

steps. The Office accepted the claim for acute chronic lumbar and thoracic strains and an episode of anxiety and depression. Appellant experienced intermittent disability beginning August 1986. He returned to part-time work on October 21, 1991 and to full-time work as a clerk on April 13, 1992. By decision dated May 1, 1992, the Office reduced appellant's compensation to zero based on its finding that his actual earnings as a general office clerk fairly and reasonably represented his wage-earning capacity.

On May 12, 2006 appellant filed a claim for compensation from May 1 to 12, 2006 for four hours per day. In a form report dated April 21, 2006, Dr. Martha MacRitchie, a Board-certified physiatrist, diagnosed lumbar strain and a herniated disc at L4-5 and checked "yes" that the condition resulted from his employment. She found that he was partially disabled beginning February 1, 2006 with restrictions on working over four hours per day or lifting, pushing or pulling over 10 pounds. In a report dated August 14, 2006, Dr. MacRitchie noted that she began treating appellant in 1992 for low back and right leg symptoms. A computerized tomography (CT) scan showed a herniated disc at L5-S1 with impingement on the right S1 nerve root. Dr. MacRitchie stated, "In my experience, it is not unusual for an early diagnosis of lumbar strain to evolve into a more complete finding of herniated disc as symptoms and the disease process progress."

On October 3, 2006 the Office referred appellant to Dr. Stephen Thomas, Jr., a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated October 27, 2006, Dr. Thomas noted that appellant worked full time as a clerk. He diagnosed degenerative arthritis of the lumbar spine due to age and obesity. Dr. Thomas found that his lumbar and thoracic strain had resolved and that his degenerative arthritis was unrelated to his 1986 employment injury.

By letter dated November 13, 2006, Dr. MacRitchie disagreed with Dr. Thomas' evaluation, citing to the reasons she provided in her August 14, 2006 report. On December 12, 2006 the Office found a conflict existed between Dr. MacRitchie and Dr. Thomas regarding the nature of appellant's current back condition and whether the August 25, 1986 work injury resulted in a herniated disc.¹

On March 8, 2007 the Office referred appellant to Dr. Timothy Borman, an osteopath certified by the American Osteopathic Association in orthopedic surgery, for an impartial medical examination. On April 4, 2007 Dr. Borman reviewed the history of injury and the medical evidence of record. He diagnosed multilevel degenerative disc disease unrelated to appellant's federal employment. Dr. Borman noted that appellant had a history of a herniated disc diagnosis but had no documented radiculopathy or "clinical syndrome of herniated nucleus pulposus." He disagreed with Dr. MacRitchie that a lumbar strain could cause degenerative disc disease. The Office asked Dr. Borman to address whether appellant required further medical treatment for his work-related condition, had any continued disability or restrictions due to his

¹ In a report dated February 22, 2007, Dr. Scott H. Kitchel, a Board-certified orthopedic surgeon, diagnosed chronic lumbar strain and lumbar radicular pain disorder. He recommended against surgery. Dr. Kitchel opined that appellant's "work injury in 1986 is the major contributing cause to his spine problems and ongoing need for treatment."

employment injury and whether the injury-related conditions had resolved. Dr. Borman responded that these questions were “[n]ot applicable.”

On June 6, 2007 the Office notified appellant of its proposed termination of his compensation and authorization for medical treatment on the grounds that the weight of the evidence established that he had no further employment-related condition or disability.

In a report dated June 22, 2007, Dr. Peter S. Kosek, a Board-certified anesthesiologist, attributed appellant’s “need for ongoing treatment and his disability to his original lumbar strain.” He concurred with Dr. Borman’s opinion that he did not have radiculopathy but stated that “a person can have debilitating pain without radiculopathy.” In a report dated July 5, 2007, Dr. Kosek asserted that appellant’s work injury caused the majority of his disability.

On July 30, 2007 appellant requested an oral hearing on the notice of proposed termination of compensation. In a report dated July 24, 2007, received by the Office on August 2, 2007, Dr. MacRitchie related that Dr. Borman misinterpreted her comment that a lumbar strain could evolve to a herniated disc. She clarified that she meant that with more symptoms and objective testing the correct diagnosis became clear.

By decision dated August 2, 2007, the Office finalized its termination of his compensation and authorization for medical treatment. On September 13, 2007 appellant requested an oral hearing. By decision dated October 18, 2007, the Office denied his request for a hearing as untimely under section 8124.

LEGAL PRECEDENT -- ISSUES 1 & 2

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.² 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

² See 5 U.S.C. § 8115 (determination of wage-earning capacity).

³ *Sharon C. Clement*, 55 ECAB 552 (2004).

⁴ *Tamra McCauley*, 51 ECAB 375, 377 (2000).

⁵ *Id.*

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.⁶ 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.⁷

Board precedent further provides that when a wage-earning capacity determination has been issued and the employee submits evidence with respect to increased disability for work, the issue presented is whether modification of wage-earning capacity is warranted, not whether he or she has sustained a recurrence of disability.⁸

ANALYSIS -- ISSUE 2

The Office issued a wage-earning capacity decision on May 1, 1992 based on appellant's actual earnings in the position as general office clerk. It found that he had no loss of wage-earning capacity as his actual earnings met or exceeded those held at the time of injury.

On May 12, 2006 appellant filed a claim for compensation from May 1 to 12, 2006 for four hours per day. The Office attempted to terminate compensation and medical benefits as of August 2, 2007 based on the findings of Dr. Borman. Appellant, however, was not in receipt of compensation at the time that he reduced his hours and filed a claim for compensation. Once a wage-earning capacity decision is made it remains in effect until it is properly modified.⁹ The Board has held that when a wage-earning capacity determination has been issued and appellant submits evidence regarding his ability to work, the Office must evaluate the evidence to determine if modification of his wage-earning capacity is warranted.¹⁰ The Office's procedure manual directs the claims examiner to consider the criteria for modification when a claimant requests resumption of compensation for wage loss.¹¹ The initial issue, consequently, is whether appellant has established that his wage-earning capacity should be modified. Accordingly, the Board finds that the Office should have considered the issue of modification of the May 1, 1992 wage-earning capacity determination.

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

⁷ *Id.*

⁸ See *Katherine T. Kreger*, 55 ECAB 633, 636 (2004); *Sharon C. Clement*, *supra* note 3.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Supra* note 6.

CONCLUSION

The Board finds that the Office improperly terminated his compensation and authorization for medical benefits instead of adjudicating the issue of whether his wage-earning capacity should be modified.¹²

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 18 and August 2, 2007 are reversed.

Issued: February 11, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

¹² In view of the Board's disposition of the merits, the issue of whether the Office properly denied appellant's request for an oral hearing is moot.