

FACTUAL HISTORY

This case has previously been before the Board.² On July 10, 1995 appellant, then a 36-year-old letter carrier, caught his right thumb on a chain link fence while in the performance of duty. His claim has been accepted for open finger wound with complications and injury to digital nerve.³ Appellant had three surgical procedures on his right upper extremity that were approved by the Office. His latest surgery occurred on October 13, 1997.

On February 9, 1999 the Office issued a decision reducing appellant's wage-loss compensation to zero. The Office found that the constructed position of computer technician represented appellant's wage-earning capacity.⁴ Because the weekly wages of the selected position exceed the current wages of appellant's date-of-injury job, the Office determined that appellant had no loss of wage-earning capacity, and therefore was no longer entitled to wage-loss compensation.

When the case was last before the Board, the Office had denied appellant's April 19, 2001 claim for additional wage-loss compensation.⁵ By decision dated December 23, 2004, the Board found that the Office had applied an incorrect standard in reviewing appellant's claim. The Office adjudicated the claim as a recurrence of disability, rather than as a request for modification of the February 9, 1999 wage-earning capacity determination. Accordingly, the Board set aside the Office's November 5, 2002 decision and remanded the case for a determination of whether appellant established a basis for modification of the February 9, 1999 decision.⁶

When appellant filed for additional compensation he advised the Office that he had worked for approximately one year for a private company repairing trains and buses. The position required lifting in excess of the 20-pound limitation imposed by his treating physician and appellant was ultimately dismissed because of his inability to meet the physical requirements of the job. Appellant explained that, when he attempted to lift items in excess of the 20-pound weight restriction, pain would set in and he could not perform the job correctly.

² Docket No. 03-1929 (issued December 23, 2004).

³ Appellant also has an accepted claim for a March 4, 1997 right wrist sprain (ICD-9/842.0) (02-0726791). Appellant's July 10, 1995 and March 4, 1997 claims have been combined under file number 02-0699651.

⁴ The selected position was characterized as light duty with up to 20 pounds lifting required. It was deemed medically suitable based on the March 3, 1998 report of Dr. Paul G. Jones, a Board-certified orthopedic surgeon and Office referral physician. The computer technician position was also consistent with the 20-pound lifting restriction imposed on April 20, 1998 by Dr. Salvatore R. Lenzo, a Board-certified orthopedic surgeon and appellant's treating physician.

⁵ Appellant filed a notice of recurrence (Form CA-2a) claiming disability beginning June 27, 2000, causally related to his July 10, 1995 employment injury.

⁶ Docket No. 03-1929 (issued December 23, 2004). The December 23, 2004 decision is incorporated herein by reference.

Appellant's treating physician, Dr. Lenzo reported on August 29, 2000 that appellant had recently stopped working because his job required him to lift up to 40 pounds, which resulted in significant pain in his elbow. On physical examination, he noted limitations in range of motion at the elbow and some slight numbness in the right hand, but no gross motor weakness. Dr. Lenzo also noted that appellant had been advised to undergo a cervical discectomy and fusion. Appellant also reported some stomach problems while taking anti-inflammatory medication. Dr. Lenzo prescribed pain medication and a splint, but did not otherwise address disability or work tolerance.⁷

In an April 17, 2001 report, Dr. Lenzo noted that appellant continued to experience problems with his right upper extremity and neck. He also reported that an April 11, 2001 diagnostic study showed findings consistent with a low right cervical radiculopathy.⁸ Additionally, Dr. Lenzo noted evidence of cervical spinal stenosis and he explained that appellant was advised to undergo a cervical discectomy and fusion. He further indicated that appellant had been unable to return to work because of continuing problems in the right upper extremity, which precluded him from doing any type of work.

Dr. Lenzo also provided a May 14, 2001 report in which he indicated that appellant strained his paracervical area on July 15, 1995. He also explained that such a strain could have caused a compression of the C5-7 nerve root. Dr. Lenzo indicated that appellant's current neck problems extended into his upper extremities and required surgical intervention. According to him, appellant's current symptomatology was related to the July 15, 1995 employment incident when he was impaled on a chain link fence. Dr. Lenzo also noted that, when appellant worked for Altech Services, Inc., repairing buses and trains, he should not have done any lifting in excess of 15 pounds.

By decision dated June 21, 2005, the Office denied modification of the February 9, 1999 wage-earning capacity determination.⁹ Appellant requested an oral hearing, which was conducted in a teleconference on January 6, 2006. He submitted a January 10, 2006 report from Dr. Lenzo indicating that he had 50 percent impairment of the right upper extremity. This report, however, did not specifically address appellant's work tolerance or disability.¹⁰

In a decision dated February 13, 2006, the Office hearing representative affirmed the June 21, 2005 decision.

⁷ On September 12, 2000 Dr. Lenzo recommended strengthening exercises for the right upper extremity, which the Office authorized along with the previously recommended splint.

⁸ Sensory and motor nerve conduction studies were within normal range and needle electromyography (EMG) showed an abnormality compatible with a low right cervical radiculopathy.

⁹ The Office initially denied modification on May 20, 2005, but neglected to advise appellant of his appeal rights. The Office, therefore, reissued the decision on June 21, 2005 with the appropriate appeal rights attached.

¹⁰ Dr. Lenzo also authored two prior reports regarding the extent of appellant's right upper extremity impairment. In a February 6, 2001 report, he identified 25 percent impairment and in an April 1, 2005 report, he indicated that appellant's permanent impairment increased to 50 percent.

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.¹¹ 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 erroneous.¹² The burden of proof is on the party seeking modification of the wage-earning capacity determination.¹³

ANALYSIS

Appellant did not allege that he was retrained or otherwise vocationally rehabilitated or that the original February 9, 1999 wage-earning capacity determination was erroneous. He did not specifically argue that the selected position of computer technician was not medically or vocationally suitable, or that the weekly salary and availability of such positions were misrepresented. Appellant has not raised any of these issues and the record does not otherwise support any such basis for modification. His only claim is that beginning June 27, 2000 he was physically unable to work. For appellant to prevail he must demonstrate a material change in the nature and extent of the injury-related condition, which thus far includes open wound of finger with complications and injury to digital nerve.

In his April 29, 2000 treatment notes, Dr. Lenzo reported that appellant recently stopped working because of significant pain in his elbow. The pain was associated with appellant having lifted in excess of 40 pounds at work. This report, however, does not establish a material change in appellant's injury-related condition. Dr. Lenzo did not indicate that appellant was disabled from work nor did he state that the reported numbness in appellant's right hand or the limited range of motion in the elbow were associated with appellant's accepted condition.

Dr. Lenzo's April 17, 2001 report is similarly deficient. He noted at the time that appellant had been unable to return to work because of continuing problems in the right upper extremity, which precluded him from doing any type of work. Dr. Lenzo did not describe any continuing problems in the right upper extremity.¹⁴ The only findings he reported pertained to appellant's cervical condition, which as previously indicated has not been accepted as employment related. Dr. Lenzo also did not relate the continuing right upper extremity problems to the July 15, 1995 employment injury. In fact, he did not even reference appellant's employment injury.

¹¹ See *Katherine T. Kreger*, 55 ECAB 633, 635 (2004).

¹² *Tamra McCauley*, 51 ECAB 375, 377 (2000).

¹³ *Id.*

¹⁴ The April 11, 2001 nerve conduction study Dr. Lenzo referenced in his report showed normal results with respect to appellant's right upper extremity.

It is also evident from Dr. Lenzo's May 14, 2001 report that it was appellant's cervical condition, and not his accepted injury-related condition that precluded him from working. Regarding appellant's June 2000 work stoppage, Dr. Lenzo noted that, while appellant worked at Altech Services, Inc., he lifted weights in excess of what had been recommended.¹⁵ The fact that appellant disregarded his treating physician's advice and undertook work that exceeded his physical capabilities does not demonstrate a material change of his accepted injury-related condition. The Board finds that Dr. Lenzo's various reports do not establish that appellant's accepted condition has changed such that it currently precludes him from performing the selected position of computer technician.¹⁶ Accordingly, appellant failed to establish a material change in the nature and extent of the injury-related condition, and therefore, modification is unwarranted.

CONCLUSION

The Board finds that appellant has not established a basis for modifying the Office's February 9, 1999 wage-earning capacity determination.

¹⁵ Dr. Lenzo previously advised the Office that appellant was capable of lifting up to 20 pounds. *See supra* note 5.

¹⁶ The several reports Dr. Lenzo authored regarding the extent of appellant's right upper extremity impairment do not specifically address appellant's ability to work. While the February 6, 2001, April 1, 2005 and January 10, 2006 reports are relevant for purposes of determining entitlement to a schedule award, they are not particularly probative on the issue of whether appellant demonstrated a material change in his accepted condition.

ORDER

IT IS HEREBY ORDERED THAT the February 13, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 20, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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