

(4) whether the Office properly required recovery of the overpaid amount by deducting \$50.00 per month from appellant's continuing compensation payments.

FACTUAL HISTORY

The Office accepted that on August 12, 1997 appellant, then a 54-year-old welder in intermittent status, sustained bilateral ankle fractures, heel fractures and a fracture of the L4 vertebra when he fell 20 feet from a miter gate. The Office also approved several surgeries including arthroscopy, open fracture fixations and a bone graft. Appellant stopped work on the date of injury and did not return. He received compensation for total disability on the daily and periodic rolls.

Appellant's attending Board-certified orthopedic surgeons, Drs. Craig Roberts and David Seligson, submitted reports from February to April 1999 stating that appellant could work with restrictions. The Office then undertook a return to work effort, including vocational testing, a labor market survey and job placement assistance.

By decision dated May 22, 2000, the Office determined that the constructed position of service dispatcher (U.S. Department of Labor, *Dictionary of Occupational Titles* #959.167-010) was representative of appellant's wage-earning capacity. Effective May 21, 2000, the Office reduced appellant's total disability compensation based on his ability to earn \$15,932.80 a year in the constructed position.

Appellant requested an oral hearing, later changed to a review of the written record. By decision dated March 2, 2001 and finalized March 8, 2001, an Office hearing representative affirmed the May 22, 2000 wage-earning capacity determination. The hearing representative found that appellant did not submit sufficient rationalized medical evidence establishing that he remained totally disabled for work due to the accepted injuries.

By July 15, 2003 decision, the Office issued a schedule award for a 12 percent impairment of the left lower extremity and a 5 percent impairment of the right lower extremity. The period of the award ran from July 13, 2003 to June 19, 2004. The record demonstrates that, following expiration of the schedule award, the Office reinstated compensation at the total disability rate beginning June 20, 2004.

In a June 6, 2005 notice, the Office advised appellant of its preliminary determination that an overpayment of compensation in the amount of \$7,612.50 was created in his case as he was paid compensation for total disability for the period June 20, 2004 to February 19, 2005 when he was only entitled to compensation at the reduced rate set forth in the wage-earning capacity determination. The Office included a log of all compensation paid from February 23, 2003 to March 14, 2005. These records show that for the period June 20, 2004 to February 19, 2005 appellant received \$9,642.50 in compensation at the total disability rate. However, he was only entitled to receive \$2,030.00 under the May 22, 2000 wage-earning capacity determination, resulting in a \$7,612.50 overpayment of compensation.

Appellant submitted an overpayment recovery questionnaire (Form OWCP-20) dated June 21, 2005. He noted income of \$1,055.00 in monthly Social Security benefits, assets of

\$13.08 in a checking account, and monthly expenses of \$418.20 in rent, \$200.00 for food and \$200.00 for clothing. Appellant asserted that, on November 1, 2004,¹ an unspecified physician “sent papers stating [appellant] was unable to work. So therefore [he] thought [the Office] had raised [his] payment” from partial to total disability. Appellant requested a telephonic hearing on the issue of waiver.

In an undated letter received by the Office on November 9, 2005, appellant stated that approximately six months before, an unspecified Office employee told him that if he submitted medical proof of total disability, the Office “could get [him] more money.” Appellant asserted that enclosed medical evidence established that he was totally disabled for work. In an April 9, 2002 report, Dr. Roberts diagnosed subtalar joint arthritis, status-post bilateral calcaneus fractures and left third metatarsal fracture. In August 20 and November 9, 2002 reports, Dr. Roberts noted both that appellant was disabled for work and that he was able to work “with restrictions.” In March 1 and November 14, 2005 reports, Dr. Roberts stated that appellant was “permanently disabled and unable to work.” In a May 22, 2006 letter, Dr. Roberts diagnosed bilateral subtalar joint arthrosis, bilateral calcaneocubid joint arthrosis and status post bilateral calcaneus fractures. He stated that appellant was completely and permanently disabled for work.

The Office conducted a telephonic hearing on September 13, 2006. Appellant reported a total monthly income of \$1,346.00, with expenses of \$936.50 for food, clothing, utilities and mortgage. The Office found that the overpayment was not subject to waiver.

By decision dated September 13, 2006, the Office found that an overpayment of \$7,612.50 occurred in his case as he was incorrectly paid compensation at the total disability rate from June 20, 2004 to February 19, 2005. The Office further found that appellant was not at fault in creation of the overpayment but that it was not subject to waiver as he did not meet the appropriate financial criteria. The Office directed recovery of the overpayment at the rate of \$50.00 every 28 days from appellant’s continuing compensation payments.

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

¹ There is no medical evidence of record received between July 2003 and March 16, 2005.

² See *Sharon C. Clement*, 55 ECAB 552 (2004).

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

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

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained August 12, 1997 fractures of both ankles, both heels and his L4 vertebra. By decision dated May 22, 2000 and affirmed on March 8, 2001, the Office found that the selected position of service dispatcher represented his wage-earning capacity.

Appellant then asserted on June 21 and November 9, 2005 that he was totally disabled for work on or before November 1, 2004 and was therefore entitled to receive compensation for total disability. He submitted reports from Dr. Roberts, an attending Board-certified orthopedic surgeon, indicating that appellant was totally disabled for work for unspecified periods on and after August 20, 2002. Thus, Dr. Roberts supported appellant's assertion that his accepted condition had worsened spontaneously such that he was no longer able to perform any work, including the selected service dispatcher position. 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 a standing wage-earning capacity determination is warranted.⁶

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. If there is a claim for increased disability that would prevent a claimant from performing the position that was the basis for a wage-earning capacity decision, then clearly there is an issue of whether modification is appropriate. However, in its September 13, 2006 decision regarding the overpayment issues, the Office failed to address the wage-earning capacity issue. Under the circumstances of this case, however, the Board finds that the issue presented was whether the May 22, 2000 wage-earning capacity determination should be modified. In its September 13, 2006 decision, the Office should have considered whether Dr. Roberts' reports were sufficient to warrant modification of the standing wage-earning capacity determination. However, the Office did not do so, addressing only the overpayment. Thus, the case must be remanded for further development on the wage-earning capacity issue.

⁴ *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

⁵ *Sue A. Sedgwick*, *supra* note 4.

⁶ *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*, 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).

On remand of the case, the Office shall undertake appropriate development to determine if Dr. Roberts' reports are sufficient to warrant a modification of the May 22, 2000 wage-earning capacity determination. After all development deemed necessary, the Office shall issue an appropriate decision in the case.

ANALYSIS -- ISSUES 2, 3 and 4

The Office's September 13, 2006 decisions finding an overpayment of compensation, denying waiver and directing recovery was predicated on the assumption that appellant was not totally disabled for work from June 20, 2004 to February 19, 2005. However, the Office's September 13, 2006 decision did not address the issue of whether appellant submitted sufficient medical evidence to establish total disability for work, thereby requiring modification of the May 22, 2000 loss of wage-earning capacity determination. Therefore, it is premature for the Board to address Issues 2, 3 and 4 regarding the overpayment. The Board finds that Issues 2, 3 and 4 are moot.

CONCLUSION

The Board finds that the case is not in posture for a decision as it must be remanded for further development regarding whether the May 22, 2000 wage-earning capacity determination required modification. The Board further finds that the issues of fact and amount of the overpayment, as well as denial of waiver and direction of its recovery, are moot.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 13, 2006 is set aside and the case remanded for further development consistent with this decision.

Issued: May 3, 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