

The Office accepted the claim for sciatica, prostatitis and displacement of lumbar intervertebral disc and authorized laminectomy, discectomy, foramentory, which occurred on May 11, 2001. The Office placed appellant on the periodic rolls for temporary total disability by letter dated December 5, 2000.

In a report dated May 9, 2002, Dr. Robert F. Hall, a second opinion Board-certified orthopedic surgeon, diagnosed possible left S1 nerve root pressure and postoperative L5-S1 lumbosacral spine decompression. As to appellant's ability to work, he opined that he was capable of light-duty work with restrictions. The restrictions include no lifting more than occasional of up to 25 pounds, able to alternate standing and sitting, no continuous standing or sitting and no driving "vehicles that requires him to be in a sustained sitting position for any prolonged period of time, greater than ½ hour."

In a report dated July 3, 2002, Dr. Larry D. Tice, a treating Board-certified neurological surgeon, diagnosed sciatic, L4-5 and L5-S1 lumbar stenosis, L5-S1 lumbar discectomy, prostatitis, chronic obstructive pulmonary disease, deconditioning syndrome, nephrolithiasis and ulcerative colitis. He stated that he agreed with Dr. Hall's restrictions and opinion that appellant was capable of working. Dr. Tice then stated that he was capable of working a light-duty position with restrictions, which included no lifting more than 25 pounds and "the ability to change positions frequently and not be in one position for a long period of time."

In a January 15, 2003 report, Dr. Tice reported diminished spinal range of motion and "minimal tenderness of the sciatic notch." He diagnosed sciatic, L4-5 and L5-S1 lumbar stenosis, L5-S1 lumbar discectomy, prostatitis, chronic obstructive pulmonary disease, deconditioning syndrome, nephrolithiasis and ulcerative colitis. In concluding, Dr. Tice opined that appellant was capable of performing a light-sedentary position provided he was not required to occasionally lift more than 25 to 40 pounds.

Appellant informed the Office that effective August 1, 2003 he began working as an oil field pump gauger for four hours per day five days a week, at Harrison Oilfield Services, Inc. with an hourly pay rate of \$7.50.

By decision dated October 3, 2003, the Office determined appellant's loss of wage-earning capacity based upon his actual earnings as an oil field pump gauger with wages of \$301.01 per week. This employment was effective August 1, 2003 and fairly and reasonably represented his wage-earning capacity. The Office noted that he was working full time at the time of his injury but currently was only capable of part-time employment. Therefore, appellant's entitlement to compensation would be reduced effective October 5, 2003. The Office noted that his entitlement to medical benefits continued.

By decision dated October 22, 2003, the Office reissued the October 3, 2003 loss of wage-earning capacity decision on the grounds that it had erroneously calculated appellant's wages based upon a 40-hour week instead of his 20-hour week. It incorrectly used a general schedule pay table instead of the wage grade pay table. Thus, the Office determined that appellant earned \$150.50 per week. The Office noted his weekly pay rate at the time of the injury was \$674.66 and that the current pay rate as of October 5, 2003 for his job and step was \$852.06.

In a letter dated August 18, 2004, appellant informed the Office that his condition had worsened and that he had not worked for six months as of August 16, 2004. He submitted an August 16, 2004 disability note from Dr. Jonas S. Munger, a treating Board-certified family practitioner, who opined that appellant was unable to work for six months due to depression and worsening of his pain and anxiety.

In a letter dated August 25, 2004, the Office informed appellant of the evidence required to modify a loss of wage-earning capacity decision and informed him to file a claim for a recurrence of disability.

On October 1, 2004 the Office received progress notes dated June 21 to September 13, 2004, from Dr. Munger. On September 23, 2004 appellant again described the worsening of his back condition.

On June 21, 2004 Dr. Munger related that appellant “has recently been working four hours a day and his back has been causing him problems” and that appellant stated that “[h]e does have some mild radiation down the back of his right leg. He diagnosed unspecified backache, unspecified prostates, unspecified ulcerative colitis and unspecified acute sinusitis.

In a July 19, 2004 note, he diagnosed depression and unspecified backache, unspecified prostatitis, unspecified ulcerative colitis, nephrolithiasis and unspecified anxiety state. On August 16, 2004 Dr. Munger noted that appellant attributed the worsening of his condition “to his work schedule, the pain he has at work, as well as the work causing anxiety and difficulties.” He stated that the walking up and down the stairs caused his back to hurt. Dr. Munger reported continued significant anxiety and depression.

In a September 13, 2004 progress note, Dr. Munger noted that appellant stopped work due to his pain and inability to perform his work. He had complaints of pain down his right leg and significant depression in dealing with low back pain. A physical examination revealed “tenderness in the paraspinal muscles,” negative supine and sitting straight leg raises and complaints of “subjective numbness of the right leg down to the base of his foot along the posterior aspect of his leg.”

On October 4, 2004 the Office received appellant’s September 23, 2004 recurrence claim alleging a recurrence of disability on June 17, 2004 due to his accepted September 6, 2000 employment injury.

In a report dated October 7, 2004, Dr. Tice diagnosed failed spine surgery syndrome, ulcerative colitis, prostates, nephrolithiasis, chronic obstructive pulmonary disease and sciatica. He opined that appellant’s “functional capacity is significantly restricted as a result of his back injury.” A physical examination revealed diminished spinal range of motion, “diminished pedal pulses” and “diminished vibratory sense in the angle compared to the knee.” Also of record are an October 14, 2004 x-ray interpretation, an October 14, 2004 magnetic resonance imaging (MRI) scan and an October 14, 2004 request for radiologic procedures.

By decision dated November 15, 2004, the Office denied appellant’s claim for a recurrence of disability beginning June 17, 2004.

In a November 9, 2004 report, Dr. Munger opined that appellant's condition had worsened based upon his subjective complaints of pain. He stated:

“In reviewing his MRI [scan], [appellant] does continue to have subtle stenosis at L4-5 and L5[-]S1 level, which is outlined both by his MRI [scan] and his neurosurgeon. I believe that this is objective evidence that his back may be slightly worse. I also believe that this objective evidence that the type of work and driving conditions that [appellant] is subject to, results in worsening back pain most specifically on the left side.”

On December 3, 2004 the Office received appellant's undated request for reconsideration and reports dated June 21 to November 9, 2004 by Dr. Munger and dated October 22 and 27, 2004 from Dr. Tice, who stated that due to the “significant and objective deterioration in [appellant's] condition, he has been forced to restrict his activities.”

Dr. Tice stated that the recent MRI scan showed “a deterioration as a result of the previous injury and the previous surgery.” He noted that the MRI scan showed no evidence of a recurrent disc herniation although there was “subtle evidence of some stenosis present here.”

By decision dated February 1, 2005, the Office denied modification of the November 15, 2004 decision. The Office found that appellant failed to establish that the wage-earning capacity decision should be modified. The evidence was insufficient to establish that appellant's condition had worsened, that the original rate was in error or that he had been vocationally rehabilitated. Neither Dr. Tice nor Dr. Munger addressed the issue of why appellant was unable to perform the duties of his modified position of oil field pump gauger or provided any work restrictions.

LEGAL PRECEDENT

The Office's procedure manual provides that if 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.² The Office's procedure manual further indicates that, under these circumstances, the claims examiner will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity decision.³

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

² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995). See *Mary E. Marshall*, 56 ECAB ____ (Docket No. 04-1048, issued March 25, 2005).

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995). See *Harley Sims, Jr.*, 56 ECAB ____ (Docket No. 04-1916, issued February 8, 2005).

rehabilitated or the original determination was, in fact, erroneous.⁴ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁵

ANALYSIS

Subsequent to the October 22, 2003 loss of wage-earning capacity decision, appellant submitted an October 14, 2004 x-ray interpretation, an October 14, 2004 MRI scan, an August 16, 2004 disability note, progress notes dated June 21, July 19, August 16 and September 13, 2004 and a November 9, 2004 report all by Dr. Munger and a September 23, 2004 statement by appellant alleging his back pain had worsened and reports dated October 7, 22 and 27, 2004 by Dr. Tice. In his November 9, 2004 report, Dr. Munger reported a worsening of appellant's condition based upon an MRI scan and his subjective complaints of pain. He also opined that appellant's work, such as walking up and down stairs and the driving conditions caused the worsening of appellant's back pain. In an October 7, 2004 report, Dr. Tice stated that appellant's functional capacity was "significantly restricted" due to the employment injury as the physical examination revealed diminished spinal range of motion, pedal pulses and vibratory sense in the ankle. Based upon a recent MRI scan, Dr. Tice, in an October 27, 2004 report, concluded that appellant's condition had deteriorated as a result of the employment injury and subsequent surgery. The reports by Dr. Munger and Dr. Tice are supportive of appellant's argument that his employment-related condition has worsened.

Proceedings under the Federal Employees' Compensation Act are not adversary in nature, nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.⁶ In the instant case, although the reports of Dr. Munger and Dr. Tice contain rationale insufficient to discharge appellant's burden of proof that his condition had worsened or changed, they constitute substantial evidence in support of his claim and raise a unrefuted inference of causal relationship sufficient to require further development of the case record by the Office.⁷ There is no probative opposing medical evidence in the record for this period.

On remand, the Office should develop the medical evidence as appropriate to obtain a rationalized opinion regarding whether modification of the October 22, 2003 loss of wage-earning capacity decision is warranted. Following such further development of the case record as it deems necessary, the Office should issue a *de novo* decision.

⁴ *Stanley B. Plotkin*, 51 ECAB 700 (2000); *Tamra McCauley*, 51 ECAB 375 (2000).

⁵ *Harley Sims, Jr.*, 56 ECAB ____ (Docket No. 04-1916, issued February 8, 2005); *Stanley B. Plotkin*, *supra* note 4.

⁶ *William B. Webb*, 56 ECAB ____ (Docket No. 04-1413, issued November 23, 2004).

⁷ *John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978); *see also Cheryl A. Monnell*, 40 ECAB 545 (1989); *Bobby W. Hornbuckle*, 38 ECAB 626 (1987) (if medical evidence establishes that residuals of an employment-related impairment are such that they prevent an employee from continuing in the employment, she is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity).

CONCLUSION

The Board finds that this case is not in posture for a decision as to whether modification of appellant's wage-earning capacity determination is warranted.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 1, 2005 is set aside and the case remanded to the Office for proceedings consistent with this opinion.

Issued: September 19, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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