

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

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GARY L. MOFFITT, Appellant )  
and ) Docket No. 04-1576  
DEPARTMENT OF THE AIR FORCE, ) Issued: February 8, 2005  
NEWARK AIR FORCE STATION, OH, )  
Employer )  
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)

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*Appearances:*  
*Gary L. Moffitt, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Alternate Member  
MICHAEL E. GROOM, Alternate Member  
A. PETER KANJORSKI, Alternate Member

**JURISDICTION**

On June 2, 2004 appellant filed an appeal from a merit decision of the Office of Workers' Compensation Programs dated March 19, 2004 denying his request for modification of an August 20, 2002 wage-earning capacity decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant has established that the August 20, 2002 determination that his wage-earning capacity was represented by the position of telephone solicitor should be modified.

**FACTUAL HISTORY**

This is appellant's third appeal before the Board on this issue. In an October 22, 1997 decision, the Board reversed decisions of the Office which determined his wage-earning capacity

on the basis that a conflict in medical opinion existed as to his capacity for work.<sup>1</sup> In a January 30, 2004 decision, the Board determined that the Office properly reduced appellant's compensation effective August 20, 2002 on the grounds that the position of telephone solicitor represented his wage-earning capacity. The Board found, however, that it improperly denied appellant's request for reconsideration as he submitted new medical evidence seeking to modify the wage-earning capacity determination. The facts and the circumstances of the case are set forth in the prior decisions and are hereby incorporated by reference.<sup>2</sup>

In reports dated July 19 and September 3, 2002, Dr. Richard E. Simon, an attending Board-certified family practitioner, noted that appellant had disc damage at L2-3, the site of a previous laminectomy, in addition to damage to the discs at L3-4 and L5-S1. He opined that appellant had findings compatible with disc disease that had developed since his original injury. In a November 11, 2002 report, Dr. Simon noted that appellant had problems with chronic pain, progressive disc disease and arthritis. He advised that appellant had post-laminectomy syndrome and was on chronic opiate therapy. Dr. Simon stated that he was seeing appellant for regular pain management and found him to be totally disabled for work. He did not discuss any change in the nature and extent or worsening of appellant's employment-related condition. Dr. Simon referred appellant to a pain clinic for chronic pain, for which he was taking opiates, and for treatment of seizure-like activity. He stated that appellant had additional damage to his back and experienced chronic pain. Dr. Simon stated that a magnetic resonance imaging (MRI) scan showed progression of disc disease and cervical arthritis.

Appellant also submitted an August 12, 2002 MRI scan which revealed a status post-laminectomy defect involving the L2-3, L3-4 levels, and a September 25, 2002 computerized tomography (CT) scan report which revealed probable early degenerative disc disease of C5-6 and C6-7.

In a February 5, 2003 report, Dr. Punyavathi Chitturi, a Board-certified anesthesiologist, noted that appellant had low back pain radiating to his lower extremities, neck and mid-thoracic pain, pain radiating into his right upper extremity, and numbness and tingling in both arms and legs. He diagnosed significant lumbar and cervical degenerative disc disease with radiculopathy.

By decision dated March 19, 2004, the Office found that the evidence submitted by appellant did not warrant modification of the November 20, 2002 wage-earning capacity determination. The Office found that the medical evidence failed to establish a material worsening of his work-related condition which would preclude him from performing the duties of a telephone solicitor.

#### **LEGAL PRECEDENT**

It is well established that, once a loss of wage-earning capacity is determined, a modification of such determination is not warranted unless there is a material change in the

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<sup>1</sup> Docket No. 95-1795 (issued October 22, 1997). Appellant's claim had been accepted for lumbosacral strain and a permanent aggravation of lumbar laminectomy.

<sup>2</sup> Docket No. 03-1867 (issued January 30, 2004).

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>3</sup> The burden of proof is on the party attempting to show that the award should be modified.<sup>4</sup>

### **ANALYSIS**

The Board finds that the August 20, 2002 wage-earning capacity should not be modified as the evidence submitted by appellant fails to establish a material change in the nature or extent of his accepted conditions, for a lumbosacral strain and aggravation of a prior lumbar laminectomy.

As noted in the prior appeals, a conflict of medical opinion arose as to the nature and extent of appellant's work capacity. This conflict arose between Dr. Simon, appellant's attending Board-certified family practitioner, and Dr. Robert C.C. Chiu, a Board-certified orthopedic surgeon. Dr. Boyd W. Bowden, II, an osteopathic Board-certified orthopedic surgeon, was selected as the impartial medical specialist and he set forth physical limitations defining appellant's capacity for work eight hours a day in a sedentary position. Based on this report, the Office determined appellant's wage-earning capacity based on the constructed position of a telephone solicitor.

The July 19, 2002 report of Dr. Simon consists of a one paragraph notation stating the physician's opinion that appellant was disabled from work. This report did not address the November 20, 2002 wage-earning capacity determination or discuss any of the sedentary duties of the telephone solicitor position. The brief report provides no discussion of any contemporaneous physical examination of appellant and merely repeated the physician's conclusion as to total disability. The Board finds that this report is not well rationalized and does not establish a material change in the nature or extent of appellant's injury-related conditions. In the September 3, 2002 report, Dr. Simon mentioned an MRI scan and disc damage at the site of the prior laminectomy at L2-3. He stated that there was additional damage to the discs at L3-4 and L5-S1. The specific nature of such damage was not described nor was any findings from physical examination noted. The physician merely opined that the MRI scan findings were compatible with disease developing since that time. The relevant issue of appellant's capacity for work or sedentary duty was not discussed. The November 11, 2002 report repeated the physician's interpretation of the August 12, 2002 MRI scan and noted that appellant had problems with chronic pain for which he used opiates. Dr. Simon noted that he was attempting to arrange new physical therapy techniques to help appellant deal with his symptoms, addressed a recent flare up of right arm pain and cervical arthritis and opined that appellant remained unable to work. However, the physician did not provide a rationalized opinion to establish a material change in the nature or extent of the accepted condition or explain why appellant was unable to perform the duties of the sedentary telephone solicitor position. Although appellant has submitted additional reports from his attending physician, they are largely duplicative of the reports Dr. Simon prepared that gave rise to the conflict in medical opinion. These reports are

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<sup>3</sup> *Charles D. Thompson*, 35 ECAB 220 (1983); *Elmer Strong*, 17 ECAB 226 (1965).

<sup>4</sup> See *Linda Thompson*, 51 ECAB 694 (2000); *Jack E. Rohrbaugh*, 38 ECAB 186 (1986).

not sufficient to establish a material change in his accepted condition such that the wage-earning capacity rating should be modified.

Dr. Chitturi examined appellant on February 5, 2003 for lower back pain radiating into both lower extremities and pain in the neck and mid thoracic region. He reviewed a history of the employment injury and listed his findings on examination, noting appellant's prior lumbar laminectomy in 1983. He diagnosed significant lumbar and cervical degenerative disease and noted treatment options, including a change in the medication regimen, physical therapy and surgery should conservative methods fail. The report of Dr. Chitturi did not discuss the 2002 wage-earning capacity determination, did not provide any opinion on appellant's capacity for work in a sedentary telephone solicitor position or explain how there was a material change in the nature or extent of the accepted conditions such as to render appellant totally disabled from the constructed position.

The Board finds that the evidence submitted by appellant does not establish that the November 20, 2002 wage-earning capacity rating was in error, that his accepted medical condition worsened or renders him disabled from performing the sedentary duties of the constructed position, or that he has been vocationally rehabilitated. Appellant has not met his burden of proof to show that a modification of the wage-earning capacity determination is warranted. There is insufficient rationalized medical evidence to establish that he is disabled from sedentary work for eight hours per day.

### **CONCLUSION**

The Board finds that appellant has failed to establish a basis for modification of the November 20, 2002 wage-earning capacity rating.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated March 19, 2004 is hereby affirmed.

Issued: February 8, 2005  
Washington, DC

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member