United States Department of Labor
Employees' Compensation Appeals Board

P.M., Appellant	)	
	)	**Docket No. 07-2176**
and	)	**Issued: June 4, 2008**
	)	
U.S. POSTAL SERVICE, POST OFFICE, St. Louis, MO, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 27, 2007 appellant filed a timely appeal from a July 5, 2007 decision of the Office of Workers' Compensation Programs' hearing representative, who affirmed a January 19, 2007 decision denying modification of a loss of wage-earning capacity decision, and an August 17, 2007 decision denying his request for further merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501(d)(3), the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether appellant has established that modification of his wage-earning capacity determination was warranted; and (2) whether the Office properly denied appellant's request for a merit review of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

This case has previously been before the Board.[1] By decision dated November 6, 2003, the Board affirmed a March 20, 2003 wage-earning capacity determination based on appellant's

[1] Docket No. 03-1174 (issued November 6, 2003).

actual earnings in a limited-duty position. The Board vacated a May 22, 2002 decision denying authorization for surgery for a four-level anterior cervical discetomy and fusion.[2] The Board found that there was a conflict in the medical opinion evidence between Dr. Faisal Albanna, a Board-certified neurosurgeon, and Dr. Michael E. Chabot, a second opinion osteopath, on whether the surgery was necessary. The facts and the history contained in the prior appeal are incorporated by reference.

In September 22, 2005 treatment notes, Dr. Albanna diagnosed L3-4 and L5-S1 severe disc degeneration, cervical spondylitic changes with osteophyte formation at C4-5, C5-6, C6-7 and L3-4 Grade 1 spondylolisthesis. A physical examination revealed decreased cervical and lumbosacral spine range of motion and left upper extremity radicular pain and numbness. Dr. Albanna stated that he was "concerned about [appellant's] left upper extremity numbness, continuing numbness, especially with movement of his head and pain." He recommended that an electromygraph, nerve conduction study and lumbar myelogram with computerized tomography post myelogram be performed.

On October 19, 2005 appellant submitted a claim for compensation for the period October 19 to 28, 2005. He also submitted an October 19, 2005 disability note by Dr. Albanna which diagnosed cervical spondylosis and left carpal tunnel syndrome. Dr. Albanna indicated that appellant was totally disabled until November 19, 2006 pending further evaluation.

By letter dated October 27, 2005, the Office informed appellant that the evidence was insufficient to support his claim that he was totally disabled and advised him as to the evidence required to support his claim.

In an October 19, 2005 treatment note, Dr. Albanna diagnosed cervical spondylosis, spinal stenosis, disc degeneration and left carpal tunnel syndrome. Appellant presented with complaints of pain in his lower back, neck, left trapezius, both lower extremities, left upper extremity "and hand discomfort with inability to use the hand."

In a letter dated November 7, 2005, appellant stated that he was not working due to several work-related injuries and that he had developed left carpal tunnel syndrome.

On November 14, 2005 appellant filed a Form CA-7 claiming lost wages for the period October 29 to November 11, 2005.

[2] On July 22, 1998 appellant, then a 50-year-old elevator operator, sustained injury to his right shoulder while pushing a BMC and wire cages on an elevator. The Office accepted the claim for a right rotator cuff tear and authorized open compression and rotator cuff repair surgery, which was performed on August 25, 1998. On April 28, 1999 appellant sustained injury to his right shoulder, left leg and back while pushing and pulling containers of mail. The claim was accepted for lumbar spasms, L4-5 herniated disc and temporary aggravation of cervical spondylosis. Subsequently, the Office accepted a consequential condition of depression. Appellant was off work from April 28 to July 7, 1999 when he returned to a limited-duty job. The Office authorized L3-4 decompression and discetomy, which occurred on June 23, 2000. He returned to work part time on September 18, 2000. On March 30, 2001 the Office issued a schedule award for a 16 percent permanent impairment of the right arm.

On November 8, 2005 Dr. Albanna stated a cervical myelogram revealed cervical spondylosis due to osteophyte formation and a nerve conduction study showed left carpal tunnel syndrome. He opined that, while appellant's lower back and neck conditions were "probably preexisting to any particular work-related injury," these conditions had been aggravated by appellant's several years work as a dispatcher. Dr. Albanna opined appellant's left carpal tunnel syndrome had been caused and aggravated by the repetitive work he performed.

On November 28, 2005 appellant filed a claim for lost wages for the period November 12 to 25, 2005.

On October 26, 2005 appellant filed an occupational disease claim alleging that his left carpal tunnel syndrome and cervical disc problems were due to the repetitive duties of his limited-duty job.[3]

By decision dated November 29, 2005, the Office denied appellant's claim for compensation on and after October 19, 2005.

In letters dated December 5 and 13, 2005, appellant requested a review of the written record by an Office hearing representative.[4]

On March 20, 2006 appellant filed a claim for a recurrence of total disability beginning September 16, 2005 due to his accepted January 4, 1999 employment injury.

By decision dated April 25, 2006, the Office hearing representative set aside the November 29, 2005 decision. She found the Office incorrectly identified the issue as whether appellant had sustained a recurrence of disability when it should have adjudicated whether the March 20, 2003 loss of wage-earning capacity decision should be modified.

In a March 30, 2006 disability note, Dr. Albanna indicated that appellant was totally disabled until May 2, 2006 pending further evaluation. He diagnosed spondylosis anterior cervical fusion and left carpal tunnel syndrome. On May 2, 2006 Dr. Albanna indicated that appellant was totally disabled until June 13, 2006 pending further evaluation.

On July 10, 2006 Dr. Chabot, a second opinion osteopath, diagnosed right rotator cuff repair and shoulder acromioclavicular joint degeneration, left shoulder weakness appearing to be C5 neuropraxia, chronic back pain with degeneration, L5-S1 disc degeneration, L3-4 spinal stenosis, status post L3-4 lumbar laminectomy. He concluded that appellant's March 2006 cervical fusion was due to his advanced cervical spinal degenerative disease and was not caused or aggravated by his employment duties. Dr. Chabot opined that appellant was capable of working with restrictions. The restrictions included a sedentary position, no lifting more than 10

[3] According to the Office decision dated January 19, 2007, the Office assigned this claim number 10-2048731. The Office note the claim had been denied by decision dated February 27, 2006.

[4] On December 5, 2005 appellant filed a claim for a schedule award. As there is no final Office decision his claim for another schedule award, the Board does not have jurisdiction over this issue. 20 C.F.R. § 501.2(c); *see Linda Beale*, 57 ECAB 429 (2006) (the Board's jurisdiction extends only to a review of final decisions by the Office issued within one year of the date of the filing of an appeal).

to 15 pounds with right upper extremity and no repetitive work at the shoulder height and above with the left upper extremity. Dr. Chabot stated that, if appellant "wears headphones, he would still be able to drive himself to work with an automatic and perform work duties with the right upper extremity." Any work duties requiring the "use of the left upper extremity should be avoided until his left arm function returns."

On October 31, 2006 the Office referred appellant to Dr. Charles I. Mannis, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Dr. Albanna and Dr. Chabot.

On November 10, 2006 the Office received medical reports dated October 1, 2005 to October 11, 2006 from Dr. Albanna, who recommended neck surgery and noted appellant's main complaint was of left lower extremity pain. He diagnosed L3-4 and L5-S1 severe disc degeneration, cervical spondylitic changes with osteophyte formation at C4-5, C5-6, C6-7 and L3-4, Grade 1 spondylolisthesis based on diagnostic testing. Dr. Albanna, in a July 25, 2006 report, noted appellant's complaints of neck stiffness and left upper extremity weakness. Diagnostic testing revealed disc degeneration at L3-4, L4-5 and L5-S1, severe spinal stenosis and L3-4 spondylolisthesis. On August 30, 2006 Dr. Albanna reported that appellant had complaints of low back pain and left upper and lower extremity weakness. Based on diagnostic testing, he diagnosed disc degeneration at L3-4, L4-5 and L5-S1, severe spinal stenosis and L3-4 spondylolisthesis. Dr. Albanna noted that appellant wanted to return to work with lifting up to 10 pounds, no use of the left upper extremity two hours sitting and using a headset. On October 11, 2006 he diagnosed lumbar spinal stenosis, spondylosis and S/P cervical fusion and would be off work until approval of surgery.

On December 11, 2006 Dr. Mannis reviewed the medical evidence, statement of accepted facts and provided findings on physical examination. He diagnosed status post right rotator cuff repair with right shoulder pain, probably left upper extremity radiculopathy, status post left carpal tunnel syndrome, lumbar degenerative disc disease with previous lumbar laminectomy and status post cervical fusion. A physical examination revealed "mild restriction of cervical motion in all planes," mild cervical crepitus with motion, very mild right shoulder restriction of motion, right shoulder mild crepitus, "significant restriction of lumbar motion" with flexion of 60 degrees, extension of 30 to 35 degrees, and side-bending of 30 degrees and hypoactive lower extremities reflexes. Dr. Mannis stated:

> "It is my opinion that the right shoulder and lower back injuries are definitively related to the work-related incident. It is my opinion that the cervical complaints offered are due to degenerative disc disease. It is my opinion that there has been some permanent aggravation of these complaints due to the repetitive nature [appellant]'s work and it is also my opinion that the development of the left carpal tunnel syndrome is likely due to repetitive movement and related to his work activities.
>
> "It is noted during my examination that there are subjective complaints, however a significant number of objective findings are noted as well. It is my opinion however that [appellant] would be able to function in a sedentary capacity should he so desire. Limited lifting at or above shoulder level with the right upper

extremity and limited repetitive use of the left upper extremity should also be advised. No repetitive bending or prolonged standing or walking should be carried out as well. It is also my opinion that the cervical fusion was medically necessary and as mentioned causally related to the aggravation of the preexistent cervical degenerative disc disease."

By decision dated January 19, 2007, the Office denied modification of the March 20, 2003 loss of wage-earning capacity decision.

On February 5, 2007 appellant requested a review of the written record by an Office hearing representative.

By decision dated July 5, 2007, an Office hearing representative affirmed the January 19, 2007 decision denying modification of the March 20, 2003 loss of wage-earning capacity decision. In reaching this determination, the Office hearing representative relied upon the opinion of Dr. Mannis, the impartial medical examiner.

By letter dated August 6, 2007, appellant requested reconsideration. He alleged that he did not have carpal tunnel syndrome when he accepted the limited-duty position on November 25, 2002.

By decision dated August 17, 2007, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that his request neither raised substantial legal questions nor included new and relevant evidence and, thus, it was insufficient to warrant review of its prior decision.[5]

LEGAL PRECEDENT -- ISSUE 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.[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]

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

[5] The Board notes that, following the August 17, 2007 decision, the Office received additional evidence. However, the Board may not consider new evidence on appeal. *See* 20 C.F.R. §§ 501.2(c); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995). *See Mary E. Marshall*, 56 ECAB 420 (2005).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995). *See Harley Sims, Jr.*, 56 ECAB 320 (2005).

rehabilitated or the original determination was, in fact, erroneous.[8] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[9]

It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on proper factual and medical background must be given special weight.[10]

ANALYSIS -- ISSUE 1

The Board finds that appellant has established a material change in the nature of his injury-related condition.

The Office accepted that appellant sustained a right shoulder injury as a result of his accepted July 22, 1998 employment injury and lumbar spasms, L4-5 herniated disc, temporary aggravation of cervical spondylosis and a consequential condition of depression as a result of his accepted April 28, 1999 employment injury. In 2003, it determined that his actual earnings in the permanent limited-duty position fairly and reasonably represented his wage-earning capacity.

The Office properly referred appellant to Dr. Mannis, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between appellant's treating physician, Dr. Albanna, and the Office referral physician, Dr. Chabot, on the issues of appellant's ability to work and whether the March 2006 surgery was necessary and causally related to his accepted employment conditions. Dr. Mannis opined that appellant's lower back injuries, right shoulder and left carpal tunnel syndrome were employment related and that his cervical degenerative disc disease had been aggravated by his employment duties. He also concluded that the March 2006 surgery was necessary and causally related to appellant's employment injuries. Dr. Mannis opined that appellant had developed left carpal tunnel syndrome and sustained an aggravation of his cervical degenerative disc disease as a result of his employment duties, supporting that appellant's medical condition had worsened. With respect to appellant's ability to work, he indicated that appellant was capable of working with restrictions which included limited right upper extremity lifting at shoulder level or above, limited left upper extremity repetitive use, no prolonged standing or walking and no repetitive bending. Appellant's restrictions identified by Dr. Mannis are more restrictive than those set forth in appellant's limited-duty position as Dr. Mannis provided restrictions on the use of appellant's right and left upper extremities and no prolonged standing, lifting or repetitive bending. The Board finds that Dr. Mannis' report constitutes the special weight of the medical evidence and establishes that appellant sustained a material change in his employment-related condition.[11]

[8] *Stanley B. Plotkin*, 51 ECAB 700 (2000); *Tamra McCauley*, 51 ECAB 375 (2000).

[9] *Harley Sims, Jr.*, *supra* note 7; *Stanley B. Plotkin*, *supra* note 8.

[10] *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

[11] In view of the disposition of the first issue, the Board finds that it is unnecessary to address the second issue in this case.

CONCLUSION

The Board finds that appellant established a material change in his accepted condition such that modification of the March 20, 2003 wage-earning capacity was warranted.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 17 and July 5, 2007 are reversed.

Issued: June 4, 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