and standing; no twisting.

By decision dated October 9, 2001, OWCP determined that the modified job offer from the employing establishment was suitable to appellant's work restrictions.

Appellant filed claims for compensation for intermittent periods of disability commencing October 4, 2001 and submitted an October 19, 2011 report from Dr. Leon Dickerson, a Board-certified orthopedic surgeon, who diagnosed HNP at L5-S1 and indicated that she had difficulty doing light-duty work for eight hours a day. Dr. Dickerson reported that appellant still complained of back pain and left leg pain. He opined that appellant had reached maximum medical improvement and released him to work with the following restrictions: 30 pounds lifting occasionally; squatting occasionally. On October 2, 2001 Dr. Dickerson indicated that appellant had had a discectomy at L5-S1 and was still symptomatic. He opined that appellant had 13 percent permanent whole body impairment.

By decision dated June 19, 2002, OWCP reduced appellant's compensation to zero based on its findings that his actual earnings as a modified mail processor, \$730.40 weekly, fairly and reasonably represented his wage-earning capacity. It found that his wages increased to \$786.00 a week effective March 23, 2002 and determined that his actual earnings met or exceeded his wages at the time of his injury.²

Appellant, through his attorney, filed a notice of recurrence and submitted a June 26, 2003 report from Dr. Dickerson, who indicated that there was no change in appellant's overall condition. Dr. Dickerson stated that appellant had a chair that he sat in from which he did well, but it was taken away and his back and leg began to hurt more.

² Appellant, through his attorney, filed a claim for compensation for the period July 19 to 20, 2003. By decision dated October 20, 2003, OWCP denied the claim on the basis that he did not submit sufficient evidence to establish disability for the period claimed.

On August 27, 2010 appellant accepted a job offer from the employing establishment as a full-time modified mail processing clerk. The position duties included sorting and casing letters manually. The physical requirements included lifting, carrying, sitting, walking and standing intermittently and simple grasping continuously.

Appellant worked in his modified mail processing clerk position until April 8, 2011, when the employing establishment withdrew his limited-duty assignment as part of the National Reassessment Process (NRP).

Subsequently, appellant filed claims for wage-loss compensation (Form CA-7) for the period May 20 to June 3, 2011 as the employing establishment had no work available for him due to the NRP.

On July 26, 2011 Dr. George Bradley, a Board-certified family practitioner, indicated that appellant's original injury was in 1998, which necessitated a laminectomy. He stated that recurrence of post-surgical lumbar symptoms was known as post-laminectomy syndrome and opined that appellant's condition was directly related to the surgery, which was a direct result of his 1998 injury. Dr. Bradley stated that appellant had multiple recurrent episodes, including an episode in 2005, which were all direct results of the original injury.

By decision dated August 5, 2011, OWCP denied appellant's claim for compensation for the period May 20 to June 3, 2011.

Appellant filed a claim for compensation for the period August 20 to December 3, 2011.

In an October 25, 2011 report, Dr. Bradley reiterated his diagnosis and indicated that appellant had three additional surgeries in 1999 and 2001. He opined that appellant was unable to work due to pain, limited mobility and limited range-of-motion.

By decision dated April 24, 2012, OWCP denied appellant's claim for compensation benefits commencing June 28, 2011.

On May 2, 2012 appellant, through his attorney, requested reconsideration.

By decision dated June 20, 2012, OWCP's hearing representative vacated the April 24, 2012 decision finding that the issue was whether the June 19, 2002 loss of wage-earning capacity determination should be modified and remanded the case for further development.

In a July 11, 2012 letter, OWCP accepted appellant's claim as a request for modification of the June 19, 2002 loss of wage-earning capacity determination. It advised him of the three criteria required to modify the loss of wage-earning capacity decision and afforded him 30 days to submit additional evidence.

Subsequently, appellant filed a claim for a schedule award and submitted progress notes from Dr. Bradley dated June 19, 2012. He also submitted a November 9, 2012 report from Dr. William C. Daniels, an orthopedic surgeon, who diagnosed displacement of lumbar intervertebral disc without myelopathy and opined that he had a three percent permanent impairment of the left lower extremity.

By decision dated November 27, 2012, OWCP denied modification of the June 19, 2002 loss of wage-earning capacity determination. Adjudicating appellant's claim as a request to modify the loss of wage-earning capacity determination, it stated that the evidence failed to establish a change in the nature and extent of his injury-related condition, that he had been retrained or vocationally rehabilitated or that the original determination was erroneous.

On December 4, 2012 appellant, through his attorney, requested a hearing before an OWCP hearing representative, contending that the position was make-shift or otherwise inappropriate for a wage-earning capacity determination. A hearing was held *via* telephone on March 19, 2013.

By decision dated May 30, 2013, OWCP's hearing representative affirmed the November 27, 2012 decision finding that appellant failed to submit evidence sufficient to establish one of the three criteria required to modify the loss of wage-earning capacity decision.

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.³ Section 8115(a) of FECA provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his or her actual earnings if his or her actual earnings fairly and reasonably represent his or her wage-earning capacity.⁴ Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.⁵

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.⁶ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁷

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.⁸ OWCP procedures provide that when the employing establishment has withdrawn a light-duty assignment, which

³ See *Katherine T. Kreger*, 55 ECAB 633 (2004).

⁴ See 5 U.S.C. § 8115 (determination of loss of wage-earning capacity).

⁵ *Id.* at § 8115(a); see also *Loni J. Cleveland*, 52 ECAB 171 (2000).

⁶ See *Sharon C. Clement*, 55 ECAB 552 (2004).

⁷ See *Tamra McCauley*, 51 ECAB 375, 377 (2000).

⁸ *Id.*

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.⁹

ANALYSIS

OWCP accepted that appellant sustained an employment-related aggravation of his preexisting HNP at L5-S1. On January 18, 2002 appellant returned to work full time as a modified mail processor with the employing establishment. By decision dated June 19, 2002, OWCP determined that he had no loss of wage-earning capacity as his actual earnings as a modified mail processor fairly and reasonably represented his wage-earning capacity.

On April 8, 2011 the employing establishment indicated that appellant's modified position was no longer available as part of an NRP after determining that it did not have work available for his position. Appellant subsequently filed a claim requesting compensation for wage loss beginning May 20, 2011. Through his attorney he requested modification of the June 19, 2002 loss of wage-earning capacity decision, contending that the position was make-shift or otherwise inappropriate for a loss of wage-earning capacity determination.

Appellant did not submit any evidence to show that OWCP's original loss of wage-earning capacity decision was erroneous. OWCP based its loss of wage-earning capacity determination on his actual earnings that a modified mail processor effective October 4, 2001 fairly and reasonably represented his wage-earning capacity. Its determination was consistent with section 8115(a) of FECA which provides that the wage-earning capacity of an employee is determined by appellant's actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity.¹⁰ OWCP properly noted that he had received actual earnings as a modified mail processor for more than 60 days at the time of its loss of wage-earning capacity determination. The position was not a temporary or part-time position.¹¹ In fact, appellant worked in such modified position for almost nine years before the employing establishment withdrew it as part of the NRP. While he claimed that the modified position was an odd-lot or makeshift position designed for his particular needs, the Board finds that he has not established this assertion. Appellant did not submit sufficient evidence to establish that the modified position was not reasonably available on the open labor market or could not have been performed by another employee. There is no evidence establishing that the duties assigned to him were merely to keep him employed or that the duties and/or the position was created especially for him to fill until such time as it could be determined whether he could physically

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.6(a)(5) (June 2013); *T.M.*, Docket No. 08-975 (issued February 6, 2009).

¹⁰ See *A.P.*, 58 ECAB 198 (2006); *David L. Scott*, 55 ECAB 330 (2004).

¹¹ See *James D. Champlain*, 44 ECAB 438, 440-41 (1993); Federal (FECA) Procedural Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (October 2009). In *Jeffrey T. Hunter*, 52 ECAB 503 (2001), the Board found that duties of regular employment are covered by a specific job classification and such duties would have been performed by another employee if the employee did not perform them. The test is not whether the tasks that the employee performs would have been done by someone else, but instead whether she occupied a regular position that would have been performed by another employee.

return to another position or alternative status.¹² While counsel asserted that the position was makeshift or temporary, he appears to base his argument simply on the fact that it was a modified position. There is no evidence to show that appellant was not working eight hours a day or that the position consisted of make-shift work designed for his particular needs.¹³ Accordingly, the Board finds that there is no evidence that the position was make-shift, temporary, seasonal or otherwise inappropriate for a loss of wage-earning capacity determination.¹⁴

The Board finds that appellant has not met any of the requirements for modification of OWCP's June 19, 2002 loss of wage-earning capacity determination. Appellant did not allege that he was retrained or otherwise vocationally rehabilitated and, as discussed, there is no evidence that the original loss of wage-earning capacity determination was erroneous. Furthermore, the evidence does not establish a material change in his employment-related condition. Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn and not on actual wages lost.¹⁵ Absent a showing that the loss of wage-earning capacity determination should be modified, appellant has no disability under FECA and is not entitled to compensation for wage loss based on the withdrawal of his limited-duty position.¹⁶ Accordingly, OWCP properly denied his claim for wage-loss compensation as he had not established modification of the established loss of wage-earning capacity determination and properly denied modification of its June 19, 2002 loss of wage-earning capacity decision.

On appeal, counsel contends that OWCP's decision was contrary to fact and law. For the reasons stated above, the Board finds that counsel's arguments are not substantiated.

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

CONCLUSION

The Board finds that OWCP properly denied modification of its June 19, 2002 loss of wage-earning capacity determination.

¹² See *J.K.*, Docket No. 11-159 (issued August 19, 2011).

¹³ See *N.C.*, Docket No. 11-378 (September 9, 2011); *J.C.*, 58 ECAB 700 (2007).

¹⁴ See *D.S.*, 58 ECAB 392 (2007); *Selden H. Swartz*, 55 ECAB 272 (2004).

¹⁵ See *Marie A. Gonzales*, 55 ECAB 395 (2004); *Roy Matthew Lyon*, 27 ECAB 186 (1975).

¹⁶ See *S.L.*, Docket No. 10-1478 (issued February 10, 2011); *K.R.*, Docket No. 09-415 (issued February 24, 2010).

ORDER

IT IS HEREBY ORDERED THAT the May 30, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 15, 2014
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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