



occurred on July 16, 1984 when he fell while attempting to flee a pack of dogs he encountered on his mail route. The Office denied modification of a September 29, 1994 wage-earning capacity determination or to refer appellant for vocational rehabilitation services. By decision dated December 4, 2003, the Board affirmed part of the Office's March 11, 2003 decision and set aside the remainder of the decision.<sup>2</sup> The Board affirmed the Office's denial of modification of the September 29, 1994 wage-earning capacity determination; however, it set aside the Office's decision to deny appellant vocational rehabilitation services. The facts of the case, as set forth in the Board's prior decision, are incorporated herein by reference.

On remand, the Office referred appellant's case to a rehabilitation specialist in February 2004. On April 8, 2004 appellant signed a vocational rehabilitation plan and subsequently participated in vocational testing and underwent a functional capacity evaluation. The employing establishment did not extend an offer of reemployment at the time; therefore, the Office proposed to place appellant with a new employer. Appellant had been receiving wage-loss compensation based on the September 29, 1994 wage-earning capacity determination. However, after consultations between the claims examiner and the rehabilitation specialists, it was decided that while appellant participated in vocational rehabilitation his compensation would be adjusted to temporary total disability status. This change became effective April 18, 2004.

In July 2004 appellant relocated from Virginia to Jacksonville, Florida. A formal job placement plan had yet to be developed by the time he moved to Florida. In the fall of 2004, appellant enrolled at Florida A&M University in order to qualify to become a public school teacher. He accumulated a total of 18 credit hours during the fall 2004 and spring 2005 semesters. Appellant did not work during this time period.<sup>3</sup>

Effective March 19, 2006 the Office resumed payment of wage-loss compensation based on the September 29, 1994 wage-earning capacity determination.<sup>4</sup> Additionally, it advised appellant it would continue with vocational rehabilitation efforts. Appellant voiced his disagreement with the Office's decision to reduce his wage-loss compensation. The Office explained during a June 6, 2006 telephone conversation that because of the prior wage-earning capacity determination, he was not entitled to wage-loss compensation for temporary total disability even though he was receiving vocational rehabilitation services.

---

<sup>2</sup> Docket No. 03-1105 (issued December 4, 2003).

<sup>3</sup> The rehabilitation services appellant had been receiving in Virginia were officially terminated on September 22, 2004. It was anticipated that appellant's case file would be transferred to the Jacksonville, Florida district Office and rehabilitation services would continue uninterrupted. However, almost a year lapsed before his case file was transferred to the Jacksonville Office. In the interim, appellant secured funding for his vocational rehabilitation effort from the Florida Department of Education, Division of Vocational Rehabilitation. He eventually returned home to Virginia in June 2006 and his case record was transferred back to the national Office a few months later.

<sup>4</sup> Since the prior appeal, the Office denied modification of the loss of wage-earning capacity (LWEC) determination on September 23, 2004 and July 19, 2005.

On July 14, 2006 appellant filed a notice of recurrence of disability commencing September 13, 1991.<sup>5</sup> Appellant also filed a claim for compensation (Form CA-7) for lost wages for the period 1991 to 2006.

Dr. Christopher S. Rumana, a Board-certified neurosurgeon, previously operated on appellant in January 2005.<sup>6</sup> In a report dated June 26, 2006, he stated that he first saw appellant on October 28, 2004 for evaluation and treatment of back and left leg pain. Appellant reported a history of back and leg pain of many years duration that began after he was attacked by several dogs in 1984. Dr. Rumana also noted that appellant had undergone two previous back surgeries, in addition to the multilevel lumbar decompression performed on January 5, 2005. Following the most recent surgery, appellant reported improvement of his symptoms with some occasional mild left leg pain. Dr. Rumana last saw appellant on February 10, 2005. As to appellant's ability to work, Dr. Rumana indicated appellant could work an 8-hour day with a 25-pound lifting restriction. The lifting restriction was necessary due to appellant's "history of injury, multiple lumbar surgeries and the recurrent nature of his back problem."

On August 4, 2006 the Office advised appellant of its preliminary finding that he received an overpayment of \$33,003.07 during the period April 18, 2004 to March 18, 2006. It explained that the overpayment arose because he was paid wage-loss compensation for temporary total disability rather than based on the previously established wage-earning capacity. The Office advised appellant that he was not at fault in creating the overpayment.

Appellant subsequently requested a hearing. He also submitted an overpayment recovery questionnaire along with certain financial records, including a copy of his 2005 Federal tax return.

In a decision dated February 15, 2007, the Office denied appellant's July 14, 2006 recurrence claim. It found the evidence insufficient to establish that appellant's current medical condition was due to the accepted work injury. Appellant later requested an oral hearing.

A hearing was held on May 10, 2007, which addressed both the overpayment issue and appellant's claimed recurrence of disability beginning September 13, 1991. Appellant also challenged the Office's continued reliance on the September 29, 1994 wage-earning capacity determination. However, the hearing representative advised that the propriety of the wage-earning capacity determination was not before her, particularly in light of the Board's decision affirming that determination.

By decision dated August 20, 2007, the hearing representative affirmed the preliminary finding that appellant received an overpayment in the amount of \$33,003.07. Appellant was not at fault in creating the overpayment; however, the hearing representative denied waiver of recovery of the overpayment. She did compromise the principal amount by more than \$20,000.00. The outstanding principal was set at \$13,300.00 and the hearing representative

---

<sup>5</sup> Appellant included a copy of an earlier recurrence claim dated December 26, 1991, which he had filed with the Department of the Navy.

<sup>6</sup> Dr. Rumana performed a January 5, 2005 lumbar decompression at L3-4 and L4-5.

ordered that \$200.00 be withheld every 28 days from appellant's continuing compensation payments. As to the July 14, 2006 recurrence claim, the hearing representative found that the medical evidence did not establish an employment-related recurrence of disability on or after September 13, 1991. The hearing representative also reiterated in her decision that she would not entertain appellant's arguments regarding the propriety of the Office's September 29, 1994 wage-earning capacity determination.

### **LEGAL PRECEDENT -- ISSUE 1**

An individual undergoing an Office-approved rehabilitation program is entitled to receive compensation at the rate for total disability, less any earnings received from employment which is not undertaken as a specific part of the rehabilitation program.<sup>7</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that the Office did not establish fact of overpayment. Appellant's case was referred for vocational rehabilitation services in February 2004 and the Office assigned a rehabilitation counselor on March 5, 2004. His initial meeting with his rehabilitation counselor occurred on March 8, 2004. A formal rehabilitation plan was executed and, in April 2004, he underwent vocational testing as well as a functional capacity evaluation in accordance with that plan. He fully participated in the vocational rehabilitation process. Therefore, the Office properly adjusted his wage-loss compensation to temporary total disability status effective April 18, 2004.<sup>8</sup> The Federal (FECA) Procedure Manual is specific as to how a vocational rehabilitation participant is to be compensated. The Office has not identified a basis to reduce appellant's compensation for temporary total disability during his full-time participation in vocational rehabilitation services.<sup>9</sup> Accordingly, the Board finds that the Office failed to establish that appellant was overpaid \$33,003.07 during the period April 18, 2004 to March 18, 2006.

### **LEGAL PRECEDENT -- ISSUE 2**

A wage-earning capacity determination is a finding that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages.<sup>10</sup> Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.<sup>11</sup> Once the wage-earning capacity of an injured

---

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.8 (December 1993).

<sup>8</sup> There is no evidence that appellant worked during the period April 18, 2004 to March 18, 2006.

<sup>9</sup> While there was clearly a lapse in vocational rehabilitation services appellant should have received from the Office following his relocation to Florida, this was not appellant's fault. The Board further notes that the Office did not inform appellant that his vocational rehabilitation status had been changed in any respect following his July 2004 relocation to Florida.

<sup>10</sup> 5 U.S.C. § 8115(a) (2000); see *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

<sup>11</sup> See *Katherine T. Kreger*, 55 ECAB 633, 635 (2004).

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 erroneous.<sup>12</sup> The burden of proof is on the party seeking modification of the wage-earning capacity determination.<sup>13</sup>

The Federal (FECA) Procedure Manual provides that 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.<sup>14</sup> The procedure manual further indicates that under these circumstances, “the [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal [loss of wage-earning capacity] decision.”<sup>15</sup>

### **ANALYSIS -- ISSUE 2**

Both the Federal (FECA) 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 the Office’s wage-earning capacity decision is warranted.<sup>16</sup> Appellant filed a claim for compensation on July 14, 2006 and he specifically requested that the hearing representative address his concerns regarding the September 29, 1994 wage-earning capacity determination. However, she declined based on the mistaken premise that the Board’s prior review of this issue precluded further consideration by the Office. The Board finds that the Office should have treated appellant’s July 14, 2006 recurrence claim as a request for modification of the September 29, 1994 wage-earning capacity determination.

### **CONCLUSION**

The Office failed to establish that appellant received an overpayment of \$33,003.07 for the period April 18, 2004 to March 18, 2006. The Board further finds that appellant’s July 14, 2006 recurrence claim raised the issue of whether modification of the Office’s September 29, 1994 wage-earning capacity determination was warranted. As the Office did not properly adjudicate this issue, the case will be remanded for an appropriate decision.

---

<sup>12</sup> *Tamra McCauley*, 51 ECAB 375, 377 (2000).

<sup>13</sup> *Id.*

<sup>14</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

<sup>15</sup> *Id.*

<sup>16</sup> *Katherine T. Kreger*, *supra* note 11; *Sharon C. Clement*, 55 ECAB 552, 555-56 (2004).

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 20, 2007 decision of the Office of Workers' Compensation Programs is reversed with respect to the issue of overpayment. As to the adjudication of the July 14, 2006 recurrence claim, that aspect of the hearing representative's decision is set aside, and the case is remanded for further action consistent with this decision.

Issued: November 21, 2008  
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