

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JOEL L. CLEMENT and DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL CENTER, Seattle, WA

*Docket No. 03-421; Submitted on the Record;  
Issued June 26, 2003*

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DECISION and ORDER

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

The issue is whether appellant has established that the Office of Workers' Compensation Programs' June 6, 1997 wage-earning capacity determination should be modified.

This case is before the Board for the second time. In the first appeal, the Board affirmed the Office's January 7, 2002 decision finding that appellant had failed to establish that he sustained a recurrence of disability beginning March 2001, causally related to his accepted July 1, 1993 employment injuries of low back strain, a herniated nucleus pulposus at L4-5 and left leg radiculopathy.<sup>1</sup> The Board remanded the case for the Office to consider whether appellant had established modification of its June 6, 1997 wage-earning capacity decision. The findings of fact and conclusions of law from the Board's prior decision are hereby incorporated by reference.

By decision dated November 18, 2002, the Office denied modification of its June 6, 1997 wage-earning capacity determination.

The Board finds that appellant has not established that the Office's June 6, 1997 wage-earning capacity determination should be modified.

Once the loss of wage-earning capacity is determined, 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.<sup>2</sup> The burden of proof is on the party attempting to show that the award should be modified.<sup>3</sup>

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<sup>1</sup> *Joel L. Clement*, Docket No. 02-592 (issued October 10, 2002).

<sup>2</sup> *James D. Champlain*, 44 ECAB 438 (1993).

<sup>3</sup> *Id.*

Appellant did not submit any evidence to show that the Office's original determination of his wage-earning capacity was erroneous.<sup>4</sup> The Office in its June 6, 1997 decision, found that appellant had the capacity to earn wages in the selected position of truck driver. The Office based its determination on the July 29, 1996 report of Dr. Robert N. Joyner, appellant's attending physician, who specializes in family practice. In his July 29, 1996 report, he reviewed the position of truck driver and approved the position for appellant with modification of the lifting requirement to under 35 pounds. The Office subsequently approved a rehabilitation plan for appellant to receive training services as a truck driver from August 19 to September 27, 1996. In a report dated February 11, 1997, appellant's rehabilitation counselor identified the positions of truck driver and tractor-trailer driver as suitable for appellant given his qualifications and work restrictions.<sup>5</sup> The rehabilitation counselor noted that appellant had a state certified drivers' license and had "received training related to the safe operation of commercial vehicles." The Office, therefore, properly determined that appellant had the capacity to earn wages as a truck driver.

The record does not establish that appellant sustained a material change in the nature and extent of his employment-related condition such that he could not perform the position of truck driver. The record indicates that appellant received periodic treatment for back pain from 1997 to 2000. In a form report dated October 29, 1997, Dr. David Butler diagnosed lumbar disc disease and checked "yes" that the condition was caused by an injury from 1993 exacerbated by "unusual exertion." He found that appellant could resume his regular employment with his usual limitations on October 6, 1997. Dr. Butler, however, did not provide any rationale for his causation opinion in support of his checkmark "yes" on the medical form and thus his opinion is of little probative value.<sup>6</sup> In a chart note dated May 3, 2000, Dr. T. Gilmore, who is Board-certified in family practice, diagnosed low back strain and noted that appellant "felt his back go out" after lifting an object at a hotel. In a chart note dated May 10, 2000, Dr. Gilmore related that appellant "strained [his] back while lifting luggage" on May 1, 2000.<sup>7</sup> The chart notes submitted by appellant do not establish a material change in his injury-related condition and are insufficient to meet his burden of proof. Further, Dr. Gilmore's chart notes of May 3 and 10, 2000 indicate that appellant sustained new nonemployment-related injury to back.

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<sup>4</sup> Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of benefits. Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. 5 U.S.C. §§ 8101-8193; *David W. Green*, 43 ECAB 883 (1992). If the actual earnings do not fairly and reasonably represent wage-earning capacity or the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of the employee's injuries and the degree of physical impairment, his or her usual employment, the employee's age and vocational qualifications and the availability of suitable employment. *Samuel J. Chavez*, 44 ECAB 431 (1993).

<sup>5</sup> The rehabilitation counselor noted that appellant had lifting restrictions of 35 pounds but found that "many truck driving jobs" were within his restrictions.

<sup>6</sup> *Bernard Snowden*, 49 ECAB 144 (1997).

<sup>7</sup> In a report dated May 10, 2000, Dr. Gilmore found that appellant could resume his regular employment on May 11, 2000. He further noted that appellant injured his back "helping his girlfriend lift luggage while they were at a hotel" rather than in his work as a truck driver.

In a report dated August 29, 2000, Dr. Donn Colby, a Board-certified internist, discussed appellant's history of a 1993 low back injury with subsequent back pain "every six months or so." Dr. Colby stated: "Yesterday [appellant] underwent a physical test for a plumber's union, which required some lifting of some cement blocks. While doing that he noticed an exacerbation of the pain in his lower back." Dr. Colby diagnosed low back strain and found that appellant could return to his regular employment duties on September 4, 2000. He did not attribute appellant's condition to his July 1993 employment injury but instead discussed a new injury to appellant's back after he lifted cement blocks. His report, therefore, does not discharge his burden of proof to show that he could not perform the duties of a truck driver due to a change in the nature or extent of his employment-related condition.

Dr. Sohail K. Mirza, a Board-certified orthopedic surgeon, provided a report dated April 6, 2001, in which she noted appellant's history of a July 1993 employment injury. Dr. Mirza reviewed the results of a magnetic resonance imaging (MRI) scan obtained on March 6, 2001 and found that appellant had disc degeneration and bulges at L4-5 and L5-S1. He further found that, while a computerized tomography (CT) scan of appellant's lumbar spine obtained in July 1993 showed an L4-5 disc herniation, the current MRI scan showed resolution of the herniated disc. Dr. Mirza did not attribute a diagnosed condition to appellant's July 1993 employment injury or find him disabled from employment and thus his report is insufficient to show a material change in appellant's condition. Additionally, Dr. Mirza found that appellant's accepted condition of a herniated disc at L4-5 had resolved.

In a report dated May 2, 2001, Dr. Richard L. Rapport, a Board-certified neurosurgeon, related that he had previously treated appellant for a left disc herniation in 1993. He noted that appellant "was really quite well until he moved a couch a few weeks ago and developed left back and then left radiating leg pain." Dr. Rapport found that appellant's MRI scan showed resolution of the "free fragment" but an annular bulge at L4-5. He diagnosed lumbar strain and a bulging disc at L4-5. He did not, however, discuss the cause of appellant's diagnosed condition and thus his opinion is of little probative value.<sup>8</sup> Further, Dr. Rapport related a history of a possible new injury from moving a couch rather than the progressing of appellant's prior employment injury.

Dr. Susannah Taylor, a Board-certified internist, diagnosed lumbar strain in a report dated May 11, 2001. She did not provide a finding on causation or indicate that appellant was unable to perform his employment duties and thus her report is of little probative value.<sup>9</sup>

In a report dated May 16, 2001, Dr. Maureen Johnson, a Board-certified internist, discussed appellant's July 1993 employment injury. Dr. Johnson noted that appellant reported that "driving with sitting on a continuous basis and then the heavy lifting caused a recurrence of his left leg symptoms and he has had progressive problems with climbing up hills and climbing up stairs." She diagnosed "L4-5 dis[c] derangement now with degenerative changes and radicular component in the left leg and acute impaired mobility." Dr. Johnson recommended an electromyogram and noted that if it revealed radiculopathy at L5 it was "likely related to the

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<sup>8</sup> *Michael E. Smith*, 50 ECAB 313 (1999) (medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

<sup>9</sup> *Id.*

injury in 1993.” Dr. Johnson, however, did not specifically address the cause of appellant’s degenerative changes and radiculopathy at L4-5 but instead recommended further testing. Therefore, her opinion is insufficient to meet appellant’s burden of proof to establish a material change in his injury-related condition.

In a report dated August 28, 2001, Dr. Johnson discussed appellant’s history of a July 1993 employment injury and subsequent retraining as a truck driver. She noted appellant’s history of an L4-5 disc herniation with radiculopathy, which had improved but still caused problems in the “course of his work.” Dr. Johnson noted that appellant “reportedly had a variety of different [medical] encounters, which he did not mention today” and discussed various visits by appellant to physicians. She indicated that pain in appellant’s left leg and sometimes right side had “incapacitated him as per his report from his self-employment as a truck driver due to the fact that he frequently has to load as well as unload the cargo he is transporting.” Dr. Johnson opined that appellant had been retrained in a profession, which resulted in “a high incidence of back problems.” She concluded that bending and lifting repeatedly during appellant’s work as a truck driver “contributed greatly to his ongoing problem.” However, it appears that Dr. Johnson did not find appellant disabled from his employment but instead merely noted appellant’s opinion that he was incapacitated “as per his report” due to frequent lifting and unloading.<sup>10</sup> She further did not provide medical rationale specifically explaining how appellant’s accepted back condition changed in a material fashion causing him to be unable to work as a truck driver.<sup>11</sup> Further, Dr. Johnson did not discuss the effect on appellant’s condition of his various injuries subsequent to the Office’s wage-earning capacity determination, which included the onset of back pain after lifting luggage on May 1, 2000 lifting concrete on August 20, 2000 and lifting a couch around April 2001.

The record also contains a form report from Dr. Johnson dated August 28, 2001, in which she diagnosed degenerative disc disease and L4-5 and chronic pain syndrome.<sup>12</sup> She checked “yes” that the condition was caused or aggravated by employment and noted that appellant “has not tolerated voc[ation] to driving.” She found that he was disabled from January 1 to August 28, 2001. However, the checking of a box “yes” in a form report, without additional explanation or rationale, is insufficient to establish causal relationship.<sup>13</sup>

In a chart note dated April 11, 2001, Dr. Bruce Smith, a Board-certified internist, noted appellant’s history of a back injury in 1993 and diagnosed low back pain with a history of a possible disc injury. Dr. Smith did not address causation or find appellant disabled from employment, his report is of little probative value.

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<sup>10</sup> See *Earl David Seal*, 49 ECAB 152 (1997) (a physician’s report is of little probative value where it is based on the claimant’s beliefs concerning causal relationship rather than the physician’s independent opinion).

<sup>11</sup> *Caroline Thomas*, 51 ECAB 451 (2000) (a medical opinion not fortified by medical rationale is of little probative value).

<sup>12</sup> In a medical report dated November 21, 2001, Dr. Johnson diagnosed “[c]hronic low back pain with degenerative disc and prior disc protrusion with radiculopathy.” She, however, did not address the cause of the diagnosed condition and thus her report is of little probative value.

<sup>13</sup> *Calvin E. King*, 51 ECAB 394 (2000).

In a report dated May 22, 2002, Dr. Christopher Mathews, a Board-certified internist, diagnosed an exacerbation of sciatica. Dr. Mathews noted that appellant had a history of a 1993 employment injury. He found that appellant's exacerbation occurred "a couple of days" after he completed vocational rehabilitation as a truck driver or "about five days ago." Dr. Mathews did not specifically address the cause of appellant's exacerbation and further relied on an inaccurate history of injury, that of appellant completing vocational rehabilitation as a truck driver about a week and a half prior to his examination. Thus, his report is of diminished probative value.<sup>14</sup>

In a patient management report dated October 24, 2002, a group of physicians reviewed recent treatment notes, diagnosed an "aggravation of chronic lumbar disease, minor" and noted that appellant had "possible narcotic-seeking behavior."<sup>15</sup> As the physicians did not find that appellant had a change in his injury-related condition, this report is insufficient to meet his burden of proof.

For these reasons, appellant has not shown that the Office improperly refused to modify its determination of his wage-earning capacity.

The decision of the Office of Workers' Compensation Programs dated November 18, 2002 is hereby affirmed.

Dated, Washington, DC  
June 26, 2003

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>14</sup> *Vaheh Mokhatarians*, 51 ECAB 190 (1999) (medical opinions based on an incomplete history or which are speculative or equivocal in character have little probative value).

<sup>15</sup> In a report dated July 17, 2002, Dr. Leonard R. Frank diagnosed the onset of low back pain after appellant lifted a wheelchair. In a report dated August 22, 2002, Dr. A. Sims diagnosed chronic low back pain. As neither physician addressed the relevant issue of whether appellant sustained a material change in his injury-related condition, these reports are of little probative value.