

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

JOSE MEDINA, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Los Angeles, CA, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 05-1352
Issued: November 22, 2005**

Appearances:
Jose Medina, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge

JURISDICTION

On June 7, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs hearing representative's decision dated November 12, 2004, which affirmed the July 19, 2004 decision, denying 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 as of April 1, 2004.

FACTUAL HISTORY

On March 16, 1988 appellant, then a 33-year-old custodian, filed a traumatic injury claim for a low back condition he sustained on that same date after lifting boxes in the performance of

duty.¹ The Office accepted appellant's claim for low back strain, herniated lumbar disc with chronic nerve root irritation and a subsequent lumbar laminectomy surgery on August 22, 1990.²

The Office continued to develop appellant's claim and in a decision dated December 17, 1997, the Office granted appellant a schedule award for 12 percent permanent impairment of the left lower extremity and 1 percent permanent impairment of the right lower extremity.

On February 10, 1998 appellant filed a notice of recurrence of disability, alleging a recurrence of disability on February 9, 1998. Appellant stopped work on February 9, 1998.

In a report dated April 7, 1998, Dr. Ralph N. Steiger, a Board-certified orthopedic surgeon, advised that appellant had an increase in neck and back pain since February 9, 1998. He indicated that appellant was in need of a caudal injection and opined that appellant was totally temporarily disabled.

On May 22, 1998 the Office accepted appellant's claim for musculoligamentous lumbar spine with radiculitis bilateral legs.

By decision dated June 25, 1999, the Office advised appellant that he was reemployed as a modified custodian with wages of \$662.52 per week on April 1, 1999. The Office determined that the position fairly and reasonably represented his wage-earning capacity. The Office advised appellant that it was terminating his compensation as his actual wages met or exceeded the wages of the job he held when injured and no loss of wages had occurred.

In a separate decision also dated June 25, 1999, the Office denied appellant's claim for an additional schedule award.

On June 11, 2003 the Office also accepted appellant's claim for a lumbar spine sprain/strain.³

On April 9, 2004 the appellant filed a notice of recurrence of disability for a recurrence beginning on April 1, 2004. Appellant stopped work on that date.

By letter dated April 22, 2004 2003, the Office advised appellant that additional factual and medical evidence was needed. The Office explained that a physician's opinion was crucial to his claim and allotted appellant 30 days within which to submit the requested information.

In reports dated May 18 and 19, 2004, Dr. Steiger advised that appellant had an exacerbation of his symptoms and was temporarily totally disabled.

¹ The record does not contain the actual claim form; however, these facts are accepted by the Office.

² The record also reflects that appellant has a traumatic injury claim for an injury sustained on September 9, 1996, when he slipped on a wet floor and fell. The Office accepted this claim for thoracic, lumbar and other back strain and contusion of the back. No. 13-1111844. The Office subsequently doubled the claims.

³ The Office also noted that the medical evidence supported a temporary aggravation of the low back condition accepted under appellant's claim No. 13-0851389 and reopened appellant's claim for medical care.

By decision dated July 19, 2004, the Office denied appellant's claim for a recurrence of disability on April 1, 2004.

Appellant submitted additional reports from Dr. Steiger indicating that appellant was totally disabled.

On August 16 and 17, 2004 appellant requested a review of the written record.

By decision dated November 12, 2004, the Office denied appellant's claim for a recurrence of disability on April 1, 2004 on the grounds that the medical evidence of record failed to establish that his recurrence was causally related to the accepted March 16, 1988 employment injury.

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 an appellant'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 appellant 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.⁶ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁷

ANALYSIS

The Office developed the evidence and determined that the issue presented was whether appellant had established a recurrence of disability on April 1, 2004. Under the circumstances of this case, however, the Board finds that the issue presented was whether the June 25, 1999 wage-earning capacity determination should be modified.

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).

⁶ *Katherine T. Kreger*, 55 ECAB ____ (Docket No. 03-1765, issued August 13, 2004); see *Sue A. Sedgwick*, 45 ECAB 211 (1993).

⁷ *Id.*

According to the evidence of record appellant filed a notice of recurrence of disability on April 1, 2004. Appellant alleged that he was totally disabled and unable to work. 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 new 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.⁸

As noted above, the Office's procedure manual directs the claims examiner consider the criteria for modification when appellant requests resumption of compensation for "total wage loss." 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 June 25, 1999 wage-earning capacity decision was warranted and the case must be remanded for an appropriate decision on this issue.

⁸ See *Sharon C. Clement*, *supra* note 4. 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, 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).

ORDER

The decision of the Office of Workers' Compensation Programs dated November 12, 2004 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: November 22, 2005
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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