

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MADONNA STILLER, claiming on behalf of the estate of THOMAS E. STILLER and U.S. POSTAL SERVICE, SOUTH STATION, Warren, MI

*Docket No. 02-1135; Submitted on the Record;
Issued May 27, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied modification of its determination of the employee's wage-earning capacity.

This case was previously on appeal before the Board. In an October 11, 2000 decision, the Board affirmed the Office's decisions finding that the constructed position of jewelry sorter represented the employee's wage-earning capacity. The Board also affirmed the Office's decision denying the employee's request for reconsideration. The relevant facts are set forth in the October 11, 2000 decision.¹

By letter dated October 8, 2001, the employee, through his attorney, requested reconsideration before the Office. In a January 9, 2002 decision, the Office denied modification of the April 11, 1996 wage-earning capacity determination.²

The Board finds that the Office properly denied modification of its determination of the employee's wage-earning capacity.

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 modification.⁴ In this case, the employee sought modification of

¹ Docket No. 98-1621 (issued October 11, 2000).

² The employee died on June 4, 2002. Appellant, his wife, filed letters of authority for personal representative on behalf of his estate; *see John J. Cremo*, 38 ECAB 153 (1986); *Albert F. Kimbrell*, 4 ECAB 662 (1952).

³ *Stanley B. Plotkin*, 51 ECAB 700 (2000); *Derrick Higgin*, 50 ECAB 213 (1998).

⁴ *See James D. Champlain*, 44 ECAB 438, 440 (1993).

the Office's wage-earning capacity determination. He bore the burden to show a material change in the nature and extent of his injury-related condition or to show the original determination was erroneous.

In this case, the employee did not submit sufficient evidence to show that the Office's original determination with regard to the wage-earning capacity should be modified. In an April 11, 1996 decision, the Office determined that the employee had the wage-earning capacity to perform the position of sorter and reduced his wage-loss benefits accordingly. This determination was reviewed by the Board in the prior appeal and affirmed.

The employee did not provide sufficient rationalized medical evidence to support that he developed a material change in the nature or extent of his injury-related conditions, which would affect his wage-earning capacity determination. In a January 8, 2001 report, Dr. Eric Nicholas Backos, a Board-certified physiatrist and the employee's treating physician, opined that the employee was unable to work and he could not tolerate prolonged sitting, standing and walking. Dr. Backos' opinion is insufficient to support a material change in the employee's condition, as he failed to explain which duties the employee could and could not physically perform, but rather, stated that the employee could not tolerate prolonged sitting, standing and walking. He also failed to address how the employee's disability was due to his accepted chronic lumbosacral strain and herniated disc at L4-5. His report is essentially repetitious of a prior May 29, 1997 medical report considered by the Office.

Dr. Backos' September 6, 2001 electromyogram (EMG) report regarding an evaluation of the employee's low back and leg pain revealed a diagnosis of bilateral multilevel lumbar radiculopathies and severe peripheral neuropathy. It found no evidence of myopathic changes at that time. A September 11, 2001 computerized tomography report from Dr. David G. Fry, a radiologist, provided a diagnosis of mild to moderate canal stenosis at L3-4 related primarily to facet and ligamentous hypertrophy and diffuse bulging disc. It also diagnosed facet hypertrophy leading to left foraminal encroachment at L5-S1 and primarily on the right side at L4-5. None of these reports, however, addressed the employee's ability to perform the constructed position of jewelry sorter or address how the findings on diagnostic testing materially changed the employee's condition such that he could no longer perform such duties.

In his October 4, 2001 affidavit, Dr. Backos testified that he first treated the employee on March 31, 1997 and continued to see him over the last three to four years for back pain, peripheral neuropathy and weakness in his lower extremities. Regarding the employee's back pain, Dr. Backos diagnosed multiple lumbar radiculopathies with spinal stenosis superimposed on a history of four surgeries, which was supported by his September 6, 2001 EMG study. Dr. Backos was given a description of the jewelry sorter position by the employee's attorney and opined that the employee's back condition prevented him from performing the duties of the selected position due to his need to lie down for 2 to 4 hours a day and his inability to lift 10 pounds on a regular basis. He explained how the employee's back condition prevented him from performing the duties of a jewelry sorter and concluded that if the employee worked, he would miss three to four days a month. Although Dr. Backos stated that the employee was unable to perform the duties of the selected position, he failed to address how the employee's disability was due to his accepted lumbosacral strain and herniated disc at L4-5 or how his condition had changed from the original wage-earning capacity decision. For these reasons, appellant has not

shown a material change in the nature or extent of the employee's accepted conditions. No evidence has been submitted to suggest that appellant has been retrained or that the original wage-earning capacity decision was otherwise erroneous.

The January 9, 2002 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
May 27, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member