

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

CALVIN R. PHILLIPS, Appellant)	
)	
and)	Docket No. 05-1406
)	Issued: November 16, 2005
U.S. POSTAL SERVICE, POST OFFICE,)	
Franklin, TX, Employer)	
)	

Appearances:
Calvin R. Phillips, *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 21, 2005 appellant filed a timely appeal from merit decisions of the Office of Workers' Compensation Programs dated October 15, 2004 and April 1, 2005 finding that he had not established a recurrence of disability on December 20, 2002. 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 December 20, 2002.

FACTUAL HISTORY

On June 13, 1977 appellant, then a 26-year-old distribution clerk, filed a traumatic injury claim stating that he injured his lower back that day while in the performance of duty.

The Office accepted a lumbar strain, herniated disc at L4-5 and L5-S1, and authorized surgeries performed in November 1977 and April 1979.

By decision dated October 24, 1979, the Office determined that appellant's actual earnings of \$271.71 per week as a distribution clerk fairly and reasonably represented his wage-earning capacity. The Office decreased appellant's compensation based on his actual earnings.

Appellant returned to work on November 5, 1979, and the Office paid appellant appropriate compensation for disability for intermittent times until April 23, 1984 when he returned to full-time regular duty. In a report dated November 15, 1979, Dr. Alexander E. Brodsky, appellant's Board-certified orthopedic surgeon, advised that appellant was improved and that he was to remain in a light-duty status. On April 23, 1984 Dr. Brodsky released appellant to return to work.

On March 26, 2003 appellant claimed a recurrence of disability for which he stopped work on December 20, 2002. The employing establishment noted that appellant's work-related injury occurred on June 13, 1977, and that his pay stopped on February 24, 2003. By letter dated April 28, 2003, the Office advised appellant regarding the type of evidence he needed to support his claim. On June 17, 2003 the Office denied his claim for a recurrence of disability. On August 26, 2003 appellant requested reconsideration. Appellant also resubmitted his March 26, 2003 claim for a recurrence of disability on August 27, 2003.

In support of his claim, appellant submitted additional medical records. In a report dated December 20, 2002, Dr. Mike N. Yuan, a neurologist, examined appellant for weakness, slurred speech, unsteady gait and bilateral hand numbness that began on December 9, 2002. Dr. Yuan recommended follow-up studies. A March 13, 2003 lumbar MRI scan revealed postsurgical changes with marked degenerative changes. A May 1, 2003 lumbar spine MRI scan revealed severe L4-5 and L5-S1 degenerative disc disease and facet arthritis, questionable L4 spondylosis and mild posterior spurring at L3-4, L4-5 and L5-S1. A May 2, 2003 lower extremity venous evaluation was negative. A cervical MRI scan dated May 3, 2003 revealed degenerative disc disease and spinal stenosis at C4-5, C5-6 and C6-7 and multiple foraminal stenosis throughout the cervical spine.

In a report dated May 30, 2003, Dr. Rajesh K. Bindal, appellant's attending neurologist, examined appellant that day in a follow-up of recent anterior cervical decompression and fusion for severe spinal cord stenosis and impingement. He noted that appellant had some improvement in his leg strength and had good range of motion of his neck.

By decision dated September 29, 2003, the Office denied appellant's claim for a recurrence of disability. On July 19, 2004 appellant requested reconsideration. In a report received by the Office on January 20, 2004 and dated October 17, 2003, Dr. Bindal stated that appellant was doing well post neck surgery, but noted significant problems with low back pain and leg pain that he associated with a work-related injury suffered a number of years ago that was exacerbated two weeks prior. He opined that appellant's work-related low back injury caused his disability. Dr. Bindal noted that the Office had not certified that appellant's disability was work related but he asserted that appellant's low back and leg condition was work related and caused his disability.

On January 30, 2004 Dr. Bindal stated that appellant had hyperreflexia throughout the upper and lower extremities, pathologic reflexes including clonus and Hoffman's signs

bilaterally, decreased pinprick sensation in the left hand and first and second digits of the right hand and throughout his legs. He stated that appellant had permanent and persistent neuropathy and myelopathy and that his cervical spinal cord injury caused his disability. Dr. Bindal determined that appellant was permanently disabled in the lower extremities due to his work-related cervical spinal cord injury.

On October 15, 2004 the Office denied modification of its September 29, 2003 decision denying benefits. On February 3, 2005 appellant filed a request for reconsideration. In a report dated December 30, 2004, Dr. Bindal stated that appellant was completely disabled for the rest of his life and unable to work. He stated that appellant had residual myelopathy related to his marked cervical stenosis. Dr. Bindal also stated that appellant's work-related chronic, severe, low back pain and leg pain "are related to an on-the-job injury suffered a number of years ago." He also noted that his severe cervical myelopathy related to his cervical stenosis condition complicated his condition. On April 1, 2005 the Office denied modification of its previous decision denying benefits.

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.¹

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."²

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.³ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁴

¹ See *Sharon C. Clement*, 55 ECAB ____ (Docket No. 01-2135, issued May 18, 2004).

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

³ *Katherine T. Kreger*, 55 ECAB ____ (Docket No. 03-1765, issued August 13, 2004); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

⁴ *Id.*

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 December 20, 2002. Under the circumstances of this case, however, the Board finds that the issue presented was whether the October 24, 1979 wage-earning capacity determination should be modified.

According to the evidence of record appellant returned to work at 8 hours per day, 40 hours per week on November 5, 1979 in accordance with the reports of his attending physician, Dr. Bindal. However, on October 17, 2003 he stated that appellant could not work based on his work-related low back and leg injury suffered a number of years ago. In his January 30, 2004 report, Dr. Bindal stated that appellant's total disability was caused by his work-related cervical spinal cord injury. On December 30, 2004 he stated that appellant was completely disabled as a result of his work-related injury sustained previously. It is clear that the claim in this case was that appellant could not work in the 40-hour light-duty position, the position that the Office determined had represented 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.⁵

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 disability that prevented him from working in the 40-hour per week light-duty position. 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 October 24, 1979 wage-earning capacity decision was warranted and the case must be remanded for an appropriate decision on this issue.

⁵ See *Katherine T. Kreger*, *supra* note 3; *Sharon C. Clement*, *supra* note 1. 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

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 1, 2005 and October 15, 2004 are set aside and the case remanded for further action consistent with this decision of the Board.

Issued: November 16, 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