

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

O.K., Appellant

and

**NATIONAL AERONAUTICS & SPACE
ADMINISTRATION, Cape Canaveral, FL,
Employer**

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**Docket No. 06-861
Issued: December 11, 2006**

Appearances:
Ronald S. Webster, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 11, 2006 appellant, through his attorney, filed a timely appeal from merit decisions of the Office of Workers' Compensation Programs dated June 1 and December 20, 2005 denying his claim for compensation and a merit decision dated December 20, 2005 finding that he did not establish a recurrence of disability. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly determined that the issue was whether appellant had established that he was entitled to compensation for total disability from March 1, 1970 onward; and (2) whether the Office properly determined that the issue was whether he established a recurrence of disability beginning November 27, 2001 causally related to his accepted employment injury.

FACTUAL HISTORY

This case is before the Board for the second time. In the first appeal, the Board set aside the Office's July 23, 1973 decision denying appellant's request for reconsideration of a March 11, 1970 wage-earning capacity determination.¹ The Board instructed the Office to further develop the medical evidence to determine whether appellant could perform the selected position of stock records clerk. The findings of fact and conclusions of law from the prior decision are incorporated by reference.

By decision dated March 23, 1978, the Office denied appellant's request for modification of his wage-earning capacity after finding that he had the physical capacity to perform the work of a stock room clerk.² The Office paid him compensation based on the difference in wages between a stock room clerk and his date-of-injury position. In a decision dated January 22, 1979, the Office denied appellant's request for reconsideration of the merits of his claim under 5 U.S.C. § 8128.

On May 19, 2003 appellant submitted a claim for compensation (Form CA-7) requesting compensation from March 1, 1970 to the present. He provided an April 22, 2003 form report from Dr. Arnold R. Penix, a Board-certified orthopedic surgeon, who discussed appellant's history of a crush injury to the left ankle in 1961 with subsequent surgical repairs. Dr. Penix diagnosed post-traumatic arthritis of the left ankle and checked "yes" that the condition was caused or aggravated by employment. He found that appellant was totally disabled beginning in 1970.

By letter dated August 4, 2003, the Office informed appellant's attorney that he should complete a notice of recurrence of disability (Form CA-2a).³ In a decision dated November 17, 2003, the Office denied appellant's claim for compensation on the grounds that the evidence was insufficient to establish that he was totally disabled from March 1, 1970 to the present.

Appellant's attorney notified the Office on November 18, 2003 that appellant required a left ankle fusion "due to the increasing pain and worsening of [his] condition." He argued that appellant had sustained a recurrence of disability and was now totally disabled. On November 20, 2003 appellant requested an oral hearing on his claim.⁴

¹ *Oxley T. Kinnaird*, Docket No. 75-16 (issued September 30, 1974). The Office accepted that appellant sustained a fractured fibula and a crush injury to his left ankle from a May 27, 1961 employment injury.

² In a report dated November 10, 1976, Dr. Bright McConnell, Jr., a Board-certified orthopedic surgeon, found that appellant had the physical capabilities to perform the position.

³ In its letter, the Office referred to the reduction in appellant's compensation as occurring in 1982 rather than 1970.

⁴ He submitted a report dated September 5, 2002 from Dr. Gerald C. Shute, a Board-certified orthopedic surgeon, who noted appellant's history of a 1961 crush injury to his left ankle. He diagnosed post-traumatic arthritis of the left ankle and recommended a left ankle fusion.

On December 9, 2003 appellant filed a recurrence of disability claim (Form CA-2a) on November 27, 2001 causally related to his May 27, 1961 employment injury.

By decision dated December 30, 2003, the Office denied appellant's request for a hearing. It noted that as his injury occurred before 1966 he was not entitled to a hearing as a matter of right. The Office further found that the issue could be resolved equally well through the reconsideration process.

On August 10, 2004 appellant requested reconsideration of his claim. Counsel contended that the newly submitted medical evidence established that his condition had "progressed to the point where he now has severe osteoarthritis of the left ankle" and met the "standard of indicating a change of condition whereas [he] should be entitled to compensation from the last date paid and continuing." With his reconsideration request, appellant submitted a report dated July 26, 2004 from Dr. Penix who diagnosed progressive osteoarthritis of the left ankle due to the 1961 crush injury. Dr. Penix explained that the osteoarthritis had progressed over the past several years such that appellant was now totally disabled.

By decision dated June 1, 2005, the Office denied modification of its prior decision.⁵ It noted that appellant had not established a material change in the nature and extent of his injury-related condition or that its determination that he could perform the position of stock clerk was in error.⁶ The Office further found that the medical evidence was insufficient to establish that he had sustained a recurrence of disability.

On November 17, 2005 appellant, through his attorney, requested reconsideration of his claim. He submitted a report dated November 9, 2005 from Dr. Penix who diagnosed severe osteoarthritis "directly caused" by appellant's 1961 employment-related ankle fracture.

By decision dated December 20, 2005, the Office denied appellant's claim for a recurrence of disability beginning November 27, 2001 after finding that the medical evidence did not establish that he was totally disabled due to his accepted employment injury. It noted that the evidence did not show a worsening of his condition which would constitute a recurrence of disability.⁷

⁵ The Office indicated that it was denying modification of a decision dated October 31, 2003 rather than December 30, 2003; however, this appears to be a typographical error.

⁶ The Office referred to the standard for modifying a loss of wage-earning capacity determination but did not specifically adjudicate the issue of whether the prior wage-earning capacity determination should be modified. The Office denied modification of its finding that he had not established total disability beginning March 1970.

⁷ The Office indicated that in order to establish modification of a loss of wage-earning capacity, an employee must show a worsening of a medical condition, which "would be considered a recurrence of disability." It then determined that the evidence was insufficient to support that he was totally disabled for the period in question. One of the criteria for establishing modification of a loss of wage-earning capacity determination, however, is whether appellant has established a material change in his injury-related condition rather than total disability. *See Darletha Coleman*, 55 ECAB 143 (2003).

In another decision dated December 20, 2005, the Office denied modification of its June 1, 2005 decision. The Office found that appellant had not established that he was totally disabled beginning March 1, 1970 causally related to his May 27, 1961 employment injury.

LEGAL PRECEDENT -- ISSUES 1 & 2

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.⁸

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.⁹ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.¹⁰

The Office's procedure manual provides: "If 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 [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity."¹¹

ANALYSIS -- ISSUES 1 & 2

The Office accepted that appellant sustained a crushed left ankle with a fracture of the left fibula, peptic duodenitis and an aggravation of preexisting disc disease due to a May 27, 1961 employment injury. He sustained intermittent periods of total disability until September 1968, when he stopped work and did not return. The Office determined that he had the capacity to perform the position of stock records clerk and, accordingly, reduced his compensation in a formal loss of wage-earning capacity determination dated March 11, 1970.¹²

⁸ *Katherine T. Kreger*, 55 ECAB 633 (2004).

⁹ *Sharon C. Clement*, 55 ECAB 552 (2004).

¹⁰ *Id.*

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

¹² The Office denied reconsideration of its wage-earning capacity decision on July 23, 1973. In a decision dated September 30, 1974, the Board set aside the July 23, 1973 decision and remanded the case for further development of the medical evidence. By decision dated March 23, 1978, the Office denied modification of its March 11, 1970 wage-earning capacity determination after finding that the medical evidence established that appellant had the capacity to perform the work of a stock room clerk. In a decision dated January 22, 1979, the Office denied his request for reconsideration under section 8128.

On March 19, 2003 appellant submitted a Form CA-7 requesting compensation from March 1, 1970 to the present. On December 9, 2003 he filed a recurrence of disability claim on November 27, 2001 causally related to his May 27, 1961 employment injury. Appellant argued that he developed severe osteoarthritis resulting from his employment injury and was now totally disabled. In a report dated July 26, 2004, Dr. Penix diagnosed severe, progressive osteoarthritis of the left ankle due to appellant's accepted 1961 employment injury. He opined that he was totally disabled from employment due to the progression of the osteoarthritis. 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 a wage-earning capacity is warranted.¹³

In a decision dated November 17, 2003, the Office denied appellant's claim on the grounds that he did not establish that he was totally disabled beginning March 1, 1970. The Office did not address the issue of whether appellant had established modification of the formal loss of wage-earning capacity determination. In decisions dated June 1 and December 20, 2005, the Office denied modification of its finding that he did not establish total disability beginning March 1, 1970. In its June 1 and December 20, 2005 decisions, the Office noted that appellant had not established a material change in the nature and extent of his injury-related condition or established error in its determination that he could perform the position of stock clerk. The Office, however, did not separately adjudicate the issue of whether the prior wage-earning capacity determination should be modified. Instead the Office found that the evidence was insufficient to warrant modification of its denial of his claim for compensation for total disability from 1970 onwards.

In another decision dated December 20, 2005, the Office found that appellant had not established that he sustained an employment-related recurrence of disability beginning November 27, 2001. It referred to the standard for establishing modification of a formal wage-earning capacity determination but then determined that the evidence was insufficient to support that appellant was totally disabled for the period in question.

Board precedent and 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.¹⁴ Appellant submitted medical evidence supporting that he sustained an increase in disability that prevented him performing the position of stock clerk. The Board finds that the Office should have adjudicated the issue of modification of the wage-earning capacity determination.

¹³ See *Sharon C. Clement*, *supra* note 9. 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.* See also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

¹⁴ *Id.*

CONCLUSION

The Board finds that appellant's claim for compensation raised the issue of whether a modification of the 1970 wage-earning capacity decision was warranted. The case is remanded for an appropriate decision on this issue.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 20 and June 1, 2005 are set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: December 11, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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