

**United States Department of Labor
Employees' Compensation Appeals Board**

L.A., Appellant)
)
and)
)
DEPARTMENT OF LABOR, MINE SAFETY &)
HEALTH ADMINISTRATION, Denver, CO,)
Employer)

**Docket No. 08-168
Issued: September 19, 2008**

Appearances:
John S. Evangelisti, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 23, 2007 appellant filed a timely appeal of a September 7, 2007 merit decision of the Office of Workers' Compensation Programs finding that he had not established a recurrence of disability. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly determined that the issue presented was whether appellant sustained a recurrence of disability on April 11, 2006.

FACTUAL HISTORY

On January 2, 2001 appellant, then a 54-year-old mine inspector, filed a traumatic injury claim for a December 26, 2000 lower back injury. The Office accepted the claim for aggravation of cervical spondylosis with cervical fusion and aggravation of lumbar spondylosis with lumbar

fusion. Appellant returned to a light-duty position on July 1, 2004, working four hours per day, three days per week.

By decision dated July 20, 2005, the Office determined that appellant's actual earnings in the light-duty position since July 1, 2004 fairly and reasonably represented his wage-earning capacity. It reduced his monetary benefits based on his actual earnings in the light-duty position.

On April 12, 2006 appellant informed the Office that, due to a regression of his condition, his work schedule would need to be reduced to three hours per day, three days per week. He requested that his compensation benefits be modified to reflect his increased disability. In an April 11, 2006 report, Dr. Carvil Jackson, a treating physician, stated that appellant was severely limited in his work capacity, and was capable of working only three hours per day, every other day, for a total of nine hours per week. Appellant reduced his schedule according to Dr. Jackson's recommended restrictions and asked the Office to modify his compensation payments accordingly.

In a letter dated May 2, 2006, the Office informed appellant that the decrease in his work schedule might constitute a recurrence of disability. Appellant was advised to explain why he believed the increase in his disability was related to his original injury, and to provide a medical report containing a diagnosis and an opinion as to the cause of his disabling condition.

On May 22, 2006 appellant submitted a notice of recurrence. He alleged that his condition had regressed neurologically due to the nature of his original injury.

By decision dated August 1, 2006, the Office denied appellant's claim for a recurrence of disability. It found that the evidence did not support a worsening of his condition which rendered him incapable of working in the limited-duty position.

On July 26, 2007 appellant requested reconsideration of the August 1, 2006 decision. He submitted reports dated September 7 and November 9, 2006 from Dr. Jackson, who found that appellant had severe restrictions in cervical and lumbar range of motion and reiterated his recommendation that appellant's work schedule be reduced to three hours per day, three days per week. In a report dated July 13, 2007, Dr. Jackson stated that appellant's condition had been exacerbated by performing prolonged light-duty work activities, noting nerve root irritation and inflammation in the lumbar and cervical spine regions, with associated radicular symptomatology of the cervical and lumbar roots. He opined that it was medically justifiable to reduce appellant's schedule to three hours per day, three days per week. In an accompanying work capacity evaluation, Dr. Jackson provided additional restrictions, including pushing, pulling and lifting no more than 10 pounds and 15-minute breaks every two hours. On July 24, 2007 Dr. Jackson diagnosed cervical spondylosis and stenosis, status post decompression laminectomy, discectomy and fusion; lumbar and cervical strain; chronic pain and deconditioned state; and poor balance secondary to lumbar stenosis. He reiterated his previous restrictions and opined that appellant's diagnosed conditions were causally related to the accepted December 26, 2000 work injury.

Appellant submitted a November 28, 2006 report from Dr. Richard Ruskin, a treating physician, who diagnosed chronic pain syndrome; cervical and lumbar degenerative disc disease

at multiple levels, cervical spondylosis and lumbar post laminectomy syndrome. Dr. Ruskin stated that appellant's symptoms were worsening and opined that he was capable of working only three hours per day, three days per week.

By decision dated September 7, 2007, the Office denied modification of the August 1, 2006 decision, finding that the medical evidence did not establish that appellant had sustained a recurrence of disability on or after April 11, 2006.

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.¹

The Office's 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. 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.²

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.³ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁴

ANALYSIS

In this case, the Office developed the evidence and determined that the issue presented was whether appellant had established a recurrence of disability on April 11, 2006. Under the circumstances of this case, however, the Board finds that the issue presented was whether the July 20, 2005 wage-earning capacity determination should be modified.

The record reflects that appellant returned to work at four hours per day, three days per week. Appellant's physician, Dr. Jackson, stated in an April 11, 2006 report that appellant was severely limited in his work capacity and was capable of working only three hours per day, every other day, for a total of nine hours per week. Appellant contends that he could not work in the four-hour per day light-duty position, the position that the Office determined had represented his wage-earning capacity, for the foreseeable future. The Board has held that, when a wage-earning

¹ See *Sharon C. Clement*, 55 ECAB 552 (2004).

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

³ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

⁴ *Id.*

capacity determination has been issued and appellant submits evidence with respect to disability for work, the Office must evaluate the evidence to determine if a modification of his wage-earning capacity is warranted.⁵

As noted, 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. In this case, appellant submitted evidence of an increased partial disability that prevented him from working in his light-duty position four hours per day, three days per week. The Board finds that the Office should have considered the issue of modification of the wage-earning capacity determination.

CONCLUSION

The Board finds that appellant's claim raised the issue of whether a modification of the July 20, 2005 wage-earning decision was warranted and the case must be remanded for a proper decision on the issue presented.

⁵ See *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sharon C. Clement*, *supra* note 1. 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).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 7, 2007 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: September 19, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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