

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GORDON LOCKWOOD and DEPARTMENT OF THE AIR FORCE,
MALMSTROM AIR FORCE BASE, MT

*Docket No. 99-485; Submitted on the Record;
Issued July 20, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant has established a recurrence of disability commencing March 12, 1998 causally related to a February 20, 1991 employment injury; and (2) whether appellant has established that a modification of his wage-earning capacity determination is warranted.

In the present case, the Office of Workers' Compensation Programs accepted that appellant, a snow removal equipment operator, sustained an L4-5 disc bulge in the performance of duty on February 20, 1991 while cleaning his work area and moving materiel. Appellant returned to a part-time position in August 1991; his employment was terminated in February 1992 and he began receiving compensation for temporary total disability. He again returned to work in a light-duty position on March 8, 1996. By decision dated June 28, 1996, the Office determined that the actual earnings fairly and reasonably represented appellant's wage-earning capacity and reduced his compensation. By decision dated January 6, 1997, the Office issued a schedule award for a six percent permanent impairment to the left leg.

In a memorandum dated February 23, 1998, the employing establishment advised appellant that the extended "pipeline" funding for his position was no longer available, and his employment would be terminated on March 12, 1998. Appellant filed a notice of recurrence of disability commencing March 12, 1998.

In a decision dated September 15, 1998, the Office denied appellant's claim for a recurrence of disability commencing March 12, 1998. The Office also noted the requirements for modifying a wage-earning capacity determination.

The Board finds that the case is not in posture for decision with respect to whether appellant has established a recurrence of disability commencing March 12, 1998.

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that light duty can be performed, the employee has the burden to establish by the weight of reliable, probative and substantial evidence a recurrence of total disability. As part of this burden of proof, the employee must show either a change in the nature and extent of the injury-related condition, or a change in the nature and extent of the light-duty requirements.¹

In this case, the Office based its decision on a review of the medical evidence, without addressing whether there had been a change in the nature and extent of the light-duty job. It is well established that, when a light-duty position is withdrawn, a claimant has established a change in the nature and extent of the light-duty requirements.² The Office's procedure manual recognizes that a recurrence of disability includes "withdrawal of a light-duty assignment made specifically to accommodate the claimant's condition due to the work injury."³

The record indicates that appellant returned to work in a "pipeline" funded job; the employment ended when the funding ceased. No evidence was presented as to the nature of the "pipeline" job in this case. The Board notes that the Office's procedure manual states that a recurrence of disability does not include a work stoppage caused by "cessation of special funding for a particular position or project (e.g., "pipeline" grants)."⁴ It does not, however, explain the basis for finding that cessation of pipeline funding is not a recurrence of disability. In a prior Board case, evidence was presented that "'pipeline funding,' in essence, was a program which allowed agencies to bring back or to reduce the number of long-term compensation recipients from their rolls and bring them back into a meaningful program, work hardening type program, to get them acclimated back into the work environment ... and to ultimately find them a full-time position with the agency."⁵

In this case, however, the record does not contain any probative evidence with respect to the "pipeline" funded position provided for appellant. The employing establishment indicated that appellant's job was a "pipeline" funded position, without further explanation. On remand, the Office should further develop the evidence and make proper findings as to the nature of appellant's job, its intended duration, funding, and other relevant information. After such development, the Office should issue an appropriate decision as to whether the cessation of the funding constituted a withdrawal of light duty that would establish a recurrence of disability.

The Board further finds that the case is not in posture for decision on the issue of whether appellant has established a modification of his wage-earning capacity determination.

¹ *Terry R. Hedman*, 38 ECAB 222 (1986).

² *See, e.g., Jackie B. Wilson*, 39 ECAB 915 (1988) (the employing establishment no longer had any work within appellant's work restrictions).

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(b)(1) (May 1997).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(b)(2) (May 1997).

⁵ *Thomas A. Harper*, Docket No. 97-314 (issued July 9, 1998).

With respect to modification of the June 28, 1996 wage-earning capacity determination, the Board has held that, 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.⁶ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁷

As the above discussion illustrates, the Office did not secure probative evidence regarding the “pipeline” funded position in this case. The Board notes that a temporary position is not appropriate for a wage-earning capacity determination.⁸ Until the record is properly developed as to the nature of appellant’s “pipeline” position, it cannot be determined whether the original wage-earning capacity determination was erroneous. After proper development of the evidence, the Office should issue an appropriate decision with respect to modification of wage-earning capacity.

The decision of the Office of Workers’ Compensation Programs dated September 15, 1998 is set aside and the case remanded to the Office for further action consistent with this decision of the Board.

Dated, Washington, DC
July 20, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member

⁶ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

⁷ *Id.*

⁸ *Pamela J. Darling*, 49 ECAB 286 (1998); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.7(a)(3) (December 1995).