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JACK H. MASON, Appellant)	
)	
and)	Docket No. 05-815
)	Issued: July 22, 2005
DEPARTMENT OF THE ARMY, McALESTER)	
ARMY AMMUNITION PLANT, McAlester, OK,)	
Employer)	
)	

Case Submitted on the Record

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

On February 23, 2005 appellant filed a timely appeal of the January 18, 2005 merit decision of the Office of Workers' Compensation Programs, which denied a claim for recurrence of disability. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

The issue is whether the Office properly determined that the issue presented was a recurrence of disability.

Appellant, a 77-year-old former locomotive engineer, sustained a traumatic injury on August 29, 1974 when he slipped while climbing onto an engine. The Office initially accepted the claim for a torn muscle of the right arm. The claim was later expanded to include degenerative disc at C5-6 with anterior cervical fusion performed on March 31, 1976 and, in

1980, the Office accepted tardy left ulnar palsy. Appellant received appropriate compensation payments for total disability on the periodic rolls. On August 10, 1992 he returned to work in a part-time, limited-duty capacity as a mobile equipment dispatcher. Appellant worked three hours per day, four days a week.

In a decision dated October 26, 1992, the Office adjusted appellant's wage-loss compensation based on his actual weekly earnings of \$105.48 as a part-time, mobile equipment dispatcher. The Office reduced his wage-loss compensation payments finding that his actual earnings fairly and reasonably represented his wage-earning capacity. The decision was effective August 10, 1992.

Due to a reduction-in-force (RIF), the employing establishment relieved appellant of his duties effective September 26, 1998. The Office continued to pay appellant wage-loss compensation based on the October 26, 1992 loss of wage-earning capacity determination.

On December 6, 2004 appellant filed a notice of recurrence of disability (Form CA-2a). He did not identify a specific date of recurrence of disability. Appellant stated that he returned to part-time, light-duty work in 1992 and he was laid off in 1998. He also indicated that his condition had worsened since his 1998 lay off. Appellant questioned why the Office continued to deduct 48 hours of pay from his continuing compensation payments despite an Office physician's finding that he was not employable. He explained that for the past four years an Office's physician submitted annual reports indicating that appellant was not employable.

Appellant submitted five recent reports from Dr. Fred M. Ruefer, a Board-certified orthopedic surgeon, who initially performed a second opinion evaluation at the Office's request in February 1996. He examined appellant a second time on October 15, 1996 and for the next eight years became the attending physician. While Dr. Ruefer initially found appellant capable of working on a part-time basis, in a November 2, 2000 report, he first expressed the opinion that appellant was unable to work and not likely to return to work in the foreseeable future. Dr. Ruefer reiterated that appellant was unemployable in reports dated September 28 and December 10, 2001, October 2, 2002, October 7, 2003 and October 14, 2004.¹ He diagnosed residual cervical radiculopathy and neck pain secondary to cervical surgery. Dr. Ruefer also diagnosed a severely frozen shoulder on the right side.

By decision dated January 18, 2005, the Office denied that appellant sustained a recurrence of disability.

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

¹ In his December 10, 2001 report, Dr. Ruefer found that appellant could not perform his former duties as a dispatcher.

wages. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.²

The Office's procedure manual provides that, if 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.³ The procedure manual further indicates that under these circumstances, "the [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal [loss of wage-earning capacity] decision."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

ANALYSIS

The Office issued a formal loss of wage-earning capacity determination on October 26, 1992 based on appellant's actual earnings as a part-time mobile equipment dispatcher. Appellant continued to work part time as a mobile equipment dispatcher until September 26, 1998, when the employing establishment discharged him due to a RIF. Although appellant lost 12 hours of weekly pay as a result of the September 1998 RIF, this fact alone did not warrant an adjustment to his wage-loss compensation.⁷ The Office continued to compensate appellant based on the October 26, 1992 loss of wage-earning capacity determination, which remained in effect at the time appellant filed his December 6, 2004 notice of recurrence. Appellant questioned the amount of compensation he received and submitted the reports of Dr. Ruefer to support his contention that he is totally disabled.

In its January 18, 2005 decision, the Office did not consider whether appellant established a basis for modification of the October 26, 1992 loss of wage-earning capacity determination. Rather, the Office adjudicated the claim based on appellant's filing of a recurrence of disability form. The Office did not reference the October 26, 1992 loss of wage-earning capacity determination. The Office's procedure manual and Board precedent provides

² See *Katherine T. Kreger*, 55 ECAB ____ (Docket No. 03-1765, issued August 13, 2004).

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

⁴ *Id.*

⁵ *Tamra McCauley*, 51 ECAB 375, 377 (2000).

⁶ *Id.*

⁷ A recurrence of disability means, among other things, an inability to work when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her 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). 20 C.F.R. § 10.5(x) (1999).

that, when a formal wage-earning capacity determination has been issued and appellant submits evidence with respect to disability for work, the Office must evaluate the evidence to determine if modification of the wage-earning capacity decision is warranted.⁸ The Office should have considered whether the evidence submitted by appellant established a basis for modification of the October 26, 1992 wage-earning capacity determination.

CONCLUSION

The Board finds that appellant's December 6, 2004 notice of recurrence of disability and the medical evidence submitted raise the issue of whether modification of the Office's October 26, 1992 wage-earning capacity determination is warranted. As the Office did not properly adjudicate this issue, the case will be remanded for an appropriate decision.

ORDER

IT IS HEREBY ORDERED THAT the January 18, 2005 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: July 22, 2005
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

⁸ *Katherine T. Kreger*, *supra* note 2; *Sharon C. Clement*, 55 ECAB ____ (Docket No. 01-2135, issued May 18, 2004).