

an inability to perform his duties. On July 24, 1995 appellant returned to work in a full-time permanent limited-duty position as a clerk.¹

Accompanying appellant's claim were several reports from Dr. Charles J. Heller, a Board-certified orthopedist, dated February 1, 1982 to July 3, 1984, who noted a history of his injury on February 1, 1982 and subsequent treatment for acute pain in the low back radiating down the left leg. In his reports of November 15, 1983 to July 3, 1984, Dr. Heller advised that appellant remained symptomatic, experiencing severe paravertebral muscle spasms with little range of motion and remained totally disabled.

Thereafter, in the course of developing the claim, the Office referred appellant to several second opinion physicians and to an impartial medical adviser.

Appellant came under the treatment of Dr. Laurence Mercer McKinley, a Board-certified orthopedist, who noted treating him from May 17, 1989 to November 19, 1997. He noted a history of appellant's back injuries of April 1980 and February 1982. Dr. McKinley noted that appellant experienced continued low back pain and alteration in sensation in the left leg. Reports from January 5, 1992 to March 27, 1995, noted his progressive improvement with physical therapy with a reduction in symptomology.

On June 22, 1995 the employing establishment offered appellant a full-time permanent position as a clerk. On July 24, 1995 he returned to work as a full-time clerk.

In a letter dated August 21, 1995, the Office reduced appellant's monetary compensation effective July 24, 1995, based upon his actual earnings of \$340.00 per week. The Office advised him that he had been employed as a clerk with wages of \$340.00 per week effective July 24, 1995. This was not a formal decision.

By decision dated October 10, 1995, the Office reduced appellant's compensation effective that same date based on his ability to earn wages of \$340.00 as a clerk. The Office indicated that he had been employed in the position for over 60 days effective July 24, 1995. The Office concluded that the position of clerk represented appellant's wage-earning capacity.

On October 23, 1995 appellant filed a CA-8, claim for compensation on account of disability for October 19, 1995. In a decision dated December 19, 1995, the Office denied his claim.

On July 30, 1996 appellant filed a claim for a schedule award. On April 10, 1997 the Office granted him a schedule award for 10 percent impairment of the left upper extremity. The period of the award was from July 1, 1996 to February 4, 1997.

¹ The record reflects that appellant filed several work-related compensation claims that were accepted by the Office: on May 14, 1980 he sustained a low back strain which was accepted by the Office in file number 13-615402, on October 18, 1995 appellant sustained a cervical and lumbar strain which was accepted by the Office in file number 13-1098102, on March 5, 1996 he sustained a cervical and lumbar strain and bilateral knee strain which the Office accepted in file number 13-1103785 and on January 24, 1997 appellant sustained a cervical and lumbar strain which the Office accepted in file number 13-1127014. These claims were consolidated with the current file before the Board.

Appellant continued to submit reports from Dr. McKinley dated December 10, 1997 to December 21, 2001, which noted that he returned to work in a modified position in July 1995 and reached a permanent and stationary status July 8, 1996. On January 26, 2001 he performed a decompression laminectomy L3-S1 discectomy at L4-5 and fusion at L4-S1 with iliac crest bone graft. On July 17, 2001 Dr. McKinley returned appellant to full-time light-duty work. Other reports from him noted new symptoms of low back, right buttock and right lower extremity pain. On July 25, 2002 Dr. McKinley performed a decompression at L3-4 and laminoplasty at L3-4 bilaterally and foraminotomy of L3-4 bilaterally, dissection of epidural scar tissue and removal of herniated L3-4 disc and extruded fragments and bilateral foraminotomies at L4-5. On October 28, 2002 he released appellant to his modified clerk position.

On August 7, 2003 appellant filed a CA-7, claim for compensation requesting leave without pay from August 6 to 20, 2003. In a report dated August 6, 2003, Dr. McKinley noted that he presented with increased symptoms of pain in his low back and radiating into his buttocks which occurred over the last six weeks. Upon physical examination, range of motion was limited in flexion and extension. Dr. McKinley diagnosed mechanical back pain at the L3-4 level and status post L3-4 discectomy with mechanical instability at the L3-4 level and advised that appellant was temporarily totally disabled due to the severity of his pain until September 16, 2003.

By letter dated August 19, 2003, the Office noted that Dr. McKinley's report of August 6, 2003 certified total disability from August 6 to September 16, 2003 and requested that appellant submit additional information to determine whether he sustained a recurrence of disability.

By letter dated October 23, 2003, appellant noted that he returned to work in 1995 to a light-duty position and continued to work in this position intermittently until August 6, 2003. Additional reports from Dr. McKinley dated August 26, 2003 noted that he was improving after the facet injections at L3-4 and physical therapy. He diagnosed instability at L3-4 with retrolisthesis at L3-4 and mechanical back pain at L3-4. Dr. McKinley opined that appellant developed instability following the discectomy at L3-4 and was temporarily totally disabled. He advised in reports dated September 16 to November 4, 2003 that he experienced flare-up of back symptoms on August 26, 2003 and remained temporarily totally disabled. Dr. McKinley's reports of November 4, 2003 to March 8, 2004 advised that a magnetic resonance imaging (MRI) scan performed on November 7, 2003 revealed a left sided extruded disc at C5-6 and left foraminal stenosis at C6-7 and diagnosed cervical degenerative disc disease at C5-6 and C6-7, cervical spondylosis, cervical extruded disc, degenerative lumbar disc disease at L4-5 and L5-S1, status post fusion from L4 to S1, status post discectomy at L3-4 and instability at L3-4.

In a decision dated April 28, 2004, the Office denied appellant's claim for a recurrence of disability on the grounds that the evidence of record did not establish a change in the nature and extent of his injury-related disability or a change in the nature of his light-duty job.²

² In a conference memorandum date May 15, 2004, between appellant's spouse and the claims examiner, his spouse was informed of the deficiencies in the medical evidence with regard to appellant's claim for recurrence and advised that he must submit evidence which showed a change in the nature of his light-duty position or a change in the nature of his work-related condition.

By letter dated May 20, 2004, appellant requested reconsideration and submitted additional medical evidence. In reports dated January 12 to May 10, 2004, Dr. McKinley noted treating him for low back pain burning into the right buttock, neck pain and left arm radiculopathy and diagnosed cervical degenerative disc disease at C5-6 and C6-7, degenerative lumbar disc disease at L4-5 and L5-S1, status post fusion from L4 to S1, status post discectomy at L3-4 and instability at L3-4. In a report dated May 21, 2004, he noted treating appellant for over 15 years for multiple injuries sustained during the course of his employment at Camp Pendleton. Dr. McKinley advised that in August 2003, appellant experienced increased symptoms of low back pain with pain radiating into his buttocks which caused him to be physically disabled from performing his modified position. He noted that the physical examination revealed diminished range of motion of the lumbar spine and that diagnostic studies revealed retrolisthesis of L3 on L4, which was consistent with a diagnosis of instability following a discectomy. Dr. McKinley advised that the discectomy had been performed for treatment of appellant's work-related injury and the mechanical instability produced severe pain which resulted in him not being able to continue to work after August 6, 2003. Dr. McKinley advised that until this time he had functioned very well in his modified work position. He noted that appellant's position required him to locate files, run errands, make copies of contracts and take plans and blueprints to other agencies and all of these activities required extended sitting, bending, straightening, standing and walking. Dr. McKinley opined that because of the significant lumbar instability, pain, limitation of motion, inability to stand up straight, bend and do minimal normal activities, appellant was unable to perform his limited-duty position after August 6, 2003. His report of July 12, 2004 noted limited range of motion in flexion and extension and diagnosed cervical degenerative disc disease at C5-6 and C6-7, sensory radiculopathy at C6, degenerative lumbar disc disease post decompressive laminectomy at L4 to sacrum with fusion from L4 to sacrum and subsequent discectomy at L3-4 with evidence of translational instability.

In a merit decision dated August 23, 2004, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant modification of the prior decision.

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.³

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 claims examiner will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity."⁴

³ See *Sharon C. Clement*, 55 ECAB ____ (Docket No. 01-2135, issued May 18, 2004).

⁴ 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.⁵ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁶

ANALYSIS

The Office developed the evidence and determined that the issue presented was whether appellant had established a recurrence of disability on August 6, 2003. Under the circumstances of this case, however, the Board finds that the issue presented was whether the October 10, 1995 wage-earning capacity determination should be modified.

The evidence indicates that appellant returned to work at the employing establishment on July 24, 1995 as a full-time clerk. He subsequently stopped work on August 6, 2003 stating that he experienced increased low back pain radiating into his buttocks and was totally disabled from work. Appellant filed several CA-7 claim forms for compensation from August 6 to October 28, 2003 and sought treatment from Dr. McKinley. The Office developed that claim as a recurrence of disability commencing on August 6, 2003. It is clear that the claim in this case was that appellant's condition had deteriorated such that he was having difficulty working in the clerk position, which had been compatible with his wage-earning capacity for the foreseeable future. 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.⁷

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.⁸ The Board finds that the Office should have considered the issue of modification of the wage-earning capacity determination.⁹

⁵ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

⁶ *Id.*

⁷ *See Sharon C. Clement*, *supra* note 3. 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.3, slip op. at 5; *Cf. Elsie L. Price*, 54 ECAB ____ (Docket No. 02-755, issue July 23, 2003) (acceptance of disability for an extended period was sufficient to establish that modification of the wage-earning capacity determination was warranted).

⁸ *Katherine T. Kreger*, 55 ECAB ____ (Docket No. 03-1765, issued August 13, 2004).

⁹ *See Francis C. Vela*, Docket No. 04-1000 (issued October 27, 2004) (where the Board found that the Office improperly developed the evidence regarding whether appellant sustained a recurrence of disability when there was an existing loss of wage-earning capacity determination in place and instead the Office should have determined whether the existing wage-earning capacity determination should have been modified).

CONCLUSION

The Board finds that appellant's claim for compensation raised the issue of whether a modification of the October 10, 1995 wage-earning capacity decision was warranted and the case must be remanded for an appropriate decision on the issue.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated August 23 and April 28, 2004 are set aside and remanded for further development of the case as the Office deems necessary, a *de novo* decision shall be issued.

Issued: August 10, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board