

a result of operating a machine at work. She first became aware of her condition on November 29, 1998. Appellant's claim was accepted for cervical radiculopathy at C6. While she did not initially lose time from work, in February 1999, appellant was provided limited-duty employment. She was offered a permanent limited-duty assignment, which she accepted on May 19, 2001. The Office issued a loss of wage-earning capacity decision on September 6, 2001 finding that appellant's actual earnings in the modified position of distribution clerk, eight hours per day, fairly and reasonably represented her wage-earning capacity.

Appellant filed several claims for recurrence, including a claim filed on November 6, 2003 which was accepted. Following a surgical procedure, she was released to return to work to her previous permanent modified position on February 17, 2004.

On April 6, 2004 appellant filed a CA-2a claim form for recurrence of disability, alleging that as a result of a change in her hours and workstation, pain and swelling reappeared in her shoulders and back and that she could no longer endure the pain associated with her job duties.

In a letter dated April 15, 2004, appellant's treating physician, Dr. Todd E. Midla, stated that "her restrictions should be permanent." He recommended that "she should have sedentary physical demand for 40 inch to 70 inch lift, medium category for floor to waist and light duty for all other lifts." Dr. Midla stated that she had limitations with prolonged walking and sitting, but that she did well in straight-backed chairs; that while sitting, she could tolerate her elbows bent at 90 degrees and supported either on the table or armrest of a chair to avoid constant strain on the neck and shoulders; and that she could reach 9 to 12 inches from body center while sitting and standing and preferred heights during standing ranged from 34½ inches to 40½ inches off the floor. He opined that she should be able to return to work as soon as a suitable position could be found to meet her restrictions.

Appellant submitted a statement in which she indicated that upon her return to work on February 17, 2004, the pain and swelling in her shoulders and back was exacerbated by her lack of a straight-backed chair with arms and wheels.

By letter dated April 30, 2004, the employing establishment offered appellant a limited-duty assignment based upon the restrictions outlined by appellant's treating physician.

On June 1, 2004 the Office notified appellant that the information submitted in connection with her claim was insufficient. She was advised to submit within 30 days a detailed narrative medical report supporting a causal relationship between her claimed recurrence of disability and the original condition related to the 1998 occupational injury claim. In response, appellant submitted a CA-7 form dated May 11, 2004.

On June 25, 2004 appellant filed a request for a schedule award.

On July 6, 2004 the Office denied appellant's recurrence of disability claim, finding that the factual and medical evidence provided did not establish that the claimed occurrence resulted from the accepted work injury.²

On September 30, 2004 the Office notified appellant that her request for a schedule award could not be considered at that time because the medical evidence in the record indicated that her condition had not yet reached maximum medical improvement.³

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.⁴

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."⁵

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

² The Board notes that subsequent to the Office's July 6, 2004 decision, appellant submitted additional evidence which had not previously been considered by the Office. The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c); *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952). Therefore, the evidence cannot be considered by the Board.

³ The Board does not have jurisdiction to consider the issue of appellant's application for a schedule award because the Office has not yet rendered a final decision in that regard. (The Board has jurisdiction to consider and decide appeals from final decisions; there shall be no appeal with respect to any interlocutory matter disposed of during the pendency of the case). 20 U.S.C. § 501.2(c).

⁴ See *Sharon C. Clement*, 55 ECAB ____ (Docket No. 01-2135, issued May 18, 2004).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995); see also *Katherine T. Kreger*, 55 ECAB ____ (Docket No. 03-1765, issued August 13, 2004).

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

ANALYSIS

In this case, the Office developed the evidence and determined that the issue presented was whether appellant had established a recurrence of disability on April 26, 2004 causally related to her accepted November 29, 1998 employment injury. Under the circumstances of this case, however, the Board finds that the issue presented was whether the September 6, 2001 wage-earning capacity determination should be modified.

According to the evidence of record on April 6, 2004 appellant filed a claim for recurrence, alleging that as a result of a change in her hours and workstation, pain and swelling reappeared in her shoulders and back and that she could no longer endure the pain associated with her job duties. The medical evidence submitted in support of her claim consisted of a letter from her physician, Dr. Midla, who made recommendations regarding certain restrictions which would allow appellant to return to work. He explained that her new work restrictions were permanent and that appellant could only return to work if work was offered within the new restrictions. 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.

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. If there is a claim for increased disability that would prevent a claimant from performing the position that was the basis for a wage-earning capacity decision, then clearly there is an issue of whether modification is appropriate. In this case, appellant submitted evidence of an increased partial disability that prevented her from working in the position which was determined to represent her wage-earning capacity. 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 compensation raised the issue of whether a modification of the September 6, 2001 wage-earning capacity determination was warranted and the case must be remanded for an appropriate decision on this issue.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 6, 2004 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: February 17, 2005
Washington, DC

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member