United States Department of Labor
Employees' Compensation Appeals Board

S.R., Appellant	)	
and	)	**Docket No. 08-1000**
	)	**Issued: April 22, 2009**
U.S. POSTAL SERVICE, POST OFFICE, New Orleans, LA, 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
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 19, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decisions dated March 22, 2007 and February 7, 2008. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether the Office hearing representative properly denied modification of the December 18, 1991 loss of wage-earning capacity (LWEC) determination.

FACTUAL HISTORY

On September 17, 1988 appellant, then a 31-year-old mail processor, filed a traumatic injury claim alleging that he injured his back while pulling a tray of mail from the sleeve of a post con. The Office accepted his claim for lumbar strain and herniated disc at L4-5. Appellant underwent approved surgery (lumbar laminectomy) in November 1988 and April 1990.

Appellant stopped work on the date of injury and returned to limited duty four hours per day on June 9, 1990. He stopped work completely on August 21, 1990 and was terminated for

cause on September 24, 1990. The Office accepted his claim for a recurrence of disability as of April 14, 1991 and paid compensation for total disability. It referred appellant for vocational rehabilitation, which did not result in employment.

In a decision dated December 18, 2001, the Office reduced appellant's compensation benefits, based on its finding that the constructed position of leasing consultant, with a weekly pay rate of $420.00, was medically and vocationally suitable, was available in his commuting area and represented his wage-earning capacity.

The position of leasing consultant involved showing apartments to prospective residents, providing assistance to current residents (such as keys and rate information) and performing basic office duties. The position was considered light duty, with frequent alternation between sitting and standing; occasional stooping, reaching and walking within the apartment complex; rare to occasional climbing of stairs; and occasional lifting up to 10 pounds. Appellant's treating physician, Dr. John Cazale, IV, a Board-certified orthopedic surgeon, reviewed the position description for leasing consultant and opined on July 18, 2000 that appellant was capable of performing the duties required by the job.

In a report dated July 8, 2003, Dr. Cazale stated that he had examined appellant after not having seen him for "awhile." He noted that appellant was in a pain management program through the Veterans Administration and was taking 30 milligrams (mg.) of methadone per day. Stating that appellant had no new complaints, Dr. Cazale indicated that he "remains completely disabled at the present time."

The record contains correspondence from the Office to both appellant and Dr. Cazale requesting a current medical report regarding his work-related injury and his ability to work. On June 3, 2003 the Office asked Dr. Cazale for treatment records from October 4, 2000 forward. On June 10, 2005 and June 26, 2006 it asked appellant for a current narrative report from his physician. On July 7, 2006 the Office again asked Dr. Cazale to provide information regarding appellant's medical status and his ability to work. In a letter dated July 18, 2006, it informed appellant that the most current medical reports supporting his entitlement to continuing compensation were three years old and advised him that his failure to submit an appropriate medical narrative might be cause for suspension of his benefits.

The record contains a copy of the Office's July 7, 2006 letter to Dr. Cazale, bearing the following notation: "Last seen 1999." The notation was signed by Dr. Cazale.

In a report dated August 7, 2006, Dr. Cazale stated that appellant had "a failed back." He indicated that appellant was in persistent back pain, with occasional radicular pain, following two surgical procedures "years ago." Dr. Cazale noted that appellant was in chronic pain management and was "on methadone." He stated that appellant's neurological examination was intact, but that "flexion and extension and lateral films revealed a little instability." Dr. Cazale opined that appellant was completely disabled.

On January 12, 2007 appellant filed a notice of recurrence of disability as of July 8, 2003. He alleged that his back had "never healed since the original [September 17, 1988] injury."

By decision dated March 22, 2007, the Office denied appellant's claim, finding that the medical evidence failed to establish that he sustained a recurrence of disability as of July 8, 2003. It noted the requirements for modifying a formal LWEC decision, but did not issue a finding as to whether appellant had submitted evidence sufficient to warrant a modification of the existing LWEC decision. On March 26, 2007 appellant requested an oral hearing.

On June 4, 2007 the Office asked appellant to obtain a narrative report from his treating physician which addressed issues presented on an accompanying form, including the date of his most recent examination; present diagnosis; and an opinion as to whether appellant was disabled due to his accepted condition or whether he could work light duty.

In work-capacity evaluation forms dated June 1 and July 9, 2007, Dr. Cazale indicated that appellant was totally disabled, indicating by a checkmark that he was unable to perform his usual job. In response to an inquiry regarding his medical reasons, he stated, "failed back surgeries."

In a narrative report dated July 9, 2007, Dr. Cazale stated that appellant was "doing about the same." He noted that appellant had weaned himself off of methadone and was not taking anything for pain. Dr. Cazale diagnosed a "failed back" and pseudoarthrosis of the lumbar spine. He opined that appellant remained permanently disabled.

At the December 4, 2007 hearing, appellant testified that he believed the original 2001 LWEC decision was "ridiculous" and that his civil rights had been violated by the Office's failure to consider "irrefutable" medical evidence and by the employing establishment's vindictive attitude. He stated that he had not worked since he was terminated by the employing establishment because he was totally disabled at that time. Appellant indicated that he visited his treating physician every three years. He stated that he had no medical records to support his claim prior to July 8, 2003, when Dr. Cazale told him that he was disabled. Appellant testified that he had been "off methadone" since January 2007 and did not take any medication for pain.

The hearing representative questioned appellant as to whether he believed that the evidence supported modification of the original LWEC determination. Appellant contended that the original LWEC decision was in error because of his two surgeries. He also alleged that his medical condition had worsened, indicating that due to his advanced age and back pain, he must carefully schedule the time he spends performing such duties as cutting the grass, riding the lawn mower and doing the wash. Appellant acknowledged that he had not been vocationally rehabilitated.

By decision dated February 8, 2008, the hearing representative affirmed the Office's March 22, 2007 decision, finding that appellant had failed to establish that the December 18, 2001 LWEC decision should be modified. The hearing representative found that the evidence did not establish that the original LWEC was erroneously issued; that appellant's medical condition had changed such that he was unable to perform the duties of the approved position; or that appellant had been vocationally rehabilitated.

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

The Board finds that appellant failed to meet his burden of proof to establish that the December 18, 2001 wage-earning capacity decision should be modified. Therefore, the Office hearing representative's February 7, 2008 decision should be affirmed.

Initially, the Board finds that the Office hearing representative properly evaluated appellant's claim as a request for modification of the December 18, 2001 LWEC decision. 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.[5] Therefore, as a formal LWEC decision was issued in this case, the issue presented was whether the evidence of record was sufficient to warrant modification of the Office's December 18, 2001 wage-earning capacity determination. The Board notes that, in its March 22, 2007 decision, the Office referenced the criteria for modifying a formal LWEC decision, but did not make a finding as to whether appellant had met his burden of proof to justify modification. Rather, the Office found that appellant had failed to establish that he sustained a recurrence of disability. In her February 7, 2008 decision, the Office hearing representative correctly found that appellant's claim raised the issue of whether a modification of the December 18, 2001 LWEC decision was warranted.[6]

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[1] *See* 5 U.S.C. § 8115 (determination of wage-earning capacity).

[2] *Sharon C. Clement*, 55 ECAB 552 (2004).

[3] *Tamra McCauley*, 51 ECAB 375, 377 (2000).

[4] *Id.*

[5] *See Katherine T. Kreger*, 55 ECAB 633 (2004). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11(a) (October 2005).

[6] The Board notes that, in affirming the Office's March 22, 2007 decision, the hearing representative incorrectly stated that the Office had found that appellant had not met the criteria for modification of the LWEC decision. The Board finds that the error is harmless, as the hearing representative properly addressed the issue of whether the LWEC decision should be modified in its February 7, 2008 decision.

After accepting appellant's claim for lumbar strain and herniated disc at L4-5 and approving surgical procedures performed in November 1988 and April 1990, the Office reduced his compensation benefits on December 18, 2001, based on its finding that the constructed position of leasing consultant, with a weekly pay rate of $420.00, was medically and vocationally suitable and represented his wage-earning capacity. Appellant claimed a recurrence of disability as of August 8, 2003. In a decision dated March 22, 2007, the Office found that the medical evidence was insufficient to show an employment-related recurrence of disability. On February 7, 2008 an Office hearing representative found that the evidence was insufficient to establish that the December 18, 2001 LWEC should be modified. Once the 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.[7] If a claimant is seeking modification, he must establish that the original rating was in error or that the injury-related condition has worsened.[8] The Board finds that appellant has failed to meet his burden of proof to establish that the December 18, 2001 wage-earning capacity determination should be modified.

The evidence of record does not support appellant's claim that the December 18, 2001 decision was in error. Appellant alleged at the oral hearing that the original LWEC decision was "ridiculous" and that his civil rights had been violated by the Office's failure to consider "irrefutable" medical evidence and the employing establishment's vindictive attitude. However, he presented no evidence to support his claim. There is also no evidence that the position was part time, seasonal or temporary or that appellant was unable to perform the duties of the accepted position on the date the LWEC decision was issued. The issue, therefore, is whether appellant has established a material change in the nature and extent of his injury-related condition warranting modification of the December 18, 2001 wage-earning capacity determination.

The constructed position of leasing consultant, which the Office found represented appellant's wage-earning capacity, involved showing apartments to prospective residents, providing assistance to current residents (such as keys and rate information) and performing basic office duties. The position was considered light duty, with frequent alternation between sitting and standing; occasional stooping, reaching and walking within the apartment complex; rare to occasional climbing of stairs; and occasional lifting up to 10 pounds. Dr. Cazale reviewed the physical requirements of the position and opined that appellant was capable of performing the duties associated with the job. There is no probative medical evidence of record establishing that appellant's accepted condition had worsened by August 3, 2007 to the degree that he was unable to perform the duties of the constructed position.

On July 8, 2003 Dr. Cazale stated that he had examined appellant after not having seen him for "awhile." He noted that appellant was in a pain management program through the Veterans Administration and was taking 30 milligram of methadone per day. Stating that

[7] *Tamra McCauley, supra* note 3.

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11(b) (October 2005).

appellant had no new complaints, Dr. Cazale indicated that he "remains completely disabled at the present time." This report lacks probative value on several counts. Dr. Cazale did not provide examination findings or a definitive diagnosis. Nor does his report contain an opinion as to whether appellant's alleged disability is causally related to his accepted injury. The Board has long held that medical evidence which does not offer an opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[9] Moreover, Dr. Cazale did not identify or explain why appellant was unable to perform, the specific physical requirements of the constructed position of leasing consultant approved by the Office in 2001.

On August 7, 2006 Dr. Cazale stated that appellant had "a failed back," and was in persistent back pain, with occasional radicular pain, following two surgical procedures "years ago." He noted that appellant was in chronic pain management and was "on methadone." Dr. Cazale stated that appellant's neurological examination was intact, but that "flexion and extension and lateral films revealed a little instability." He again opined that appellant was completely disabled. Dr. Cazale again failed to provide a specific diagnosis. The Board has consistently held that pain is a symptom, rather than a compensable medical diagnosis.[10] His report also fails to address how appellant's condition had deteriorated such that he was unable to perform the duties of leasing consultant. Dr. Cazale's blanket statement regarding appellant's claimed disability does not constitute probative medical evidence.

In work-capacity evaluation forms dated June 1, 2007, Dr. Cazale indicated that appellant was totally disabled, noting by a checkmark that he was unable to perform his usual job. In response to an inquiry regarding his medical reasons, he stated, "failed back surgeries." On July 9, 2007 Dr. Cazale stated that appellant was "doing about the same." Noting that appellant had weaned himself off of methadone and was not taking anything for pain, Dr. Cazale diagnosed a "failed back" and pseudoarthrosis of the lumbar spine. He again opined that appellant remained permanently disabled. In neither report did Dr. Cazale explain how appellant's current diagnosed condition was causally related to his accepted lumbar strain and herniated disc. He did not describe the progression of the accepted conditions or explain how the conditions had worsened to the degree that appellant was unable to work in the constructed position of leasing consultant. For all of these reasons, Dr. Cazale's reports are of diminished probative value.

In this case, it was appellant's burden to establish either that the original rating was in error or that there has been a material change in the nature and extent of his injury-related condition such that he is unable to perform the duties of the constructed position. There is no probative medical evidence of record that demonstrates appellant's inability to perform the duties of the leasing consultant position due to his accepted conditions. The Board notes that the dearth of medical evidence documenting appellant's treatment for his alleged disabling condition over long periods of time undermines his claim. The Board finds that the evidence does not demonstrate that the original LWEC decision was in error or that appellant's condition has worsened such that he can no longer perform the duties of leasing consultant. Therefore,

[9] *A.D.*, 58 ECAB ___ (Docket No. 06-1183, issued November 14, 2006); *Michael E. Smith*, 50 ECAB 313 (1999).

[10] *See Robert Broome*, 55 ECAB 339, 342 (2004).

appellant has failed to meet his burden of proof to establish that the December 18, 2001 wage-earning capacity determination should be modified.

CONCLUSION

The Board finds that the medical evidence of record is insufficient to warrant modification of the Office's December 18, 2001 wage-earning capacity determination.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 7, 2008 is affirmed.

Issued: April 22, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board