

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

LARRY F. NICHOLS, Appellant

and

**U.S. POSTAL SERVICE, GENERAL MAIL
FACILITY, Detroit, MI, Employer**

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**Docket No. 06-144
Issued: April 13, 2006**

Appearances:
Larry F. Nichols, pro se
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 October 27, 2005 appellant filed a timely appeal of the Office of Workers' Compensation Programs' decisions dated June 15 and October 11, 2005, denying modification of its finding that he did not establish a recurrence of disability as of September 2, 2001. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction to review the merits of the case.

ISSUE

The issue is whether the Office properly determined that the issue presented was whether appellant established a recurrence of disability as of September 2, 2001.

FACTUAL HISTORY

On December 29, 1983 appellant filed a traumatic injury claim alleging that he sustained an injury to his back and right leg on December 27, 1983 while lifting tires.¹ The Office

¹ The record does not contain a copy of appellant's claim for traumatic injury (Form CA-1).

accepted the claim for a lumbosacral strain with right lumbosacral radiculitis, sciatica and a herniated lumbar disc and began paying compensation for appellant's total disability.

On or about August 14, 1991, appellant began working as a secondary teacher. By decision dated June 30, 1992, the Office determined that appellant's actual earnings of \$307.91 per week as a teacher fairly and reasonably represented his wage-earning capacity. The Office decreased appellant's compensation based on his actual earnings.

Appellant submitted a letter dated November 28, 2001 and a claim for a recurrence of disability,² alleging that he had been totally disabled since September 2, 2001. In a December 11, 2001 report, Dr. Mohammad Khadid, a treating physician, opined that appellant was disabled from teaching school due to persistent back and lower extremity pain. By decision dated April 4, 2002, the Office denied appellant's claim for compensation on the grounds that the evidence failed to establish that the claimed recurrence was causally related to the December 29, 1983 employment injury. In a decision dated January 28, 2003, the Board affirmed the Office's April 4, 2002 decision.³ In an April 10, 2003 decision, the Office denied appellant's request for reconsideration.

In support of a June 17, 2003 request for reconsideration, appellant submitted an April 29, 2003 report from Dr. Louis D. Zegarelli, a Board-certified osteopath specializing in orthopedic surgery, who diagnosed chronic mechanical lumbosacral pain syndrome, annular fiber tears with high probability for internal disc disruption at L4-5 and L5-S1, lumbar radicular syndrome based on a positive electromyography (EMG) study and L4-5 and L5-S1 disc protrusions. He opined that there had been a gradual worsening in appellant's condition, and that there was a direct relationship between his current condition and his December 29, 1983 employment-related injury.

By decision dated June 24, 2003, the Office denied appellant's request for reconsideration on the grounds that it was untimely and failed to present clear evidence of error. By decision dated October 15, 2003, the Board affirmed the Office's April 10, 2003 decision, but found that appellant's June 17, 2003 request was timely filed and remanded the case to the Office for consideration under the proper standard.⁴ By decision dated November 24, 2003, the Office found that the additional evidence presented was insufficient to establish that appellant had sustained a recurrence of disability beginning September 2, 2001.

Appellant made a third appeal to the Board. By decision dated August 5, 2004, the Board remanded the case to the Office for further development of the medical evidence.⁵

² In a letter dated September 10, 2001, the Office stated that it had received appellant's request for a recurrence of disability. However, the record does not contain a copy of a CA-2a form.

³ Docket No. 02-2309 (issued January 28, 2003).

⁴ Docket No. 03-1964 (issued October 15, 2003).

⁵ Docket No. 04-644 (issued August 5, 2004).

The Office referred appellant, along with the entire medical record and a statement of accepted facts, to Dr. Robert M. Chouteau, a Board-certified osteopath specializing in orthopedic surgery, for a second opinion examination. In a March 1, 2005 report, Dr. Chouteau diagnosed lumbar spondylosis with lumbar discogenic disease L4-5, L5-S1, and opined that his condition was secondary to his accepted employment injury and was permanent in nature. Based upon his examination of appellant and review of the entire medical record, Dr. Chouteau opined that appellant would have difficulty with prolonged standing, bending and stooping in his capacity as a school teacher. He indicated that appellant was “functioning at light sedentary,” and that he had been living with his condition, “even though it [hadn’t] worsened since 1983.” In an accompanying work capacity evaluation, Dr. Chouteau indicated that appellant could work for 8 hours per day with restrictions, including: standing, operating a motor vehicle, squatting and climbing for no more than 1 hour; sitting, walking, twisting, bending/stooping, kneeling, and pushing and lifting up to 10 pounds for no more than 2 hours; and reaching for no more than 4 hours.

By decision dated April 18, 2005, the Office denied modification of its previous decision. In an April 29, 2005 report, Dr. Zegarelli opined that appellant was disabled from engaging in any significant work activity due to low back pain. In a revised decision dated June 15, 2005, the Office denied appellant’s claim, finding that he had failed to establish that he was totally disabled as of September 2, 2001.

On July 6, 2005 appellant again requested reconsideration. In a June 23, 2005 report, Dr. Zegarelli opined that appellant was medically unable to work due to constant pain in his lumbar spine. After reviewing June 11, 2001 and June 10, 2003 MRI scan studies, he noted a rapid worsening of disc pathology at L4-5 and L5-S1 caused by the accepted work injury. On October 11, 2005 the Office denied modification of its prior decision, finding that the weight of medical evidence rested with the opinion of Dr. Choteau.

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.⁶

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 CE [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity.”⁷

⁶ See *Katherine T. Kreger*, 55 ECAB ____ (Docket No. 03-1765, issued August 13, 2004). See also *Sharon C. Clement*, 55 ECAB ____ (Docket No. 01-2135, issued May 18, 2004).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

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.⁸ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁹

ANALYSIS

In this case, the Office developed the evidence and determined that the issue presented was whether appellant had established a recurrence of disability on September 2, 2001. Under the circumstances of this case, however, the Board finds that the issue presented was whether the June 30, 1992 wage-earning capacity determination should be modified.

As noted, appellant returned to full-time employment as a teacher. Based upon his actual earnings as a teacher, the Office issued a formal wage-earning capacity decision on June 3, 1992. Appellant and his physicians alleged a worsening of his condition as of September 2, 2001, such that he was unable to perform the duties of his teaching position. The record reflects that appellant stopped work and did not return, alleging a change in his injury-related condition. Dr. Mohammad Khadid opined that appellant was disabled from teaching school due to persistent back and lower extremity pain. Dr. Zegarelli opined that appellant was medically unable to work due to constant pain in his lumbar spine caused by the accepted work injury. The facts of record do not indicate a timely period of disability. Rather, appellant has alleged disability as of September 2, 2001 regarding the position that the Office determined represented his wage-earning capacity. 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.¹⁰

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." 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 a disability that prevented him from working in the position on which the wage-

⁸ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

⁹ *Id.*

¹⁰ See *Katherine T. Kreger*, *supra* note 6. See also *Sharon C. Clement*, *supra* note 1. The Board notes that consideration of the modification issue does not preclude the Office from acceptance of a limited period of employment-related disability, without a formal modification of the wage-earning capacity determination. *Id.* at n.10, slip op. at 5; Cf. *Elsie L. Price*, 54 ECAB 734 (2003) (acceptance of disability for an extended period was sufficient to establish that modification of the wage-earning capacity determination was warranted).

earning capacity decision was based. The Board finds that the Office should have considered the issue of modification of the wage-earning capacity determination.¹¹

CONCLUSION

The Board finds that appellant's claim for compensation raised the issue of whether a modification of the June 30, 1992 wage-earning capacity decision was warranted and the case must be remanded for an appropriate decision on this issue.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 11 and June 15, 2005 are set aside and the case remanded for further action consistent with this decision of the Board.

Issued: April 13, 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

¹¹ The Board notes that its prior decisions in this case addressed the issue of whether appellant had established a recurrence of disability. Since the issuance of the Board's last decision in this case, on August 5, 2004, the Board established a precedent in the case of *Katherine T. Kreger*, *supra* note 6. In *Kreger*, the Board found that in cases where the Office has issued a wage-earning capacity decision and a claimant files a claim for recurrence of disability, the Office is required to treat the claim as a request for modification of the wage-earning capacity determination. In accordance with the ruling in *Kreger*, this case shall be remanded for the Office's consideration of the issue of modification of the 1992 wage-earning capacity decision.