

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

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**EDWARD MORENO, JR., Appellant**

**and**

**U.S. POSTAL SERVICE, MAIN POST OFFICE,  
McAllen, TX, Employer**

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**Docket No. 04-931  
Issued: September 9, 2004**

*Appearances:*  
*Edward Moreno, Jr., pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Member  
WILLIE T.C. THOMAS, Alternate Member  
MICHAEL E. GROOM, Alternate Member

**JURISDICTION**

On February 25, 2004 appellant filed a timely appeal of a merit decision of the Office of Workers' Compensation Programs dated February 9, 2004, denying modification of a June 23, 2003 decision which found that he failed to establish that he sustained a recurrence of disability due to his December 18, 2000 employment injury. In a decision dated November 13, 2003, the Office found that appellant's actual earnings as a modified clerk fairly and reasonably represented his wage-earning capacity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the wage-earning capacity and recurrence of disability issues in this case.

**ISSUES**

The issues are: (1) whether the Office properly determined that appellant's actual earnings as a modified distribution clerk fairly and reasonably represented his wage-earning capacity; and (2) whether appellant has established that he sustained a recurrence of disability during the period April 28 through May 30, 2003, due to his December 18, 2000 employment injury.

## **FACTUAL HISTORY**

On December 18, 2000 appellant, then a 35-year-old automation clerk, filed a traumatic injury claim alleging that on that date he bruised his left ankle and his left knee buckled when he was struck from behind by a postal cart. The Office accepted appellant's claim for a torn medial meniscus and dislocation of the patella of the left knee. Appellant received appropriate compensation.

On August 31, 2001 appellant accepted the employing establishment's job offer of limited-duty work as a modified distribution clerk, as of September 1, 2001. He stopped work on September 3, 2002 to undergo arthroscopic surgery on his left knee, which was performed by Dr. S. Gopal Krishnan, a treating Board-certified orthopedic surgeon, on September 4, 2002. Appellant received appropriate compensation.

Appellant returned to his limited-duty job on January 13, 2003. Subsequently, he became temporarily totally disabled from March 7 through 26, 2003 and received appropriate compensation.

On May 5, 2003 appellant filed a claim for compensation (Form CA-7) for the period April 28 through May 2, 2003. He submitted an April 23, 2003 duty status report from Dr. Cesar A. Matos-Martinez, a Board-certified psychiatrist, in which he diagnosed internal derangement due to the December 18, 2000 employment injury. Dr. Matos-Martinez indicated that appellant could return to work with certain physical restrictions and that he was temporarily totally disabled from April 28 through May 2, 2003.

On May 12, 2003 the employing establishment controverted appellant's claim on the grounds that the April 23, 2003 duty status report appeared to have been altered. The employing establishment noted that Dr. Krishnan's office advised the last time he saw appellant was on March 26, 2003. The employing establishment contended that the April 23, 2003 report was the same as Dr. Krishnan's March 26, 2003 duty status report, except for the date which it believed had been altered.

By letter dated May 21, 2003, the Office advised appellant to submit additional medical evidence supportive of his claim. On May 22, 2003 appellant filed another Form CA-7 requesting compensation for the period May 12 through 25, 2003. He submitted a May 15, 2003 duty status report stating Dr. Matos-Martinez' diagnosis of internal derangement due to the December 18, 2000 employment injury and finding that appellant could resume work with certain physical restrictions. Dr. Matos-Martinez stated that appellant was temporarily totally disabled for the period May 12 through 25, 2003. In a May 15, 2003 letter, Dr. Matos-Martinez stated that appellant was under his care and that he could return to work on May 26, 2003.

On June 7, 2003 appellant filed a Form CA-7 for the period May 26 through 30, 2003. The employing establishment indicated that appellant returned to work on June 2, 2003. In a June 3, 2003 letter, Dr. Matos-Martinez stated that appellant had been under his care since September 1994, for the treatment of anxiety and panic attacks. He saw appellant on April 24, 2003 on an emergency basis because he had been feeling very upset and angry. Dr. Matos-Martinez reported appellant's complaints of depression due to dealing with stress at

home and at work on a regular basis. Appellant became upset when people looked at him and asked him whether he had polio, noting that his left thigh was less developed than his right thigh due to several surgeries. Dr. Matos-Martinez provided his findings on mental examination and diagnosed a panic disorder. He noted his prior findings on mental examination of appellant on May 29, 2003 and his diagnosis of a single severe nonpsychotic episode of major depression. Dr. Matos-Martinez opined that appellant was unable to work due to the strength of his emotional condition and the stress at work.

In a June 23, 2003 decision, the Office denied appellant's claim for compensation for the period April 28 through May 2, 2003 and May 12 through 30, 2003. The Office found the medical evidence of record was insufficient to establish that he was disabled due to his December 18, 2000 left knee injury. The Office noted Dr. Matos-Martinez' diagnosis of panic disorder due to stress at home and work and recommended that appellant file an occupational disease claim.

Appellant submitted the July 28 and October 16, 2003 progress notes of Dr. Krishnan regarding his left knee condition. On October 28, 2003 he requested reconsideration of the Office's June 23, 2003 decision. Appellant submitted a July 28, 2003 letter from Dr. Krishnan who opined that appellant's knee problem and the pain experienced was a factor in his depression. Appellant also submitted a duplicate copy of Dr. Matos-Martinez' June 3, 2003 letter.

By decision dated November 10, 2003, the Office denied modification of the June 23, 2003 decision. The Office found that Dr. Krishnan failed to address whether appellant was totally disabled during the claimed period.

In a November 13, 2003 decision, the Office found that appellant's actual earnings as a modified clerk, which became effective January 11, 2003, fairly and reasonably represented his wage-earning capacity. The Office found that appellant's actual earnings of \$858.09 per week met or exceeded the current wages of \$825.52 per week for the job he held at the time of his injury. The Office noted that the decision did not affect appellant's entitlement to ongoing medical benefits.

On November 17, 2003 appellant requested reconsideration of the Office's November 10, 2003 decision. He submitted Dr. Krishnan's July 28, 2003 duty status report, providing a diagnosis of internal derangement of the left knee due to the December 18, 2000 employment injury. Dr. Krishnan stated that appellant was temporarily totally disabled but that he was able to perform the duties of the modified distribution clerk position. Appellant also submitted Dr. Krishnan's December 3, 2003 progress notes regarding his knee condition. Dr. Krishnan indicated that appellant was temporarily totally disabled from October 22 through December 15, 2003 and that he had a clinical depression. On January 8, 2004 Dr. Krishnan noted that appellant showed extreme atrophy of the left quadriceps and weakness in the left leg. He advised appellant to return to work on December 23, 2003 and to undergo synvisc injections due to patellofemoral changes. In a January 16, 2003 letter, Dr. Matos-Martinez excused appellant from work beginning January 5, 2004 until further notice.

By decision dated February 9, 2004, the Office denied modification of the November 10, 2003 decision. The Office found the medical evidence of record insufficient to establish that appellant was totally disabled during the period April 28 through May 30, 2003.<sup>1</sup>

### **LEGAL PRECEDENT -- ISSUE 1**

Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity.<sup>2</sup> Generally, wages actually earned are the best measure of a 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.<sup>3</sup> The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Shadrick* decision,<sup>4</sup> has been codified at 20 C.F.R. § 10.403. The actual earnings in the position are compared with the current wages of the date-of-injury position to determine loss of wage-earning capacity.<sup>5</sup>

### **ANALYSIS -- ISSUE 1**

The Office accepted that on December 18, 2000 appellant sustained a torn medial meniscus and a dislocation of the patella of the left knee. He accepted a limited-duty position as a modified distribution clerk effective September 1, 2001. Following his September 4, 2002 left knee surgery for which he received appropriate compensation for temporary total disability, appellant returned to the modified distribution clerk position on January 11, 2003. He worked in the modified position and the record does not contain evidence showing that the modified distribution clerk position was part-time, sporadic, seasonal or temporary work.<sup>6</sup> Moreover, the record does not reveal that the position was a makeshift position designed for appellant's particular needs.<sup>7</sup>

Actual earnings are generally the best measure of wage-earning capacity. The Office first calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the "current" pay rate of the job held when injured.<sup>8</sup> In this case, the

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<sup>1</sup> The Board notes that subsequent to the Office's February 9, 2004 decision, the Office received additional medical evidence. The Board, however, cannot consider evidence that was not before the Office at the time of the final decision. See *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36n.2 (1952); 20 C.F.R. § 501.2(c).

<sup>2</sup> 5 U.S.C. § 8115(a).

<sup>3</sup> See *Monique L. Love*, 48 ECAB 378 (1997).

<sup>4</sup> *Albert C. Shadrick*, 5 ECAB 376 (1953).

<sup>5</sup> *Id.*

<sup>6</sup> See *William D. Emory*, 47 ECAB 365 (1996).

<sup>7</sup> *Id.*

<sup>8</sup> *Albert C. Shadrick*, *supra* note 4.

evidence of record reveals that the pay rate of appellant's date-of-injury position currently is \$825.52 per week. Appellant is earning \$858.09 per week in a modified distribution debate. His actual wages exceed the current rate of pay of his date-of-injury salary. Based on the evidence of record, appellant's actual earnings as a modified distribution clerk fairly and reasonably represent his wage-earning capacity and the Office properly determined that he had no loss of wage-earning capacity.<sup>9</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.<sup>10</sup>

When an employee who is disabled from the job he held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that he can perform the limited-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and to show that he cannot perform such limited-duty work. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the limited-duty job requirements.<sup>11</sup>

To show a change in the degree of the work-related injury or condition, the claimant must submit rationalized medical evidence documenting such change and explaining how and why the accepted injury or condition disabled the claimant for work on and after the date of the alleged recurrence of disability.<sup>12</sup>

### **ANALYSIS -- ISSUE 2**

In this case, appellant has not shown a change in the nature and extent of his employment-related condition or a change in the nature and extent of the limited-duty job requirements. The record shows that, following the December 18, 2000 employment-related left knee torn meniscus and dislocation of the patella, appellant returned to work in a limited-duty capacity. The record does not establish nor did appellant allege that the claimed recurrence of total disability was caused by a change in the nature or extent of his limited-duty job requirements. Rather, he has alleged that his accepted condition has materially changed or worsened since he returned to work and rendered him totally disabled during the period April 28 through May 30, 2003.

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<sup>9</sup> *Monique L. Love, supra* note 3.

<sup>10</sup> 20 C.F.R. § 10.5(x) (1999).

<sup>11</sup> *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

<sup>12</sup> *James H. Botts*, 50 ECAB 265 (1999).

Appellant has not submitted sufficient rationalized medical opinion evidence to establish that he sustained a recurrence of total disability during the claimed period due to his December 18, 2000 employment injury. Dr. Matos-Martinez' April 23, 2003 duty status report noted that appellant had internal derangement of the left knee due to the December 18, 2000 employment injury. He stated that appellant was totally disabled from April 28 through May 2, 2003. The report of Dr. Matos-Martinez, however, failed to provide any medical rationale explaining how or why appellant's knee condition and resultant disability were due to his December 18, 2000 employment injury. In a May 15, 2003 duty status report, Dr. Matos-Martinez reiterated his diagnosis and appellant's physical restrictions. He opined that appellant was totally disabled during the period May 12 through 25, 2003. Dr. Matos-Martinez failed to provide any medical rationale to support his opinion that appellant's knee condition and total disability during the claimed period was caused by his accepted employment injury. Further, in a June 3, 2003 letter, Dr. Matos-Martinez found that appellant was unable to work due to an emotional condition that was caused by unidentified stress at home and at work. The physician failed to explain how appellant's emotional condition and resultant disability were caused by his December 18, 2000 employment injury.

Dr. Krishnan's July 28 and October 16, 2003 progress notes regarding appellant's left knee condition failed to address whether appellant sustained a recurrence of disability for the period April 28 through May 30, 2003 due to the December 18, 2000 employment injury. On July 28, 2003 Dr. Krishnan opined that appellant's knee problem was a factor in his depression. However, the physician did not address whether appellant was totally disabled for the relevant period due to the December 18, 2000 employment injury. On July 28, 2003 Dr. Krishnan indicated that appellant had internal derangement of the left knee due to his accepted employment injury provided appellant's physical restrictions. He found that appellant was totally disabled but did not address whether appellant was disabled for the claimed period due to his December 18, 2000 employment injury. His December 3, 2003 progress notes regarding appellant's left knee condition noted disability from October 22 through December 15, 2003. This report does not address whether appellant was totally disabled during the claimed period due to his December 18, 2000 employment injury. Dr. Krishnan's January 8, 2004 letter advising appellant that he could return to work on December 23, 2003 and his January 16, 2004 letter excusing appellant from work beginning January 5, 2004 also failed to address whether appellant was disabled for work during the period April 28 through May 30, 2003 due to his December 18, 2000 employment injury.

As appellant has not submitted rationalized medical evidence supporting a causal relationship between his accepted employment injury and a recurrence of disability during the period April 28 through May 30, 2003, he has failed to meet his burden of proof.

### **CONCLUSION**

The Board finds that the Office properly determined that appellant's actual earnings as a modified distribution clerk fairly and reasonably represented his wage-earning capacity. The Board further finds that appellant has failed to establish that he sustained a recurrence of disability during the period April 28 through May 30, 2003 due to his December 18, 2000 employment injury.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 9, 2004 and November 13, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 9, 2004  
Washington, DC

Colleen Duffy Kiko  
Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member