

FACTUAL HISTORY

On December 18, 1992 appellant, a 34-year-old maintenance mechanic, filed an occupational disease claim alleging that on June 27, 1992 he first realized his allergic asthma was due to his federal employment. The Office accepted the claim for aggravation of asthma and placed him on the periodic rolls by letter dated August 30, 1993. It subsequently expanded his claim to include depression and consequential osteopenia.

By letter dated June 20, 2000, the Office advised appellant that his monetary compensation was being reduced, effective June 5, 2000, due to the fact that he was reemployed as a general technician with wages of \$628.85 per week. He was advised that he continued to be entitled to receive payment for medical expenses for treatment of his work-related condition. In a decision dated August 8, 2000, the Office found that his actual earnings as a general technician with wages of \$628.85 per week fairly and reasonably represented his wage-earning capacity.

On August 11, 2004 appellant filed a recurrence of disability claim (Form CA-2a), commencing August 10, 2004 causally related to his 1992 employment injury. He stopped work on August 11, 2004 and alleged that the dust at work made his “asthma much worse than it was before” he returned to work. The record reveals that appellant did not return to work following the alleged recurrence of disability.

By decision dated October 12, 2004,² the Office denied appellant’s claim for a recurrence of disability on the grounds that the medical evidence of record failed to establish that it was causally related to the accepted employment injury. The Office advised appellant to file a new claim for wage loss, as his condition was attributed to “new work-related environmental factors.”

On August 27, 2005 appellant requested an oral hearing before an Office hearing representative.

By decision dated October 3, 2005, the Office denied appellant’s request for an oral hearing as untimely filed. The Office further denied the request, finding that the issue could be resolved through the reconsideration process.

LEGAL PRECEDENT -- ISSUE 1

A wage-earning capacity decision is a determination that either actual earnings or earnings in 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.³

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

² The decision was originally issued on September 9, 2004, but was reissued on October 12, 2004.

³ See *Sharon C. Clement*, 55 ECAB ____ (Docket No. 01-2135, issued May 18, 2004).

need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity.”⁴

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.⁵ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁶

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 August 10, 2004. Under the circumstances of this case, however, the Board finds that the issue presented was whether the August 8, 2000 wage-earning capacity determination should be modified.

According to the evidence of record, appellant returned to work on June 5, 2000 to a general technician position within his restrictions. The Office found that his actual earnings fairly and reasonably represented his wage-earning capacity. Appellant subsequently filed a notice of recurrence on August 10, 2004, stopping work on August 11, 2004 and contending that the dust in his work environment aggravated his accepted asthma condition. He contends that his condition has deteriorated or worsened to the extent that he became disabled for work. 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.⁷ 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.⁸

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

⁵ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

⁶ *Id.*

⁷ *See Sharon C. Clement*, *supra* note 3. 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 734 (2003) (acceptance of disability for an extended period was sufficient to establish that modification of the wage-earning capacity determination was warranted).

⁸ In light of the disposition of this issue, the Board finds that second issue in this case is rendered moot.

CONCLUSION

The Board finds that appellant's claim for compensation raised the issue of whether a modification of the August 8, 2000 wage-earning capacity decision was warranted and the case must be remanded for an appropriate decision on this issue.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 12, 2004 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: September 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