United States Department of Labor
Employees' Compensation Appeals Board

A.R., Appellant	)	
and	)	**Docket No. 06-876**
	)	**Issued: November 17, 2006**
U.S. POSTAL SERVICE, POST OFFICE, Sacramento, CA, Employer	)	

Appearances:
Ron Watson, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 8, 2006 appellant filed a timely appeal from the March 10, 2005 merit decision of the Office of Workers' Compensation Programs, which retroactively determined his loss of wage-earning capacity (LWEC). Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this decision.

ISSUE

The issue is whether the Office properly reduced appellant's compensation based on a retroactive LWEC determination.

FACTUAL HISTORY

On January 31, 1997 appellant, then a 47-year-old city letter carrier, filed a claim alleging that the duties of his position exacerbated his back condition:[1] "The prolonged sitting or standing, the twisting, the pushing and pulling, repetitive bending and stooping, as well as

[1] Appellant had a back injury in 1990, which the Office accepted for back strain -- OWCP File No. 13-0920746.

mounting and dismounting from the Postal Vehicle on a repetitive basis exacerbates my back condition, and all of these are necessary functions of the job of a city letter carrier." The Office accepted his claim for a permanent aggravation of a herniated disc at L5-S1 and a permanent aggravation of degenerative disc disease in the lumbar spine. He received compensation for wage loss. On December 21, 2000 he underwent an L5-S1 discectomy, left L5-S1 foraminotomy and interbody fusion. The Office paid compensation on the periodic rolls.

On September 15, 2001 Dr. Elvert F. Nelson, appellant's orthopedic surgeon, reported the following:

> "I reviewed the job description for Video Coding System Technician submitted by the United States Postal Service. In my opinion, [appellant] could return to work as a Video Coding System Technician.
>
> "The position indicates that he can get a five-minute break every hour. He can stand and sit. He has a headphone microphone. He does not use his hands. He has to speak and look at a computer screen."

Appellant accepted the job offer and began full-time work as a Video Coding System Technician on January 28, 2002 at the same step and grade as his date-of-injury position. The employing establishment informed the Office that same day.

Appellant continued to receive treatment for low back pain and radiculopathy. On June 10, 2002 Dr. Robert A. McAuley, a physiatrist, reported that appellant continued to complain of lower back and leg pain, "much unchanged." In addition, appellant was complaining of right leg pain. On physical examination Dr. McAuley found decreased range of motion in the lumbar spine and a positive straight leg raise on the left. He diagnosed lumbosacral disc degeneration status post lumbar laminectomy with residual left radiculopathy. Dr. McAuley recommended aquatic exercises three times per week for six weeks before transitioning to land-based exercises.

An August 23, 2002 electromyogram (EMG) and nerve conduction studies revealed evidence of severe acute L4-S1 radiculopathy on the right and left. An October 11, 2002 magnetic resonance imaging (MRI) scan revealed the following: (1) postoperative changes at L5-S1 status post anterior lumbar discectomy, hardware and probable bony fusion; (2) caudal narrowing of the left neural foramina at L5-S1 caused by lateral bulging disc and osteophytes with probably at least a slightly displaced exiting left L5 nerve root/spinal nerve; and (3) minimal to mild degenerative changes elsewhere in the lower thoracic and lumbar spine superimposed on a slightly congenitally small spinal canal without mass effect or displaced neural structure.

On October 28, 2002 Dr. McAuley reported that appellant noted increasing leg and back pain, particularly over the last year or so: "He has more pain radiating into the left leg than the right. Nerve conduction studies and EMG, which I performed in August, showed bilateral radiculopathies, L4, L5 and S1. The subsequent MRI scan showed foraminal narrowing affecting the left L5 nerve root, as well as postoperative changes." Findings on physical examination showed that appellant walked with a limp, sat with his left leg extended and had

decreased range of motion of the lumbar spine. Appellant expressed interest in obtaining an opinion from a spinal surgeon regarding the feasibility of revision surgery. Dr. McAuley addressed appellant's disability status: "For the time being, [appellant] is capable of performing light duty; however, he has been missing a number of days due to back and leg pain. I believe it is likely that I will restrict his number of hours at work in the near future."

On November 14, 2002 Dr. McAuley reported that appellant was uncomfortably sitting unless his left leg was extended in front of him and externally rotated. He noted that appellant had a markedly positive straight leg raise on the left. Dr. McAuley diagnosed bilateral lumbosacral radiculopathies, status post discectomy at L5-S1 in December 2000. He again addressed appellant's disability status: "I completed Family Medical Leave Act papers at [appellant's] request, indicating that, based on his lower back and leg condition, it would be expected that he will miss between five and six days per month of work due to pain. Otherwise, his work status remains the same. He is working modified duties full time."

On December 18, 2002 Dr. McAuley reported that appellant had become totally disabled for work:

> "[Appellant] continues to have increasing low back and leg pain. He tells me he is quite uncomfortable at work and is in so much pain that he is not able to concentrate on his job duties. Without additional surgery, there is not much chance that [he] will be able to work satisfactorily at his current position. His current position is substantially modified at this point, and I have been required to modify it even more as of today's visit. My overall assessment is that [appellant] is not fit to perform his job and should be medically retired."

On January 16, 2003 Dr. McAuley reported a history of progressive back pain, disc disorder and surgery. He diagnosed lumbar disc disorder, revealed on MRI scan, and related this to the accepted employment injury. Dr. McAuley indicated that appellant was totally disabled for work beginning December 9, 2002 and remarked: "unable to do more than sedentary work with frequent changes of position and medication use." That same day, appellant filed a claim for wage loss beginning December 9, 2002.

The Office issued appellant a schedule award on January 31, 2003 for a 15 percent permanent impairment of his left lower extremity, a consequence of his accepted low back condition. The award ran from January 26 to September 24, 2003.

On March 6, 2003 Dr. McAuley related appellant's history of injury and clinical course through the December 2000 surgery. He continued:

> "Subsequently, initially [appellant] noted some improvement from his surgery. Later on, however, his pain returned full force. Since then, he has simply been treated with medication. In late January 2002, [he] started a modified position. He took a job doing video coding services. He had to sit a great deal during the performance of these duties. This caused an increase in his already significant lower back pain. His pain was so severe that, in order to be comfortable, he would have to lie down; however, to lie down was not permitted. Therefore, he

> had to take a considerable number of days off, averaging between four and five per month. Eventually, he stopped working altogether on December 9, 2002. At that point, he decided to apply for disability retirement."

Dr. McAuley reported that appellant was not capable of a full range of sedentary activity: "He has to be off of his feet 25 percent to 30 percent of the day in order to be comfortable."

Appellant's disability retirement became effective August 15, 2003. On January 14, 2004, however, he notified the Office that he was electing to receive compensation benefits.

On March 3, 2005 the employing establishment advised the Office that appellant last worked on November (sic) 9, 2002 and that he was on leave without pay from that point on "and chose to abandon his job because he didn't like it."

In a decision dated March 10, 2005, the Office made a retroactive LWEC determination. The Office found that the position of Video Coding System Technician fairly and reasonably represented his wage-earning capacity: "Since you have demonstrated the ability to perform the duties of this job for two months or more, this position is considered suitable to your partially disabled condition." The Office explained that, because appellant's actual earnings in that position met or exceeded the current wages of the job he held when he was injured, his entitlement to compensation for wage loss ended on January 28, 2002, the date he was reemployed with no loss in earning capacity "and your compensation payments have been terminated." The Office noted that appellant "chose to abandon his employment with the U.S. Postal Service as a Video Coding System Technician, until his disability retirement was approved on August 15, 2003."

On November 15, 2005 the Office denied modification of its LWEC determination.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden to justify termination or modification of compensation benefits.[2]

Section 8115(a) of the Federal Employees' Compensation Act provides that the wage-earning capacity of an employee is determined by actual earnings if actual earnings fairly and reasonably represent the wage-earning capacity. Generally, wages actually earned are the best 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.[3]

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[2] *Harold S. McGough*, 36 ECAB 332 (1984).

[3] *Don J. Mazurek*, 46 ECAB 447 (1995).

After the claimant has been working for 60 days, the Office will determine whether the claimant's actual earnings fairly and reasonably represent his or her wage-earning capacity. If so, a formal decision should be issued no later than 90 days after the date of return to work.[4]

Where the Office learns that the claimant has returned to alternative work more than 60 days after the fact, the Office may consider a retroactive LWEC determination. Such a determination may be appropriate where an investigation reveals that a claimant held private employment and had earnings which were not reported to the Office. A retroactive decision may be made if:

> "(1) The claimant has worked in the position for at least 60 days;
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> "(2) The Office has determined that the employment fairly and reasonably represents the wage-earning capacity (an assessment of suitability need not be made); and
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> "(3) The work stoppage did not occur because of any change in the claimant's injury-related condition affecting ability to work."[5]

If no formal LWEC decision has been issued, the Office should consider whether it is appropriate to issue a retroactive LWEC determination. The Office will also need to ask the claimant to provide his or her reasons for ceasing work.[6]

If the reasons constitute an argument for a recurrence, appropriate development and evaluation of the medical and factual evidence should be undertaken upon submission of Form CA-2a, notice of recurrence.[7] If the recurrence is approved, compensation for total wage loss should be paid until the claimant can return to work. If the claimant cannot return to work, the Office will refer the case for vocational rehabilitation services. If the claimant fails to meet his or her burden of proving a recurrence of total disability, a formal decision denying the recurrence is necessary.[8]

If no claim for recurrence is filed, and a retroactive LWEC determination is not appropriate, the penalty provision of section 8106(c)(2) of the Act for abandoning suitable work

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[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(e) (December 1993).

[5] *Id*. at Chapter 2.814.7(c)(1) (December 1993).

[6] *Id*. at Chapter 2.814.9(b).

[7] When an employee is disabled from the job he held when injured, on account of employment-related residuals, and he returns to a limited-duty position or the medical evidence of record establishes that he can perform the limited-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and to show that he cannot perform such limited-duty work. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the limited-duty job requirements. *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(b)(1).

may be applied. Section 8106(c)(2) may be invoked if an employee is shown to have abandoned a suitable job without good reason and subsequently to have claimed benefits.[9]

ANALYSIS

The question that arises in this case is whether it was appropriate for the Office to issue a retroactive LWEC determination. Office procedures state that the Office will determine whether the claimant's actual earnings fairly and reasonably represent his wage-earning capacity after the claimant has been working for 60 days, and that a formal decision should be issued no later than 90 days after the date of return to work. The Office did not meet that time frame. Appellant returned to full-time work as a Video Coding System Technician on January 28, 2002. At some point on or after March 29, 2002, the Office should have determined whether appellant's actual earnings fairly and reasonably represented his wage-earning capacity and should have issued a formal decision no later than April 29, 2002. The Office's March 10, 2005 decision occurred about three years later.

This is not a case in which the Office first learned of appellant's return to work more than 60 days after the fact. The Office knew on January 20, 2002 that appellant had returned to work that day. So in these circumstances, it is not clear under Office procedures whether the Office may even consider a retroactive LWEC determination.

Regardless, once the Office learned that appellant had stopped work as a Video Coding System Technician on or about December 9, 2002, the Office should have followed its own procedures and asked appellant to provide his reasons for ceasing work. If the reasons constituted an argument for a recurrence, then the Office should have undertaken appropriate development and evaluation of the medical and factual evidence upon submission of a Form CA-2a, notice of recurrence. The Office, however, did not make this inquiry.

Without ruling on the matter, the Board finds that the evidence in this case presents an argument for recurrence. This does not appear to be a case in which, as the employing establishment represented, appellant simply abandoned his job because he did not like it. The medical evidence reflects complaints of increasing back and leg pain in 2002, particularly in the latter half. Electrodiagnostic studies showed postoperative changes, caudal narrowing of the left neural foramina at L5-S1 and severe acute L4-S1 radiculopathy bilaterally. Appellant began walking with a limp and found himself having to sit with this left leg extended and rotated externally. He was expressing interest in revision surgery. By November 14, 2002, Dr. McAuley, his physiatrist, found a markedly positive straight leg raise on the left and expected him to miss between five and six days per month of work due to pain. Finally, on December 18, 2002 Dr. McAuley reported that appellant continued to have increasing low back and leg pain and was in so much pain at work that he was not able to concentrate on his job duties. He concluded that without additional surgery there was not much chance that appellant would be able to work satisfactorily at his position. Having already substantially modified appellant's position, Dr. McAuley determined that appellant was no longer fit to perform his job

[9] *Id*. at Chapter 2.814.9(b)(2).

as a Video Coding System Technician and should be medically retired. He later reported that appellant was totally disabled for work beginning December 9, 2002.

The Board finds that it was inappropriate for the Office to issue a retroactive LWEC determination when the evidence raised a substantial question whether appellant's work stoppage on or about December 9, 2002 occurred because of changes in the injury-related condition affecting his ability to work. The Office should have asked appellant to submit a Form CA-2a, notice of recurrence, and should have undertaken appropriate development and evaluation of the medical and factual evidence. The Board will set aside the Office's March 10, 2005 LWEC decision and remand the case for such further action.

CONCLUSION

The Board finds that the Office did not meet its burden to justify modification of appellant's entitlement to compensation benefits. A retroactive LWEC determination was inappropriate under the circumstances. After appellant's work stoppage, the Office should have developed the issue of recurrence.

ORDER

IT IS HEREBY ORDERED THAT the March 10, 2005 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this opinion.[10]

Issued: November 17, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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[10] The Office November 15, 2005 decision denying modification of its LWEC determination is moot.