

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

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**JAMES REDFORD, Appellant**

**and**

**DEPARTMENT OF DEFENSE, DEFENSE  
LOGISTICS AGENCY, Philadelphia, PA,  
Employer**

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**Docket No. 06-459  
Issued: August 11, 2006**

*Appearances:*  
*Jeffrey P. Zeelander, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On December 21, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated December 13, 2005, which denied modification of a February 15, 1995 wage-earning capacity determination. Pursuant to 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 the wage-earning capacity decision was warranted. On appeal, counsel argues that appellant's back condition is a consequence of his accepted leg injury.

**FACTUAL HISTORY**

This case has previously been on appeal before the Board. In an October 7, 2005 decision, the Board set aside and remanded a February 9, 2005 decision of the Office. The Board found that appellant's September 25, 2003 recurrence of disability claim and the medical evidence submitted raised the issue of whether modification of the Office's February 15, 1995

wage-earning capacity determination was warranted.<sup>1</sup> The facts and the law of the prior decision are incorporated herein by reference.

On November 20, 1987 appellant, then a 43-year-old preventive maintenance worker, sustained an employment-related left leg ligament strain with subsequent development of avascular necrosis, which necessitated a total left hip replacement on October 20, 1993. He returned to a limited-duty assignment as a roofer checker. By decision dated February 15, 1995, the Office found that appellant had no loss of wage-earning capacity based on his actual earnings in the modified position. On April 3, 1995 he was granted a schedule award for a 44 percent impairment of the left lower extremity. Appellant worked in the modified position until September 25, 2003, when he filed a recurrence of disability claim. On June 16, 2003 he felt a sharp pain in his left hip and lower back when he stepped off the sidewalk while walking to his vehicle after work. By decision dated February 10, 2004, the Office denied the recurrence of disability claim, noting that appellant had not responded to its January 6, 2004 development letter. Appellant, through counsel, requested a review of the written record and submitted additional medical evidence. By decision dated February 9, 2005, an Office hearing representative affirmed the February 10, 2004 decision. Appellant, as noted, contends that his low back condition is a consequence of his accepted injury.

The medical evidence germane to the present appeal includes a January 20, 1995 report from Dr. Craig Israelite, a Board-certified orthopedic surgeon. He performed appellant's total hip replacement and advised that appellant might need another hip replacement in approximately 10 years. In a March 17, 1995 report, Dr. Israelite evaluated appellant for schedule award purposes and described losses of range of motion. He noted muscle weakness and equal leg lengths and advised that appellant did not require an assistive device. A June 12, 2003 cervical spine magnetic resonance imaging (MRI) scan demonstrated degenerative changes at C3 through T2 and disc herniations at C3-4 and C5-6 with compression of nerve roots at C3, C4 and C6. An MRI scan of the lumbar spine that day demonstrated spondylosis at L5-S1 with a disc bulge and central stenosis and generalized degenerative disease at L4-5 with a right-sided herniation causing stenosis. In a June 27, 2003 report, Dr. Scott Kurzrok, a Board-certified osteopath specializing in family medicine, noted treating appellant for low back pain and the MRI scan diagnosis of a herniated disc. He provided work restrictions. In a July 14, 2003 form report, Dr. Kurzrok diagnosed multilevel disc herniations and advised that incapacity began on June 25, 2003 and would continue for approximately 12 weeks. He noted that appellant had been referred to a neurosurgeon.

In an initial consultation report dated September 9, 2003, Dr. Hagop L. Der Krikorian, a neurosurgeon, noted the history of left total hip replacement and appellant's complaint of low back and right leg pain of several years duration. Examination demonstrated a slightly forward, stooped gait with positive straight leg raising test on the right. Deep tendon reflexes were absent bilaterally with weakness of the dorsiflexors on the right and hypesthesia in the L5 distribution. Dr. Der Krikorian advised that neurological examination of the left lower extremity was normal. Examination of the upper extremities demonstrated hypesthesia in the C4, C5 and to a lesser extent the C6 distribution bilaterally, worse on the right. He noted his review of the MRI scans,

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<sup>1</sup> Docket No. 05-807.

opining that appellant primarily had L5 and S1 radiculopathy on the right secondary to spondylosis, herniated disc at L4-5 on the right and foraminal stenosis at L5-S1 on the right. On October 27, 2003 Dr. Der Krikorian performed micro-hemilaminectomies at L4-5 and L5-S1. In a November 11, 2003 follow-up note, he advised that appellant was doing well postoperatively and subsequently provided restrictions to appellant's physical activity.

By report dated January 21, 2004, Dr. Kurzrok stated that appellant had been his patient for several years with diagnoses of diabetes, hyperlipidemia, hypertension and chronic back pain. He noted the history of the prior work injury, which necessitated the left total hip replacement and the 2003 MRI scan findings with subsequent back surgery. Dr. Kurzrok opined that, while the surgical procedure was deemed successful and markedly relieved appellant's pain, he still could not work and was unable to lift weights greater than 10 pounds and "cannot be comfortable in any position greater than 10 minutes at one time." He stated:

"I do feel quite strongly, after reviewing the patient's past medical history, that the patient's previous total hip replacement is causative to his current lumbar disc herniations. The patient did not have any traumatic event that would cause this degree of a herniation. It is also known that a prosthetic device in his left hip does not allow the normal and natural forces of realignment in his back. A total hip replacement will cause undue stress in his lumbar spine and make him prone toward any disc herniation."

Following the Board's October 17, 2005 order, in a decision dated December 13, 2005, the Office found that appellant did not meet his burden of proof to establish that modification of the prior wage-earning capacity decision was warranted.

### **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.<sup>2</sup> The Office'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."<sup>3</sup> 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

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<sup>2</sup> *Katherine T. Kreger*, 55 ECAB \_\_\_\_ (Docket No. 03-1765, issued August 13, 2004).

<sup>3</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

fact, erroneous.<sup>4</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>5</sup>

In discussing the range of compensable consequences, once the primary injury is causally connected with the employment, Larson notes that, when the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury, the rules that come into play are essentially based upon the concepts of direct and natural results and of claimant's own conduct as an independent intervening cause. The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.<sup>6</sup>

### ANALYSIS

The Board finds that appellant did not submit sufficient evidence showing that the Office's February 15, 1995 wage-earning capacity determination was erroneous. He requested a resumption of compensation for total wage loss beginning June 17, 2003 contending that his back condition was a consequence of his accepted left hip injury and that there had been a material change in the nature and extent of the accepted condition. The Board, however, finds that he has not met his burden of proof.

Appellant's attending family practitioner, Dr. Kurzrok, stated that he believed appellant's back condition was caused by the 1987 employment injury and subsequent total hip replacement in 1993 because appellant had no intervening traumatic event. He stated, generally that a left hip replacement would not allow the "normal and natural forces of realignment in his back" which would cause undue stress in the lumbar spine and make him prone toward disc herniation. The Board finds, however, that Dr. Kurzrok did not provide sufficient explanation how the specific mechanics by which the 1987 employment injury and hip replacement surgery in 1993 could cause or contribute to appellant's disc herniations. Diagnostic testing revealed fairly extensive degenerative disease of the cervical and lumbar regions and the physician did not address how a prosthetic implant would cause or contribute to the degenerative process. Dr. Der Krikorian, appellant's neurosurgeon, did not provide an opinion regarding the cause of appellant's back condition. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship.<sup>7</sup>

The Board finds that the medical evidence of record is insufficient to establish a material change in appellant's condition. As noted above, the burden of proof is on the party attempting to show a modification of the wage-earning capacity. In this case, appellant has not submitted

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<sup>4</sup> *Stanley B. Plotkin*, 51 ECAB 700 (2000).

<sup>5</sup> *Id.*

<sup>6</sup> A. Larson, *The Law of Workers' Compensation* § 10.01 (December 2000); see *Charles W. Downey*, 54 ECAB 421 (2003).

<sup>7</sup> *Conard Hightower*, 54 ECAB 796 (2003).

sufficient medical evidence to establish a material change in the nature and extent of his employment-related conditions.<sup>8</sup>

**CONCLUSION**

The Board finds that the Office properly denied modification of the February 15, 1995 wage-earning capacity determination.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated December 13, 2005 be affirmed.

Issued: August 11, 2006  
Washington, DC

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

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>8</sup> *Stanley B. Plotkin, supra* note 4.