United States Department of Labor
Employees' Compensation Appeals Board

J.W., Appellant	)	
and	)	**Docket No. 16-0834**
	)	**Issued: August 25, 2016**
U.S. POSTAL SERVICE, POST OFFICE, Philadelphia, PA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 15, 2016 appellant timely appealed the February 26, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUE

The issue is whether appellant's actual earnings as a part-time, limited-duty carrier fairly and reasonably represented his wage-earning capacity effective June 12, 2009.

[1] 5 U.S.C. § 8101 *et seq.*

[2] The case record provided to the Board includes evidence received after OWCP issued its February 26, 2016 decision. The Board is precluded from considering evidence that was not in the case record at the time OWCP rendered its final decision. 20 C.F.R. § 501.2(c)(1) (2014).

FACTUAL HISTORY

This case has previously been before the Board.[3] Appellant, a 53-year-old former city carrier, injured his lower back as a result of a January 28, 2009 employment-related fall. He was delivering mail on private property when he slipped and fell on a tiled porch. OWCP accepted appellant's claim for lumbar sprain/strain, aggravation of underlying L1-2 disc herniation, aggravation of underlying L4-5 disc bulge, and lumbar radiculopathy. After a four-month period of temporary total disability, appellant returned to work in a part-time, limited-duty capacity effective June 12, 2009. His limited-duty carrier responsibilities included "casing [and] pulling down route." Appellant worked four hours per day, and OWCP compensated him for four hours of lost wages per day.

On November 5, 2010 the employing establishment offered appellant another temporary part-time (four hours), limited-duty assignment. Per OWCP's instructions, the employing establishment based the offer on the July 20, 2010 permanent restrictions identified by appellant's treating physician, Dr. Gene I. Geld, a family practitioner.[4] Appellant accepted the limited-duty job offer on November 6, 2010.

Although appellant's physician indicated that the work restrictions were permanent, the employing establishment advised OWCP that it was currently unable to extend an offer of permanent limited-duty work. The employing establishment explained that such an offer would have to await the next National Reassessment Program (NRP) review, but until then it would continue to provide appellant limited-duty work. OWCP in turn advised him that it could not issue a formal loss of wage-earning capacity (LWEC) determination based on actual earnings because his limited-duty assignment was not permanent.[5] Appellant remained on the periodic compensation rolls and continued to receive four hours of wage-loss compensation per day.[6]

On January 9, 2014 appellant filed a Form CA-2a claiming that he suffered a recurrence of disability beginning September 28, 2013. He alleged that his employing establishment withdrew limited-duty work effective September 28, 2013. Appellant also claimed that his

[3] Docket No. 15-0465 (issued April 29, 2015).

[4] The November 5, 2010 modified assignment included "casing mail [and] maintaining all office duties" for appellant's route (up to four hours per day). Additional duties included recording change of addresses (two to four hours per day), and casing mail on any open routes (two to four hours per day). The November 5, 2010 offer recognized that appellant was not to exceed four hours of limited-duty work per day. There was also no crouching, stooping, or climbing. Other limitations included occasional walking, sitting, standing, and reaching overhead (not to exceed four hours). Lastly, the offer noted frequent grasping, fine manipulation, and repetitive reaching (not to exceed four hours). Although the November 5, 2010 offer did not specify appellant's salary, the employing establishment subsequently identified his annual salary as $54,619.00 (Level 1, Step A).

[5] Personnel records indicate that appellant's tenure with the employing establishment dated back to October 1996.

[6] In 2011 OWCP briefly interrupted payment of wage-loss compensation while appellant received compensation for a schedule award. It resumed payment of wage-loss compensation effective October 4, 2011.

previous limited-duty assignment exceeded his medical restrictions.[7] The employing establishment refuted his allegation that it had withdrawn his limited-duty assignment. To the contrary, it claimed to have merely accommodated his request that he be allowed to exhaust his remaining sick leave prior to commencing his OPM-approved disability retirement.

By decision dated May 27, 2014, OWCP denied appellant's claim for recurrence of disability beginning September 28, 2013. Appellant requested a hearing. The Branch of Hearings & Review's hearing representative affirmed the denial of appellant's recurrence claim in a December 16, 2014 decision.[8] Appellant appealed to the Board.

When the case was previously on appeal, the Board affirmed the hearing representative's December 16, 2014 decision. In its April 29, 2015 decision, the Board found that appellant voluntarily stopped work on September 28, 2013 in response to OPM's recent approval of a FERS-based disability retirement. Appellant did not establish that the employing establishment withdrew his part-time, limited-duty assignment on or after September 28, 2013. The Board further found that appellant failed to establish that the employing establishment changed his limited-duty assignment such that the November 5, 2010 job requirements exceeded his established physical limitations. Lastly, the Board found that the medical evidence of record did not establish that he was totally disabled on or after September 28, 2013 due to his employment-related lumbar condition.[9] The Board's April 29, 2015 decision is incorporated herein by reference.

Since the case was last before the Board, Dr. Geld provided a March 19, 2015 work capacity evaluation (OWCP 5-c) wherein he noted that appellant was unable to perform his usual job, but could work four hours per day performing sedentary or light duties. He limited appellant to four hours of sitting, walking, standing, kneeling, and reaching above shoulder. Dr. Geld precluded all twisting, bending/stooping, squatting, climbing, and operating a motor vehicle at work. Additionally, he imposed a four-hour, 20-pound restriction with respect to pushing, pulling, and lifting. Finally, Dr. Geld noted that appellant should take a five- to seven-minute break every half hour.

Dr. Geld saw appellant for follow-up on June 18, September 16, and December 10, 2015. On each occasion, he examined appellant and reported that his condition and work restrictions remained unchanged.

[7] The position appellant held since November 6, 2010 allegedly required him to stand in excess of one hour. He also claimed that his limited-duty assignment exceeded his 20-pound lift/carry limitation. Appellant alleged that he had to lift and/or carry relay bags weighing 35 to 70 pounds.

[8] The hearing representative found no evidence that the employing establishment withdrew appellant's limited-duty assignment. Instead, the record established that appellant's work stoppage was due to his acceptance of disability retirement benefits. The hearing representative further found that the evidence did not support appellant's claim that the limited-duty position he performed since November 6, 2010 exceeded his medical restrictions.

[9] Since June 2009, appellant's treating physician, Dr. Geld, consistently found him capable of working part-time, limited duty. He indicated as much on September 20, 2013, just prior to appellant's work stoppage, and again on December 19, 2013, a few days after the effective date of his disability retirement.

On January 21, 2016 appellant advised OWCP that he planned to resume part-time work beginning January 25, 2016. He anticipated working four hours per day as a general food service worker at a high school. Appellant's expected hourly wage was $8.25, and he intended to work 20 hours per week while school was in session.

In a February 26, 2016 decision, OWCP found that appellant's part-time employment as a limited-duty carrier beginning June 12, 2009 fairly and reasonably represented his wage-earning capacity. It noted that he earned $512.66 per week as a limited-duty carrier. The decision described appellant's former duties casing mail and pulling down route.[10] OWCP explained that because he had demonstrated the ability to perform the duties of the job for two months or more, the position was considered suitable to his partially disabled condition. The February 26, 2016 decision also noted the history of the claim, including appellant's third-party surplus, his December 2013 disability retirement, and his subsequent claim for recurrence of disability, which OWCP denied.[11] Additionally, OWCP indicated that a retroactive LWEC determination was appropriate, but offered no explanation. It also noted that Dr. Geld advised on December 10, 2015 that appellant's work restrictions remained unchanged. Consequently, OWCP adjusted his wage-loss compensation based on his weekly earnings as a limited-duty carrier effective June 12, 2009.

LEGAL PRECEDENT

An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed based on an LWEC.[12] An employee's actual earnings generally best reflect his or her wage-earning capacity.[13] Absent evidence that actual earnings do not fairly and reasonably represent the employee's wage-earning capacity, such earnings must be accepted as representative of the individual's wage-earning capacity.[14] Compensation payments are based on the wage-earning capacity determination, and OWCP's finding remains undisturbed until properly modified.[15]

A light-duty position that fairly and reasonably represents an employee's ability to earn wages may form the basis of an LWEC determination if that light-duty position is a classified

[10] According to the June 12, 2009 job offer, appellant was expected to case mail and pull down a route over the course of a four-hour workday. The job offer included a 20-pound lifting limitation, and indicated that the majority of his four-hour shift would be devoted to casing mail (one to four hours, intermittently). It also specified that an average of 30 minutes would be spent lifting up to 20 pounds, as well as 30 minutes spent pulling down the route. The June 12, 2009 offer did not specify appellant's salary nor did it identify the position as permanent.

[11] However, OWCP did not specifically mention appellant's November 5, 2010 modified assignment.

[12] 5 U.S.C. § 8115(a); 20 C.F.R. §§ 10.402, 10.403; *see Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

[13] *Hayden C. Ross*, 55 ECAB 455, 460 (2004).

[14] *Id.*

[15] *See Katherine T. Kreger*, 55 ECAB 633, 635 (2004).

position to which the injured employee has been formally reassigned.[16] The position must conform to the established physical limitations of the injured employee; the employing establishment must have a written position description outlining the duties and physical requirements; and the position must correlate to the type of appointment held by the injured employee at the time of injury.[17] If these circumstances are present, a determination may be made that the position constitutes "regular" federal employment.[18]

With respect to part-time employment, FECA Procedure Manual (PM) provides: (1) a part-time position may form the basis of an LWEC determination if the employee was a part-time worker at the time of injury; and (2) for an employee who was a full-time employee on the date of injury, a part-time position may form the basis of an LWEC determination if the employee's stable, established work restrictions limit him or her to part-time work.[19] For a part-time position to fairly and reasonably represent the wage-earning capacity of an individual who was a full-time employee on the date of injury, the position should involve the number of hours the employee is capable of working as indicated in the current, stable work restrictions.[20]

Reemployment may not be considered representative of the injured employee's wage-earning capacity where the job is temporary and the employee's date-of-injury job was permanent.[21] However, if the employee was a temporary employee when injured, a temporary position may reasonably represent his or her wage-earning capacity as long as the position will last for 90 days or more.[22]

As long as there is no work stoppage due to the accepted condition(s), a formal LWEC determination should be issued following 60 calendar days from the date of return to work.[23]

If the injured employee is no longer working in the alternative position upon which a rating is being considered, OWCP may consider a retroactive LWEC.[24] However, this is rare and should only be made where the employee worked in the position for at least 60 days; the employment fairly and reasonably represented his or her wage-earning capacity as outlined under

[16] 20 C.F.R. § 10.510.

[17] *Id.*

[18] *Id.*

[19] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Earnings*, Chapter 2.815.5c(1)(b) (June 2013).

[20] *Id.* at Chapter 2.815.5c(1)(b)(ii).

[21] *Id.* at Chapter 2.815.5c(2)(d). A job is considered temporary when expressly stated in the job offer, position description, or other supporting documentation. *Id.* If the language in the job offer is ambiguous, OWCP should ask the employing establishment if the position represents temporary work and document the file accordingly. *Id.*

[22] *Id.* at Chapter 2.815.5c(2)(d)(iii).

[23] *Id.* at Chapter 2.815.6a.

[24] *Id.* at Chapter 2.815.7.

FECA PM Chapter 2.815.5; and the subsequent work stoppage or change in the alternative positions(s) did not occur because of any change in the employee's injury-related condition affecting his or her ability to work.[25]

ANALYSIS

At the time of his January 28, 2009 work injury, appellant was a permanent employee working full-time as a city carrier. He was off work for approximately four months due to his accepted employment injury. On June 12, 2009 appellant returned to work as a part-time (four hours per day), limited-duty carrier "casing mail [and] pulling down route." The written job offer included a 20-pound lifting restriction. After appellant's physician identified permanent work restrictions in July 2010, OWCP asked the employing establishment to extend an offer of permanent limited-duty work. Appellant subsequently received and accepted a November 5, 2010 modified assignment working four hours per day.[26] This latest written offer did not identify the part-time modified assignment as permanent and upon further inquiry OWCP learned that the employing establishment could not extend a permanent offer at that time. The employing establishment explained that the possibility of a permanent assignment would have to await the next NRP review, but in the interim it would continue to provide appellant limited-duty work. The November 5, 2010 job offer is the most recent of record.[27] Appellant continued to work part-time, limited duty through September 28, 2013, at which time he voluntarily stopped working in advance of his December 13, 2013 OPM-approved disability retirement.

As noted, this case was previously before the Board with respect to appellant's claimed recurrence of disability beginning September 28, 2013. OWCP denied the recurrence claim, which was subsequently upheld by the Branch of Hearings & Review, and affirmed by the Board. The Board's prior decision referenced both the June 12, 2009 and November 5, 2010 part-time, limited-duty assignments. The April 29, 2015 Board decision also noted that the most recent limited-duty position "was not identified as permanent," and that the employing establishment specifically advised OWCP that it "was currently unable to extend an offer of permanent limited[-]duty" work. Moreover, the Board's prior decision indicated that OWCP specifically acknowledged that it "could not issue a formal LWEC determination based on actual wages" from appellant's latest temporary assignment. Given his permanent employee status at the time of the January 28, 2009 work injury, an LWEC determination based on a temporary assignment would have been inappropriate.[28]

The Board notes that the February 26, 2016 LWEC determination was based on a limited-duty assignment that appellant had not held since November 2010. It is unclear why OWCP selected the June 12, 2009 limited-duty carrier position rather than the November 5, 2010

[25] *Id.* at Chapter 2.815.7(a).

[26] Although Dr. Geld continued to impose a 20-pound lifting/carrying (intermittent) restriction, the November 5, 2010 job offer did not specifically identify any lifting/carrying restrictions.

[27] There is no indication in the record that the employing establishment subsequently amended the November 5, 2010 job offer making it a permanent assignment.

[28] *Supra* note 19 at Chapter 2.815.5c(2)(d).

modified assignment, which he performed for almost three years prior to his voluntary retirement in December 2013. The February 26, 2016 LWEC determination makes no mention of appellant's November 5, 2010 modified assignment.

Appellant argues that the job OWCP rated him on was a temporary assignment and therefore the position should not have formed the basis of an LWEC determination. The Board agrees. Neither the June 12, 2009 nor November 5, 2010 part-time, limited-duty assignment was specifically designated as a permanent position. Moreover, the former assignment was superseded by the latter, and it is clear from the record that the November 5, 2010 job offer was not intended to be permanent. At the time, the employing establishment specifically advised OWCP that it was not prepared to extend appellant a permanent offer. Reemployment in a temporary position may not form the basis of an LWEC determination where the employee's date-of-injury job was permanent.[29] Accordingly, OWCP's February 26, 2016 decision shall be reversed.

CONCLUSION

Appellant's actual earnings as a part-time, limited-duty carrier effective June 12, 2009 do not fairly and reasonably represent his wage-earning capacity.

[29] *Id.*

ORDER

IT IS HEREBY ORDERED THAT the February 26, 2016 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 25, 2016
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board