

postoperative arachnoiditis with another spinal fusion surgery in 1994. Appellant stopped work on July 11, 1978 and was placed on the periodic rolls in October 1978 for wage-loss compensation. In a decision dated November 25, 1996, the Office determined that the position of appointment clerk fairly and reasonably represented appellant's wage-earning capacity. Appellant's compensation benefits were adjusted effective December 8, 1996 to reflect his ability to earn wages in that position.¹

On September 27, 2004 appellant filed a Form CA-2a, claiming a recurrence of disability as of August 18, 1999 stemming from his accepted work injury of July 11, 1978. He indicated that he did not have any other injuries since the initial injury and the date of recurrence and did not have any hobbies nor engaged in any sport activities. Appellant contended that he had "helped out," with no set hours, about three to four days a week for a friend in his tackle shop until 1989 ringing sales for fishing gear and signing for deliveries. He further stated that he was "barely able to get around and can only walk short distances" because of leg weakness. Appellant also indicated that he had trouble sleeping and was constantly tired.

In a January 7, 2003 report, Dr. Robert J. Banco, a Board-certified orthopedic surgeon, advised that appellant had chronic low back pain and developed a slow transitional syndrome. He indicated that appellant's history dated to a work injury of July 1975² when he injured his lower back and the spinal fusion operation went on to a nonunion. Dr. Banco indicated that he saw appellant in April 1994. A computerized tomography (CT) myelogram demonstrated an ongoing nonunion which was surgically repaired on November 7, 1994 with an L4-S1 posterior fusion with instrumentation. Despite that surgical procedure, appellant continued to have back pain. A recent discography demonstrated transitional syndrome at the L3-4 level. A March 13, 2000 CT scan demonstrated a solid posterior fusion at L4-5 and L5-S1. Disc degeneration was noted at L3-4. Dr. Banco opined that appellant's current back pain was related to his work injury. He advised that his prognosis was guarded for any improvement in his low back pain and his treatment program was to maintain himself on a daily walking program.

In a December 20, 2004 report, Dr. Mark A. Finno, a physiatrist, indicated that appellant was evaluated for his low back pain, with the onset of such symptoms beginning "many years ago" after a work injury in 1978. He noted appellant's history of two spinal surgeries and complaints of residual low back pain. Dr. Finno reported that appellant had a normal neurologic examination. He accessed chronic low back pain and provided his recommendations. Dr. Finno reported that he discussed the natural history and etiology of appellant's symptoms and noted that Dr. Banco had stated that appellant was completely disabled and did not have a work capacity. He noted that appellant was not interested in intervention at this time and understood the importance of staying active and continuing a regular home exercise program.

¹ The record reflects that on March 15, 1991 appellant pled guilty to mail fraud and making false statements in connection with the receipt of disability compensation. By decision dated July 22, 2002, the Board affirmed the Office's April 16 and August 15, 2001 decisions finding that appellant forfeited his right to monetary compensation from August 17, 1988 through December 14, 1990 which resulted in an overpayment in the amount of \$46,946.47 for which he was at fault. Docket No. 01-1447 (issued July 22, 2002).

² This is a typographic error as appellant's employment injury occurred on July 11, 1978.

In a December 23, 2004 report, Dr. Dennis M. Dimitri, a Board-certified family practitioner, noted that appellant was unable to work since his back injury at work in 1978 and that he had a failed fusion in 1978 and a second fusion in 1994. He opined that appellant was completely and totally disabled due to daily back pain. Dr. Dimitri stated that appellant was unable to maintain any single activity such as standing, sitting or walking without constant position changes. He advised that his prognosis was poor with no improvement expected.

In a letter dated February 24, 2005, the Office advised appellant that further factual and medical evidence were required to establish that his claimed recurrence was related to his work injury. This included a physician's opinion regarding the relationship between his ability to work and the accepted work-related conditions.

By decision dated March 30, 2005, the Office denied appellant's claim for a recurrence of disability. On April 4, 2005 appellant, through his attorney, requested an oral hearing which was held on March 30, 2006. Counsel confirmed that appellant did not work since 1978 and advised that a recurrence claim was not filed earlier because of the Office's previous decisions regarding an overpayment of compensation. He further explained that 1999 was selected as the year of recurrence because that was when Dr. Banco first disabled appellant from all employment. Counsel argued that the second fusion surgery in 1994 was unsuccessful and questioned how the Office could assume that the surgery alleviated appellant's symptoms without referral to a second opinion physician.

Additional medical reports dated January 12, 2004 and May 18 and June 8, 2006 from Dr. Banco were received post hearing. In his January 12, 2004 report, Dr. Banco advised that he "stated many times over the past years that [appellant] is completely disabled and has no work capacity." He stated that this would not change. In a May 18, 2006 report, Dr. Banco advised that he had been appellant's treating physician since April 7, 1994 and reiterated appellant's history of injury. He reiterated that appellant did well for a short time after his November 7, 1994 L4-S1 posterior fusion with instrumentation. Dr. Banco indicated that he continued to have pain although a repeat CT scan on August 18, 1999 showed a solid fusion. He stated that appellant was developing a transitional syndrome as a 2000 discogram demonstrated deterioration of the L3-4 disc. Dr. Banco diagnosed appellant with transitional syndrome at L3-4 and opined that his low back pain and continued leg pain were the result of transitional disease from his original work-related fusion. He rationalized that appellant's work injury required a spinal fusion which went to a nonunion and required reoperation with instrumentation and resulted in a solid fusion. However, since that time, appellant developed a transitional syndrome. Dr. Banco indicated that appellant had no work capacity due to his chronic low back pain and bilateral leg pain. In a June 8, 2006 report, he reiterated the history of injury and appellant's two spinal fusions. Dr. Banco indicated that, over the years since the second spinal fusion, the CT scans and discograms have demonstrated a solid posterior fusion at L4-5 and L5-S1. However, appellant had significant disc degeneration at the L3-4 area which was nonoperable. Dr. Banco opined that appellant's back pain was related to his work injury and he was unable to work because of the transitional syndrome. He advised that further surgical procedures would only create further transitional syndromes at adjacent levels which was the reason why appellant could not work.

By decision dated June 29, 2006, the Office hearing representative affirmed the denial of appellant's claim for a recurrence of disability. The Office hearing representative found that the "current medical evidence does not establish that the claimant's condition has deteriorated to the point of total disability, sufficient to warrant a change in the previous LWEC [lose of wage-earning capacity] decision." The hearing representative further found that the medical evidence lacked sufficient discussion on how or why appellant became totally disabled in 2003 and was devoid of any sound medical reasoning on causal relationship.

LEGAL PRECEDENT

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.³

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.⁴ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁵ 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.⁶

ANALYSIS

The Office accepted that appellant sustained a lumbar strain and post-traumatic and postoperative arachnoiditis due to his July 11, 1978 employment injury. Spinal fusion surgeries in 1978 and 1994 were also authorized and accepted. Appellant stopped work on July 11, 1978 and did not return. He indicated that he worked briefly for a friend in a tackle shop until 1989.

The Office determined that appellant had the capacity to perform the position of appointment clerk and, accordingly, reduced his compensation in a formal loss of wage-earning capacity determination dated November 25, 1996.

On September 27, 2004 appellant claimed a recurrence of disability as of August 18, 1999 causally related to his July 11, 1978 employment injury. He argued that his constant back

³ *Katherine T. Kreger*, 55 ECAB 633 (2004).

⁴ *Sharon C. Clement*, 55 ECAB 552 (2004).

⁵ *Id.*

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

pain was totally disabling and resulted from his employment injury. Dr. Banco, Dr. Dimitri and Dr. Finno opined that appellant is totally disabled as a result of the employment injury. Dr. Dimitri and Dr. Finno attribute the disability to appellant's back pain while Dr. Banco refers to a transitional syndrome diagnosis. Both the Office 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.⁷

In its June 29, 2006 decision, the hearing representative noted that the current medical evidence did not establish that appellant's condition had deteriorated to the point of total disability sufficient to warrant a change in the previous wage-earning capacity decision and the medical evidence lacked sufficient medical rationale and explanation on causal relationship. The hearing representative, however, did not adjudicate the issue of whether the prior wage-earning capacity determination should be modified. Instead the hearing representative found that the evidence was insufficient to establish appellant's claim for a recurrence of total disability beginning August 18, 1999.

Board precedent and the Office's procedure manual direct the Office to consider the criteria for modification when the claimant requests resumption of compensation for total wage loss.⁸ Appellant submitted medical evidence supporting that he sustained an increase in disability. However, the question of whether that disability prevented him from performing the position of appointment clerk has not been addressed. The Board finds that the Office should have adjudicated the issue of modification of the wage-earning capacity determination.

CONCLUSION

The Board finds that appellant's claim for compensation raised the issue of whether a modification of the November 25, 1996 wage-earning capacity decision was warranted. The case is remanded for appropriate decision on this issue.

⁷ See Sharon C. Clement, *supra* note 4.

⁸ *Id.* 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). In this case, however, appellant is claiming total disability from August 18, 1999 onwards.

ORDER

IT IS HEREBY ORDERED THAT the June 29, 2006 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: March 2, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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