

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

J.J., Appellant

and

**DEPARTMENT OF THE ARMY, NATIONAL
GUARD BUREAU, Sacramento, CA, Employer**

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**Docket No. 13-623
Issued: July 25, 2013**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On January 23, 2013 appellant filed a timely appeal from an August 24, 2012 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 has established that OWCP's July 2, 2002 loss of wage-earning capacity (LWEC) determination should be modified.

FACTUAL HISTORY

This case has previously been before the Board. In an April 8, 2004 decision, the Board affirmed OWCP's decision reducing appellant's compensation to reflect his wage-earning

¹ 5 U.S.C. § 8101 *et seq.*

capacity in the constructed position of budget officer.² The Board accorded determinative weight to the August 30, 2000 opinion of Dr. Warren Clift, a Board-certified neurologist selected as the impartial medical examiner, who indicated that appellant was capable of working an eight-hour day with restrictions, which included a six-hour sitting limit.

The Board further found that appellant had not met his burden of proof to establish that either his preexisting migraine headaches or attention deficit hyperactivity disorder were caused or aggravated by the April 7, 1999 work injury or caused disability for the constructed position.

In a March 4, 2011 decision, the Board set aside OWCP's November 9, 2009 decision, which found that his reconsideration request was untimely filed and did not establish clear evidence of error and directed OWCP to adjudicate the request as a request for modification of a wage-earning capacity determination.³ In a June 27, 2012 order, the Board set aside and remanded OWCP's May 19, 2011 merit decision denying his request for reconsideration of OWCP's July 2, 2002 LWECD determination.⁴ The Board requested OWCP to issue a *de novo* decision as it was unclear whether the proper standard of review had been used in determining whether modification of the wage-earning capacity determination was warranted. The facts of the case are set forth in the Board's prior decisions and are incorporated herein by reference.

The relevant facts are as follows: on April 22, 1999 appellant, then a 50-year-old heavy mobile equipment mechanic supervisor, filed a traumatic injury claim alleging that on April 7, 1999 he experienced pain in his lower back and loss of strength and feeling in his left leg while jogging during a diagnostic fitness test. OWCP accepted his claim for temporary aggravation of lumbar radiculopathy, a herniated disc at L4-5 and an aggravation of degenerative disc disease. This was later expanded to include the permanent aggravation of a herniated nucleus pulposus at L5 on the left. Appellant did not work from May 5 through 7, 1999 and returned on May 11, 1999. He stopped work on May 12, 1999 due to increasing pain. Effective September 29, 2000, appellant was discharged from the employing establishment.⁵ He received total disability compensation benefits from June 20, 1999 until his compensation was reduced, effective July 14, 2002, when OWCP determined that appellant's wage-earning capacity was that of the constructed position of budget officer.

In a June 16, 2009 statement, appellant stated that he was required to maintain concurrent military membership in the National Guard and that failure to hold military membership would cause separation from federal civilian service. He alleged that OWCP had failed to consider the facts of his medical condition; specifically, the May 11, 2000 results of the Medical Duty

² Docket No. 03-2281 (issued April 8, 2004), *order denying petition for recon.* (issued August 2, 2004).

³ Docket No. 10-1379 (issued March 4, 2011).

⁴ Docket No. 11-1958 (issued June 27, 2012).

⁵ The record reflects that, since appellant was in an excepted position in the Federal Civil Service, he was required to maintain concurrent military membership in the National Guard. Failure to hold military membership would cause separation from the Federal Civil Service. Due to his work-related medical condition, appellant was honorably discharged by the Army National Guard on July 11, 2000. Soon after, his federal civilian employment was terminated on September 29, 2000.

Review Board and the medical reports of Col. Phillip Siegel, the military physician, regarding his migraine headaches. Appellant alleged that the statement of accepted facts was inaccurate and incomplete, OWCP failed to maintain his records in accordance with Department of Labor regulations, that there was a violation of the Privacy Act and that there were procedural errors in the vocational rehabilitation program, which resulted in the wage-earning capacity decision.

Medical reports of record since the Board's April 8, 2004 decision include multiple reports from Dr. Frederick Karl Gregorius, a Board-certified neurosurgeon. In an April 2, 2004 report, Dr. Gregorius diagnosed myofascial spinal pain in both the lumbar and cervical regions and noted that appellant's disability status was unchanged. He also noted that appellant was last seen on September 17, 2003 and that he did home exercises until he received authorization for physical therapy. In an October 18, 2005 report, Dr. Gregorius stated that appellant continued to suffer from chronic lumbar spine pain and that his disability remained the same as it has been in the past. He noted that appellant had paraspinous cervical spasms, which begin at the base of the skull and progress to migraines. In February 9, 2006 and July 13, 2007 reports, Dr. Gregorius noted that appellant had an exacerbation of his lumbar spine pain from sitting for a prolonged period of time. He noted no change in the disability status from the past. On November 12, 2007 Dr. Gregorius noted that appellant's pain continued to be present in the left side of his lumbar spine with posterolateral radiation down the left leg, depending on how long he sits. Appellant's sitting tolerance was noted to be 30 to 45 minutes, beyond which his back pain increases and he develops more pain down the left leg. Dr. Gregorius stated that appellant's disability is the same as it has been in the past. On May 1, 2008 he stated that appellant's pain is about the same. Dr. Gregorius noted that the lumbar spine pain alternates between legs and can radiate down the posterolateral left leg to the toes and he can have right-sided pain down to the hamstring. He opined that appellant's disability is the same as it has been in the past.

In reports dated September 4, 2008, January 12, 2009 and August 27, 2010, Dr. Gregorius noted that appellant had an exacerbation of his disabling lumbar spine pain with left leg pain, but noted that appellant's disability was the same as it has been in the past. In a January 6, 2011 report, he advised that appellant's pain had continued to worsen since he was last seen in August 2010. Appellant continued to have pain down the back of the right leg which was increasing in intensity. Dr. Gregorius stated that appellant has become more disabled because of persistent pain and thought it justified to do neurodiagnostic studies, but noted that appellant's disability is the same as it has been in the past.

Appellant underwent lumbar x-ray and comparison lumbar magnetic resonance imaging (MRI) scan studies on January 21, 2011 and in a January 31, 2011 report, Dr. Gregorius indicated that the x-rays showed a mild scoliosis with a concavity to the right side with anterolisthesis of L4-5 and degenerative disc disease, most impressive at L4-5 and L5-S1 levels. The MRI scan revealed a grade 1 spondylolisthesis at L4-5 with a disc protrusion resulting in moderate-to-severe central and lateral recess stenosis and narrowing of the L4 neural foramina. Other levels show degenerative changes, most impressive at L4-5 level. Dr. Gregorius opined that appellant's scan findings had deteriorated since the last set of studies, which had been obtained a number of years ago. He stated that appellant was responding to conservative measures and was not a surgical candidate. Dr. Gregorius noted that appellant was undergoing acupuncture and physical therapy and that his disability has been the same as it has been in the past.

In an April 7, 2011 report, Dr. Gregorius noted that appellant has completed 12 acupuncture treatments but had not been able to go to physical therapy because his lumbar spine pain persisted. In addition, appellant had severe migraine headaches which are triggered by his back pain. Dr. Gregorius noted that appellant's disability was the same as it has been in the past.

In his August 1, 2011 report, Dr. Gregorius noted that appellant last had acupuncture in June 2011 and that appellant continued to have persistent back pain with radicular pain down the posterolateral left leg. He stated that appellant had increasing pain with sitting which should be limited to 20 to 30 minutes and due to the pain he cannot drive long distances. Dr. Gregorius also noted that appellant's disability was the same as it has been in the past. In a February 15, 2012 report, he stated that appellant has had a change in pain location as the pain was in the back and posterolateral radicular down his right leg. Dr. Gregorius noted that the pain increased with activities. He further stated that appellant's disability was the same as it has been in the past. In a July 27, 2012 report, Dr. Gregorius noted that appellant continued with persistent pain in the lumbar spine. He stated that appellant continued to need medication, which he took on a daily basis. Appellant stated that medication affects his mental status and acupuncture makes him less dependent on medication and is the only thing that will help him. Dr. Gregorius further stated that appellant's disability was the same as it has been in the past.

Physical therapy reports and progress notes from Brian Loh, an acupuncturist, were received as well as a duplicate copy of the May 11, 2000 Medical Duty Review Board Results report. The report found appellant unfit for retention in the Army National Guard. Co. Robert Siegel, the military physician, noted "frequent migraine headaches associated with back pain -- lumbar disc herniation."

By decision dated August 24, 2012, OWCP denied modification of its July 2, 2002 wage-earning capacity decision, finding that none of the criteria for modification had been met.

LEGAL PRECEDENT

It is well established that either a claimant or OWCP may seek to modify a formal LWEC determination. 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.⁶ The burden of

⁶ *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sharon C. Clement*, 55 ECAB 552 (2004). See also *Tamra McCauley*, 51 ECAB 375 (2000).

proof is on the party attempting to show modification.⁷ There is no time limit for appellant to submit a request for modification of a wage-earning capacity determination.⁸

The Board has held that OWCP may accept a limited period of disability without modifying a standing wage-earning capacity determination. This occurs when there is a demonstrated temporary worsening of a medical condition of insufficient duration and severity to warrant modification of a wage-earning capacity determination. This narrow exception is only applicable for brief periods of medical disability.⁹

ANALYSIS

OWCP accepted that appellant sustained temporary aggravation of lumbar degenerative disc disease and radiculopathy and later, permanent aggravation of left-sided herniated nucleus pulposus at L5. The current accepted diagnoses are lumbar neuritis or radiculitis and degeneration of lumbar intervertebral disc. On July 2, 2002 OWCP found that appellant had established his capacity to earn wages in the selected position of budget officer. It also found that her headaches were not causally related to the April 7, 1999 work injury and his underlying attention deficit hyperactivity disorder did not disable him from performing the selected position. On April 29, 2004 the Board affirmed OWCP's July 2, 2002 decision. On June 16, 2009 appellant filed a statement, which OWCP determined constituted a request to modify the original July 2, 2002 LWEC determination. By decision dated August 24, 2012, OWCP denied modification of its July 2, 2002 LWEC determination.

In his June 16, 2009 statement, appellant did not contend that he was retrained or otherwise vocationally rehabilitated. He contended that the July 2, 2002 LWEC was erroneous and that his accepted conditions had worsened. The Board finds that appellant has not submitted sufficient evidence to establish that OWCP's original wage-earning capacity decision should be modified.

By decision dated July 2, 2002, OWCP determined that appellant had the wage-earning capacity to perform the selected position of budget officer and reduced his wage loss accordingly. This determination was reviewed by the Board in a prior appeal and affirmed. The Board had also affirmed the impartial medical specialist's determination that appellant's headaches were not causally related to the April 7, 1999 work injury and his underlying attention deficit hyperactivity disorder did not disable him from performing the selected position.

⁷ *Darletha Coleman*, 55 ECAB 143 (2003).

⁸ *W.W.*, Docket No. 09-1934 (issued February 24, 2010); *Gary L. Moreland*, 54 ECAB 638 (2003). *See also Daryl Peoples*, Docket No. 05-462 (issued July 19, 2005); *Emmit Taylor*, Docket No. 03-1780 (issued July 21, 2004). In *Peoples* and *Taylor*, the Board determined that the claimant's request for reconsideration of a wage-earning capacity determination constituted a request for modification of the decision. The Board set aside OWCP's decision denying the claimant's reconsideration request as untimely and remanded both cases for OWCP to adjudicate the issue of modification of an LWEC determination.

⁹ *K.R.*, Docket No. 09-415 (issued February 24, 2010).

In requesting modification of the wage-earning capacity determination, appellant generally alleged that the statement of accepted facts was inaccurate and incomplete, OWCP failed to maintain his records in accordance with Department of Labor regulations, that there was a violation of the Privacy Act and that there were procedural errors in the vocational rehabilitation program. However, he presented no evidence to support his general allegations of error. Appellant also alleged that OWCP failed to consider the results of the Medical Duty Review Board report of May 11, 2000 and the medical reports of Col. Phillip Siegel regarding migraine headaches. The May 11, 2000 Medical Duty Review Board report, which addressed appellant's lack of fitness/ability to do his regular federal or collateral military job is not relevant to the issue of his capacity to earn wages of budget officer. As noted above, the Board had previously affirmed the determination that appellant's headaches were not causally related to the April 7, 1999 work injury and his underlying attention deficit hyperactivity disorder did not disable him from performing the selected position, based upon the weight of the impartial medical specialist's report. Thus, the issue of appellant's migraine headaches were addressed and considered in the LWECD determination. Appellant has not demonstrated that the original determination was erroneous or that he was retrained or otherwise vocationally rehabilitated. As such, the only remaining basis for modification is whether the medical evidence establishes a material change in the nature and extent of the injury-related condition.

It is noted that the Board previously accorded determinative weight to the August 30, 2000 opinion of Dr. Warren Clift, a Board-certified neurologist selected as the impartial medical examiner, who indicated that appellant was capable of working an eight-hour day with restrictions, which included a six-hour sitting limit. Dr. Gregorius opined in his January 6, 2011 report that appellant's pain down the back of his leg continued to worsen since he was last seen in August 2010. He also indicated that appellant had become more disabled because of persistent pain. In his January 31, 2011 report, Dr. Gregorius reviewed January 21, 2011 diagnostic studies and opined that appellant's scan findings had deteriorated since the last set of studies. However he continued to opine in all his progress reports that appellant's disability remained the same. Although the evidence supports a finding that there was a worsening in appellant's accepted condition, Dr. Gregorius has offered no opinion as to whether appellant is unable to perform the duties of the constructed budget officer position.

Additionally, it is noted that in his February 15, 2012 report, Dr. Gregorius indicated that appellant's pain location had changed from the left leg to the right leg but offered no opinion as to whether the change in pain location was causally related to the April 7, 1999 work injury. Thus, while the evidence establishes that there was a worsening in appellant's condition, Dr. Gregorius provides no support that appellant is unable to perform the position on which the original LWECD determination was based.

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

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that the July 2, 2002 wage-earning capacity determination should be modified.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated August 24, 2012 is affirmed.

Issued: July 25, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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