

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

ROBERT A. MONTGOMERY, Appellant

and

**DEPARTMENT OF THE NAVY, NAVAL
WEAPONS STATION, Concord, CA,
Employer**

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**Docket No. 05-100
Issued: June 6, 2006**

Appearances:
Robert A. Montgomery, pro se
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge

JURISDICTION

On October 12, 2004 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated September 27, 2004 which denied his request for benefits for a recurrence of disability and a January 12, 2004 decision, reducing his wage-loss compensation based on his actual wages. Under 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 presented was a recurrence of disability; and (2) whether the Office properly modified its determination of appellant's loss of wage-earning capacity.

FACTUAL HISTORY

This is the second appeal before the Board. On April 19, 1993 appellant, a 31-year-old stevedore, injured his lower back when he was struck by a board while opening a rail car door.

The Office accepted the claim for lumbar strain and lumbar disc herniation/displacement. Appellant has not returned to his federal employment.

On August 28, 1995 appellant began working as a security guard/surveillance person, a job obtained for him by an Office vocational rehabilitation counselor; the position entailed weekly wages of \$250.00. He stopped working at this position in December 1995. Appellant obtained employment with various other private entities.

By decision dated February 21, 1996, the Office advised appellant that it was reducing his compensation effective March 2, 1996 because the weight of the medical evidence showed that he was no longer totally disabled for work due to effects of his April 19, 1993 employment injury and that the evidence of record showed that his actual wages as a surveillance worker/guard, a job at which appellant had worked for 60 days, represented his wage-earning capacity. The Office also determined that appellant had a 41 percent wage-earning capacity, which was computed by comparing the pay rate at the time of his stevedore position with the pay rate for his position of surveillance worker/guard. Thereafter, he annually reported his earnings to the Office on its EN1032 forms.

In a Form EN1032 dated December 10, 2000, appellant informed the Office that he had obtained employment as a warehouse forklift loader with Associated Wholesale Grocery, Inc. in Kansas City, Kansas, with weekly earnings of \$469.60.

In a decision dated May 18, 2001, the Office modified appellant's wage-earning capacity to reflect weekly earnings of \$500.80 as an order filler and warehouse worker with Associated Wholesale Grocery, Inc. The Office determined that his wage-earning capacity was 69 percent of the current pay rate for his date-of-injury position and his compensation was reduced to reflect his wage-earning capacity.

On August 21, 2001 appellant filed a Form CA-2a claim for benefits, alleging that he sustained a recurrence of disability on July 26, 2001 which was caused or aggravated by his April 19, 1993 employment injury.

By decision dated November 21, 2001, the Office denied appellant compensation for a recurrence of his accepted lower back condition. The Office found that he failed to submit medical evidence sufficient to establish that the claimed condition or disability as of July 26, 2001 was caused or aggravated by the April 19, 1993 employment injury. In a November 12, 2003 decision,¹ the Board affirmed the Office's denial of benefits for an alleged recurrence of disability and modified its determination of appellant's loss of wage-earning capacity. The Board found that the only relevant medical evidence appellant submitted in support of his claim for a recurrence of disability did not indicate whether his condition or disability was causally related to his April 19, 1993 employment injury. The Board, therefore, found that these did not constitute sufficient medical evidence demonstrating a causal connection between appellant's current condition and his accepted lower back condition. The complete facts of this case are set forth in the Board's November 12, 2003 decision and are herein incorporated by reference.

¹ Docket No. 02-935 (issued November 12, 2003).

In an Office memorandum dated December 4, 2003, the Office indicated that appellant had been working as a seat builder for Johnson Controls in Oklahoma City, since February 18, 2002, a position which entailed building car seats for General Motors. The hourly rate for this position was \$18.75, at which he was working full time, 40 hours per week. The Office stated that this work was of a strenuous nature.

In a report dated December 16, 2003, Dr. Mark Wellington, an osteopath and appellant's attending physician, stated that he had examined him on December 9, 2003, at which time he noted an increased intensity in appellant's right radicular, lumbar pain. He advised that, although appellant continued to work, his recent exacerbation of back pain caused some difficulty performing normal functions of his job with Johnson Controls. Dr. Wellington stated that appellant's present condition did not prevent him from returning to work.

On January 5, 2004 appellant filed a Form CA-2a claim for benefits, alleging that he sustained a recurrence of disability on December 19, 2003 which was caused or aggravated by his April 19, 1993 employment injury. He submitted a January 5, 2004 report from Dr. Harvey C. Jenkins, a specialist in orthopedic surgery, who stated that appellant presented with low back pain which started in April 1993 following his rail car accident. Dr. Jenkins indicated that appellant's back pain had been intermittent since that time and noted that he had received epidural steroid injection which had partially ameliorated the pain. He indicated findings on examination and diagnosed intervertebral disc disorder with possible stenosis.

In a decision dated January 12, 2004, the Office modified appellant's wage-earning capacity to reflect his earnings as an order filler and warehouse worker of \$778.40 a week. The Office determined that appellant's wage-earning capacity was 96 percent of the current pay rate for his date-of-injury position and his compensation was reduced to reflect his wage-earning capacity.

In a report dated February 16, 2004, Dr. Jenkins noted that appellant had undergone a magnetic resonance imaging (MRI) scan which showed L2-3 disc protrusions centered to the left which indented the thecal sac and L4-5 broad-based disc bulge, with protrusion centered to the left midline indenting the thecal sac, narrowing the left neuroforamen and displacing the proximal left L5 nerve root. He also noted L5-S1 small paramedical disc bulge with annular tear, which mildly narrowed the left lateral recess and displaced the S1 nerve root. Dr. Jenkins reiterated that appellant had received epidural injections, but stated that these had not helped his condition. He advised that appellant continued to have severe symptoms and concluded that there were several levels which could be contributing to his back and lower left leg pain. Dr. Jenkins essentially reiterated these findings and conclusions in follow-up reports dated March 5 and 24 and April 12, 2004. In his May 5, 2004 report, Dr. Jenkins stated that appellant's symptoms were clearly consistent with those he has experienced since his 1993 injury and were a natural progression of that problem.

By decision dated September 27, 2004, the Office denied appellant compensation for a recurrence of disability December 19, 2003 causally related to his accepted April 19, 1993 lower back injury. The Office found that he failed to submit medical evidence sufficient to establish

that the claimed condition or disability December 19, 2003 which was caused or aggravated by the accepted conditions.

LEGAL PRECEDENT -- ISSUE 1

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.²

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."³

ANALYSIS -- ISSUE 1

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 19, 2003. Under the circumstances of this case, however, the Board finds that the issue presented was whether the February 1, 1996 wage-earning capacity determination should be modified.

According to the evidence of record, appellant sustained an employment-related low back injury on April 19, 1993. His claim was accepted by the Office for lumbar strain and lumbar disc herniation/displacement. Appellant did not return to work with the employing establishment, but found work as a security guard/surveillance person, working full time at the weekly wages of \$250.00. The Office reduced his compensation based on his actual wages as a surveillance worker/guard in its February 21, 1996 decision. Appellant subsequently obtained employment as a warehouse forklift loader with Associated Wholesale Grocery, Inc. in Kansas City, Kansas, with weekly earnings of \$469.60 and by decision dated May 18, 2001, the Office modified appellant's wage-earning capacity to reflect weekly earnings of \$500.80 with Wholesale Grocery, Inc. He subsequently filed a claim for recurrence of disability which was denied by the Office in a November 21, 2001 decision. By decision dated November 12, 2003, the Board affirmed the Office's denial of the claim for recurrence of disability and reversed the May 18, 2001 modification of appellant's loss of wage-earning capacity determination.

Appellant began working with Johnson Controls on February 18, 2002 and on January 5, 2004 filed a claim for recurrence of disability on December 19, 2003 when he was still working

² See *Katherine T. Kreger*, 55 ECAB ____ (Docket No. 03-1765, issued August 13, 2004).

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

with Johnson Controls.⁴ In its September 27, 2004 decision, the Office did not consider whether appellant established a basis for modification of the February 21, 1996 loss of wage-earning capacity determination. Instead, the Office identified the issue as whether appellant established a recurrence of disability. This constituted error on the part of the Office. Both the Office's procedural 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 the Office's loss of wage-earning capacity decision is warranted.⁵ The Office, therefore, should have considered whether appellant established a basis for modification of the February 21, 1996 wage-earning capacity determination. Therefore, the Office's September 27, 2004 decision is set aside.

LEGAL PRECEDENT -- ISSUE 2

In order to modify a formal loss of wage-earning capacity determination, the Office must establish either that the original rating was in error, that the claimant's medical condition had changed or that the claimant has been vocationally rehabilitated.⁶ The burden is on the Office to establish that there had been a change so as to affect the employee's capacity to earn wages in the job determined to represent his earning capacity. The Office may modify a wage-earning capacity determination if the claimant has been vocationally rehabilitated and is employed in a new job earning 25 percent more than the current rate of pay for the job for which the claim was rated.⁷

ANALYSIS -- ISSUE 2

In the present case, as noted above, appellant was working as a stevedore at the time of his employment injuries. He eventually stopped working at this position and obtained several other jobs until August 9, 1998, when he obtained employment with Associated Wholesale Grocery, Inc. as an order selector and forklift operator.⁸ After receiving evidence that appellant was working as a seat builder for Johnson Controls as of February 18, 2002, the Office, in its January 12, 2004 decision, formally reduced his loss of wage-earning capacity based on actual earnings in this position of \$750.00 a week, which represented an increase exceeding 25 percent of his prior wage-earning capacity of \$320.00 as a security guard.

⁴ A recurrence of disability means, among other things, an inability to work when a light-duty assignment made a specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force). 20 C.F.R. § 10.5(x) (1999).

⁵ *Katherine T. Kreger, supra note 2; Sharon C. Clement, 55 ECAB ____* (Docket No. 01-2135, issued May 18, 2004).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11 (June 1996, July 1997).

⁷ *Id.*

⁸ As noted earlier, the Office in its April 5, 2001 decision modified appellant's wage-earning capacity to reflect weekly earnings of \$500.80 as an order filler and warehouse worker with Associated Wholesale Grocery, Inc. August 9, 1998 a determination which the Board reversed in its November 12, 2003 decision.

An increase in pay by itself, however, is not sufficient evidence that there has been a change in an employee's capacity to earn wages. The Board has held that, without a showing of additional qualifications obtained by appellant through retraining, it is improper to make a new loss of wage-earning capacity determination based on increased earnings.⁹ Prior to such a modification, the Office is required to determine the duration, exact pay, duties and responsibilities of the new job; determine whether the claimant underwent training or vocational preparation to earn the current salary; and assess whether the actual job differs significantly in duties, responsibilities or technical expertise from the job at which the claimant was rated.¹⁰

In this case, the Office determined the duration and exact pay of the current job, but did not determine the duties of the seat builder position or whether appellant underwent training or vocational preparation to earn the current salary. The case record does not contain sufficient information to permit a determination of whether appellant has been retrained or otherwise rehabilitated so as to permit the use of the seat builder position in determining his wage-earning capacity. Only after all the factors have been examined can the Office properly determine whether appellant has been retrained or otherwise vocationally rehabilitated such that modification of his loss of wage-earning capacity is warranted.

As noted above, it is the Office's burden to establish that appellant has been vocationally rehabilitated. Since the Office failed to follow accepted procedures and adequately address the relevant factors, the Board finds that the Office failed to meet its burden in this case. As the Office failed to follow its own procedures in modifying the original wage-loss determination, the Office failed to meet its burden of proof. The Board, therefore, reverses the January 12, 2004 Office decision modifying the original wage-earning capacity determination.

CONCLUSION

The Board finds that appellant's April 11, 2002 notice of recurrence raised the issue of whether modification of the Office's wage-earning capacity determination was warranted. As the Office did not properly adjudicate this issue, the case will be remanded for an appropriate decision.

⁹ *Odessa C. Moore*, 46 ECAB 681 (1995); *Willard N. Chuey*, 34 ECAB 1018 (1983).

¹⁰ *Id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11(d) (June 1996).

ORDER

IT IS HEREBY ORDERED THAT the September 27, 2004 decision of the Office of Workers' Compensation Programs is set aside and the January 12, 2004 decision is reversed.

Issued: June 6, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board