



This case has previously been before the Board on appeal.<sup>1</sup> On April 13, 2006 the Board set aside and remanded the Office's June 15 and October 11, 2005 decisions denying appellant's recurrence claim, finding that his November 28, 2001 notice of recurrence of disability and the medical evidence submitted raised the issue of whether modification of the Office's June 30, 1992 wage-earning capacity determination was warranted.<sup>2</sup> The facts and the conclusions of the law contained in that decision are incorporated herein by reference. The facts and the evidence relevant to the issue currently before the Board are set forth below.

The record contains a December 11, 2001 report from Dr. Mohammad Khadid, a treating physician, who opined that appellant was disabled from teaching school due to persistent back and lower extremity pain. On April 29, 2003 Dr. Louis D. Zegarelli, a Board-certified osteopath specializing in orthopedic surgery, diagnosed chronic mechanical lumbosacral pain syndrome, annular fiber tears with high probability for internal disc disruption at L4-5 and L5-S1, lumbar radicular syndrome based on a positive electromyography (EMG) study, and L4-5 and L5-S1 disc protrusions. He opined that there had been a gradual worsening in appellant's condition and that there was a direct relationship between his current condition and his December 29, 1983 employment-related injury.

In a March 1, 2005 second opinion report, Dr. Robert M. Chouteau, a Board-certified osteopath specializing in orthopedic surgery, diagnosed lumbar spondylosis with lumbar discogenic disease L4-5, L5-S1, opined that appellant's condition was secondary to his accepted employment injury and was permanent in nature. Based upon his examination of appellant and review of the entire medical record, he opined that appellant would have difficulty with prolonged standing, bending and stooping in his capacity as a school teacher. Dr. Chouteau indicated that appellant was functioning at a "light sedentary" level, and that he had been living with his condition, even though it had not worsened since 1983. In an accompanying work capacity evaluation, Dr. Chouteau indicated that appellant could work for eight hours per day with restrictions, including: standing, operating a motor vehicle, squatting, and climbing for no more than one hour; sitting, walking, twisting, bending/stooping, kneeling, and pushing and lifting up to 10 pounds for no more than two hours; and reaching for no more than four hours.

On April 29, 2005 Dr. Zegarelli opined that appellant was disabled from engaging in any significant work activity due to low back pain. In a June 23, 2005 report, Dr. Zegarelli opined that appellant was medically unable to work due to constant pain in his lumbar spine. After reviewing June 11, 2001 and June 10, 2003 magnetic resonance imaging (MRI) scan studies, he noted a rapid worsening of disc pathology at L4-5 and L5-S1, caused by the accepted work injury.

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<sup>1</sup> On January 28, 2003 the Board affirmed the Office's April 4, 2002 decision denying appellant's claim for a recurrence of disability. Docket No. 02-2309 (issued January 28, 2003). By decision dated October 15, 2003, the Board found that appellant's request for reconsideration was timely filed and remanded the Office's April 10, 2003 denial for review under the proper standard. Docket No. 03-1964 (issued October 15, 2003). By decision dated August 5, 2004, the Board remanded the case to the Office for further development of the medical evidence. Docket No. 04-644 (issued August 5, 2004).

<sup>2</sup> Docket No. 06-144 (issued April 13, 2006).

Pursuant to the Board's April 13, 2006 decision, the case was remanded and the Office adjudicated the case as a request for modification of an established loss of wage-earning capacity. By decision dated June 23, 2006, the Office denied modification of the June 30, 2002 loss of wage-earning capacity determination, finding that the position of teacher continued to represent appellant's present wage-earning capacity. The Office found that the weight of the medical evidence was represented by the report of Dr. Chouteau.

### **LEGAL PRECEDENT**

A wage-earning capacity decision is a determination that actual earnings in employment 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.<sup>3</sup>

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 CE [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal [loss of wage-earning capacity].”<sup>4</sup>

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

Section 8123 of the Act provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician, who shall make an examination.<sup>7</sup> In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>8</sup>

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<sup>3</sup> See *Sharon C. Clement*, 55 ECAB 552 (2004).

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

<sup>5</sup> *Sue A. Sedgwick*, 45 ECAB 211 (1993).

<sup>6</sup> *Id.*

<sup>7</sup> 5 U.S.C. § 8123; see *Charles S. Hamilton*, 52 ECAB 110 (2000).

<sup>8</sup> *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001).

## ANALYSIS

The Office accepted the conditions of a lumbosacral strain with right lumbosacral radiculitis, sciatica and a herniated lumbar disc. Appellant did not submit evidence showing that the Office's June 30, 1992 wage-earning capacity determination was erroneous. Rather, he requested a resumption of compensation for total wage loss beginning September 2, 2001 by filing a recurrence of disability claim on November 28, 2001, contending that he was unable to perform the duties of a secondary teacher. Because a formal decision of appellant's loss of wage-earning capacity was in place when he filed the claim, the Board instructed the Office to adjudicate the case as a request for modification of an established loss of wage-earning capacity.<sup>9</sup> On remand, the Office complied with the Board's directive. There is no evidence of record that appellant has been retrained or otherwise vocationally rehabilitated.

In support of his claim that he was unable to perform the duties of a secondary teacher, appellant submitted a report from Dr. Khadid, who opined on December 11, 2001 that he was disabled due to persistent back and lower extremity pain. On April 29, 2003 Dr. Zegarelli diagnosed chronic mechanical lumbosacral pain syndrome, annular fiber tears with high probability for internal disc disruption at L4-5 and L5-S1, lumbar radicular syndrome based on a positive electromyography (EMG) study and L4-5 and L5-S1 disc protrusions. He opined that there had been a gradual worsening in appellant's condition, and that there was a direct relationship between his current condition and his December 29, 1983 employment-related injury. On April 29, 2005 Dr. Zegarelli opined that appellant was disabled from engaging in any significant work activity due to low back pain. In a June 23, 2005 report, Dr. Zegarelli opined that appellant was medically unable to work due to constant pain in his lumbar spine. After reviewing June 11, 2001 and June 10, 2003 MRI scan studies, he noted a rapid worsening of disc pathology at L4-5 and L5-S1, caused by the accepted work injury.

Dr. Chouteau, the second opinion physician, opined that appellant would have difficulty with prolonged standing, bending and stooping in his capacity as a school teacher. He indicated that appellant was functioning at a "light sedentary" level, and that he had been living with his condition, even though it had not worsened since 1983. Dr. Chouteau stated that appellant could work for eight hours per day with restrictions, including: standing, operating a motor vehicle, squatting and climbing for no more than one hour; sitting, walking, twisting, bending/stooping, kneeling, and pushing and lifting up to 10 pounds for no more than two hours; and reaching for no more than four hours. The Office concluded in its June 23, 2006 decision that the June 30, 1992 wage-earning capacity determination should remain undisturbed, as there was insufficient evidence that appellant's condition had changed or that he was unable to perform the duties of the position.

The Board finds a conflict of medical opinion between appellant's physicians and Dr. Chouteau, regarding the nature of appellant's impairments and his ability to work. Section 8123(a) of the Act provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be

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<sup>9</sup> *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sharon C. Clement*, *supra* note 3.

appointed to make an examination to resolve the conflict.<sup>10</sup> When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.<sup>11</sup> Therefore, the case will be remanded to the Office for resolution of the conflict.

On remand, the Office shall refer appellant, the case record and an updated statement of accepted facts, to an appropriate Board-certified specialist or specialists to determine if appellant's medical condition has substantially changed. Following this and any other development deemed necessary, it shall issue an appropriate decision on whether the June 30, 1992 wage-earning capacity determination should be modified.

### **CONCLUSION**

The Board finds that this case is not in posture for a decision as to whether modification of appellant's wage-earning capacity determination is warranted.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated June 23, 2006 is set aside and the case is remanded for further proceedings consistent with the above opinion.

Issued: June 13, 2007  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>10</sup> 5 U.S.C. § 8123(a); *Bryan O. Crane*, 56 ECAB \_\_\_\_ (Docket No. 05-232, issued September 2, 2005).

<sup>11</sup> *Elaine Sneed*, 56 ECAB \_\_\_\_ (Docket No. 04-2039, issued March 7, 2005); *Delphia Y. Jackson*, 55 ECAB 373 (2004).