United States Department of Labor
Employees' Compensation Appeals Board

LARRY L. NEWELL, SR., Appellant	)	
and	)	**Docket No. 04-569**
	)	**Issued: October 6, 2004**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS AFFAIRS MEDICAL CENTER, Danville, IL, Employer	)	

Appearances:
Stephen Scavuzzo, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On December 28, 2003 appellant, through his representative, filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated September 30, 2003, in which a hearing representative affirmed that appellant had not established that his wage-earning capacity should be modified. 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 appellant has established that the Office's November 15, 2001 loss of wage-earning capacity (LWEC) determination should be modified.

FACTUAL HISTORY

On June 29, 1995 appellant, then a 50-year-old warehouseman, filed a claim for a traumatic injury occurring on June 1, 1995 in the performance of duty. The Office accepted appellant's claim for lumbosacral strain and a herniated disc at L4-5. Appellant sustained

employment-related lumbar sprains on October 19, 1988 and October 21, 1992. On June 10, 1996 appellant underwent a laminectomy and microdiscectomy at L4-5. He returned to light-duty employment following the surgery with intermittent periods of disability.[1]

On January 25, 2000 appellant underwent a bilateral lateral mass fusion at L4-5.[2] He returned to part-time limited-duty employment on March 22, 2000 and to full-time limited-duty employment on August 10, 2000.

On February 5, 2001 appellant sustained an exacerbation of his lumbar spinal fusion in the performance of duty. Appellant stopped work on February 20, 2001 and returned to work on March 19, 2001. On May 8 and June 27, 2001 appellant accepted a full-time position as a mail processing equipment handler with the employing establishment beginning July 1, 2001.

In a work status report dated October 19, 2001, Dr. Michel H. Malek, a Board-certified neurosurgeon, diagnosed failed back syndrome and found that appellant should be off work for four weeks or until the completion of diagnostic testing. He requested authorization for a computerized tomography (CT) scan and myelogram, an electromyogram (EMG) and magnetic resonance imaging (MRI) scan study.

The record indicates that appellant stopped work on October 19, 2001. He filed a Form CA-7, claim for compensation on account of disability, dated November 8, 2001, in which he requested compensation beginning October 19, 2001.[3]

By decision dated November 15, 2001, the Office reduced appellant's compensation effective March 19, 2001 on the grounds that his actual earnings as a mail processing equipment handler fairly and reasonably represented his wage-earning capacity.

In a letter dated November 16, 2001, the Office informed appellant that he should submit rationalized medical evidence in support of his claim for total disability beginning October 19, 2001. The Office further noted that Dr. Malek was not appellant's authorized physician.

In a report dated October 19, 2001, received by the Office on December 14, 2001 Dr. Malek discussed appellant's history of injury, diagnosed failed back syndrome and recommended further objective testing.[4] He stated: "Given [appellant's] incapacitation, I think

[1] In a decision dated March 12, 1998, a hearing representative reversed an October 6, 1997 Office decision and found that appellant had established a recurrence of disability on April 7, 1997.

[2] By decision dated December 21, 1999, the Office granted appellant a schedule award for a three percent permanent impairment of the right lower extremity.

[3] It is unclear from the record the exact date that the Office received appellant's claim for compensation beginning October 19, 2001.

[4] In a note dated October 29, 2001, Dr. Malek opined that appellant should remain off work until a follow-up appointment on November 9, 2001.

it is not unreasonable to keep him off work for about a week or so during the time these studies are performed."[5]

In a progress note dated November 9, 2001, Dr. Malek stated that appellant had a "history of lumbar fusion which has not taken" and found that he was unable to work from October 19, 2001 until a follow-up appointment due to pain. In another report dated November 9, 2001, Dr. Malek stated:

> "[Appellant's] CT myelogram was done of the lumbar spine and shows foraminal narrowing at a couple of levels, especially L4-L5 and L5-S1. The CT myelogram of the lumbar spine shows no evidence of any definite solid fusion. There is instrumentation at L4-L5 level."

Dr. Malek recommended a discogram.

In a report dated December 4, 2001, Dr. Suhail N. Alnaquib, a Board-certified internist, noted that appellant was off work beginning October 19, 2001 due to increased pain in his back and left leg and the need for further objective testing. He found that appellant was "unable to work [un]til further notice."

Dr. Malek completed a work status report on December 7, 2001. He diagnosed failed back syndrome, a failure of fusion, problems with appellant's leg supporting his weight, back pain and leg pain. He found that appellant should remain off work for four weeks.

On December 12, 2001 appellant submitted a letter to the Office's Branch of Hearings and Review requesting an appeal of his claim and a review of the written record. In an order dated December 13, 2001, the Board dismissed appellant's appeal at his request.[6]

In a report dated December 12, 2001, Dr. John L. Beghin, a Board-certified orthopedic surgeon, diagnosed chronic lumbar radicular syndrome.[7] He noted that he was "uncertain as to the origin of [appellant's] progressive pain complaints" and recommended against further surgery.

In a report dated February 15, 2002, Dr. James J. Harms, a Board-certified orthopedic surgeon, diagnosed "[b]ack and leg symptoms that [are] probably caused by inflammation or irritation going out into the nerves, but it could be any of five or six different causes." In an illness/injury report form dated February 15, 2002, Dr. Harms listed no change in appellant's work abilities.

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[5] An EMG and nerve condition studies performed on October 28, 2001 revealed L4-5 root irritation on both sides.

[6] Order dismissing appeal, Docket No. 02-297 (issued December 13, 2001).

[7] In a signed disability form dated December 12, 2001, Dr. Beghin indicated that appellant should be off work from October 19, 2001 to January 19, 2002 and noted that he had "chronic pain." In a signed disability certificate dated January 16, 2002, Dr. Beghin found that appellant was unable to work from October 19, 2001 to February 19, 2002.

In a report dated February 18, 2002, Dr. Thomas L. Sutter, an osteopath, diagnosed chronic back pain, recommended a functional capacity evaluation (FCE) and found that appellant could "function at a sedentary/light physical demand level and it would be reasonable to put him at those restrictions and return him to the [employing establishment] if they will accept him at that type of position."[8]

In a report dated March 12, 2002, Dr. Judith R. Lee-Sigler, a Board-certified physiatrist, diagnosed status post lumbar sprain/strain with contusion which she found to be related to appellant's employment. She also diagnosed failed back syndrome and degenerative disc disease with nerve irritation and L5 radiculitis. Dr. Lee-Sigler found that appellant should be off work for eight weeks for therapy and an FCE.[9] Dr. Lee-Sigler submitted similar reports on March 28 and April 9, 2002.

Dr. Victoria Johnson, a Board-certified physiatrist, evaluated appellant on May 31, 2002. She noted that appellant related an inability to complete further therapy after his "right lower extremity buckled underneath him."[10] She listed findings on physical examination, diagnosed post lumbar sprain/strain with contusion and failed back syndrome, degenerative joint disease with nerve root irritation, L5-S1 radiculitis and deconditioning.

In a decision dated June 5, 2002, a hearing representative affirmed the Office's November 15, 2001 wage-earning capacity determination.[11] He advised appellant to file a claim for a recurrence of disability if he believed that he was unable to perform his job duties.

On August 19, 2002 appellant filed a notice of recurrence of disability beginning October 19, 2001 causally related to his June 1, 1995 and February 5, 2001 employment injuries. In an accompanying statement, appellant related that he never fully recovered from his fall on February 5, 2001 and that his symptoms increased with increased activity. He also submitted additional medical evidence, including a report dated June 11, 2002 from Dr. Richard A. Rak, a Board-certified neurosurgeon, who diagnosed "[p]ersistant back and leg p[e]n following two back operations" and found that appellant was "really incapacitated and not able to work."[12] On August 8, 2002 Dr. Rak opined that appellant was "incapacitated from any and all work because of chronic severe back and leg pain."

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[8] In a report dated February 26, 2002, Dr. Alnaquib found that appellant could not work due to pain and his need for medication. In a report dated February 27, 2002, Dr. W. Graves, an osteopath, agreed to take appellant off work pending further examination.

[9] In a signed illness/injury report form dated March 12, 2002, Dr. Lee-Sigler found that appellant could not work for eight weeks and referred him for physical therapy.

[10] In a signed illness/injury report of the same date, received by the Office on July l5, 2002, Dr. Johnson found that appellant could not work.

[11] The hearing representative noted that appellant was entitled to benefits for his LWEC and total disability compensation from February 6 to March 18, 2001.

[12] In a signed illness/injury report dated June 11, 2002, Dr. Rak found appellant unable to work for two months. In a signed illness/injury report dated July 19, 2002, Dr. Rak diagnosed lumbar radiculitis and found that appellant unable to work.

Dr. Alnaquib, in a letter dated August 26, 2002, stated that appellant could no longer work due to pain and the need for the maximum dose of medication. In a narrative report of the same date, Dr. Alnaquib noted findings of increased pain and stated: "It is my judgment [appellant] is no longer capable of holding a job and should be considered [d]isabled. [He] [w]as first off work October 19, 2001 [with] fusion failure."[13]

By decision dated October 2, 2002, the Office found that appellant had not established a recurrence of disability such that he was incapable of performing his position of mail processing equipment operator as of October 19, 2001.

On October 8, 2002 appellant, through his representative, requested a hearing.

The record indicates that appellant returned to work with restrictions on August 27, 2002 and stopped work on September 5, 2002.[14]

A hearing was held on April 29, 2003. At the hearing, appellant submitted an unsigned report dated October 7, 2002 from Dr. Malek, who found that appellant's "restrictions set down in July 2000, are permanent and extend to this date." He further stated that the discogram performed on November 27, 2001 revealed "no evidence of fusion" and was negative at L3-4 and positive at L5-S1. He found that appellant had a permanent disability.

In a report dated December 12, 2002, Dr. Lee-Sigler discussed appellant's history of injury and his return to work with restrictions from February until October 2001. She described appellant's complaints when she initially treated him. Dr. Lee-Sigler related that she believed that "a second attempt to return to work without any further diagnostics or treatment would lead to ultimate failure, thus the rationale for his off work status." She stated:

> "In summary, it is not that he had objective weakness that le[d] to his off work status, but rather that he had failed attempts to return to work without what I considered intervention to facilitate a return to work or even a second functional capacity evaluation towards determining basic work restrictions."[15]

By decision dated September 30, 2003, the hearing representative affirmed the Office's October 2, 2002 decision after finding that appellant had not established that he sustained a recurrence of disability on October 19, 2001 warranting modification of the established LWEC determination.

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[13] In an illness/injury report dated August 29, 2002, a physician diagnosed chronic lumbar back pain and found that appellant could resume sedentary work on that date.

[14] On November 25, 2002 appellant filed an occupational disease claim alleging that he sustained nerve root irritation at C4-5 and C5-6 due to factors of his federal employment.

[15] In a report dated April 22, 2003, Dr. Lee-Sigler diagnosed cervical radiculitis, cervical degenerative disc disease with neural foraminal stenosis and a history of posterior lumbar sprain/strain injury.

LEGAL PRECEDENT

Once the wage-earning capacity of an injured employee is properly determined, it remains undisturbed regardless of actual earnings or lack of earnings.[16] A modification of such a 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.[17] The burden of proof is on the party attempting to show the award should be modified.[18]

In addition, the Office's procedure manual contains provisions regarding the modification of a formal LWEC. The relevant part provides that a formal LWEC will be modified when: (1) the original rating was in error; (2) the claimant's medical condition has changed; or (3) the claimant has been vocationally rehabilitated.[19]

Section 8115(a) of the Federal Employees' Compensation Act provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings, if his actual earnings fairly and reasonably represent his wage-earning capacity.[20] Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.[21] In addition, the Federal (FECA) Procedure Manual provides that the Office can make a retroactive wage-earning capacity determination if appellant worked in the position for at least 60 days, the position fairly and reasonably represented his wage-earning capacity and "*the work stoppage did not occur* because of any change in his injury-related condition affecting the ability to work."[22] (Emphasis in the original.) The Board has concurred that the Office may perform a retroactive wage-earning capacity determination in accordance with its procedures.[23]

The Office's procedure manual provides that, "[i]f a formal [LWEC] decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation

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[16] *Sharon C. Clement*, 55 ECAB ___ (Docket No. 01-2135, issued May 18, 2004).

[17] *David L. Scott*, 55 ECAB ____ (Docket No. 03-1822, issued February 20, 2004); *Ronald Litzler*, 51 ECAB 588 (2000).

[18] *Linda Thompson*, 51 ECAB 695 (2000).

[19] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11(a) (June 1996).

[20] 5 U.S.C. § 8115(a); *James Henderson, Jr.*, 51 ECAB 268 (2000).

[21] *Selden H. Swartz*, 55 ECAB ___ (Docket No. 02-1164, issued January 15, 2004); *Bette L. Kvetensky*, 51 ECAB 346 (2000).

[22] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(e) (May 1997).

[23] *See Tamra McCauley*, 51 ECAB 375 (2000).

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 [LWEC]."[24]

In cases where appellant ceases work after reemployment and the Office has not issued a formal LWEC determination, the Office's procedure manual provides as follows:

> "If no formal LWEC decision has been issued, the CE must ask the claimant to state his or her reasons for ceasing work and make a suitability determination on the job in question. If the job is considered suitable, the CE then advises the claimant that he or she has the burden of proving total disability … after return to work and invite the claimant to submit a Form CA-2a.
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> > (1) *If the reasons stated by the claimant* amount to an argument for a recurrence, the CE should develop and evaluate the medical and factual evidence upon receipt of Form CA-2a…."[25] (Emphasis in the original.)

ANALYSIS

While the Office initially adjudicated appellant's claim for compensation as a recurrence of disability, the hearing representative properly addressed appellant's October 18, 2001 claim for a recurrence of disability as a request for modification of the existing wage-earning capacity determination. The Office issued its wage-earning capacity decision on November 15, 2001. On August 19, 2002 appellant filed a claim for a recurrence of disability requesting compensation beginning October 19, 2001. As noted above, following issuance of a formal LWEC determination, the Office's procedure manual directs the CE to consider the criteria for modification when the claimant requests resumption of compensation for total disability.[26] Additionally, 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 the wage-earning capacity decision is warranted.[27]

In this case, the evidence establishes that the initial wage-earning capacity determination was erroneous. Appellant stopped work on October 18, 2001 and the Office issued its LWEC determination on November 15, 2001 retroactive to March 19, 2001. As noted above, the Office's procedure manual provides that a retroactive determination may be made where the claimant worked in the position for at least 60 days, the employment fairly and reasonably represents his wage-earning capacity and the work stoppage did not occur because of any change

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

[25] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(b) and 9(b)(1), respectively (December 1995).

[26] *Id.*

[27] Once the Office determines whether modification of the wage-earning capacity is warranted, it may consider additional issues such as whether appellant has established a limited period of disability without establishing modification of the wage-earning capacity determination. *See Sharon C. Clement*, *supra* note 16.

in the claimant's injury-related condition.[28] In this case, the Office issued its original wage-earning capacity determination after receiving evidence that appellant had been taken off work by a physician. In a report dated October 19, 2001, received by the Office on October 22, 2001, Dr. Malek diagnosed failed back syndrome and opined that appellant should remain off work for four weeks. The record also contains a Form CA-7 dated November 8, 2001, from appellant requesting compensation beginning October 19, 2001, the date he stopped work.[29] Appellant, therefore, had alleged that a work stoppage occurred as a result of a change in his injury-related condition. The Board has held that it is inappropriate to issue a retroactive wage-earning capacity determination when there is a pending claim for compensation from the time of the work stoppage.[30] The Board notes that Office procedures direct the CE to request information from the claimant regarding the work stoppage and develop the record appropriately. If the reasons for the work stoppage constitute an argument for a recurrence of disability, appropriate development and evaluation of the medical evidence will be undertaken.[31] Therefore, prior to issuing a formal wage-earning capacity decision, the Office should have determined whether appellant sustained a work stoppage due to a change in his injury-related condition. As the Office's original LWEC decision was erroneously issued, appellant has satisfied the criteria for modifying the Office's November 15, 2001 LWEC decision.

CONCLUSION

The Board finds that the Office improperly denied modification of its determination of appellant's wage-earning capacity. The Office erroneously issued a retroactive wage-earning capacity decision after appellant stopped work and filed a claim for compensation for total disability.

[28] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(e) (May 1997); *see also Elbert Hicks*, 49 ECAB 283 (1998).

[29] The Form CA-7 is not date stamped by the Office.

[30] *Juan A. DeJesus*, 54 ECAB ___ (Docket No. 03-1307, issued July 16, 2003); *William M. Bailey*, 51 ECAB 197 (1999).

[31] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment*: *Determining Wage-Earning Capacity*, Chapter 814.9(b) (December 1995).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 30, 2003 is reversed.

Issued: October 6, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member