

sustained a recurrence of disability on April 1, 2002. Appellant accepted the position of supply technician and returned to limited duty in December 2002.

By decision dated March 7, 2003, the Office reduced appellant's wage-loss compensation based upon his actual wages of \$617.56 in the position of supply technician. Appellant was informed that his monthly compensation payment would be \$544.00. In a decision dated July 11, 2003, the Office modified the prior wage-loss compensation to reflect that his monthly compensation would be reduced to \$525.00 instead of \$544.00.

On October 6, 2005 appellant filed a claim for compensation (Form CA-7) for wage-loss beginning October 15, 2005.¹ The employing establishment terminated him effective October 14, 2005 based upon his medical disqualification for employment with the National Guard.² By letter dated October 20, 2005, the Office informed appellant of the evidence needed to support his claim. Appellant did not reply within the time allotted.

By decision dated December 12, 2005, the Office denied appellant's request for modification of the July 11, 2003 wage-earning capacity decision.

On December 28, 2005 appellant requested an oral hearing and submitted magnetic resonance imaging scans dated November 10 and 20, 2005 and a November 23, 2004 progress note by Dr. Daniel P. Noble, a treating Board-certified orthopedic surgeon. A telephonic hearing was held on April 12, 2006 at which appellant testified. Dr. Noble diagnosed chronic intermittent low back pain and lumbar spine degenerative disc disease. A physical examination revealed "full range of motion without obvious discomfort" in the lumbar spine. He stated that appellant "can continue with his work duties as currently employed."

Subsequent to the hearing, appellant submitted additional factual and medical evidence. In a report dated March 29, 2004, Dr. Noble opined that appellant was capable of performing the duties of his military position.

In a decision dated June 20, 2006, the Office hearing representative affirmed the denial of appellant's request for modification of his 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 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

¹ Appellant was honorably discharged from the Army National Guard effective August 28, 2005.

² Appellant's application for disability retirement was denied by the Office of Personnel Management on September 20, 2005.

³ *Mary E. Marshall*, 56 ECAB ____ (Docket No. 04-1048, issued March 25, 2005); *Katherine T. Kreger*, 55 ECAB 633 (2004).

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.⁴ 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.⁵ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁶

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.⁷

ANALYSIS

The Office issued a loss of wage-earning capacity decision on July 11, 2003. On October 6, 2005 appellant filed a claim for compensation for wage-loss beginning October 15, 2005. 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.⁸ As noted above, the burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁹

The Board finds that appellant did not submit sufficient evidence showing that the Office's July 11, 2003 wage-earning capacity determination was erroneous. Rather, he filed a claim for compensation for lost wages due to the termination of his employment by the employing establishment. The employing establishment terminated appellant's employment based upon his medical disqualification for employment in the National Guard, which was a

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

⁵ *Harley Sims, Jr.*, 56 ECAB ____ (Docket No. 04-1916, issued February 8, 2005); *Stanley B. Plotkin*, 51 ECAB 700 (2000).

⁶ *Marie A. Gonzales*, 55 ECAB 395 (2004).

⁷ See Federal (FECA) Procedure Manual, *supra* note 4 at Chapter 2.814.11 (July 1997).

⁸ *David L. Scott*, 55 ECAB 330 (2004).

⁹ *Harley Sims, Jr.*, *supra* note 5.

requirement for appellant's position. There is no evidence in the record that he 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 October 15, 2005. In fact, the medical evidence he submitted shows no material change in his condition. Dr. Noble opined that appellant was capable of performing his work duties as a supply technician as well as his military duties in the National Guard. As noted above, the burden of proof is on the party attempting to show a modification of the wage-earning.

CONCLUSION

The Board finds that the Office properly denied modification of the July 11, 2003 amended wage-earning capacity determination.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 20, 2006 is affirmed.

Issued: February 14, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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