

On November 25, 1994 appellant, then a 45-year-old part-time flexible city carrier, filed a traumatic injury claim alleging that on November 23, 1994 he injured his lower back while lifting a tray of flats and placing it on the platform. By letter dated January 18, 1995, the Office accepted his claim for back strain. Appellant's claim was later accepted for lumbar strain and

herniated nucleus pulposus L5-S1. He returned to work as a part-time flexible office clerk (modified) on March 16, 1996. By decision dated February 10, 1997, the Office determined that this position fairly and reasonably represented appellant's wage-earning capacity.

Appellant's claim for a recurrence of disability on May 15, 2002 was accepted. On July 25, 2003 the Office issued a schedule award for a 20 percent impairment of both feet (10 percent impairment of each foot). Appellant elected to receive the amount in a lump-sum payment.

On October 7, 2003 appellant started a new position as a full-time city carrier (modified). The restrictions for this position included: lifting no more than 15 pounds; up to 6 hours fine manipulation (keyboarding); and no bending, squatting, kneeling or reaching above shoulders. On January 29, 2004 the Office issued an "Attachment to Wage-Earning Capacity Determination" and found that appellant's current earnings represented his wage-earning capacity.

On April 21, 2004 appellant filed a claim for recurrence of the November 23, 1994 injury. On the form he indicated that he stopped work after the recurrence on April 15, 2004.

In a May 12, 2004 medical report, Dr. Bhaskar Mukherji, a Board-certified physiatrist, noted that appellant gave a history of a workers' compensation injury several years ago and that his pain started getting worse around April 2004. He noted likely cervical radiculopathy; lumbar radiculopathy and postlaminectomy syndrome. On May 29, 2004 Dr. Mukherji reviewed appellant's imaging studies and determined that appellant had diffuse cervical and lumbar degenerative disc disease. On May 19, 2004 he noted that appellant could return to work on May 20, 2004 to a sedentary job with 15-minute breaks every 2 hours.

In a July 13, 2004 medical report, Dr. Catherine Stober, a Board-certified internist, indicated that appellant was currently under her care for degenerative disc disease of the lumbar spine. She noted that appellant's physical condition had declined remarkably since his return to work in April 2002. Dr. Stober noted that appellant is able to walk a short distance but may require a walking staff, and that he requires numerous periods of recumbency during the day. She noted that the cervical radiculopathies have created a marked decrease in range of motion and weakness of both the right and left arms. Dr. Stober determined that appellant should not return to employment with the employing establishment and that he was not fit for other gainful employment. She concluded that appellant was totally disabled and incapable of maintaining any type of employment. Finally, Dr. Stober concluded that appellant's disabilities were likely permanent.

In a report dated August 4, 2004, a Dr. John Faccia assessed appellant with degenerative disc disease, cervical and lumbosacral spondylosis, foraminal stenosis, and radiculopathy and neuropathy.

In a December 22, 2004 report, Dr. Mukherji noted that appellant suffered from chronic arm and low back pain. He noted that "[t]he arm pain that he is describing is not fully in keeping with the spine problem, and so we can get a functional capacity evaluation."

By letter dated March 14, 2005, the Office referred appellant to Dr. David H. McCord, a Board-certified orthopedic surgeon, for a second opinion evaluation. In an April 12, 2005 report, Dr. McCord noted that appellant needed a firm diagnosis and suggested further testing, specifically a “lumbar discography and thin cut actually directed [computerized tomography] afterwards.” He concluded that, as appellant’s diagnosis was unclear, he remained unable to work and was disabled.

On August 2, 2005 appellant requested to change treating physicians to Dr. McCord and the Office accepted this change by letter dated September 6, 2005. In a report dated August 26, 2005, Dr. McCord noted that, based on appellant’s history, examination, multiple radiographs and studies, he has internally deranged and disrupted disc, vertical instability and lateral stenosis at L3-4, L4-5 and L5-S1. He noted that he discussed surgical options with appellant. On October 25, 2005 Dr. McCord operated on appellant. Procedures included a first-stage anterior lumbar fusion with autograph and allograft L4-5, L5-S1; anterior radical discectomy, foraminotomy and decompression L4-5, L5-S1 with corpectomy L4-5 and L5-S1 and a right iliac crest bone graft. A second stage fusion and decompression was carried out on October 27, 2005.

By letter dated January 10, 2006, the Office expanded appellant’s claim to include the accepted condition of aggravation of degenerative disc disease, L3-4 and L5-S1.

By decision dated January 19, 2006, the Office denied appellant’s claim for compensation for the period April 15, 2004 through October 24, 2005 as the medical evidence did not demonstrate that appellant’s injury of November 23, 1994 prevented him from performing the sedentary duties of his modified job.

On February 13, 2006 appellant requested review of the written record.

In a decision dated June 1, 2006, the hearing representative reversed, in part, the Office’s decision in that he found that appellant was entitled to compensation for temporary total disability between April 12 and October 24, 2005. However, he affirmed the denial of compensation for the period April 14, 2004 and April 11, 2005.

By letter dated January 3, 2007, appellant requested reconsideration. He specifically asked that compensation be awarded for the period April 14, 2004 through April 11, 2005, arguing that causal relationship had been established. In support of his request, appellant resubmitted numerous items of evidence that had previously been considered by the Office and medical evidence concerning his condition after the October 2005 surgeries.

By decision dated August 21, 2007, the Office denied modification of the June 1, 2006 decision.

LEGAL PRECEDENT

Once a loss of wage-earning capacity is determined, a modification of such a determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, or the employee has been retrained or otherwise vocationally

rehabilitated.¹ The burden of proof is on the party attempting to show the award should be modified.²

Board precedent provides that, when a wage-earning capacity determination has been issued and the employee submits evidence with respect to increased disability for work, the issue presented is whether modification of wage-earning capacity is warranted, not whether appellant has sustained a recurrence of disability.³

ANALYSIS

According to the evidence of record, the Office accepted that, as a result of appellant's November 23, 1994 work injury, she sustained a back strain, lumbar strain and herniated nucleus pulposus L5-S1. Appropriate medical and compensation benefits were paid. Appellant returned to work as a part-time flexible office clerk (modified) on March 16, 1996 and by decision dated February 10, 1997, the Office determined that this position fairly and reasonably represented appellant's wage-earning capacity. On October 7, 2003 appellant started work as a full-time city carrier (modified) and on January 29, 2004 the Office found that this position represented appellant's wage-earning capacity.

Appellant alleged a recurrence of total disability on April 15, 2004. In this regard, he contended that his condition has deteriorated or worsened to the extent that he became totally disabled for work. The Office determined that appellant had not established that he sustained a recurrence of disability. However, the Board has held that when a wage-earning capacity determination has been issued and he submits evidence with respect to disability to work the Office must evaluate the evidence to determine if modification of wage-earning capacity is warranted.⁴ The Office's procedure manual directs the claim's examiner to consider the criteria for modification when a claimant requests resumption of compensation for total wage loss. Accordingly, the Board finds that the Office should have considered the issue of modification of the January 29, 2004 wage-earning capacity determination.

CONCLUSION

The Board finds that appellant's claim for compensation for a recurrence of total disability raised the issue of whether a modification of the January 29, 2004 wage-earning capacity decision was warranted and the case must be remanded for an appropriate decision on the issue.

¹ See *D.M.*, 59 ECAB ____ (Docket No. 07-1230, issued November 13, 2007); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

² *Id.*; *Jack E. Rohrabough*, 38 ECAB 186, 190 (1986).

³ *Katherine T. Kreger*, 55 ECAB 633, 636 (2004); see *Sharon C. Clement*, 55 ECAB 552 (2004).

⁴ See *Sharon C. Clement*, 55 ECAB 552 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 21, 2007 is set aside; the case is remanded for further proceedings consistent with this decision of the Board.

Issued: October 22, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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