United States Department of Labor
Employees' Compensation Appeals Board

PHILLIP B. PROCTOR, Appellant	)	
and	)	
DEPARTMENT OF AGRICULTURE, AGRICULTURAL RESEARCH SERVICE, ANIMAL PARASITOLOGY INSTITUTE, Beltsville, MD, Employer	)	**Docket No. 02-2216** **Issued: February 15, 2005**

Appearances:
Harold L. Levi, Esq., for the appellant
Miriam D. Ozur, Esq., for the Director

Oral Argument held December 2, 2004

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On September 5, 2002 appellant filed a timely appeal of merit decisions of the Office of Workers' Compensation Programs dated February 19 and June 7, 2002. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction to review the merits of these decisions.

ISSUE

The issues are: (1) whether appellant has established that he sustained a recurrence of disability commencing August 12, 1998 causally related to an accepted 1985 lumbar injury; and (2) whether the Office properly denied appellant's request to modify the wage-earning capacity decision of January 28, 1998.

FACTUAL HISTORY

The Office accepted that on July 16, 1985 appellant, then a 26-year-old animal caretaker, sustained a lumbar strain and herniated L4-5 disc, superimposed on spinal stenosis, when he

lifted a 40-pound sack of wood chips.[1] Following intermittent absences, he stopped work on March 1, 1986 and did not return.

The Office provided vocational rehabilitation services beginning July 1988, including testing and counseling. On October 26, 1990 an Office rehabilitation specialist identified the position of maintenance mechanical supervisor[2] as being within appellant's physical limitations[3] and vocational qualifications. The position was categorized as light work, with lifting up to 10 pounds, crouching, kneeling, reaching, handling, fingering and stooping. The rehabilitation specialist noted that appellant had worked in the "field for over four years" and that the position required 4 to 10 years of vocational preparation. Job placement assistance was provided through August 1992. Appellant relocated from Maryland to Macon, North Carolina in September 1992.

In a January 13, 1993 report, Dr. Gary L. Kaplowitz, an attending Board-certified orthopedic surgeon, stated that a January 11, 1993 functional capacity evaluation demonstrated that appellant was able to perform full-time light-duty work, with occasional lifting up to 20 pounds. Dr. Kaplowitz submitted October and November 1995 reports reviewing a recent lumbar magnetic resonance imaging (MRI) scan showing "lateral recess stenosis with facet joint hypertrophy and obvious stenosis at both L4[-]5 and L5[-]S1."

On September 18, 1997 the Office issued a notice proposing to reduce appellant's compensation based on his ability to earn wages in the constructed position of maintenance mechanic supervisor.[4] In an October 6, 1997 letter, appellant asserted that he was medically unable to perform such a position and that he had been turned down for many jobs when employers learned of his medical history. By decision dated January 28, 1998, the Office determined that the constructed position of maintenance mechanic supervisor represented appellant's wage-earning capacity and so reduced his continuing compensation payments to reflect what he could earn in the selected position.

Appellant then requested an oral hearing, held July 1, 1998. At the hearing, he testified that he was not vocationally qualified for the maintenance mechanic supervisor position as he had no experience in mechanics, except for a four-to-six week course in small engine repair after high school and five-months work as a golf course maintenance mechanic in 1977. Appellant also had no supervisory experience. He noted that beginning in April 1998, he had worked in a private sector tire shop "[b]alancing and mounting tires." He asserted that the constant heavy

[1] The Office also accepted that appellant sustained an allergic reaction to medication prescribed to treat the accepted lumbar condition.

[2] Department of Labor's *Dictionary of Occupational Titles* No. 638.131-026.

[3] In a September 11, 1990 report, Dr. Alvaro Sanchez, an attending Board-certified orthopedic surgeon, found appellant able to perform light-duty work, with lifting limited to 25 pounds, no repeated twisting or forward bending.

[4] In a May 13, 1997 report, an Office rehabilitation specialist stated that an April 17, 1997 labor market survey showed that maintenance mechanical supervisor positions were available in towns from 26 to 35 miles from appellant's home.

lifting caused chronic back pain.[5] Appellant submitted an August 12, 1998 report by Dr. Divakar Krishnareddy, an attending Board-certified orthopedic surgeon, who noted the accepted 1985 injury and related appellant's complaints of back pain with activity, "aggravated by long periods of sitting, standing and walking." Dr. Krishnareddy stated that appellant had stopped work at the tire shop due to back pain. He commented that appellant was able to perform full-time sedentary duty, with walking, sitting and standing limited to four hours a day.

By decision dated and finalized October 5, 1998, the Office affirmed the January 26, 1998 decision, finding that appellant submitted insufficient evidence to establish that the maintenance mechanical supervisor position was not representative of his wage-earning capacity. The hearing representative found that the Office properly conducted a vocational rehabilitation program, including selection of a position commensurate with his "physical limitations, education, age and prior experience." The hearing representative noted that the maintenance mechanic supervisor position was "light" work with lifting limited to 20 pounds, consistent with medical restrictions provided by Drs. Krishnareddy and Kaplowitz.

On March 10, 1999 appellant filed a claim asserting that he sustained a recurrence of total disability commencing August 12, 1998, the day he stopped work at the tire shop due to back pain precipitated by "lifting heavy tires and using hand tools like tire wrenches." Appellant noted that he worked for 55 hours per week, earning $6.50 an hour or approximately $366.00 per week. He also submitted a December 21, 1998 report from Dr. Krishnareddy, noting that an October 5, 1998 lumbar MRI scan showed "degenerative changes of the diffuse disc bulging at the L4-5 level." Dr. Krishnareddy recommended that appellant perform only sedentary work as back pain prevented a return to a manual labor. He opined that appellant's condition was permanent and stationary. Appellant also submitted a December 2, 1998 report from Dr. D.R. Colman, an attending physician, who noted a history of injury and treatment, noted bilateral radiculopathy and diagnosed lateral recess stenosis and facet joint hypertrophy.

In an August 6, 1999 letter, the Office advised appellant of the type of additional medical evidence needed to establish his claim for recurrence of disability. The Office noted that according to Dr. Krishnareddy's August 12, 1998 report, appellant was able to perform full-time light duty and that no subsequent report substantiated a change in his condition.

In an August 26, 1999 report, Dr. Krishnareddy diagnosed an L4-5 disc bulge with "possible chronic lumbosacral degenerative disc disease with elements of spinal stenosis." Dr. Krishnareddy stated that [appellant] "had an increase or aggravation of his condition and symptoms since September 1998. He had been doing better before that but his condition was aggravated during the five months he worked at a tire store and his pain became so severe that he was unable to continue working. From a medical standpoint, the work at the tire store did cause an increase in his symptoms."

[5] In November 2, 1998 and November 9, 1999 affidavits of earnings and employment (Form EN1032), appellant noted working from April 28 to September 22, 1998, at Tar Heel Tire Sales and Service as a tire changer, earning $6.50 per hour.

By decision dated September 7, 2000, the Office denied appellant's claim for a recurrence of disability as he submitted insufficient medical evidence substantiating that he was totally disabled for work. Also, the Office found that appellant submitted insufficient evidence to warrant modifying the loss of wage-earning capacity determination. The Office further found that Dr. Krishnareddy's August 26, 1999 report delineated a new, intervening lumbar injury caused by working at the tire shop. Thus, appellant did not demonstrate a spontaneous material worsening of [his] accepted conditions."

Appellant then requested an oral hearing, held March 5, 2001. At the hearing, appellant testified that he worked at the tire shop from April 28 to August 27, 1998, lifting tires off the cars by himself. He was fired after his supervisor surmised appellant had a prior back injury. Appellant stated that he experienced pain from his first day on the job, which eventually became excruciating. He submitted an October 31, 2000 report from Dr. Krishnareddy, finding that appellant was disabled for work due to "fairly exhaustive physical work, changing tires " at the tire shop, with lumbar pain and radiculopathy "consistent since that time." Dr. Krishnareddy diagnosed "degenerative disc disease with degenerative disc bulge at L4-5 and possible lumbar spinal stenosis at that level."

By decision dated and finalized May 30, 2001, the Office affirmed the September 7, 2000 decision, finding that modification of the loss of wage-earning capacity determination was not warranted as appellant had not submitted sufficient evidence substantiating a "material change in the nature and extent of the injury-related condition" such that he was no longer capable of performing the duties of a maintenance mechanical supervisor.

Appellant disagreed with this decision and in an October 4, 2001 letter, requested reconsideration. He asserted that while working at the tire shop, his pain "increase[d] diametrically" until he became totally disabled. Appellant also contended that he could no longer earn wages as a mechanical maintenance supervisor as he could not lift 20 pounds. He submitted additional medical evidence.

In a September 19, 2001 report, Dr. Krishnareddy stated that clinical findings, medical records and 1995 and 1998 MRI scan reports made him "relatively certain" that "in the five months of April to August 1998, [appellant] experienced a fairly rapid degeneration of his lumbar spine that results in a marked decrease in [appellant]s ability to perform" all but purely sedentary activity. Dr. Krishnareddy noted that appellant "experienced degenerative changes" of the 1985 herniated L4-5 disc, "not the least severe of which were when he worked or attempted to work changing tires." He also opined that appellant's current condition was also "unquestionably causally related" to the 1985 injury.[7]

By decision dated February 19, 2002, the Office denied modification on the grounds that the evidence submitted was insufficient to warrant modification of the May 30, 2001 decision.

[7] Dr. Krishnareddy submitted periodic chart notes from September 27, 2000 to June 6, 2001, finding appellant's lumbar condition unimproved.

Although the Office found that Dr. Krishnareddy's September 19, 2001 report clearly established that appellant's condition had deteriorated, it was due to a new "intervening injury and work factor." Appellant's work stoppage was "due to an independent intervening cause … [which] constitutes a *new injury* and *not a recurrence*." (Emphasis in the original.)

The Office further stated: "as you have not established a natural recurrence of total disability as a result of the original accepted injury, but rather a new injury, … the original loss of wage-earning capacity decision remains in effect. Appellant disagreed with this decision and in a March 18, 2002 letter requested reconsideration. He asserted that his lumbar condition degenerated spontaneously, unrelated to his five months of work at the tire shop and that the wage-earning capacity needed to be modified. He submitted additional medical evidence.

In a March 13, 2002 report, Dr. Krishnareddy opined that the 1998 "tire-changing job might have aggravated his existing condition but certainly not the whole cause for his contentious problems at this time." Dr. Krishnareddy stated that as the 1998 MRI scan showed a diffuse degenerative disc bulge, there was "some deterioration in his condition therefore he was actually advised not to continue with the tire changing work because of the aggravation [it] is causing him. It certainly did not help him … but there is no evidence in his medical history to suggest that he reinjured at that job." Dr. Krishnareddy stated that appellant was totally disabled for work due to "severe pain and he has degenerative dis[c] disease at L4-5. This was all a progression of the injury that he sustained in 1985."

By decision dated June 7, 2002, the Office denied modification on the grounds that the evidence submitted was insufficient to warrant modification of the prior decision. The Office found that Dr. Krishnareddy's March 13, 2002 report again showed that appellant's 1998 employment at the tire shop was an intervening event, breaking the chain of causation from the 1985 injury. The Office explained that appellant did not show a worsening of his condition "as a natural consequence arising from factors of [his] former federal employment." The Office concluded that modification was denied as the medical evidence did not support that "the current disability [was] related to [his] injury of July 16, 1995." The Office did not address the loss of wage-earning capacity determination in this decision.[8]

LEGAL PRECEDENT -- ISSUE 1

A recurrence of disability is defined as a spontaneous material change in the employment-related condition without an intervening injury or new exposure to factors causing the original illness or injury.[9] When an appellant claims a recurrence of disability due to an accepted employment-related injury, he has the burden of establishing by the weight of reliable, probative and substantial evidence that the recurrence of disability is causally related to the original

[8] Following issuance of the June 7, 2002 decision, appellant submitted additional evidence. This Board may not consider this evidence for the first time on appeal as it was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c).

[9] 20 C.F.R. § 10.5(x); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3.b(a)(1) (May 1997).

injury.[10] This burden includes the necessity of furnishing evidence from a qualified physician, who on the basis of a complete and accurate factual and medical history, concludes that the condition is causally related to the employment injury. Moreover, sound medical reasoning must support the physician's conclusion.[11] An award of compensation may not be based on surmise, conjecture or speculation or on appellant's unsupported belief of causal relation.[12]

ANALYSIS -- ISSUE 1

In this case, the Office accepted that appellant sustained a lumbar strain and herniated L4-5 disc, superimposed on spinal stenosis, resulting from a July 16, 1985 lifting incident. Following intermittent absences, he received compensation for total disability through January 28, 1998, at which time the Office reduced his compensation based on his ability to perform the selected position of maintenance mechanical supervisor. On March 10, 1999 appellant filed a claim for a recurrence of disability commencing August 12, 1998. Appellant thus has the burden of providing rationalized medical evidence to establish the causal relationship asserted.[13]

In support of his claim for recurrence of disability, appellant submitted reports from Dr. Krishnareddy, an attending Board-certified orthopedic surgeon. Although appellant claimed that he was totally disabled for work as of August 12, 1998 and continuing, Dr. Krishnareddy found appellant capable of sedentary work from August 12, 1998 until October 31, 2000. He released appellant to sedentary activity as of September 19, 2001, then found him totally disabled as of March 13, 2002. Thus, Dr. Krishnareddy opined that appellant had intermittent periods of partial and total disability, with total disability from October 31, 2000 to September 18, 2001 and from March 13, 2002 onward. Therefore, appellant has not submitted sufficient medical evidence to establish that he was totally disabled for work as of August 12, 1998 and continuing.

A second difficulty with appellant's claim is that Dr. Krishnareddy did not attribute appellant's lumbar condition on and after August 12, 1998 to the accepted July 16, 1985 injury. Instead, Dr. Krishnareddy opined that appellant's lumbar condition was aggravated by his private sector employment changing tires from April 28 to August 12, 1998. Dr. Krishnareddy explained in an August 26, 1999 report that appellant's lumbar condition "was aggravated during the five months he worked at a tire store and his pain became so severe that he was unable to continue working. From a medical standpoint, the work at the tire store did cause an increase in his symptoms." As of October 31, 2000, Dr. Krishnareddy opined that appellant was totally disabled for work due to "fairly exhaustive physical work, changing tires" at the tire shop, with lumbar pain and radiculopathy "consistent since that time." Dr. Krishnareddy reiterated this mechanism of causation in a September 19, 2001 report, stating that he was "relatively certain" that "in the five months of April to August 1998, [appellant] experienced a fairly rapid

[10] *Ricky S. Storms*, 52 ECAB 349 (2001).

[11] *Id*.

[12] *Alfredo Rodriguez*, 47 ECAB 437 (1996).

[13] *Ricky S. Storms*, *supra* note 10.

degeneration of his lumbar spine that results in a marked decrease in [his] ability to perform" all but purely sedentary activity. Dr. Krishnareddy noted that the work changing tires caused degenerative changes of the L4-5 disc. Also, Dr. Krishnareddy stated in a March 13, 2002 report that "the tire changing work" aggravated appellant's condition.

The Board notes that in his March 13, 2002 report, Dr. Krishnareddy stated that appellant's injury-related lumbar condition had progressed without a reinjury while working at the tire shop in 1998. However, he did not provide medical rationale supporting this opinion. The Board has held that medical opinion not fortified by medical rationale is of diminished probative value.[14] Considering Dr. Krishnareddy's repeated attributions of appellant's lumbar symptoms to the tire changing job, this lack of rationale severely reduces the persuasiveness of his contention that the injury-related condition had worsened spontaneously. Therefore, Dr. Krishnareddy's opinion that the injury-related condition had progressed without an intervening cause is insufficient to meet appellant's burden of proof in establishing a causal relationship between the claimed recurrence of disability and the accepted 1985 lumbar injury.

Dr. Krishnareddy implicated appellant's private sector employment at the tire shop as the cause of his lumbar symptoms beginning in August 1998. This intervening cause breaks the legal chain of causation from the accepted July 16, 1985 injury.[15] Therefore, the claimed recurrence of disability cannot be deemed to have arisen out of appellant's federal employment.

LEGAL PRECEDENT -- ISSUE 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. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.[16]

The Office's procedure manual provides that, "[i]f 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 CE [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity."[17]

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

[14] *Willa M. Frazier*, 55 ECAB ___ (Docket No. 04-120, issued March 11, 2004).

[15] *See Carlos A. Marrero*, 50 ECAB 117, 119-20 (1998) (the Board found that the claimant's use of an exercise machine constituted an intervening cause of appellant's disability and thus the Office properly denied appellant's claim for recurrence of disability); *Clement Jay After Buffalo*, 45 ECAB 707, 715 (1994) (the Board found that the claimant's knee injury sustained while playing basketball broke the legal chain of causation from an accepted knee injury sustained in the performance of his duties as a firefighter).

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

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

the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was, in fact, erroneous.[18] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[19]

ANALYSIS -- ISSUE 2

The Office accepted that appellant sustained a July 16, 1985 lumbar injury. By decision dated January 28, 1998, the Office found that the selected position of maintenance mechanical supervisor represented his wage-earning capacity. Appellant then filed a March 10, 1999 claim for recurrence of disability. The Office issued a September 7, 2000 decision denying the claim for recurrence of disability and finding that the wage-earning capacity determination should remain undisturbed. Thus, the September 7, 2000 decision properly addressed the wage-earning capacity issue in the case.[20] The Office continued appropriate adjudication of the wage-earning capacity issue in May 30, 2001 and February 19, 2002 decisions affirming that the January 28, 1998 wage-earning capacity determination should stand.[21]

Following issuance of the February 19, 2002 decision, appellant requested reconsideration on March 18, 2002 contending that the January 28, 1998 wage-earning capacity determination should be modified due to the claimed August 12, 1998 recurrence of disability. In support of that request, he submitted a March 13, 2002 report from Dr. Krishnareddy, an attending Board-certified orthopedic surgeon, who opined that appellant's accepted lumbar condition had progressed without reinjury such that he was totally disabled for work. Thus, Dr. Krishnareddy supported appellant's assertion that his accepted condition had worsened spontaneously such that he was no longer able to perform any work, including the selected maintenance mechanical supervisor position. 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 wage-earning capacity is warranted.[22]

As noted above, 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

[18] *Katherine T. Kreger*, 55 ECAB ___ (Docket No. 03-1765, issued August 13, 2004); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

[19] *Sue A. Sedgwick*, *supra* note 18.

[20] *Supra* note 17.

[21] *Id*.

[22] *See Sharon C. Clement*, *supra* note 16. 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 ____ (Docket No. 02-755, issue July 23, 2003) (acceptance of disability for an extended period was sufficient to establish that modification of the wage-earning capacity determination was warranted).

position that was the basis for a wage-earning capacity decision, then clearly there is an issue of whether modification is appropriate. However, in its June 7, 2002, decision reviewing Dr. Krishnareddy's March 13, 2002 report, the Office failed to address the wage-earning capacity issue, finding only that appellant had failed to establish a recurrence of disability commencing August 12, 1998. Under the circumstances of this case, however, the Board finds that the second issue presented was whether the January 28, 1998 wage-earning capacity determination should be modified. In its June 7, 2002 decision, the Office should have considered whether Dr. Krishnareddy's March 13, 2002 report was sufficient to warrant modification of the standing wage-earning capacity determination. However, the Office did not do so, addressing only the claim for recurrence of disability. Thus, the case must be remanded for further development on the wage-earning capacity issue.

On remand of the case, the Office shall undertake appropriate development to determine if Dr. Krishnareddy's March 13, 2002 report is sufficient to warrant a modification of the January 28, 1998 wage-earning capacity determination. After all development deemed necessary, the Office shall issue an appropriate decision in the case.

CONCLUSION

The Board finds that appellant has not established that he sustained a recurrence of disability commencing August 12, 1998, causally related to his July 16, 1985 employment injury, as the evidence demonstrates an intervening cause breaking the legal chain of causation from the July 16, 1985 injury. The Board further finds that appellant's March 18, 2002 request for reconsideration raised the issue of whether a modification of the January 28, 1998 wage-earning capacity decision was warranted and the case must be remanded for an appropriate decision on this issue.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 19, 2002 is affirmed. The June 7, 2002 decision is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: February 15, 2005
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

A. Peter Kanjorski
Alternate Member