

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

M.W., Appellant)

and)

**DEPARTMENT OF ENERGY, SOUTHWEST
POWER ADMINISTRATION, Tulsa, OK,
Employer**)

**Docket No. 11-1850
Issued: March 21, 2012**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 9, 2011 appellant, through his attorney, filed a timely appeal from the June 29, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met his burden of proof to establish that modification of OWCP's May 6, 2009 wage-earning capacity decision was warranted.

FACTUAL HISTORY

OWCP accepted that on June 20, 2006 appellant, then a 48-year-old journey lineman, sustained lumbago, aggravation of degenerative disc disease at L4-5 and L5-S1 and disc

¹ 20 C.F.R. § 8101 *et seq.*

protrusion at L5-S1 due to a work-related motor vehicle accident. On December 12, 2007 appellant underwent spinal fusion and decompression surgery at L4 through S1 which was authorized by OWCP. He received compensation for periods of disability.

On September 3, 2008 Dr. Ted Lennard, an attending Board-certified physical medicine and rehabilitation physician, determined that appellant reached maximum medical improvement and recommended permanent work restrictions, including no lifting more than 25 pounds and no twisting, bending or stooping for more than one hour per day.

On February 17, 2009 appellant returned to full-time work for the employing establishment as an electrician helper.² The position had physical requirements that were consistent with the work restrictions of Dr. Lennard.

In a May 6, 2009 decision, OWCP determined that appellant's actual wages as an electrician helper fairly and reasonably represented his wage-earning capacity. It reduced his compensation to zero because his actual wages exceeded the current wages of the job he held when injured.

The findings of January 26, 2010 magnetic resonance imaging (MRI) scan testing of appellant's lumbar spine showed normal alignment, vertebral body height and bone marrow signal. The conus terminated appropriately and there was no intrathecal mass lesion. Paravertebral soft tissues were unremarkable and disc height and signal were normal from T12 to L4. There was no vertebral canal or foraminal stenosis.

On January 29, 2010 Dr. Wade Ceola, an attending Board-certified orthopedic surgeon, indicated that recent diagnostic testing showed that appellant's surgical hardware showed good placement and that the fusion appeared to be mature. He noted that appellant complained of low back pain, bilateral buttocks pain and bilateral leg pain, mostly posterior and greater on the left.

On May 5, 2010 Dr. Lennard requested a functional capacity evaluation of appellant's condition and such an evaluation was carried out on May 27, 2010. The occupational therapist who carried out the evaluation indicated that the results showed that appellant could occasionally lift and carry up to 35 pounds. She indicated that a job description had been reviewed which noted that appellant was required to lift 45 pounds in his job.

In a June 14, 2010 report, Dr. George Caldwell, a Board-certified orthopedic surgeon who provided consultation for the employing establishment, indicated that he had reviewed the functional capacity evaluation and determined that appellant was unable to meet the essential physical functions of his job. He noted that appellant required narcotic pain control that potentially impaired him and stated, "Therefore, for functional and safety reasons, I believe that [appellant] is medically disqualified."

In a July 6, 2010 letter, the employing establishment official indicated that he had reviewed Dr. Caldwell's opinion and stated, "We concluded that we could not let [appellant] continue to work with his physical limitations and his need to take narcotic pain medication

² Appellant earned weekly wages of \$1,236.80 in this position.

during the workday. We placed [appellant] on extended leave without pay effective July 2, 2010.”

In an August 6, 2010 letter, OWCP requested information from Dr. Lennard including whether appellant suffered a worsening of his work-related lumbar condition subsequent to returning to the electrician helper position on February 17, 2009. Dr. Lennard was requested to provide the objective clinical findings, test results and medical rationale on which he based his conclusion. He responded that he had not seen appellant since June 4, 2009.

In mid August 2010, OWCP received a Form CA-7 in which appellant claimed wage-loss compensation beginning July 2, 2010.

In a November 5, 2010 letter, OWCP advised appellant regarding the grounds and evidence necessary to modify its prior wage-earning capacity determination of May 6, 2009. It afforded him 30 days from the date of the letter to provide additional information.

In a December 10, 2010 decision, OWCP determined that modification of its wage-earning capacity decision was not warranted. It indicated that appellant had not shown that the original determination was erroneous or that he had suffered a material change in his injury-related condition.

Appellant submitted a December 21, 2010 report of Dr. Chris Weber, an attending Board-certified physiatrist, who stated that appellant believed Dr. Lennard had failed to indicate that he could not stand for prolonged periods and that therefore his original wage-earning capacity was in error. On physical examination, Dr. Weber indicated that appellant had good alignment of his back and that his surgical incisions were well healed. There was no muscle wasting or superficial tenderness of the back and sham rotation, axial loading and flip testing were negative. Appellant reported some tenderness in the coccyx tailbone region, but no pain with hip rotation or trochanteric pain. Dr. Weber stated that appellant had good flexibility of the hips and reported a little numbness, particularly in the lateral left leg and posterior calf. Sensory and motor findings were normal in the L2 through S1 dermatomes. Dr. Weber diagnosed lumbar fusion with chronic low back pain, radicular symptoms with some MRI scan evidence of epidural fibrosis with leg symptoms and hypogonadism secondary to chronic narcotic pain management. He stated:

“[Appellant] wishes to appeal his loss of earning wages. It seems unlikely that he will return to that original or secondary job, because he cannot meet functional capacity for either. [Appellant] could be considered for a light[-]duty job where he is allowed to sit, stand, and alter positions every hour or two without prolonged standing more than a couple hours a day.”

* * *

“I believe that the testosterone is work related as discussed above, and since [w]orkmans’ [c]ompensation has already paid for his surgery, it would seem that causation had already been accepted from his 2006 motor vehicle collision, and his back problems. [Appellant’s] leg symptoms are likely related to epidural

fibrosis postoperatively and low back pain related to postfusion anatomy changes in a complex government work comp[ensation] and psychosocial setting.”

In a January 5, 2011 report, Dr. Weber discussed the treatment of appellant’s chronic headaches which he had experienced since his teens. He diagnosed status post workmans’ compensation injury of the back and chronic migraines and headaches, possibly of cervicogenic origin versus rebound analgesia. In a February 14, 2011 note, Dr. Weber provided handwritten entries that were mostly illegible. He diagnosed postfusion low back pain and root scarring symptoms.

Appellant requested a hearing before an OWCP hearing representative. At the hearing held on April 13, 2011, he testified that after he returned to work as an electrician helper on February 17, 2009 his back gradually worsened to the point that he was no longer able to work.

In a June 29, 2011 decision, OWCP’s hearing representative affirmed OWCP’s December 10, 2010 decision.

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. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.³ OWCP’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 [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

Section 8115(a) of FECA provides that the “wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity.”⁷ The Board has stated, “Generally, wages actually earned are the best

³ *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 *Stanley B. Plotkin*, 51 ECAB 700 (2000); *see also* Federal (FECA) Procedure Manual, *supra* note 4 at Chapter 2.814.11 (June 1996).

⁶ *Id.*

⁷ 5 U.S.C. § 8115(a).

measure of a wage-earning capacity and in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure."⁸ OWCP procedures direct that a wage-earning capacity determination based on actual wages be made following 60 days of employment.⁹ However, wage-earning capacity may not be based on an odd-lot or make-shift position designed for an employee's particular needs or a position that is seasonal in an area where year-round employment is available.¹⁰

ANALYSIS

OWCP based appellant's loss of wage-earning capacity on a determination that his actual earnings as an electrician helper beginning February 17, 2009 represented his wage-earning capacity. This determination was consistent with section 8115(a) of FECA which provides that the wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity.¹¹ OWCP properly noted that appellant had received actual earnings as an electrician helper for more than 60 days in that he had been working in the position since February 17, 2009 when OWCP issued its May 6, 2009 decision and there is no evidence that his earnings in this position did not fairly and reasonably represent his wage-earning capacity.¹² The electrician helper position was not an odd-lot or make-shift position designed for his particular needs and it was not seasonal in nature.¹³

The evidence does not show that appellant's actual earnings as an electrician helper did not fairly and reasonably represent his wage-earning capacity and OWCP properly adjusted his compensation based on this wage-earning capacity determination.¹⁴ For these reasons, appellant has not shown that OWCP's original determination with regard to his wage-earning capacity was erroneous.

⁸ *Floyd A. Gervais*, 40 ECAB 1045, 1048 (1989); *Clyde Price*, 32 ECAB 1932, 1934 (1981). Disability is defined in the implementing federal regulations as "the incapacity, because of an employment injury, to earn the wages the employee was receiving *at the time of injury*." (Emphasis added.) 20 C.F.R. § 10.5(f). Once it is determined that the actual wages of a given position represent a employee's wage-earning capacity, OWCP applies the principles enunciated in *Albert C. Shadrick*, 5 ECAB 376 (1953), in order to calculate the adjustment in the employee's compensation.

⁹ See Federal (FECA) Procedure Manual, *supra* note 4 at Chapter 2.814.7c (December 1993).

¹⁰ See *James D. Champlain*, 44 ECAB 438, 440-41 (1993); Federal (FECA) Procedure Manual, *supra* note 4 at Chapter 2.814.7a(1) (July 1997).

¹¹ See *supra* note 9 and accompanying text.

¹² See *supra* note 10.

¹³ See *supra* note 11.

¹⁴ OWCP properly applied the principles enunciated in *Albert C. Shadrick*, *supra* note 8, in order to calculate the adjustment in appellant's compensation.

Appellant alleged that there was a material change in the nature and extent of his employment-related condition.¹⁵ He submitted medical evidence indicating that he reported increased back and leg problems prior to stopping work on July 2, 2010. However, this evidence does not contain a rationalized medical opinion explaining why an employment-related condition prevented appellant from performing the electrician helper position or otherwise establish that OWCP improperly determined his wage-earning capacity.¹⁶

In a June 14, 2010 report, Dr. Caldwell, a Board-certified orthopedic surgeon, who provided consultation for the employing establishment, indicated that he had reviewed a May 27, 2010 functional capacity evaluation and determined that appellant was unable to meet the essential physical functions of his job. He noted that appellant required narcotic pain control that potentially impaired him and stated, “Therefore, for functional and safety reasons, I believe that [appellant] is medically disqualified.” However, this evidence would not show that OWCP’s May 6, 2009 wage-earning capacity determination should be modified because Dr. Caldwell, who did not examine appellant, did not clearly explain how a material change in appellant’s injury-related condition rendered him unable to work as an electrician helper.¹⁷ Dr. Caldwell did not adequately explain how appellant’s narcotic use would prevent him from working as an electrician helper or how this use was necessitated by his injury-related condition.¹⁸

In a December 21, 2010 report, Dr. Weber, an attending Board-certified physiatrist, stated that, on physical examination, appellant had good alignment of his back and that his surgical incisions were well healed. There was no muscle wasting or superficial tenderness of the back and sham rotation, axial loading and flip testing were negative. Appellant reported some tenderness in the coccyx tailbone region and a little numbness in the lateral left leg and posterior calf. Dr. Weber diagnosed lumbar fusion with chronic low back pain, radicular symptoms with some MRI scan evidence of epidural fibrosis with leg symptoms and hypogonadism secondary to chronic narcotic pain management. He stated that it seemed unlikely that appellant would return to his “original or secondary job” because he could not meet the functional capacity for either job.

Although Dr. Weber suggested that appellant could not work as an electrician helper, he did not adequately explain how appellant suffered a material change in his injury-related condition such that he could not work as an electrician helper. In fact, the symptoms and

¹⁵ OWCP accepted that on June 20, 2006 appellant sustained lumbago, aggravation of degenerative disc disease at L4-5 and L5-S1 and disc protrusion at L5-S1 due to a work-related motor vehicle accident. On December 12, 2007 appellant underwent spinal fusion and decompression surgery at L4 through S1.

¹⁶ See *Norman F. Bligh*, 41 ECAB 230, 237-38 (1989).

¹⁷ It should be noted that the occupational therapist who carried out the May 27, 2010 functional capacity evaluation suggested that appellant was required to lift 45 pounds in his job. Appellant was only required to lift 25 pounds in the electrician helper position and Dr. Caldwell’s disability opinion might have been influenced by an inaccurate assessment of appellant’s work requirements.

¹⁸ It appears that the employing establishment placed appellant on leave without pay starting July 2, 2010 due to his reported need for increased work restrictions. However, in order to show that modification of OWCP’s wage-earning capacity determination is warranted, appellant would have to establish a material change in his injury-related condition that necessitated such work restrictions.

medical conditions that he reported on physical examination were similar to those that other attending physicians reported prior to appellant's work stoppage on July 2, 2010. Dr. Weber suggested that appellant's current problems were related to after-effects of his December 12, 2007 approved surgery, but he did not provide sufficient medical rationale in support of this opinion.¹⁹ His opinion on appellant's ability to work appears to be more related to appellant's self-described limitations than to objective evidence of a material change in his injury-related condition.

For these reasons, appellant did not show a material change in his injury-related condition. Moreover, he has not been retrained or otherwise vocationally rehabilitated such that his work as an electrician helper would not be representative of his wage-earning capacity. Therefore, appellant did not establish that modification of OWCP's May 6, 2009 wage-earning capacity decision was warranted.

Appellant may request modification of the wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that modification of OWCP's May 6, 2009 wage-earning capacity decision was warranted.

¹⁹ Dr. Weber stated, "His leg symptoms are likely related to epidural fibrosis postoperatively and low back pain related to postfusion anatomy changes in a complex government work comp[ensation] and psychosocial setting." He also related appellant's hypogonadism to his work-related need for medication, but he did not adequately explain this opinion or detail how hypogonadism affected appellant's ability to work.

ORDER

IT IS HEREBY ORDERED THAT the June 29, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 21, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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