

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

MARVIN M. JANNSEN, Appellant)

and)

DEPARTMENT OF TRANSPORTATION,)
FEDERAL AVIATION ADMINISTRATION,)
Renton, WA, Employer)

Docket No. 04-878
Issued: December 21, 2005

Appearances:
Marvin M. Jannsen, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 17, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated October 14, 2003, which denied his recurrence of disability claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly determined that the issue presented was a recurrence of disability.

FACTUAL HISTORY

On December 4, 1975 appellant, then a 37-year-old air traffic controller, filed an occupational disease claim for an emotional condition, alleging that he experienced chronic psychoneurosis and a severe anxiety reaction associated with disassociative episodes as a result

of working under extreme pressure. Appellant stopped work on November 7, 1975.¹ The Office accepted his claim for acute and chronic severe anxiety neurosis and depression. Appellant was placed on the periodic rolls in receipt of compensation for total disability. He subsequently enrolled in an employing establishment-sponsored second career training program. The record reflects that appellant's second career ended on November 10, 1978. He utilized sick leave until April 25, 1979. Thereafter, appellant elected to receive compensation benefits retroactive to March 5, 1979 and retired.

By decision dated September 21, 1989, the Office adjusted appellant's wage-loss compensation, finding that he was no longer totally disabled. The Office determined that appellant's actual earnings as a salesman were \$517.79 and adjusted his wage-loss benefits as his earnings fairly and reasonably represented his wage-earning capacity, effective October 22, 1989. By decision dated September 22, 1989, the Office also determined appellant's retroactive compensation.²

By letter dated July 15, 2002, the Office requested that Dr. F. Bruce Merrill, a Board-certified psychiatrist and a treating physician, submit an updated report on appellant's condition, including a description of current findings and diagnoses with an opinion on causal relationship between appellant's condition and accepted work injury.

In a November 3, 2002 report, Dr. Merrill noted appellant's history of injury and treatment and opined that any type of pressure, be it financial, work related or family related triggered exacerbations. He noted that appellant's emotional condition was exacerbated by the return of his sarcoidosis and advised that appellant could not work because he was living under considerable apprehension regarding his physical state. Dr. Merrill opined that appellant's psychiatric condition was a result of an exacerbation of the psychiatric illnesses that began with his employment-related condition.

By letter dated December 22, 2002, appellant requested a resumption of compensation benefits for total disability and alleged that this was a result of his inability to work due to the deterioration in his health. Appellant advised that the sarcoidosis in his lungs was discovered in June 1975 after his annual examination at the employing establishment but nothing was done to treat the condition at that time. He stated that the sarcoidosis became a problem again in November 2000.³

By letter dated March 28, 2003, the Office requested that appellant clarify whether he was currently working as a real-estate agent and requested that he submit his current tax returns. The Office also provided appellant with a Form CA-2a claim for recurrence and explained the information needed to support his claim for recurrence.

¹ The record reflects that appellant was on sick and annual leave from November 7 to 30, 1975. He was subsequently placed on administrative duties on December 1, 1975 pending enrollment in a second career program.

² The record reflects that appellant later worked as a salesman.

³ The Office did not accept this condition. The record does not reflect that appellant sought compensation for his sarcoidosis or alleged that it was related to his employment.

In an April 9, 2003 letter, appellant alleged that he was not working due to his illness and enclosed copies of his recent tax returns. He alleged that he had no new injuries and that Dr. Ron Balkissoon, a Board-certified internist and a treating physician, agreed with Dr. Merrill about his condition. Appellant alleged that his right eye sight had diminished. Appellant listed his medications and stated that he would “like to make a claim starting 205 months ago when I was adjudicated to have the ability to make a certain amount of money.”

On April 14, 2003 appellant filed a recurrence of disability claim (Form CA-2a). He alleged that his recurrence began on that same date and filled in “continuous.” In support of his claim, appellant submitted medical records related to his treatment for sarcoidosis.

By decision dated April 28, 2003, the Office denied appellant’s claim for a recurrence of disability. The Office found that the evidence submitted was insufficient to establish a spontaneous return or increase in disability due to the previously accepted work-related injury without intervening cause.

On May 19, 2003⁴ appellant requested a review of the written record alleging total disability due to his accepted conditions of neurotic disorder and prolonged depressive reaction. Appellant alleged that he still had nightmares related to his emotional reactions to his work as an air traffic controller and that his subsequent conditions, including shingles in his right eye and sarcoidosis, resulted from employment-related stress. He provided a May 20, 2003 report from Dr. Merrill, who noted appellant’s history and discussed sarcoidosis and its effect on his emotional condition. He opined that the exacerbation of appellant’s work-related depressive disorder was related to his sarcoidosis, which was diagnosed while he was still an active air traffic controller.

By decision dated October 14, 2003, the Office hearing representative affirmed the Office’s April 28, 2002 decision, which denied appellant’s claim for a recurrence of disability causally related to his accepted employment injuries.⁵

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

⁴ Appellant’s letter was dated May 19, 2002; however, this appears to be a typographical error.

⁵ The Office also noted that the claim could also be denied for the reason that appellant’s claim was not timely filed; since appellant was aware of his condition as early as 1975.

⁶ See *Katherine T. Kreger*, 55 ECAB ____ (Docket No. 03-1675, issued August 13, 2004).

need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity.”⁷

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

The Office developed the evidence and determined that the issue presented was whether appellant had established a recurrence of disability causally related to factors of his federal employment or an accepted work-related condition. Under the circumstances of this case, however, the Board finds that the issue presented was whether the September 21, 1989 wage-earning capacity determination should be modified.

The Office issued a formal loss of wage-earning capacity determination on September 21, 1989 based on the selected position of a salesman in the areas of real estate and life insurance. This decision remained in effect through the time of appellant’s April 14, 2003 work stoppage. Both the Office’s procedure manual and Board precedent provide 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 Because there was a formal loss of wage-earning capacity determination in place when appellant stopped work on April 14, 2003, the Office should have treated his April 14, 2003 recurrence claim as a request for modification of his September 21, 1989 wage-earning capacity determination. As the Office did not properly adjudicate this issue, the case will be remanded for an appropriate decision.

CONCLUSION

The Board finds that appellant’s April 14, 2003 notice of recurrence raised the issue of whether a modification of the Office’s September 21, 1989 wage-earning capacity decision was warranted and the case must be remanded for an appropriate decision on this issue.

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

⁸ *Tamra McCauley*, 51 ECAB 375, 377 (2000).

⁹ *Id.*

¹⁰ *Katherine T. Kreger*, *supra* note 6; *Sharon C. Clement*, 55 ECAB ____ (Docket No. 01-2135, issued May 18, 2004). 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 ____ (Docket No. 02-755, issued July 23, 2003) (acceptance of disability for an extended period was sufficient to establish that modification of the wage-earning capacity determination was warranted).

ORDER

The decision of the Office of Workers' Compensation Programs dated October 14, 2003 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: December 21, 2005
Washington, DC

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

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board