

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

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| L.R., Appellant                          | ) |                         |
|  | ) |                         |
| and                                      | ) | Docket No. 06-761       |
|  | ) | Issued: August 22, 2006 |
| U.S. POSTAL SERVICE, POST OFFICE,        | ) |                         |
| GRACELAND STATION, Chicago, IL, Employer | ) |                         |
|  | ) |                         |

*Appearances:*  
Jeffrey P. Zeelander, Esq., for the appellant  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On February 13, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated February 3, 2006 which denied modification of a May 20, 2003 wage-earning capacity determination. Pursuant to 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 modification of the wage-earning capacity decision was warranted. On appeal counsel argues that appellant established a recurrence of disability.

**FACTUAL HISTORY**

On January 24, 1998 appellant, then a 38-year-old letter carrier, sustained an employment-related acute lumbosacral strain and returned to restricted duty. The claim was also accepted for discogenic disease of the lower back. On May 12, 2000 the Office accepted that appellant sustained a lumbar strain and on November 30, 2000 a herniated disc at L4-5 and S1

radiculopathy. Appellant received wage-loss compensation for the period May 30 to September 22, 2000 when he returned to limited duty.<sup>1</sup>

By decision dated May 2, 2003, the Office found that appellant had no loss of wage-earning capacity based on his actual earnings in a modified position beginning September 22, 2000. On December 29, 2004 he filed a Form CA-2a claim that he sustained a recurrence of disability on July 11, 2003, stating that he was advised to go home that day. He also submitted a CA-7 claim for compensation for the period July 11, 2003 to December 29, 2004. In an October 2, 2004 statement, James Gary, a union steward, advised that around July 2003 appellant was told there was no light duty available at the Graceland Station. By letter dated February 23, 2005, the Office informed appellant of the evidence needed to support his claim. In a March 2, 2005 statement, Mr. Gary stated that in July 2003 appellant was called into the office by Barbara Holman, branch manager, and was told there was no light duty available.

In a May 20, 2005 decision, the Office denied that appellant sustained a recurrence of disability. On May 24, 2005, through counsel, appellant requested a hearing and later requested a review of the written record. By decision dated October 25, 2005, an Office hearing representative affirmed the May 20, 2005 decision. On November 15, 2005 appellant requested reconsideration, stating that Ms. Holman told him to go home because there was no light-duty work for him.

By letter dated December 12, 2005, the Office requested that the employing establishment respond to appellant's contention. In a December 21, 2005 letter, Ms. Holman refuted appellant's statement that she told him to go home in July 2003. She noted that at that time she was working for the Chicago District dispute resolution team and not at the Graceland Station. Ms. Holman stated that she was acting manager at the Graceland Station from June to August 2002 and requested that two employees, including appellant, submit medical documentation to support their continued requirement for limited duty. Appellant was scheduled to transfer to the Ravenswood Station on August 10, 2002 and should have submitted his medical documentation there. By letter dated December 21, 2005, Stephanie Hartman advised that on August 26, 2002 she returned from a detail and continued as station manager at Graceland until May 23, 2005. She did not advise appellant to go home in July 2003, noting that during that time appellant was not on the employee rolls at Graceland Station. On December 22, 2005 the employing establishment advised that appellant had been an unassigned regular city carrier at Graceland working in a limited-duty capacity since August 2000. In July 2002, Ms. Holman requested that appellant provide medical documentation to support his continued limited-duty assignment within approximately two weeks or his status would be changed to light duty. The employing establishment stated that he did not comply and was sent home and that on August 10, 2002 he was sent a Form 50, notification of personnel action, indicating that he was the senior qualified applicant for a vacancy at the Ravenswood Station. On September 23, 2002

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<sup>1</sup> The January 24, 1998 injury was adjudicated by the Office under file number 100474155, and a claim for a recurrence of disability on August 3, 1999 was denied in decisions dated November 17, 1999 and May 8 and August 31, 2000. The May 2000 claim was adjudicated under file number 100498410, and the claims were combined under the latter file number.

a second Form 50 was sent, indicating that appellant did not report to the new assignment and was in a leave-without-pay status.

By decision dated February 3, 2006, the Office denied modification of the May 2, 2003 wage-earning capacity decision. The Office noted that, even though the employing establishment withdrew a limited-duty assignment, this was not sufficient grounds to modify a 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.<sup>2</sup> The Office's procedure manual provides 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."<sup>3</sup> 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.<sup>4</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>5</sup>

In addition, Chapter 2.814.11 of the Office's 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. Office 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 the Office 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.<sup>6</sup>

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<sup>2</sup> *Katherine T. Kreger*, 55 ECAB \_\_\_\_ (Docket No. 03-1765, issued August 13, 2004).

<sup>3</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

<sup>4</sup> *Stanley B. Plotkin*, 51 ECAB 700 (2000).

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

<sup>6</sup> See Federal (FECA) Procedure Manual, *supra* note 3 at Chapter 2.814.11 (July 1997).

## ANALYSIS

On December 29, 2004 appellant claimed compensation beginning July 11, 2003, after the Office issued a formal wage-earning capacity decision on May 2, 2003.<sup>7</sup> Applicable case law and Office procedures require that once a formal wage-earning capacity decision is in place, 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.<sup>8</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>9</sup>

In the present case, appellant did not submit evidence showing that the Office's May 2, 2003 wage-earning capacity determination was erroneous. Rather, he requested a resumption of compensation for total wage loss beginning July 11, 2003 by filing a recurrence of disability claim on December 29, 2004, contending that he was sent home because limited duty was no longer available. Because a formal decision of appellant's loss of wage-earning capacity was in place when he filed the claim, the Office properly adjudicated the case as a request for modification of an established loss of wage-earning capacity.<sup>10</sup> The Board finds that appellant has not met his burden of proof. There is no evidence of record that appellant has been retrained or otherwise vocationally rehabilitated, and he has submitted no medical evidence to show that there was a material change in the nature and extent of the injury-related condition beginning July 2003. In fact, he has submitted no medical evidence since submitting his claim in December 2004. The most current medical evidence of record is what appears to be a chiropractic treatment note dated October 16, 2000.

As noted above, the burden of proof is on the party attempting to show a modification of the wage-earning capacity. In this case, appellant has not submitted any medical evidence to establish a material change in the nature and extent of his employment-related conditions.<sup>11</sup>

## CONCLUSION

The Board finds that the Office properly denied modification of the February 15, 1995 wage-earning capacity determination.

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<sup>7</sup> Although appellant apparently stopped work at the Graceland Station in July 2002, he did not file a claim for compensation until December 29, 2004. It was therefore proper for the Office to issue a wage-earning capacity decision on May 2, 2003. *See Selden H. Swartz*, 55 ECAB \_\_\_\_ (Docket No. 02-1164, issued January 15, 2004).

<sup>8</sup> *Stanley B. Plotkin*, *supra* note 4.

<sup>9</sup> *Id.*

<sup>10</sup> *Katherine T. Kreger*, *supra* note 2; *Sharon C. Clement*, 55 ECAB \_\_\_\_ (Docket No. 01-2135, issued May 18, 2004); Federal (FECA) Procedure Manual, *supra* note 3.

<sup>11</sup> *Stanley B. Plotkin*, *supra* note 4.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated October 25 and May 21, 2005 are set aside. The decision dated February 3, 2006 is affirmed.

Issued: August 22, 2006  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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