United States Department of Labor
Employees' Compensation Appeals Board

W.S., Appellant	)	
and	)	**Docket No. 10-2005**
	)	**Issued: June 20, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Stockton, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 3, 2010 appellant timely appealed the April 7, 2010 merit decision of the Office of Workers' Compensation Programs, which denied modification of a loss of wage-earning capacity determination. Pursuant to the Federal Employees' Compensation Act[1] 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 the Office properly denied modification of the December 5, 2007 loss of wage-earning capacity determination.

[1] 5 U.S.C. §§ 8101-8193.

[2] The record on appeal contains evidence received after the Office issued its April 7, 2010 decision. The Board is precluded from considering evidence that was not in the case record at the time the Office rendered its final decision. 20 C.F.R. § 501.2(c)(1) (2010).

FACTUAL HISTORY

Appellant, a 63-year-old rural letter carrier, has an accepted occupational disease claim for lumbar sprain and herniated disc at L5-S1, which arose on or about June 2, 2005. He stopped work in June 2005 and for approximately two years thereafter he received appropriate wage-loss compensation for temporary total disability. On May 8, 2007 appellant returned to work full time as a modified rural carrier, with no loss in pay.[3] By decision dated December 5, 2007, the Office determined that his actual earnings as a modified rural carrier fairly and reasonably represented his wage-earning capacity. It noted that, because appellant had performed the position for more than 60 days without incident, it was considered suitable to his partially disabled condition and because there was no loss in earnings, he had zero loss of wage-earning capacity.[4] Accordingly, appellant was not entitled to further wage-loss compensation.

As of October 31, 2008, appellant's modified rural carrier position was no longer available. The employer explained that collective bargaining mandates necessitated appellant's removal from that particular assignment. Appellant was involuntarily reassigned to another position, but under this new position there was no work available within appellant's restrictions. He stopped work at the conclusion of his October 31, 2008 shift.

On December 12, 2008 appellant filed a notice of recurrence (Form CA-2a) with respect to his October 31, 2008 work stoppage. He noted that he had been released from duty because of ongoing physical limitations associated with his June 2, 2005 employment injury. Appellant also indicated that his condition had worsened following his return to work in May 2007. He reported receiving treatment two to three times each month. Appellant also filed a claim for compensation (Form CA-7) for lost wages beginning November 1, 2008.

On April 1, 2009 the Office informed appellant that his recurrence claim had been accepted. It did not pay wage-loss compensation, but instead advised appellant of the need to submit Form CA-7 and supporting medical evidence. Appellant subsequently submitted several CA-7s.

On May 13, 2009 the Office acknowledged receipt of appellant's claim for compensation, and advised him that it had previously rendered a formal loss of wage-earning capacity (LWEC) determination. It explained that the LWEC decision remained in effect regardless of his actual earnings. Appellant was apprised of the grounds for modifying a LWEC determination, and the Office afforded him 30 days to submit evidence or argument in support thereof.[5]

Both appellant and his counsel were reportedly unaware that the Office had issued a formal LWEC determination. Accordingly, the Office sent them additional copies of the December 5, 2007 decision.

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[3] The Office had previously advised appellant that it considered the position suitable.

[4] Appellant's then-current weekly pay rate met or exceeded the then-current wages of his date-of-injury position.

[5] The Office explained that modification was unwarranted unless there was a material change in the nature and extent of the injury-related condition, the employee had been retrained or otherwise vocationally rehabilitated or the original determination was erroneous.

The relevant medical evidence consisted of treatment records from Dr. David J. Miller, a family practitioner. During the period August 27, 2008 through June 30, 2009, Dr. Miller saw appellant on at least eight occasions. He consistently diagnosed lumbosacral neuritis and lumbar disc disorder. However, Dr. Miller did not specifically address the extent of any employment-related disability.

In a decision dated July 21, 2009, the Office denied appellant's claim for wage-loss compensation beginning November 1, 2008. It explained that the previous acceptance of a recurrence was in error, and appellant failed to establish a basis for modifying the December 5, 2007 LWEC determination. The employer's inability to continue providing limited-duty work was not sufficient grounds for modification.

Appellant's counsel requested a review of the written record. He argued that appellant should be entitled to wage-loss compensation based on the employer's October 31, 2008 withdrawal of limited-duty work. Appellant also submitted additional treatment records from Dr. Miller covering the period July 29, 2009 through February 24, 2010. He continued to diagnose lumbosacral neuritis and lumbar disc disorder, but did not otherwise address appellant's work restrictions.

By decision dated April 7, 2010, the Branch of Hearings & Review affirmed the Office's July 21, 2009 decision. The hearing representative found that appellant failed to establish a basis for modifying the December 5, 2007 LWEC determination.

LEGAL PRECEDENT

A wage-earning capacity determination is a finding that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages.[6] Actual wages earned is generally the best measure of wage-earning capacity.[7] In the absence of evidence showing that actual earnings do not fairly and reasonably represent the injured employee's wage-earning capacity, such earnings must be accepted as representative of the individual's wage-earning capacity.[8] A determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity should be made only after an employee has worked in a given position for more than 60 days.[9]

Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.[10] Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a

[6] 5 U.S.C. § 8115(a) (2006); *see Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

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

[8] *Id.*

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (October 2009).

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

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 erroneous.[11] The burden of proof is on the party seeking modification of the wage-earning capacity determination.[12]

A recurrence of disability includes an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his work-related injury or illness is withdrawn -- except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force (RIF).[13] Absent a formal wage-earning capacity determination and assuming the position was not withdrawn for cause or because of a RIF, the employee would be entitled to compensation based upon a showing of continuing injury-related disability for regular duty.[14] But when a formal wage-earning capacity determination is in place, the subsequent withdrawal of a light-duty assignment is not treated like a recurrence of disability.[15] Under those particular circumstances, the Office shall review the claim for additional compensation as a request for modification of the wage-earning capacity determination and apply the above-noted criteria in determining whether modification is warranted.[16]

The Office may accept a limited period of disability without modifying an existing wage-earning capacity determination.[17] This is appropriate where there is a demonstrated temporary worsening of a medical condition that is of insufficient duration and severity to warrant modification of a wage-earning capacity determination.[18] However, this narrow exception does not apply to a situation where there is a wage-earning capacity determination in place and the employee claims additional compensation due to the withdrawal of light-duty work.[19]

ANALYSIS

Due to residuals of his June 2, 2005 employment injury, appellant was unable to resume his date-of-injury duties as a full-time rural carrier. On May 8, 2007 he resumed work as a full-time modified rural carrier. After performing this limited-duty assignment for more than six months, the Office issued a decision on December 5, 2007 finding that appellant's modified rural carrier position fairly and reasonably represented his wage-earning capacity. At the conclusion

[11] *Tamra McCauley*, 51 ECAB 375, 377 (2000).

[12] *Id.*

[13] 20 C.F.R. § 10.5(x).

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.7(a)(4) (October 2009).

[15] *Id.* at Chapter 2.1500.7(a)(5).

[16] *Id.*; *K.R.*, Docket No. 09-415 (issued February 24, 2010); *K.R.*, Docket No. 09-28 (issued September 16, 2009).

[17] *See Katherine T. Kreger*, *supra* note 10.

[18] *Id.*

[19] *K.R.*, Docket No. 09-415, *supra* note 16; *K.H.*, Docket No. 08-2392 (issued April 21, 2009).

of appellant's shift on October 31, 2008, the employer withdrew his limited-duty assignment as a modified rural carrier. Appellant did not receive another assignment within his medical restrictions. He subsequently requested wage-loss compensation beginning November 1, 2008, which the Office ultimately denied.

On appeal, counsel correctly noted that under certain circumstances the withdrawal of a limited-duty assignment may constitute grounds for a recurrence of disability. Where an LWEC determination is already in place, a similar withdrawal of a limited-duty assignment does not result in the payment of compensation benefits absent a showing that at least one of the grounds for an LWEC modification has been satisfied. Counsel argued that the law is contradictory because it treats similarly situated employees differently merely because in the latter instance "the [Office] took the initiative to issue a formal LWEC determination." In essence, counsel argued that the fortuitous issuance of a LWEC determination should not preclude payment of wage-loss compensation where the employer has withdrawn a limited-duty assignment.

Counsel mistakenly presumes that all limited-duty assignments that have been held for more than 60 days are equally susceptible to a formal wage-earning capacity determination. Moreover, contrary to counsel's argument the issuance of a LWEC determination is not merely based on the "initiative" exhibited by the individual claims examiner. Not all limited-duty assignments will be found to fairly and reasonably represent an injured employee's wage-earning capacity. Factors to be considered in determining if a position fairly and reasonably represents the injured employee's wage-earning capacity include: (1) whether the kind of appointment and tour of duty are at least equivalent to those of the date-of-injury job; (2) whether the job is part-time or sporadic in nature; (3) whether the job is seasonal in an area where year-round employment is available; and (4) whether the job is temporary where the claimant's previous job was permanent.[20] Further, the Board has held that a makeshift or odd-lot position designed for a claimants needs will not be considered suitable.[21] Thus, the mere fact that two employees have both worked limited-duty assignments for more than 60 days does not, by itself, indicate that they are similarly situated for purposes of determining their respective loss of wage-earning capacity. Counsel's disparate treatment argument is unpersuasive. While the issuance of a LWEC determination may appear to counsel to be based on happenstance, the process of rendering such a decision is neither ministerial nor arbitrary.

On appeal, counsel did not specifically challenge the Office's finding that appellant did not establish a basis for modifying the December 5, 2007 LWEC determination. There is no evidence that appellant has been retrained or otherwise vocationally rehabilitated. Additionally, counsel has not presented evidence or argument that the original LWEC determination was erroneous as the position did not fairly and reasonably represent appellant's wage-earning capacity, at the time the LWEC determination was made. As to the third and final basis for establishing modification, appellant has not demonstrated a material change in the nature and extent of the injury-related condition. The treatment records from Dr. Miller covering the period August 2008 through February 2010 did not establish a material change in condition.

[20] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a).

[21] *A.J.*, Docket No. 10-619 (issued June 29, 2010).

Dr. Miller's diagnoses remained consistent over this time frame, and he did not otherwise address appellant's ability to perform either his regular duties or his limited-duty assignment as a modified rural carrier. Accordingly, appellant failed to establish a basis for modifying the Office's December 5, 2007 LWEC determination. Compensation for LWEC is based upon loss of one's capacity to earn, not on wages actually lost.[22] Under the current circumstances, the mere fact that the employer was either unable or unwilling to continue providing limited-duty work on or after November 1, 2008 is not a sufficient basis for awarding wage-loss compensation.

Appellant did not meet his burden of proof to modify the December 5, 2007 wage-earning capacity determination.[23] Absent a showing that the wage-earning capacity determination should be modified, appellant has no disability under the Federal Employees' Compensation Act. Accordingly, he is not entitled to wage-loss compensation due to the October 31, 2008 withdrawal of his limited-duty assignment.[24]

CONCLUSION

Appellant failed to establish a basis for modifying the December 5, 2007 loss of wage-earning capacity determination.

[22] *D.S.*, 58 ECAB 392, 395 (2007).

[23] *Tamra McCauley*, *supra* note 11.

[24] *K.R.*, Docket No. 09-415, *supra* note 16.

ORDER

IT IS HEREBY ORDERED THAT the April 7, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 20, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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