



## **FACTUAL HISTORY**

On December 19, 1998 appellant, then a 46-year-old boiler mechanic, filed an occupational disease claim alleging that he developed allergic bronchopulmonary congestion and severe allergic otitis due to chemical exposure while in the performance of duty. He stated that he first realized that his condition was due to his employment on May 26, 1988. The employing establishment terminated appellant on December 2, 1988 due to his inability to perform the duties of a boiler mechanic. The Office initially denied appellant's claim on May 31, 1989. Appellant requested reconsideration and by decision dated August 11, 1989, the Office vacated the May 31, 1989 decision and accepted the claim for aggravation of bronchitis and bilateral otitis. The Office authorized the June 7, 1990 surgery, revision tympanomastoidectomy and ossicular reconstruction. The Office accepted that appellant developed an emotional condition, adjustment reaction with depressed mood, as a result of his employment injuries on March 4, 1993.

Appellant elected to receive compensation benefits on April 18, 1990. The Office referred appellant for vocational rehabilitation services on May 6, 1991. The employing establishment offered appellant a light-duty position as a motor vehicle operator on May 6, 1993. Appellant's attending physicians found that this position was suitable with additional restrictions on May 18, 1993. The employing establishment agreed to modify the duties in accordance with these restrictions, appellant accepted the position on May 28, 1993 and returned to limited duty on June 7, 1993. By decision dated October 17, 1994, the Office reduced appellant's compensation benefits based on his actual earnings as a motor vehicle operator.

The record contains treatment notes from Dr. Hunter E. Malloy, a Board-certified otolaryngologist, dating from April 1, 1999 through November 7, 1996, which do not demonstrate a change in appellant's condition.

Appellant underwent additional ear surgeries on June 13 and June 25, 1998.

In reports dated April 24 and June 25, 2001, Dr. Earl M. Armstrong, a Board-certified pulmonologist, stated that he first examined appellant in 1989 and that at that time appellant's lungs showed inspiratory crackles diffusely and a severe restriction pattern without any obstruction on pulmonary function tests. He found that appellant's total lung capacity remained reduced to 53 percent of normal. Dr. Armstrong stated that appellant could not return to his date-of-injury position, but that he could continue working as a motor vehicle operator. In the addendum, he indicated that appellant's pulmonary function tests from 1989 through 2000 continued to document persistent restrictions to normal function of his lungs. Dr. Armstrong concluded that appellant had not suffered a recurrence, but a persistence of his work-related condition and that this condition had not improved since 1989. On December 2, 2002 he indicated that appellant could continue to work as a driver full time and that appellant's condition had not changed.

In a letter dated November 18, 2002, the employing establishment informed appellant that his position would be eliminated on January 17, 2003 due to a reduction-in-force (RIF). The employing establishment stated that reductions in the Engineering Division operations were in response to budget constraints and some positions would be eliminated to reduce employee totals

in encumbered positions. Appellant filed a notice of recurrence on March 27, 2003 alleging that he sustained a recurrence of total disability on January 17, 2003 due to his May 26, 1988 employment injury. Appellant stated that his condition had worsened and that he was under continuous medical treatment.

The Office requested additional factual and medical evidence relating to this claim on May 9, 2003. Appellant did not respond and the Office denied his claim by decision dated June 16, 2003. The Office found that appellant had not established a recurrence of disability as he stopped work due to a RIF. The Office further found that appellant had not submitted evidence supporting a modification of his wage-earning capacity determination.

Appellant, through his attorney, requested an oral hearing on June 17, 2003. Appellant submitted a factual statement noting that he believed his current condition and disability were due to his accepted employment injuries as those conditions were permanent. He also stated that his limited-duty position as a motor vehicle operator had not impacted his employment-related conditions. Appellant stated, "My condition did not change." He stated that he would have continued to work as a motor vehicle operator, if not for the RIF. Appellant also submitted a deposition describing his exposures as a boiler mechanic. The record also includes a deposition from Melvin Lee Adams, a former building engineer, boiler mechanic and shift engineer at the employing establishment addressing chemical exposures.

On February 4, 2003 Dr. Richard L. Lipsey, a toxicologist, discussed the consequences of exposure to Apexior 3, to which appellant alleged he was exposed in the performance of his federal duties as a boiler mechanic, and noted that the employing establishment failed to provide appellant with adequate safety devices. He stated that coal tar pitch derivatives were known to cause injury to many parts of the human body including eyes, lungs and skin. Dr. Lipsey opined that appellant's symptoms were causally related to his chronic exposure to high levels of toxic chemicals while working at the employing establishment.

Dr. Peter Berman, a Board-certified internist, completed a report on August 13, 2003 and opined that appellant was exposed to asphalt and cold tar derivatives, solvents, lead, paint and friable asbestos. He stated:

"Prolonged exposure to any irritants can inflame nasal mucosa and lead to persistent problems with bronchitis, sinusitis, rhinitis and inflammation of many parts of the respiratory tree, including the ear and mastoid. [Appellant's] medical records certainly indicate with a degree of medical certainty that his exposure to these products being the boilermaker business and maintenance would have exposed him and caused the eventual complications related to this exposure."

Dr. Berman opined that appellant's ear problems were exacerbated by his years of chemical exposure. He concluded that appellant was disabled from gainful employment due to hearing loss, nasal, sinus and respiratory problems.

Appellant testified at the oral hearing on December 1, 2003. By decision dated February 17, 2004, the Office hearing representative denied appellant's claim finding that he had not established that his disability on or after January 17, 2003 was due to his accepted

employment injury. The hearing representative further found that appellant had not submitted the evidence necessary to modify the October 17, 1994 wage-earning capacity determination.<sup>1</sup>

### **LEGAL PRECEDENT -- ISSUE 1**

When an employee who is disabled from the job he held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that he can perform the limited-duty position, the employee has the burden of establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and to show that he cannot perform such limited-duty work. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the limited-duty job requirements.<sup>2</sup>

The Office's procedure manual defines recurrences of disability to exclude work stoppages caused by a termination of a temporary appointment; cessation of special funding, *e.g.*, pipeline funding; true reductions in force; closure of a base or other facility, and a condition which results from a new injury, or by renewed exposure to the causative agent of a previously suffered occupational disease.<sup>3</sup> A true RIF is one in which employees performing full duty as well as those performing light duty are affected.<sup>4</sup>

### **ANALYSIS -- ISSUE 1**

Appellant returned to a light-duty position on June 7, 1993. He then filed a claim for recurrence on March 27, 2003 alleging on January 17, 2003 he became totally disabled. Appellant submitted a factual statement asserting that his limited-duty position as a motor vehicle operator had not impacted his employment-related conditions and that his employment-related condition did not change. He stated that he would have continued to work as a motor vehicle operator, if not for the RIF.

Appellant did not allege a change in the nature and extent of his injury-related condition and did not allege that his light-duty job requirements had changed. Instead, he indicated that he would have continued to work in the light-duty job of motor vehicle operator, if not for the RIF. As the record establishes that the RIF was not limited to those performing light duty, appellant's work stoppage due to the RIF is not a recurrence of disability, and the Office properly denied his claim.

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<sup>1</sup> Appellant's attorney argued on appeal, that at the time of appellant's initial claim in December 1988 the Office failed to accept the appropriate diagnosed conditions. The Board notes that the Office has not addressed the causal relationship of any additional conditions to appellant's accepted employment exposures and the Board may not address this issue for the first time on appeal. 20 C.F.R. § 501.2(c).

<sup>2</sup> *Joseph D. Duncan*, 54 ECAB \_\_\_\_ (Docket No. 02-1115, issued March 4, 2003); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

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

<sup>4</sup> *Id.*

## LEGAL PRECEDENT -- ISSUE 2

The general test for determining loss of wage-earning capacity is whether the injury-related residuals prevent the employee from performing the kind of work he or she was doing when injured. When the medical evidence establishes that the residuals of an employment injury prevent the employee from continuing in his or her employment, the employee is entitled to compensation for any resulting loss of wage-earning capacity.<sup>5</sup>

Under section 8115(a) of the Federal Employees' Compensation Act,<sup>6</sup> wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. Generally, wages actually earned are the best measure of a wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.<sup>7</sup> Office procedures provide that a determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity should be made after an employee has been working in a given position for more than 60 days.<sup>8</sup>

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."<sup>9</sup>

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless the original rating was in error, there is a material change in the nature and extent of the injury-related condition, or that the employee has been retrained or otherwise vocationally rehabilitated. The burden of proof is on the party attempting to show a modification of the wage-earning capacity.<sup>10</sup>

## ANALYSIS -- ISSUE 2

The Office determined that appellant was unable to return to his date-of-injury position. The employing establishment offered appellant a limited-duty position as a motor vehicle operator and altered this position to gain his physicians approval. Appellant returned to work in this position on June 7, 1993. The Office reduced his compensation benefits based on his

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<sup>5</sup> *Elsie L. Price*, 54 ECAB \_\_\_\_ (Docket No. 02-755, issued July 23, 2003).

<sup>6</sup> 5 U.S.C. §§ 8101-8193, 8115(a).

<sup>7</sup> *Hayden C. Ross*, 55 ECAB \_\_\_\_ (Docket No. 04-136, issued April 7, 2004).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

<sup>10</sup> *Elsie L. Price*, *supra* note 5.

earnings as a motor vehicle operator on October 17, 1994, more than 60 days after appellant returned to work. Appellant continued to work in this position until January 17, 2003 when he lost his position due to a RIF. Appellant then requested a resumption of compensation for total wage loss on March 27, 2003 by filing a notice of recurrence alleging that he sustained a recurrence of total disability on January 17, 2003.

There is no indication in the record that the original wage-earning capacity determination was erroneous. Appellant worked in this position for more than nine years after the Office determined that these wages fairly and reasonably represented his wage-earning capacity. Furthermore, there is no evidence in the record that appellant was retrained or otherwise vocationally rehabilitated.

The burden of proof is on the party attempting to show a modification of the wage-earning capacity, in this case, appellant who has not submitted any medical evidence establishing a material change in the nature and extent of his injury-related conditions. Neither Dr. Malloy, a Board-certified otolaryngologist, nor Dr. Armstrong, a Board-certified pulmonologist, provided any medical evidence supporting a worsening of appellant's employment-related condition after he returned to work in the light-duty position. In fact, appellant stated that his accepted conditions were permanent and that his duties as a motor vehicle operator did not impact his accepted conditions. He opined that his work-related conditions had not changed.<sup>11</sup>

### **CONCLUSION**

The Board finds that appellant has not met his burden of proof in establishing a recurrence of disability as his work stoppage was due to a true RIF, a circumstance excluded from the definition of recurrence of disability by the Office. The Board further finds that appellant has not met his burden of proof in establishing that his wage-earning capacity determination should be modified, as he has not established that the original determination was erroneous, a material change in the nature and extent of his injury-related condition or that he has been vocationally rehabilitated.

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<sup>11</sup> The Board notes that appellant's continued requests for a schedule award support that he believed that his condition was permanent and stationary.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 17, 2004 and June 16, 2003 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Issued: November 8, 2004  
Washington, DC

Colleen Duffy Kiko  
Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member