

he injured his right shoulder in the performance of duty. The Office accepted his claim for partial dislocation of the right acromioclavicular joint.¹ In a February 4, 1983 decision, the Board found that the Office did not meet its burden of proof to terminate appellant's compensation benefits. The case was remanded to determine appellant's permanent impairment for schedule award purposes. In a decision dated June 13, 1984, the Board remanded the case for the Office to consider appellant's continuing entitlement to compensation benefits.² The Board issued a third decision on August 7, 1985 and reversed an Office decision terminating appellant's compensation benefits and found that appellant had no more than a five percent permanent impairment of his right upper extremity.³ In the fourth decision dated March 31, 1987, the Board found that the Office had properly suspended appellant's compensation benefits for failing to report his earnings as requested.⁴

Appellant returned to light-duty work on July 14, 1990 working four hours a day. The Office determined that this position represented his wage-earning capacity on October 10, 1990. Appellant disagreed and appealed to the Board. By decision dated July 30, 1991, the Board found that the Office had properly determined appellant's loss of wage-earning capacity effective July 14, 1990 based on his actual earnings as a modified distribution clerk.⁵ The Office modified the October 10, 1990 wage-earning capacity determination on February 27, 1995 finding that it had based its decision on an improper pay rate for appellant's light-duty position. In a December 12, 1996 decision, the Board affirmed the Office's findings regarding the fact, fault, amount and waiver of an overpayment resulting from the modification of the October 10, 1990 wage-earning capacity determination.⁶ The facts and the circumstances of the case as set forth in the Board's prior decisions are adopted herein by reference.

In a report dated January 11, 1995, Dr. Charles E. Boring, Jr., a Board-certified orthopedic surgeon, examined appellant; noted that his current work duties were within his work capacity and stated that appellant should consider surgery on his right shoulder.

In a letter dated April 24, 2000, the employing establishment asked Dr. Boring's opinion regarding whether appellant could increase his work hours to six hours a day. Dr. Boring responded that he retired from the practice of medicine on December 1, 1999.

On May 25, 2001 the Office referred appellant for a second opinion evaluation with Dr. Michael Slomka, a Board-certified orthopedic surgeon. In a report dated August 22, 2001, Dr. Slomka reviewed appellant's history of injury and performed a physical examination. He noted that x-rays demonstrated mild arthritis at the acromioclavicular joint. Dr. Slomka stated, "The most striking finding is some calcium and enlargement of the acromion on the right side

¹ 34 ECAB 672 (1983).

² Docket No. 84-934 (issued June 13, 1984).

³ Docket No. 85-1168 (issued August 7, 1985).

⁴ Docket No. 86-2063 (issued March 31, 1987).

⁵ Docket No. 91-300 (issued July 30, 1991).

⁶ Docket No.96-116 (issued December 12, 1996).

causing an impingement syndrome which almost certainly gives rise to compression of the rotator cuff tendons in the subacromial area.” He stated that appellant should not work more than four hours a day and recommended surgery in the form of a subacromial decompression performed arthroscopically. Dr. Slomka concluded, “I believe that surgery would decrease his pain and increase his range of motion of the right shoulder....”

Appellant filed a claim for compensation dated March 27, 2003 requesting wage-loss compensation from March 24 to April 18, 2003. On March 28, 2003 he submitted a notice of recurrence of disability alleging that on March 24, 2003 he stopped work due to constant pain in his right shoulder causally related to his September 22, 1977 employment injury.

In support of his claim for recurrence of total disability, appellant submitted an attending physician’s report dated March 24, 2003 from Dr. Michael H. Jaquith, a Board-certified orthopedic surgeon, diagnosing chronic tendinitis of the right shoulder. Dr. Jaquith did not provide an opinion on the causal relationship between this condition and appellant’s accepted employment injury. He indicated that appellant was totally disabled.

The employing establishment contested appellant’s claim noting that he had undergone surgery the previous week to correct a nonemployment-related condition in his leg. In a letter dated June 11, 2003, the employing establishment stated that appellant first asserted that his current disability was due to his leg surgery and then stated that disability was due to his accepted employment injury.

In a letter dated April 22, 2003, the Office requested additional medical evidence from appellant supporting his claim for a recurrence of total disability. Appellant responded with a narrative statement dated May 15, 2003 and noted that Dr. Slomka had recommended surgery on the right shoulder in 2001. He also noted that he had right leg surgery in March 2003 and would undergo surgery on his left leg on May 19, 2003.

Appellant submitted a magnetic resonance imaging (MRI) scan dated February 27, 2003 which demonstrated tendinitis or minimal partial tear of the supraspinatus tendon. He submitted treatment notes from Dr. Jaquith from 1988 which included a September 10, 1998 note in which Dr. Jaquith recommended a course of conservative management which if not successful, should be followed by surgery.

By decision dated September 4, 2003, the Office denied appellant’s claim for recurrence of disability. Appellant requested reconsideration on October 3, 2003. He stated that he had not experienced a recurrence of disability, but instead needed treatment for his accepted employment injury. Appellant alleged that due to his accepted employment injury he had taken Excedrin for pain control and that this resulted in kidney damage. Appellant stated that due to the condition of his kidneys he could no longer take pain medication and required surgery. Appellant also alleged that his job duties exceeded his work restrictions. He stated that he was to reach one hour a day, but that his duties required him to answer a telephone and complete claim forms for four hours a day.

In a note dated October 10, 2003, Dr. Herman Weber, a nephrologist, stated that appellant had a long-term history of chronic renal dysfunction and vascular disease. He stated,

“I feel very strongly that this patient should not use analgesic therapy if at all possible especially nonsteroidals.”

Dr. Pawel Kalwinski, a Board-certified family practitioner, noted appellant’s history of shoulder pain as well as advanced chronic renal insufficiency and stated that appellant was unable to use anti-inflammatory medications. He recommended evaluation by an orthopedic surgeon regarding surgery.

By decision dated May 4, 2004, the Office denied modification of its September 4, 2003 decision finding that the medical evidence did not establish that appellant had sustained a recurrence of total disability due to his accepted right shoulder condition.

LEGAL PRECEDENT

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.⁷

Under section 8115(a) of the Federal Employees’ Compensation Act,⁸ 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.⁹ 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.¹⁰

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.”¹¹

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

⁷ *Elsie L. Price*, 54 ECAB ___ (Docket No. 02-755, issued July 23, 2003).

⁸ 5 U.S.C. §§ 8101-8193, 8115(a).

⁹ *Hayden C. Ross*, 55 ECAB ___ (Docket No. 04-136, issued April 7, 2004).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

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.¹²

ANALYSIS

In this case, the Office developed the evidence and determined that the issue presented was whether appellant had established a recurrence of total disability on March 24, 2003. Under the circumstances of the case, however, the Board finds that the Office should have developed the issue of whether the February 27, 1995 wage-earning capacity determination should be modified.

According to the evidence of record, appellant returned to work four hours a day with restrictions. Appellant has stated that he utilized over-the-counter pain medication for treatment of his accepted shoulder injury in accordance with his physician's instructions. Due to a change in kidney function, Dr. Weber, a nephrologist, recommended that appellant no longer use aspirin. Dr. Kalwinski, a Board-certified family practitioner, also noted appellant's kidney problems and that he was unable to use anti-inflammatory medications. Furthermore, Dr. Jaquith indicated that appellant was totally disabled on his March 24, 2004 form report. 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 the wage-earning capacity is warranted.¹³

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, as in this case. The Board finds that the Office should have considered the issue of modification of the wage-earning capacity determination.

CONCLUSION

The Board finds that appellant's claim for a recurrence of total disability raised the issue of whether a modification of the February 27, 1995 wage-earning capacity decision was warranted. The case will be remanded for an appropriate decision on this issue. The Board notes that the Office has not issued a final decision regarding appellant's request for further surgery for his right shoulder. As the Office has not issued a final decision on this issue, the Board may not consider it for the first time on appeal.¹⁴

¹² *Elsie L. Price*, 54 ECAB ____ (Docket No. 02-755, issued July 23, 2003).

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

¹⁴ 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the May 9, 2004 and September 4, 2003 decisions of the Office of Workers' Compensation Programs are set aside and remanded for further action consistent with this decision of the Board.

Issued: February 23, 2005
Washington, DC

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member