United States Department of Labor
Employees' Compensation Appeals Board

E.S., Appellant	)	
and	)	**Docket No. 21-1172**
	)	**Issued: July 14, 2023**
U.S. POSTAL SERVICE, HIGHLAND STATION, Memphis, TN, Employer	)	

Appearances:
David N. Gillis, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 26, 2021 appellant, through counsel, filed a timely appeal from a June 14, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has met his burden of proof to modify OWCP's December 31, 2020 loss of wage-earning capacity (LWEC) determination.

FACTUAL HISTORY

On January 10, 2018 appellant, then a 51-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging on that date he sprained his left shoulder when he grabbed a hand rail after slipping on a ramp while in the performance of duty. He stopped work on January 10, 2018. OWCP accepted appellant's claim for left shoulder rotator cuff strain. On August 28, 2018 it expanded acceptance of the claim to include bicipital tendinitis, primary osteoarthritis, and effusion of the left shoulder. OWCP paid appellant wage-loss compensation on the supplemental rolls beginning June 30, 2018, and on the periodic rolls beginning August 19, 2018.

On December 18, 2018 appellant underwent an OWCP-authorized left shoulder arthroscopy with biceps tenotomy, inferior labral partial tear debridement, subacromial decompression with acromioplasty, clavicle resection, and rotator cuff repair. Following his surgery, he returned to work on February 11, 2019 for four hours per day.

On August 16, 2019 Dr. Arsen Manugian, a Board-certified orthopedic surgeon, found that appellant had reached maximum medical improvement and could return to full-time work with permanent restrictions of lifting up to 50 pounds occasionally at waist level and no reaching, pulling, or pushing.

On September 6, 2019 appellant accepted a full-time modified position as an office assistant.[3] The duties included answering telephones, taking messages, assisting with customer complaints, and tracking packages. The physical requirements were simple grasping for 2 to 6 hours a day, and lifting no more than 50 pounds at waist level for 2 to 6 hours a day. The salary was $65,037.00 per year.

On December 17, 2020 appellant advised OWCP that, approximately two months after the September 6, 2019 job offer, the employing establishment offered him a 204B position as a rotating supervisor with an increase in pay. He indicated that he began the new position in December 2019.[4]

By decision dated December 31, 2020, OWCP issued a retroactive LWEC determination finding that appellant's full-time position as an office assistant beginning September 6, 2019 fairly and reasonably represented his wage-earning capacity with no loss of earnings. It found that his current wages met or exceeded those of his date-of-injury position.

[3] An August 30, 2019 job offer for the position of office assistant, also accepted by appellant, provided the duties as simple grasping for four hours per day, and lifting not more than 35 pounds for two hours per day no higher than waist level. This offer was apparently superseded by the job offer of September 3, 2019.

[4] As appellant accepted the office assistant position on September 6, 2019, December 2019 was more than 60 days after his return to work.

On May 12, 2021 appellant, through counsel, requested reconsideration. Counsel contended that appellant could not meet the physical requirements of the office assistant position on which the December 31, 2020 LWEC determination was based. He noted that the position required appellant to lift 50 pounds for up to six hours a day. Counsel provided a Department of Labor chart defining the physical demand characteristics of work and specifying that occasional activity occurred between 0 to 33 percent of the workday, or up to 2.64 hours of an 8-hour workday, frequent activity occurred for 34 to 66 percent of the workday, or up to 5.28 hours of the workday, and constant activity occurred for 67 to 100 percent of the workday, or at least 5.36 hours a day. Counsel contended that, as the physical requirements of more than occasional lifting of 50 pounds exceeded appellant's work restrictions, the position could not properly form the basis of an LWEC determination.

By decision dated June 14, 2021, OWCP denied modification of its prior decision.

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.[5] Generally, wages actually earned are the best measure of wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.[6]

A light-duty position that fairly and reasonably represents an employee's ability to eam wages may form the basis of an LWEC determination if that light-duty position is a classified position to which the injured employee has been formally reassigned. 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.[7]

OWCP's procedures provide that, in cases where reemployment is within the Federal Government, a formal actual earnings LWEC should include an "indication that the physical requirements of the alternative work do not exceed the work limitations."[8]

A determination regarding whether actual earnings fairly and reasonably represent one's wage-earning capacity should be made only after an employee has worked in a given position for at least 60 days.[9] Wage-earning capacity may not be based on an odd-lot or make-shift position

[5] 5 U.S.C. § 8115(a); *V.H.*, Docket No. 20-1012 (issued August 10, 2021); *Loni J. Cleveland*, 52 ECAB 171 (2000).

[6] *See D.A.*, Docket No. 21-0267 (issued November 19, 2021); *M.J.*, Docket No. 21-0036 (issued August 23, 2021); *K.B.*, Docket No. 20-0358 (issued December 10, 2020); *Lottie M. Williams*, 56 ECAB 302 (2005).

[7] 20 C.F.R. § 10.510; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Wages*, Chapter 2.815.5c (June 2013).

[8] *Id.* at Chapter 2.815.6d(5) (June 2013).

[9] *Id.*

designed for an employee's particular needs, a temporary position when the position held at the time of injury was permanent, or a position that is seasonal in an area where year-round employment is available.[10]

If the injured employee is no longer working in the alternative position upon which an LWEC rating is being considered, OWCP may consider a retroactive LWEC.[11] 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 FECA Chapter 2.815.5, and the subsequent work stoppage or change in the alternative position(s) did not occur because of any change in the employee's injury-related condition affecting his or her ability to work.[12]

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.[13] OWCP's procedures provide that, "[i]f a formal [LWEC] 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 CE [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal [LWEC]."[14] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[15]

ANALYSIS

The Board finds that appellant has met his burden of proof to modify OWCP's December 31, 2020 LWEC determination.

As OWCP issued a formal LWEC determination, the decision will remain in place unless there is a material change in the nature and extent of the injury-related position, the employee has

[10] *See M.S.*, Docket No. 19-0692 (issued November 18, 2019); *James D. Champlain*, 44 ECAB 438, 440-41 (1993); *id*. at Chapter 2.815.5c (June 2013).

[11] *M.F.*, Docket No. 18-0323 (issued June 25, 2019); *D.M.*, Docket No. 16-1527 (issued July 25, 2017); *D.P.*, Docket No. 14-0301 (issued July 16, 2014); *id*. at Chapter 2.815.7.

[12] *Id*.

[13] *J.A.*, Docket No. 17-0236 (issued July 17, 2018); *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

[14] *Supra* note 7 at Chapter 2.1501.3a (June 2013); *D.T.*, Docket No. 18-0174 (issued August 23, 2019); *J.B.*, Docket No. 17-0817 (issued April 26, 2018); *Harley Sims, Jr.*, 56 ECAB 320 (2005).

[15] *O.H.*, Docket No. 17-0255 (issued January 23, 2018); *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

been retrained or otherwise vocationally rehabilitated, or the original determination was erroneous.[16]

The Board finds that appellant has established that the original determination was in error. On September 6, 2019 appellant accepted a modified job offer from the employing establishment for a position as an office assistant. The physical requirements included lifting of 50 pounds at waist level for two to six hours a day.

In his August 16, 2019 report, Dr. Manugian, found that appellant could return to full-time work with restrictions of occasional 50-pound waist-level lifting. Counsel submitted evidence that lifting up to 50 pounds for 6 hours per day, as required by the offered position, constituted constant lifting, defined as 67 to 100 percent of the workday, rather than occasional lifting, defined as 0 to 33 percent of the workday or up to 2.64 hours of an 8-hour workday. Consequently, the office assistant position offered on September 3, 2019 did not comport with appellant's medical restrictions as established by Dr. Manugian.

Appellant has provided evidence that the modified position did not conform to his established physical limitations as determined by Dr. Manugian. As noted, OWCP's regulations and procedures provide that a LWEC determination based on actual earnings must conform to the physical limitations of the injured employee.[17] Therefore, the original LWEC determination was in error and appellant has met his burden of proof to modify OWCP's December 31, 2020 LWEC determination.[18]

CONCLUSION

The Board finds that appellant has met his burden of proof to modify OWCP's December 31, 2020 LWEC determination.

[16] *B.H.*, Docket No. 21-0892 (issued November 29, 2021); *J.A.*, Docket No. 17-0236 (issued July 17, 2018); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

[17] *See supra* notes 7 and 8; *see also C.M.*, Docket No. 22-0205 (issued August 17, 2022); *E.F.*, Docket No. 19-1019 (issued November 6, 2019); *W.R.*, Docket No. 18-1782 (issued May 29, 2019).

[18] *Id.*

ORDER

IT IS HEREBY ORDERED THAT the June 14, 2021 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 14, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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