

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

JAMES D. NARDO, Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,
Phoenix, AZ, Employer

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**Docket No. 04-2209
Issued: May 5, 2005**

Appearances:

*James D. Nardo, pro se
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On September 8, 2004 the Board received appellant's appeal postmarked September 4, 2004 from an August 16, 2004 nonmerit decision of the Office of Workers' Compensation Programs denying reconsideration of a September 5, 2003 merit decision finding that appellant had not established a recurrence of total disability and a June 15, 2004 merit decision terminating appellant's benefits on the basis that he refused an offer of suitable work. Pursuant to 20 C.F.R §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the issues presented by the September 5, 2003 and June 15, 2004 decisions and over the Office's August 16, 2004 decision denying merit review of appellant's recurrence claim.

ISSUES

The issues are: (1) whether the Office properly determined that the issue presented was a recurrence of disability from May 25 through November 8, 2002; (2) whether the Office met its burden of proof to terminate appellant's compensation benefits effective June 15, 2004 on the grounds that he refused an offer of suitable work; and (3) whether the Office's refusal to reopen appellant's case for further consideration of the merits under 5 U.S.C. § 8128 constituted an abuse of discretion.

FACTUAL HISTORY

On January 17, 2001 appellant, then a 55-year-old rural carrier, injured his neck and back while untangling snow chains on his postal vehicle. The Office accepted his claim for cervical strain and thoracic/trapezius strain. Appellant initially worked light duty from January 17, 2001 and stopped work on September 7, 2001. The Office expanded appellant's claim to include a cervical disc injury and approved cervical surgery and an osteotech allograft implant with fusion and acufex plate stabilization at C4-5, C5-6 and C6-7 which appellant underwent on January 10, 2002. The Office paid appropriate benefits.

On March 5, 2002 appellant returned to a full-time modified letter carrier position.¹ By decision dated May 23, 2002, the Office found that appellant's modified letter carrier position effective March 5, 2002 fairly and reasonably represented his wage-earning capacity. As appellant's actual wages met or exceeded the wages of the job held when injured, the Office found that no loss of wages had occurred.²

Appellant stopped working on May 24, 2002 and, on June 3, 2002, filed a recurrence of disability claim and alleged that on May 24, 2002 he sustained a recurrence of total disability due to his accepted January 17, 2001 employment injury. On June 17, 2002 the Office wrote appellant requesting additional information and medical evidence to support his claim for recurrence of temporary total disability on May 24, 2002. In a July 30, 2002 letter, appellant stated that he was in constant pain, the pain came from the location of the surgery and the duties of the modified letter carrier position elevated the pain to an unbearable level.

The record reflects that appellant underwent a functional capacity evaluation (FCE) on June 7, 2002 which indicated that he could not perform the essential functions of his date-of-injury letter carrier position, but that he was able to perform medium physical demand work for eight hours a day. The FCE also noted that appellant was able to perform modified or light duty dependent upon activities which met his physical capabilities.

The Office proceeded to develop the medical evidence by referring appellant for a second opinion evaluation with Dr. Boris Stojic, a Board-certified orthopedist. In a report dated July 9, 2002, Dr. Stojic obtained the medical history, reviewed appellant's medical records and set forth his examination findings. He diagnosed status post anterior cervical microdiscectomy, decompression of the spinal cord and foramina, and fusion C4 through C7 with osteotech allograft and acufex plate stabilization C4-7. Based on subjective complaints and objective findings, Dr. Stojic opined that appellant continued to have residuals of the injury. He noted that while no significant neurological deficit was appreciated, the most recent electrodiagnostic studies revealed evidence of chronic bilateral C6 radiculopathies, with some improvement on the

¹ The job duties of this position were: sorting box mail and nixie mail; answering the telephone; places copies of repeat notices to customers regarding undeliverable items into a file; processes vacation hold mail, address forward mail; purges records; accepts money, keys and undeliverable accountable mail from employees; performs quality control checks; performs mail address audits; maintains, files and records box rentals; edits AMS sheet maintenance; corrects and designs maps; and performs data input on computer. The position also contained physical restrictions.

² As this decision was issued more than one year prior to the date of appellant's appeal to the Board on September 4, 2004, the Board may not review this decision on appeal. 20 C.F.R. § 501.2(c).

left in the C7 distribution, and with no evidence of acute changes on needle examination. Evidence of multilevel severe degenerative changes of the cervical spine involving the C4 through C6-7 level were noted and the August 31, 2001 magnetic resonance imaging (MRI) scan revealed mild spinal canal narrowing and mild bilateral neural foraminal narrowing at the C3-4 level. Dr. Stojic recommended that a cervical computer tomography (CT) scan be repeated at the C3-4 level. He opined that appellant was capable of gainful employment and there was no medical reason why he could not have worked from May 24, 2002 onwards on the available modified duty.

On July 15, 2002 Dr. William White, a Board-certified neurosurgeon and appellant's treating physician, noted appellant's symptoms and that appellant reported being off work as his pain in the shoulder and arm were exacerbated by looking down at his desk in the sitting position. He stated that the July 1, 2002 electromyography (EMG) and nerve conduction study demonstrated electrical evidence for bilateral C6 distribution radiculopathies and recommended further diagnostic testing. Dr. White stated that appellant had a disability form to fill out and explained that appellant did not have any objective findings to warrant an off-work status. He further noted that he had not taken appellant off work.

On July 23, 2002 the Office forwarded a copy of Dr. Stojic's report to Dr. White and requested that he provide a rationalized discussion as to why appellant was being kept off work. In a July 30, 2002 report of telephone call, Dr. White's staff indicated that Dr. White did not put appellant on temporary total disability from May 2002 and that appellant was capable of working light duty. The staff member noted that appellant was apparently being kept off work by his primary care physician. The Office requested that Dr. White review Dr. Stojic's report as well as the recently ordered MRI and CT scans and prepare a comprehensive report on the issue of appellant's ability to return to work.

In an August 20, 2002 report, Dr. White's certified nurse, Suzanne Kelly, provided a dictation of a telephone call she had with appellant regarding his concerns that his pain was increased with any kind of forward bending of his head and that this created a difficult situation since his current work requires sitting at a desk with use of his neck in that position. The report noted that Dr. White had not yet acquired the cervical spinal x-rays for review.

By decision dated September 4, 2002, the Office denied appellant's claim for a recurrence of temporary total disability commencing May 24, 2002 and continuing.

In a letter dated September 12, 2002, appellant disagreed with the September 4, 2002 decision and requested an oral hearing before an Office representative, which was held on February 19, 2003. Appellant submitted copies of previously submitted evidence along with new evidence that included: copies of an August 25, 2002 cervical x-ray report, which indicated fractures of the C4 screws with no movement from C4 to C7 on flexion and extension despite the fractured fixation screws in C4, moderate degenerative disc disease at C3-4, bilateral degenerative disc disease at C3-4 and moderate diffuse bilateral degenerative joint disease from C4 through C7; and copies of physical therapy reports, and office notes from Dr. White noting telephone conversations with appellant.

In a September 10, 2002 office note, Dr. White reported a telephone call he had with appellant in which the following issues were addressed with appellant: making his work space ergonomically correct to reduce pain; having an ear, nose and throat consultation; and undergoing psychological testing and evaluation to address pain management. In an October 22, 2002 letter to the Office, Dr. White requested that appellant be accommodated in his job with a headset for telephone use, an easel or other measures to elevate work to eye level, heating pads or ice packs to use on a per needed basis possibly every 30 to 45 minutes for pain.

In a January 27, 2003 report, Dr. White advised that appellant's symptoms which were suggestive of symptomatic pseudoarthrosis were the fracture of the two screws, the pain with motion and improvement of pain with the cervical collar. He recommended that objective studies be repeated. Dr. White also opined that, as appellant had continuous problems since before his surgery and since the original injury, appellant's ongoing problems were related to his work injury of January 17, 2001. A duty status report dated January 27, 2003 containing appellant's work restrictions was also submitted along with a copy of a January 27, 2003 x-ray of the cervical spine with flexion and extension views.

The record reflects that appellant returned to his modified position with ergonomic accommodations on or about November 9, 2002. The Office expanded appellant's claim to include displacement of cervical intervertebral disc without myelopathy and spinal stenosis of cervical region.

In a December 10, 2002 letter, appellant advised that he did not have the ergonomic accommodations during the claimed period May 24 through November 8, 2002. He also noted that he filed a new claim, case number 132063256, which was denied.³ A copy of an occupational disease claim dated August 25, 2002 in which appellant attributes his work stoppage of May 25, 2002 to the duties of the modified letter carrier position was also of record.⁴

On April 1, 2003 appellant underwent a CT spine cervical without contrast and on April 28, 2003 he had an EMG. Based on the results of those diagnostic tests and his examination findings, Dr. White recommended that appellant undergo another cervical surgery. Appellant stopped work on April 1, 2003.

In a May 7, 2003 letter, Dr. White explained that appellant continued to experience significant pain in the neck and shoulder blade area following his January 10, 2002 surgery, even though he returned to light duty, and that appellant had related that he was unable to work in May 2002 as looking down at his work while sitting at his desk exacerbated his neck and arm pain. Dr. White noted that, despite repeated attempts to obtain x-rays done on August 18, 2002, he did not receive such films until September 18, 2002, at which time ergonomically correct workplace modifications were requested. He noted that the workplace modifications were again

³ The record contains one page of an Office decision dated December 5, 2002 denying fact of injury for a January 11, 2002 injury.

⁴ It is not clear from the record whether appellant's occupational disease claim filed August 25, 2002 was developed by the Office.

requested on October 22, 2002 and advised that appellant was able to return to work in November 2002 after such ergonomic modifications were made available.

By decision dated May 15, 2003, an Office hearing representative affirmed the September 4, 2002 decision. The hearing representative also instructed the Office to further develop Dr. White's surgical request for another cervical discectomy. The Office subsequently approved the surgical request and appellant underwent another cervical discectomy on June 5, 2003. Appropriate compensation was paid from April 1, 2003, the date appellant stopped work.

In a letter dated July 9, 2003, appellant requested reconsideration of the May 15, 2003 decision. He submitted previously submitted copies of diagnostic test reports and reports from Dr. White along with new reports from Dr. White, which reported his progress. In a June 27, 2003 report, Dr. White advised that the diagnostic testing revealed that level C4-5, which was included in the original surgery, did not fuse correctly and that this had caused the pain appellant had reported. He opined, therefore, that appellant should be compensated for the period May 25 to November 8, 2002 since the workplace accommodations were not made until November 2002.

By decision dated September 5, 2003, the Office denied modification of the denial of appellant's recurrence claim for the period May 25 to November 8, 2002.

On November 24, 2003 the employing establishment sent Dr. White a copy of a modified letter carrier job offer, which required appellant to answer telephones, perform general clerical duties and to greet customers. The position was noted to be an indoor sedentary assignment, with standing and walking required only to tolerance, with frequent change of positions. By his signature dated December 1, 2003, Dr. White advised that the proposed duties were in compliance with appellant's physical abilities and, pending a January 2004 follow-up evaluation, appellant should be able to return to work on or about January 15, 2004. Dr. White also advised appellant on December 1, 2003 that the proposed position was within his restrictions.

In a January 30, 2004 report, Dr. White noted that appellant continued to experience neck pain and had filed for disability retirement, which he favored. As no opinion was noted regarding the offered position, the employing establishment sent Dr. White a letter dated March 4, 2004, whereby it requested that Dr. White reevaluate the duties and physical requirements of the offered position. The employing establishment also confirmed that this position remained available to appellant.

In a letter dated April 12, 2004, the Office determined that the offered position was suitable work and informed appellant that he had 30 days to accept the position or offer his reasons for refusal.

On April 17, 2004 Dr. White opined that appellant was physically capable of performing the duties of the modified job offer. In a letter dated April 27, 2004, appellant stated that his application for disability retirement had been approved by Office of Personnel Management (OPM) and submitted a copy of an April 22, 2004 letter from OPM's Office of Retirement Programs which was noted that his annuity would commence February 7, 2004. In a letter dated May 27, 2004, the Office informed appellant that his reasons for refusal were not acceptable and

allowed him an additional 15 days to accept the position. Appellant did not respond to the Office's May 27, 2004 letter. By decision dated June 15, 2004, the Office terminated appellant's compensation benefits effective June 15, 2004 on the grounds that he refused a suitable work position.

On June 19, 2004 appellant requested reconsideration of the Office's September 5, 2003 decision and presented his reasons as to why he thought he was totally disabled due to his accepted injury during the period claimed from May 25 to November 8, 2002. Appellant submitted copies of previously submitted medical reports from Dr. White as well as diagnostic tests. Of record subsequent to the last merit decision of September 5, 2003 were copies of other medical reports, office notes and diagnostic testing which did not address the issue of whether appellant sustained a recurrence of disability from May 25 to November 5, 2002.

By decision dated August 16, 2004, the Office denied appellant's request for reconsideration on the grounds that the evidence appellant submitted was of a cumulative, repetitious, irrelevant and immaterial nature.

LEGAL PRECEDENT -- ISSUE 1

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.⁵

The Office's procedural manual provides in relevant part:

"9. *Claims Actions after Reemployment.* Cases where a claimant stops work after reemployment may require further action, depending on whether the rating has been completed at the time the work stoppage occurs.

- a. *Formal Loss of Wage-Earning Capacity Decision Issued.* 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. In this instance the CE [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity decision. If the claimant retires, the CE should offer an election between [Federal Employees' Compensation Act] and OPM benefits if appropriate. A penalty decision under 5 U.S.C. § 8106(c) should not be issued."⁶

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

⁵ See *Sharon C. Clement*, 55 ECAB ____ (Docket No. 01-2135, issued May 18, 2004).

⁶ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9a (December 1995).

the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.⁷ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁸

ANALYSIS -- ISSUE 1

In this case, appellant filed a June 3, 2002 claim alleging a recurrence of disability commencing May 24, 2002. The record reflects that he returned to his modified position on or about November 9, 2002 once ergonomic accommodations had been provided. Although the Office adjudicated the issue as to whether appellant had established a recurrence of disability from May 24 through November 8, 2002, under the circumstances of this case, the Board finds that the issue presented was whether the May 23, 2002 wage-earning capacity determination should be modified.

According to the evidence of record, appellant returned to his full-time modified letter carrier position on March 5, 2002 after his January 10, 2002 cervical surgery. He stopped working in such position on May 24, 2002 claiming that his neck and arm pain increased with any kind of forward bending of his head and that he could not work as his job required sitting at a desk with his neck in that position. The attending physician, Dr. White, indicated in a May 7, 2003 letter that he was unable to obtain appellant's August 18, 2002 cervical x-ray films until September 18, 2002, at which time he requested that ergonomic accommodations be made available. He additionally stated that appellant was able to return to work in November 2002 after such ergonomic modifications were made available. In a June 27, 2003 report, Dr. White advised that level C4-5, which was included in the original surgery, did not fuse correctly and that this was what caused the pain appellant had reported during his claimed work stoppage from May 25 to November 8, 2002. It is clear that the claim in this case was that appellant could not work in the full-time modified letter carrier position, the position the Office determined had represented his wage-earning capacity, without any ergonomic accommodations. The Board has held that, when a 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 wage-earning capacity is warranted.⁹

As noted above, the Office's procedure manual directs the claims examiner to consider the criteria for modification when the claimant requests resumption of compensation for "total wage loss." This section of the procedure manual covers the situation when a claimant has stopped working, but the principle is equally applicable to a claim of increased disability. If there is a claim for increased disability that would prevent a claimant from performing the position that was the basis for a wage-earning capacity decision, then clearly there is an issue of whether modification is appropriate. In this case, appellant submitted evidence of increased disability that prevented him from working in the full-time modified letter carrier position

⁷ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

⁸ *Id.*

⁹ See *Sharon C. Clement*, *supra* note 5.

without ergonomic accommodations. The Board finds that the Office should have considered the issue of modification of the wage-earning capacity determination.¹⁰

LEGAL PRECEDENT -- ISSUE 2

Section 8106(c) of the Act states that a partially disabled employee who refuses to seek suitable work, or refuses or neglects to work after suitable work is offered to, procured by, or secured for her is not entitled to compensation.¹¹ The Office has authority under this section to terminate compensation for any partially disabled employee who refuses or neglects suitable work when it is offered. Before compensation can be terminated, however, the Office has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work, and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position. In other words, to justify termination of compensation under 5 U.S.C. § 8106(c), which is a penalty provision, the Office has the burden of showing that the work offered to and refused or neglected by appellant was suitable.¹²

Once the wage-earning capacity of an injured employee is properly determined, it remains undisturbed regardless of actual earnings or lack of earnings.¹³ A modification of such a 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.¹⁴ The burden of proof is on the party attempting to show a change so as to affect the employee's capacity to earn wages in the job determined to represent her earning capacity. Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn and not on actual wages lost.¹⁵

ANALYSIS -- ISSUE 2

In this case, appellant did not return to work following his June 5, 2003 surgery but rather applied for disability retirement which was approved by OPM on April 22, 2004. In a June 15, 2004 decision, the Office then terminated appellant's compensation benefits on the grounds that he refused an offer of suitable work under section 8106(c).¹⁶ Prior to terminating appellant's compensation on June 15, 2004, the Office issued a formal loss of wage-earning capacity

¹⁰ See *Katherine T. Kreger*, 55 ECAB ____ (Docket No. 03-1765, issued August 13, 2004). In light of the disposition of this issue, the Board finds that the third issue in this case is rendered moot.

¹¹ 5 U.S.C. § 8106(c).

¹² *Sharon L. Dean*, 56 ECAB ____ (Docket No. 04-1707, issued December 9, 2004).

¹³ *Roy Mathew Lyon*, 27 ECAB 186, 190-98 (1975).

¹⁴ *Elmer Strong*, 17 ECAB 226, 228 (1965).

¹⁵ *Ronald M. Yokota*, 33 ECAB 1629, 1632 (1982).

¹⁶ 5 U.S.C. § 8106(c).

decision on May 23, 2002 in which it determined that the eight-hour-a-day position of modified letter carrier fairly and reasonably represented his wage-earning capacity.¹⁷ However, the Office did not follow the applicable case law and procedures regarding appellant's wage-earning capacity prior to terminating his compensation. The Office did not address its prior formal loss of wage-earning capacity decision or otherwise formally modify this loss of wage-earning capacity decision which was in place at the time it made its suitable work determination on June 15, 2004. As noted in issue one, the loss of wage-earning capacity decision which remains in place is determinative of appellant's capacity to perform work activity. As the Office has not appropriately addressed nor modified appellant's formal loss of wage-earning capacity decision dated May 23, 2002, this decision remains in effect and represents appellant's physical and vocational abilities. As the Office neither modified the May 23, 2002 formal loss of wage-earning capacity decision to allow for additional physical requirements or vocational training nor made any findings which determined that the position offered by the employing establishment was equivalent to the position which formed the basis of the loss of wage-earning capacity decision, termination of appellant's compensation benefits under section 8106(c) of the Act following the 2002 loss of wage-earning capacity decision was inappropriate.

Moreover, the Office did not act in accordance with its procedures which specifically address cases where a claimant stops work after reemployment. In the present case, the Office issued a formal loss of wage-earning capacity decision on May 23, 2002 and the record suggests that appellant's disability retirement had been approved April 22, 2004. Office procedures specifically provide that a decision effectuating a termination of compensation based on refusal of an offer of suitable work should not be issued in a case in which a claimant has retired following a formal loss of wage-earning capacity determination.¹⁸ As the record before the Board suggests that appellant retired after April 22, 2004, the Office improperly terminated his compensation under section 8106(c).¹⁹ Furthermore, Board precedent establishes that a formal loss of wage-earning capacity decision remains undisturbed unless appropriately modified. As the Office has not appropriately modified appellant's formal loss of wage-earning capacity decision, the suitable work termination is not appropriate.²⁰

For these reasons, the Office improperly terminated appellant's compensation benefits effective June 15, 2004 on the grounds that he refused an offer of suitable work and, therefore, the June 15, 2004 decision is reversed.

¹⁷ This position was found to reflect a no loss in wage-earning capacity. The Board notes that the above-described criteria for modifying formal loss of wage-earning capacity decisions remains the same regardless of whether a given claimant continues to work or stops work after the issuance of a formal loss of wage-earning capacity decision.

¹⁸ *Sharon C. Clement, supra* note 5.

¹⁹ *Id.*

²⁰ *Id.*

CONCLUSION

The Board finds that appellant's claim for total disability compensation for the period May 25 through November 8, 2002 raised the issue of whether a modification of the May 23, 2002 wage-earning capacity decision was warranted and the case must be remanded for an appropriate decision on this issue. The Board also finds that it was inappropriate for the Office to terminate appellant's compensation benefits under section 8106(c) of the Act as the Office neither modified the May 23, 2002 formal loss of wage-earning capacity decision nor made any findings which determined that the position offered by the employing establishment was equivalent to the position which originally formed the basis of the May 23, 2002 decision and this decision must be reversed.

ORDER

IT IS HEREBY ORDERED THAT the September 5 and August 15, 2003 decisions of the Office of Workers' Compensation Programs are set aside and the case remanded for further action consistent with this decision of the Board. The June 15, 2004 decision of the Office is reversed.

Issued: May 5, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member