



## **FACTUAL HISTORY**

This case is before the Board for the third time. By decision dated September 30, 1974, the Board set aside a July 23, 1973 decision denying the employee's request for reconsideration of a March 11, 1970 wage-earning capacity determination.<sup>2</sup> In a decision dated December 11, 2006, the Board set aside June 1 and December 20, 2005 decisions denying the employee's claim for compensation beginning March 1, 1970 and finding that he had not established a recurrence of disability.<sup>3</sup> The Board determined that the issue was whether the employee had established that modification of his wage-earning capacity was warranted and remanded the case to the Office. The capacity findings of fact and conclusions of law from the prior decisions are hereby incorporated by reference.

The relevant medical evidence is set forth. On November 26, 2001 Dr. Arnold R. Penix, a Board-certified orthopedic surgeon, evaluated the employee for chronic left ankle pain and arthritis subsequent to a 1961 fracture. He diagnosed severe osteoarthritis of the left ankle by x-ray and recommended orthotics. In progress reports dated January 2 and July 31, 2002, Dr. Penix discussed treatment recommendations. On September 5, 2002 he referred the employee to Dr. Gerald C. Shute, a Board-certified orthopedic surgeon, for a left ankle fusion. In a September 5, 2002 report, Dr. Shute noted the employee's history of bilateral knee surgery and complaints of left ankle pain. He diagnosed post-traumatic arthritis of the left ankle and scheduled a left ankle fusion.

In a form report dated April 22, 2003, Dr. Penix listed the history of injury as a crush injury to the left ankle in 1961 with multiple surgeries. He diagnosed post-traumatic left ankle arthritis and checked "yes" that the condition was caused or aggravated by employment. Dr. Penix indicated that the employee was totally disabled from 1970 to the present. In a September 4, 2003 progress report, Dr. Penix again recommended an ankle fusion. On September 18, 2003 he opined that the employee was totally disabled due to left ankle arthritis caused by degenerative joint disease.

On July 26, 2004 Dr. Penix attributed the employee's progressive arthritis of the left ankle to his 1961 employment injury. He stated:

"I first evaluated [the employee] in 2002 for progressive ankle pain and it is my opinion that he is permanently and totally disabled due to this problem. He has severe osteoarthritis of the left ankle and is incapable of any significant standing and walking due to the osteoarthritic ankle. [The employee] apparently has been evaluated in the past and was felt to not be permanently or totally disabled due to

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<sup>2</sup> Docket No. 75-16 (issued September 30, 1974). The Office accepted that the employee sustained a fractured fibula, a crush injury to his left ankle, peptic duodenitis and an aggravation of preexisting degenerative disc disease due to a May 27, 1961 employment injury. By decision dated March 11, 1970, it reduced the employee's compensation based on its finding that he had the capacity to earn wages in the selected position of stock records clerk. Following the Board's September 30, 1974 remand, the Office denied modification of its March 11, 1970 wage-earning capacity determination in a March 23, 1978 decision. In a decision dated January 22, 1979, it denied the employee's request for reconsideration under 5 U.S.C. § 8128.

<sup>3</sup> Docket No. 06-861 (issued December 11, 2006).

the condition and it was felt that he could perform some kind of limited duty type work. It is my opinion that this is not the case due to the progression of the condition over the past several years.”

In a report dated November 9, 2005, Dr. Penix found that the employee’s ankle fracture at work in 1961 caused his left ankle osteoarthritis. He stated, “It is [a] medical fact that once a patient has sustained an ankle fracture he is at increased risk to develop osteoarthritis and that has happened in the left ankle. This leads me to conclude beyond reasonable medical probability that there is a causal relationship between the ankle fracture and the arthritis in the left ankle.” Dr. Penix noted that the employee had no other possible causes of the ankle arthritis and no problem with his right ankle.

By decision dated January 25, 2007, the Office denied modification of its 1970 wage-earning capacity determination. It found that Dr. Penix’ reports supported that the employee had left ankle osteoarthritis but were insufficient to show a material change in his condition such that he could not perform the duties of a stock clerk.

On February 13, 2007 appellant, through her attorney, requested reconsideration. She contended that the medical evidence showed that the employee’s disability had increased such that he could not perform the duties of a stock clerk. In a decision dated October 11, 2007, the Office denied modification of its January 25, 2007 decision.

### **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.<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>

### **ANALYSIS**

The Office accepted that the employee sustained a fractured fibula, a crush injury to his left ankle and an aggravation of preexisting degenerative disc disease resulting from a May 27, 1961 employment injury. On March 11, 1970 the Office reduced his compensation after finding that he had the capacity to earn wages in the selected position of stock records clerk. On December 9, 2003 the employee alleged that he sustained a recurrence of disability beginning

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<sup>4</sup> *Katherine T. Kreger*, 55 ECAB 633 (2004).

<sup>5</sup> *Sharon C. Clement*, 55 ECAB 552 (2004).

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

November 27, 2001 causally related to his May 27, 1961 work injury. As the Office had issued a formal wage-earning capacity determination, it adjudicated the case as a request for modification of his wage-earning capacity.<sup>7</sup> The employee did not claim that he had been retrained or vocationally rehabilitated and has not alleged that the 1970 wage-earning capacity determination was in error. The issue, consequently, is whether the medical evidence shows a material change in the nature and extent of his injury-related conditions.

On November 26, 2001 Dr. Penix noted that the employee experienced chronic pain and arthritis of the left ankle after a fracture in 1961. He diagnosed severe left ankle osteoarthritis and recommended orthotics. Dr. Penix discussed treatment recommendations in January 2 and July 31, 2002 progress reports. He did not discuss the relevant issue of whether the employee's condition materially worsened such that he was disabled from working in the selected position of stock records clerk and thus his reports are of diminished probative value.

In a September 5, 2002 report, Dr. Shute discussed the employee's history of bilateral knee surgery and complaints of left ankle pain. He diagnosed post-traumatic arthritis of the left ankle and scheduled a left ankle fusion. Dr. Shute, however, did not specifically address the cause of the employee's post-traumatic arthritis. The Board has held that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship.<sup>8</sup> Additionally, Dr. Shute did not address the relevant issue of whether appellant was disabled from work beginning November 27, 2001.<sup>9</sup>

In a form report dated April 22, 2003, Dr. Penix noted the employee's history of a crush injury to his left ankle in 1961. He diagnosed post-traumatic left ankle arthritis and checked "yes" that the condition was caused or aggravated by employment. Dr. Penix found that the employee was totally disabled from 1970 to the present. The Board has held, however, that when a physician's opinion on causal relationship consists only of checking "yes" to a form question, without explanation or rationale, that opinion has little probative value and is insufficient to establish a claim.<sup>10</sup>

In a September 4, 2003 progress report, Dr. Penix again recommended an ankle fusion. On September 18, 2003 he opined that the employee was totally disabled due to left ankle arthritis caused by degenerative joint disease. As Dr. Penix did not address causation, his report is insufficient to meet appellant's burden of proof.<sup>11</sup>

On July 26, 2004 Dr. Penix asserted that the employee's 1961 work injury caused his progressive left ankle arthritis. He opined that the employee was unable to perform any

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<sup>7</sup> See *Katherine T. Kreger*, *supra* note 4; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

<sup>8</sup> *Conard Hightower*, 54 ECAB 796 (2003).

<sup>9</sup> *Carol A. Lyles*, 57 ECAB 265 (2005) (whether a particular injury caused an employee disability from employment is a medical issue which must be resolved by competent medical evidence).

<sup>10</sup> *Deborah L. Beatty*, 54 ECAB 340 (2003).

<sup>11</sup> See *Conard Hightower*, *supra* note 8.

“significant standing and walking due to the osteoarthritis ankle.” Dr. Penix related that the employee was unable to perform limited-duty work “due to the progression of the condition over the past several years. He did not, however, sufficiently explain how his condition progressed such that he was unable to perform the duties of a stock records clerk or provide medical evidence of bridging symptoms between his current condition and the accepted 1961 injury which support the conclusion of a causal relationship.”<sup>12</sup>

In a report dated November 9, 2005, Dr. Penix found that the employee’s ankle fracture at work in 1961 caused osteoarthritis of the left ankle. He related, “It is medical fact that once a patient has sustained an ankle fracture he is at increased risk to develop osteoarthritis and that has happened in the left ankle. This leads me to conclude beyond reasonable medical probability that there is a causal relationship between the ankle fracture and the arthritis in the left ankle.” Dr. Penix, however, did not address the issue of disability and thus his report is insufficient to meet appellant’s burden of proof.

Appellant has not submitted sufficiently rationalized medical evidence to show a material change in the nature and extent of the employee’s work-related conditions; consequently, she has not met her burden of proof to show modification of the established wage-earning capacity determination.<sup>13</sup>

### **CONCLUSION**

The Board finds that appellant has not established that the Office’s determination of the employee’s wage-earning capacity should be modified.

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<sup>12</sup> *Mary A. Ceglia*, 55 ECAB 626 (2004).

<sup>13</sup> *Stanley B. Plotkin*, 51 ECAB 700 (2000); *Tamra McCauley*, 51 ECAB 375 (2000).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated October 10 and January 25, 2007 are affirmed.

Issued: October 2, 2008  
Washington, DC

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

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

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