

**United States Department of Labor
Employees' Compensation Appeals Board**

L.H., Appellant)
)
and) **Docket No. 09-1779**
) **Issued: June 15, 2010**
)
DEPARTMENT OF LABOR, OFFICE OF)
WORKERS' COMPENSATION PROGRAMS,)
Jacksonville, FL, 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 June 30, 2009 appellant filed a timely appeal from decisions of the Office of Workers' Compensation Programs dated January 12 and March 6, 2009. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that a modification of his December 7, 2004 loss of wage-earning capacity determination is warranted; and (2) whether the Office properly refused to reopen appellant's case for reconsideration of the merits of his claim under 5 U.S.C. § 8128.

FACTUAL HISTORY

Appellant, a 50-year-old claims examiner, filed a claim for benefits based on occupational disease on May 21, 2001, claiming that he developed degenerative disc disease and a herniated nucleus pulposus causally related to factors of his employment. The Office accepted his claim

for degenerative disc disease and L4-5 hemilaminectomy with discectomy, major depressive disorder, recurrent and lumbar laminectomy and herniated nucleus pulposus at L4-5. Appellant went off work on April 9, 2001 due to his accepted lower back conditions and returned to light duty for four hours per day on August 4, 2001. He sustained a recurrence of his work-related disability and went off work again on December 5, 2001 and has not returned to work since that time. The Office paid compensation for total disability.¹

On March 26, 2003 appellant began part-time employment as a driver with Hertz Car Rental at the hourly rate of \$5.25, working 16 hours per week.

By decision dated December 7, 2004, the Office determined that appellant's actual earnings of \$105.00 per week as a part-time Hertz driver effective March 26, 2003 fairly and reasonably represented his wage-earning capacity. It found that, because he had demonstrated the ability to perform the duties of this job for 60 days or more, this position was considered suitable to his partially disabled condition. The Office stated that there was no evidence that the position was temporary. Accordingly, it reduced appellant's entitlement to compensation pursuant to 5 U.S.C. § 8106 and 5 U.S.C. § 8115, effective March 26, 2003.

In treatment notes dated April 7 and May 1 and 15, 2008, received by the Office on May 22, 2008, Lloyd Coursey, a professional counselor, noted that appellant was experiencing constant low back pain, which was causing significant depression and anxiety. In the May 15, 2008 treatment note Mr. Coursey indicated that appellant was having sharp pains in his lower back which radiated to the hip at L5-S1.

In a treatment note dated September 4, 2008, received by the Office on September 12, 2008, Mr. Coursey stated that he was examining appellant for the first time since he underwent heart surgery. He noted that appellant was physically weak, depressed and anxious and in a state of physical pain.

On November 19, 2008 appellant filed a Form CA-2a claim for benefits, alleging that he sustained a recurrence of disability on March 28, 2008, which was causally related to his accepted conditions.

By letter dated November 24, 2008, appellant stated that he was submitting medical evidence which established that he had sustained an aggravation and exacerbation of degenerative disc disease and herniated nucleus pulposus at L4-5 and aggravation of major depression and anxiety, resulting in his heart surgery. He asserted that he was entitled to a modification of wage-earning capacity based on a material worsening of the accepted medical conditions, level of education, depressed labor market in and around Jacksonville, Florida and his age.

In a Form CA-20 attending physician's report dated September 19, 2008, received by the Office on November 25, 2008, Dr. Manuel Portalatin, Board-certified in family practice, stated

¹ The facts of this case are set forth in a prior Board decision dated March 30, 2005 and are hereby incorporated by reference. Docket Nos. 03-727 & 03-1005 (issued March 30, 2005). The issues adjudicated in the prior Board decision are not presented in the instant case.

that appellant had experienced an aggravation of his work-related anxiety which exacerbated his condition and precipitated an acute coronary syndrome which totally disabled him as of March 28, 2008 and continuing. He noted that appellant was hospitalized to receive treatment for his coronary artery condition as of July 23, 2008 and released from the hospital on August 19, 2008. Dr. Portalatin also stated that appellant had persistent leg pain caused by his herniated nucleus pulposus. He checked a box indicating that the diagnosed conditions were caused or aggravated by an employment activity.

Appellant also submitted reports dated August 25 and October 13, 2008 from Dr. Anjali Pathak, Board-certified in psychiatry and neurology and Mr. Coursey's associate, which were received by the Office on November 25, 2008. In his August 25, 2008 report, Dr. Pathak stated that he had treated appellant since July 10, 2002 depression, anxiety and substance abuse. Appellant advised that chronic pain issues including degenerative disc disease and herniated disc at L4-5 complicated appellant's situation. Dr. Pathak stated that appellant had also been diagnosed with hypercholesterolemia, diabetes type 2, Osgood-Slatter's Disease and Burgess Disease. He indicated that appellant's depression and stress could have contributed to his current medical complications.

In his October 13, 2008 report, Dr. Pathak noted that appellant had been treated by Dr. Portalatin for depression and anxiety prior to July 1992. He stated that appellant had been hospitalized in July 2008 for coronary bypass surgery due to his coronary heart disease.² Based on the factual history and Dr. Pathak's ongoing examinations of appellant he opined that there was sufficient evidence that his anxiety and depression caused the material worsening of the underlying heart condition, which established a causal relationship between all three medical conditions.

In treatment notes dated November 13 and 19 and December 11, 2008, Dr. Portalatin indicated that appellant continued to experience low back pain and left lower extremity pain, in addition to radiculopathy. Appellant also submitted treatment notes from Dr. Pathak dated November 21, 2008 and from Mr. Coursey, dated December 11, 2008, which indicated that appellant had continued back pain, anxiety and depression.

In a December 8, 2008 letter, the Office advised of the three grounds to warrant modification of a formal loss of wage-earning capacity decision: (1) the original rating was in error; (2) the claimant was self-rehabilitated; or (3) the claimant's employment-related medical condition had worsened. It stated that it required a medical opinion of how appellant's work-related depression condition was causally related to the materially worsening of his preexisting coronary heart disease condition. The Office also noted that Dr. Portalatin had indicated in his September 19, 2008 CA-20 form report that appellant's low back pain had led to an increase in anxiety which aggravated his acute coronary artery syndrome condition; it stated, however, that it had received no medical documentation related to his cardiac condition or medical evidence which showed a material worsening of his accepted lumbar condition. It stated that it required

² Appellant underwent quadruple heart bypass surgery during this period of hospitalization. While the record contains no documentation indicating the precise date of surgery, the Board notes that Dr. Pathak indicated in this report that he underwent heart bypass surgery in July 2008. In addition, the September 2008 treatment notes from Mr. Coursey and Dr. Pathak indicated that appellant had recently underwent surgery.

objective medical evidence to support that his cardiac condition was related to the accepted lumbar spine and emotional conditions. The Office further advised that it required objective physical findings and medical reasoning from his physician demonstrating a material worsening of his accepted conditions. Appellant was afforded 30 days to submit additional evidence in support of his claim.

In a report dated December 19, 2008, Dr. Portalatin stated that he had treated appellant since 1995. He stated that appellant had lumbar degenerative disc disease and depressive disorder. Dr. Portalatin advised that appellant had been experiencing persistent discomfort since his last surgery which had significantly limited his daily activities; he stated that appellant's disability had affected his mood and was the main factor contributing to his depression. He asserted that his degenerative disc disease had continued to deteriorate, with appellant experiencing increased, nagging lumbar discomfort in the middle and right side of his back and new radicular pain in his left lower extremity. Dr. Portalatin advised that appellant's symptoms were exacerbated by any kind of activity, including walking from his house to his car and grocery shopping. He asserted that appellant's condition was progressive with no possibility of improvement.

By decision dated January 12, 2009, the Office denied appellant's request for modification of the December 7, 2004 loss of wage-earning capacity determination. It found that appellant had been advised of the type of evidence required to warrant a modification of the December 7, 2004 determination but had not submitted such evidence. The Office stated that he had not self-rehabilitated and had failed to submit evidence in support of his assertion that his increased back pain caused an aggravation of his emotional condition and a consequential cardiac condition which led to total disability beginning March 28, 2008. It concluded that appellant failed to establish a material worsening of his spine condition; a material worsening of his emotional condition; and a consequential cardiac condition, as none of the medical evidence he submitted contained a probative, rationalized medical opinion sufficient to demonstrate a spontaneous worsening of his accepted conditions.

In a report dated January 8, 2009, received by the Office on January 15, 2009, Dr. Pathak and Mr. Coursey stated that appellant quit his light-duty job with Hertz because he was experiencing chronic pain caused by squatting, stooping, washing cars, all of which caused a decompensation of his degenerative disc condition. They asserted that his physical symptoms caused a decompensation in his emotional condition, with increased depression and anxiety, in addition to loss of sleep and appetite and loss of joy in daily activities.

By letter dated January 23, 2009, received by the Office on January 30, 2009, appellant requested reconsideration. Appellant submitted treatment notes dated January 22 and February 5, 2009 from Mr. Coursey which essentially reiterated his previous findings and conclusions.

By decision dated March 6, 2009, the Office denied appellant's application for review on the grounds that it neither raised substantive legal questions nor included new and relevant evidence sufficient to require the Office to review its prior decision.

LEGAL PRECEDENT -- ISSUE 1

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.³

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."⁴

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 The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁶

The Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995) provides for a retroactive determination where an employee has worked for at least 60 days and the work stoppage following that date was not due to the employment-related condition.

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained degenerative disc disease, major depressive disorder and herniated nucleus pulposus at L4-5. Appellant accepted the position of part-time driver with Hertz Car Rental on March 26, 2003. By decision dated December 7, 2004, the Office found that his actual earnings in this position fairly and reasonably represented his wage-earning capacity. Appellant filed a claim for a recurrence of disability on November 19, 2008, claiming that he became totally disabled as of March 28, 2008. The question is whether he established that the December 7, 2004 wage-earning capacity decision should be modified.

Appellant did not allege that the original LWEC determination was erroneous or that he had been retrained or otherwise vocationally rehabilitated. He argued that his accepted degenerative disc disease and herniated disc conditions had materially worsened since the Office's December 7, 2004 wage-earning capacity determination; this resulted in an increase in anxiety and a deterioration of his accepted major depressive disorder, which aggravated his

³ See *Katherine T. Kreger*, 55 ECAB 633 (2004).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

⁵ *Sue Sedgwick*, 45 ECAB 211 (1993).

⁶ *Id.*

underlying nonaccepted coronary artery condition and resulted in his total disability as of March 28, 2008. The Board finds that appellant has failed to submit medical evidence sufficient to support his contention that his accepted conditions had materially changed. Appellant submitted reports and treatment notes from Mr. Coursey and Drs. Pathak and Portalatin. Mr. Coursey indicated in his April, May and September 2008 treatment notes that appellant was experiencing increased low back pain which was causing an aggravation of his depression and anxiety conditions.⁷ Dr. Pathak submitted reports dated August 25 and October 13, 2008, which further indicated that appellant's degenerative disc disease and herniated disc at L4-5 contributed to his depression, anxiety and stress conditions, which resulted in the material worsening of the underlying heart condition. Appellant also submitted treatment notes from Dr. Pathak dated November 21, 2008 and from Mr. Coursey, dated December 11, 2008, which indicated that he had back pain, anxiety and depression. The reports from these physicians, however, were not sufficient to show that there was a material worsening of appellant's accepted low back condition which caused a worsening of his anxiety and depression conditions, which in turn aggravated his underlying coronary disease condition. While the physicians did note that appellant had degenerative conditions which were worsening, they did not provide probative, objective evidence, to sufficiently describe or explain the medical process by which the claimed deterioration of his accepted conditions would have been competent to cause appellant's disability as of March 28, 2008.

Appellant also submitted the September 19, 2008 CA-20 form report from his treating physician, Dr. Portalatin, who opined that he had experienced persistent leg pain caused by his herniated nucleus pulposus and an aggravation of his work-related anxiety, which precipitated an acute coronary syndrome which totally disabled him as of March 28, 2008 and continuing. Dr. Portalatin had appellant hospitalized to treat his coronary artery condition on July 23, 2008 and undergo quadruple bypass surgery. In his December 19, 2008 report and November and December 2008 treatment notes, Dr. Portalatin stated that appellant had lumbar degenerative disc disease, left lower extremity pain, radiculopathy; he noted that he had been experiencing persistent low back discomfort since his July 2008 heart surgery. Dr. Portalatin advised that these conditions significantly limited appellant's daily activities, which affected his mood and aggravated his depression.

Dr. Portalatin did not provide an opinion which sufficiently explained, with probative, rationalized medical opinion, that there had been a material change in the nature and extent of appellant's accepted conditions. None of the reports he submitted sufficiently described a change of the accepted low back and depression conditions or explained how these accepted conditions had materially worsened such that appellant became totally disabled due to a consequential cardiac condition as of March 28, 2008. In addition, Dr. Portalatin's reports pertaining to appellant's cardiac condition, which was not an accepted condition, failed to sufficiently explain the process through which this condition was caused or contributed to by

⁷ The Board notes that there is no indication in the record that Mr. Coursey is a physician therefore his reports do not constitute medical evidence pursuant to section 8102(2). His treatment notes are referenced herein because they provide part of the basis for the opinion of Dr. Pathak, his associate who treated appellant in conjunction with Mr. Coursey.

appellant's accepted low back and emotional conditions.⁸ His opinion on causal relationship is of limited probative value in that he did not provide adequate medical rationale in support of his conclusions.⁹ Dr. Portalatin only noted summarily in his reports that appellant's accepted low back condition had deteriorated, causing an increase in anxiety and aggravation of his major depression conditions, which led to the onset of his coronary artery condition.

Appellant failed to submit a rationalized medical opinion of how the work-related back and depression conditions materially worsened and led to a consequential coronary heart disease condition. The Board finds that he failed to submit medical evidence sufficient to warrant a modification of the December 7, 2004 wage-earning capacity determination.

LEGAL PRECEDENT -- ISSUE 2

Under 20 C.F.R. § 10.606(b), a claimant may obtain review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a specific point of law; by advancing a relevant legal argument not previously considered by the Office; or by submitting relevant and pertinent evidence not previously considered by the Office.¹⁰ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.¹¹

ANALYSIS -- ISSUE 2

Appellant has not shown that the Office erroneously applied or interpreted a specific point of law; he has not advanced a relevant legal argument not previously considered by the Office; and he has not submitted relevant and pertinent evidence not previously considered by the Office. The January 8, 2009 report cosigned by Dr. Pathak and Mr. Coursey indicated that appellant's job duties with Hertz resulted in chronic pain and a deterioration of his degenerative disc condition, leading to a concomitant decompensation in his emotional condition. This report, however, merely presented a restatement of findings and conclusions submitted in previous reports and is therefore cumulative and repetitive of reports which were considered in the Office's prior merit review. Further, the Board has held that the submission of evidence which does not address the particular issue involved in the case does not constitute a basis for reopening the claim.¹² The January 22 and February 5, 2009 treatment notes from Dr. Coursey did not provide any rationalized medical opinion pertinent to the relevant issue; *i.e.*, whether there was a material change in the nature and extent of appellant's accepted physical and emotional conditions sufficient to warrant a modification of the December 7, 2004 wage-earning capacity

⁸ Furthermore, the CA-20 form report from Dr. Portalatin that supports causal relationship with a checkmark is insufficient to establish the claim, as the Board has held that without further explanation or rationale, a checked box is not sufficient to establish causation. *Debra S. King*, 44 ECAB 203 (1992); *Salvatore Dante Roscello*, 31 ECAB 247 (1979).

⁹ *William C. Thomas*, 45 ECAB 591 (1994).

¹⁰ 20 C.F.R. § 10.606(b)(1); *see generally* 5 U.S.C. § 8128(a).

¹¹ *Howard A. Williams*, 45 ECAB 853 (1994).

¹² *See David J. McDonald*, 50 ECAB 185 (1998).

determination. Appellant's reconsideration request failed to show that the Office erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by the Office. The Office did not abuse its discretion in refusing to reopen appellant's claim for a review on the merits.

CONCLUSION

The Board finds that the Office properly denied modification of the established December 7, 2004 wage-earning capacity determination. The Board finds that the Office properly refused to reopen appellant's case for reconsideration on the merits of his claim under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the March 6 and January 12, 2009 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 15, 2010
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