

FACTUAL HISTORY

On June 19, 2002 appellant, then a 49-year-old import specialist, filed a traumatic injury claim alleging that on June 17, 2002 she sustained right arm and hand, neck, knees, left arm and hand and right hip injuries when she tripped on a rug in a stairwell. Appellant stopped work on June 17, 2002. The Office accepted her claim for cervical strain, left shoulder strain, bilateral knee strain and right hip strain, authorized left shoulder arthroscopic surgery, which occurred on September 10, 2002 and paid appropriate compensation for temporary total disability.

On April 15, 2003 appellant returned to a part-time limited-duty position, as a modified import specialist. By decision dated August 18, 2003, the Office found that her actual earnings as a part-time modified import specialist represented her wage-earning capacity and reduced her compensation based upon her actual wages. Appellant claimed subsequent periods of disability and the Office paid compensation for August 12, October 7 and December 2, 2003 and January 27, March 23 to 30, June 2 and 3, July 21, August 18 and September 27, 2004.

On March 1, 2004 appellant returned to full-duty work with no restrictions. The Office removed appellant from the periodic rolls effective March 1, 2004.

On September 7, 2004 the Office received appellant's claim for compensation (Form CA-7) alleging total disability for August 31, 2004. The Office also received a disability slip dated September 1, 2004, from Dr. Joseph Neustein, an attending Board-certified orthopedic surgeon, indicated that appellant was totally disabled on August 31, 2004 due to a migraine headache, which the physician attributed to appellant's cervical sprain.

On September 20, 2004 the Office received a September 14, 2004 report by Dr. Neustein. He diagnosed left shoulder sprain, right knee chondromalacia of the patella, cervical sprain and left knee derangement. He reported a cervical magnetic resonance imaging scan which revealed disc herniations with spinal stenosis at C2-3 and C3-4 and a tear at C6-7. A physical examination revealed bilateral restriction of knee movement "with pain on flexion past 90 degrees and pain on McMurray's," and mildly limited neck motion.

Subsequently, the Office received additional CA-7 forms claiming compensation for total disability for the periods September 14 to 17 and September 7 to October 1, 2004. In support of her claims for disability the Office received disability slips dated September 14 and 27, 2004. Dr. Neustein noted appellant's period of disability as September 14 to 20, 2004, which he attributed to appellant's "severe cervical pain [and] migraine." In a September 27, 2004 disability slip, the physician concluded that appellant was totally disabled from work beginning September 27, 2004, due to knee pain and acute cervical pain.

On October 11, 2004 the Office received a September 27, 2004 report by Dr. Neustein, who diagnosed left shoulder sprain, right knee chondromalacia, cervical sprain and left knee derangement. A physical examination revealed: "pain with motion of the left shoulder limited by 10 percent over the subacromial space," left knee flexion of 100 degrees, "[r]ight knee motion is slightly greater without effusion or instability in either knee" and there was "generalized periarticular pain in both knees around the patella." Dr. Neustein indicated that appellant would be "off work due to increasing pain."

On October 22, 2004 the Office received a time analysis (Form CA-7a) and Form CA-7 requesting compensation for the period October 4 to 15, 2004. Subsequently, the Office received additional Forms CA-7 and CA-7a requesting compensation for the period October 18 to 29, 2004.

On October 28, 2004 the Office received a disability slip dated October 25, 2004 from Dr. Neustein indicating that appellant was totally disabled from work due to a herniated disc, cervical injury and acute knee pain.

In a letter dated November 2, 2004, the Office informed appellant that the evidence of record was insufficient to establish that she sustained a recurrence of disability beginning September 27, 2004 and advised her as to the type of factual and medical evidence required to support her claim.

By decision dated November 2, 2004, the Office denied appellant's claim for wage loss for the period August 31 and September 14 to 17, 2004.

Appellant filed a recurrence claim (Form CA-2a) dated November 27, 2004, alleging a recurrence of disability for August 31, September 14 to 17 and September 28, 2004, to the present.

On December 17, 2004 the Office denied appellant's request for modification of the denial of her claim for wage-loss compensation. The Office found the medical evidence insufficient to establish that her disability beginning on September 28, 2004 and continuing was causally related to her accepted June 17, 2002 employment injuries.

LEGAL PRECEDENT -- ISSUE 1

A claimant, for each period of disability claimed, has the burden of proving by the preponderance of the reliable, probative and substantial evidence that she is disabled for work as a result of the employment injury. Whether a particular injury causes an employee to be disabled for employment and the duration of that disability, are medical issues which must be established, probative and substantial evidence.¹ The Office is not precluded from adjudicating a limited period of employment-related disability when a formal wage-earning capacity determination has been issued.²

In this case, appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal relationship between her claimed disability August 31 and September 14 to 17, 2004 and her accepted cervical strain, left shoulder strain, bilateral knee strain and right hip strain.³ The Board has held that the mere belief that a condition was caused

¹ *Fereidoon Kharabi*, 52 ECAB 291 (2001).

² See *Sharon C. Clement*, 55 ECAB ____ (Docket No. 01-2135, issued May 18, 2004) at n.10, slip op. at 5; *Cf. Elsie L. Price*, 54 ECAB, 734 (2003) (acceptance of disability for an extended period of time was sufficient to establish that modification of the wage-earning capacity determination was warranted).

³ *Alfredo Rodriguez*, 47 ECAB 437 (1996).

or aggravated by employment factors or incidents is insufficient to establish a causal relationship between the two.⁴ The Board will not require the Office to pay compensation for disability in the absence of medical evidence directly addressing the particular period of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.⁵

To meet this burden, a claimant must submit rationalized medical opinion evidence based on a complete factual and medical background supporting such a causal relationship. Rationalized medical opinion evidence is medical evidence which includes a physician's opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factor(s). The opinion of the physician must be based on a complete factual and medical background, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁶

ANALYSIS -- ISSUE 1

Appellant initially returned to a part-time modified position, on April 15, 2003 and the Office determined that her actual earnings represented her wage-earning capacity. After this determination, appellant missed intermittent periods of work, some of which the Office found compensable; for others, it denied compensation. The part of the period involved on the present appeal involves the period August 31 and September 14 to 17, 2004.

Appellant's attending physician, Dr. Neustein, a Board-certified orthopedic surgeon, concluded that appellant was totally disabled for August 31 and September 14 to 17, 2004, the specific period claimed. During this period Dr. Neustein examined appellant on two different dates. His opinion that she was disabled does not consist of a repetition of appellant's complaint that she hurt too much to work. Rather, he cited to the objective basis for her pain, namely a migraine headache due to her cervical sprain, "pain with motion of the left shoulder limited by 10 percent," left knee flexion of 100 degrees and "generalized periarticular pain in both knees around the patella" which were related to conditions the Office accepted as a result of the June 17, 2002 employment injury.

The Board finds that, while these reports lack detailed medical rationale sufficient to discharge appellant's burden of proof to establish the period of disability causally related to the June 17, 2002 cervical strain, left shoulder strain, bilateral knee strain and right hip strain, this does not mean that they may be completely disregarded by the Office. In the absence of medical evidence to the contrary, the physicians' reports are sufficient to require further development of the record.⁷ It is well established that proceedings under the Federal Employees' Compensation Act are not adversarial in nature and while the claimant has the burden to establish entitlement to

⁴ *Id.*

⁵ *Fereidoon Kharabi*, *supra* note 1.

⁶ *Judith A. Peot*, 46 ECAB 1036 (1995); *Ruby I. Fish*, 46 ECAB 276 (1994).

⁷ *Jimmy A. Hammons*, 51 ECAB 219 (1999); *John J. Carlone*, 41 ECAB 354 (1989).

compensation, the Office shares responsibility in the development of the evidence.⁸ The case will be remanded to the Office to determine if appellant is entitled to disability for any period between August 31 and September 14 to 17, 2004. After this and such further development deemed necessary, the Office shall issue an appropriate decision.

LEGAL PRECEDENT -- ISSUE 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.⁹

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."¹⁰

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.¹¹ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.¹²

ANALYSIS -- ISSUE 2

In this case, the Office developed the evidence and determined that the issue presented was whether appellant had established a recurrence of disability for the period September 28, 2004 and continuing. Under the circumstances of this case, however, the Board finds that the issue presented was whether the August 18, 2003 wage-earning capacity determination should be modified.

According to the evidence of record appellant returned to work part-time as a modified import specialist at the employing establishment on April 15, 2003, a loss of wage-earning capacity decision was issued on August 18, 2003 and she returned to full-time work on March 1, 2004. Appellant filed a notice of recurrence of disability on November 27, 2004 stating that she sustained a recurrence of partial disability for the period September 28, 2004 and

⁸ *William B. Webb*, 56 ECAB ___ (Docket No. 04-1413, issued November 23, 2004).

⁹ *See Sharon C. Clement*, *supra* note 2.

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

¹¹ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

¹² *Id.*

continuing. It is clear that the claim in this case was that appellant's condition had deteriorated such that she was having difficulty working in her modified position of import specialist. 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.¹³

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. The Board finds that the Office should have considered the issue of modification of the wage-earning capacity determination.

CONCLUSIONS

The Board finds this case is not in posture for decision regarding any period of disability for August 31 and September 14 to 17, 2004. The case is remanded for further development and appropriate decision on this issue. The Board also finds that appellant's claim for total disability compensation for September 28, 2004 and continuing raised the issue of whether a modification of the August 18, 2003 wage-earning capacity decision was warranted and the case must be remanded for an appropriate decision on this issue.

¹³ See *Sharon C. Clement*, *supra* note 2. 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*, *supra* note 2 (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 December 17 and November 2, 2004 decisions of the Office of Workers' Compensation Programs are set aside and the case remanded for further action consistent with this decision of the Board.

Issued: March 8, 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