

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

T.H., Appellant)
and) Docket No. 06-1450
U.S. POSTAL SERVICE, POST OFFICE,) Issued: January 30, 2007
Wichita, KS, Employer)

)

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 7, 2006 appellant filed a timely appeal from merit decisions of the Office of Workers' Compensation Programs dated February 21 and May 26, 2006 denying modification of a wage-earning capacity determination. Pursuant to 20 C.F.R. §§ 501.2 and 501.3(c), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established that the October 30, 1998 determination of his wage-earning capacity should be modified.

FACTUAL HISTORY

This case is before the Board for the third time. In an October 27, 2004 decision, the Board affirmed a January 2, 2004 Office decision denying appellant's request for a hearing as untimely.¹ The Board remanded the case for the Office to evaluate appellant's request for

¹ *Tony E. Haynes*, Docket No. 04-886 (issued October 27, 2004).

modification of the October 30, 1998 wage-earning capacity determination. In an order dated September 6, 2005, the Board set aside the Office's March 7, 2005 decision which found that appellant had not established a recurrence of disability.² The Board remanded the case for the Office to address the pertinent issue of whether his wage-earning capacity determination should be modified.

In a decision dated February 21, 2006, the Office denied modification of its October 30, 1998 wage-earning capacity determination. It found that the medical evidence was insufficient to establish that appellant's condition worsened such that he was unable to perform the duties of the constructed position of parking lot attendant.

On February 27, 2006 appellant requested reconsideration. In a progress report dated May 15, 2006, Dr. D'Auria declined to respond to questions concerning appellant's condition and work restrictions. He stated that the issues could "be more objectively answered by an impartial medical examiner...." By decision dated May 26, 2006, the Office denied modification of its February 21, 2006 decision.

The facts from the record relevant to the issue of modification of appellant's wage-earning capacity will be set forth. In an October 30, 1998 wage-earning capacity decision, the Office found that the constructed position of parking lot attendant was within appellant's physical and vocational capabilities. It found that the February 12, 1998 reports from appellant's attending physicians, Dr. Ralph D'Auria and Dr. David G. Hollifield, Board-certified physiatrists, established that he had the capacity to perform the position.³ The Office further noted that Dr. Hollifield, in a September 22, 1998 report, opined that appellant could work as a parking lot attendant with frequent changes in position.

In a report dated November 16, 1998, Dr. D'Auria reviewed a videotape and photographs of appellant taken by investigators with the employing establishment. He opined that the surveillance evidence demonstrated that appellant had obviously been "performing actions which apparently he had not been able to do under our observations."⁴ Dr. D'Auria recommended a new FCE.⁵

In a report dated November 15, 2002, Dr. D'Auria noted that he last examined appellant over four years prior. He diagnosed status post bilateral knee surgery and a lumbar fusion at L4-5 and S1. In an accompanying work restriction evaluation, Dr. D'Auria opined that appellant could work four hours per day with limitations.

² Order Remanding Case, Docket No. 05-942 (issued September 6, 2005).

³ In a report dated February 12, 1998, Dr. D'Auria and Dr. Hollifield found that appellant could perform sedentary employment with postural limitations, lifting and sitting restrictions. The physicians obtained a functional capacity evaluation (FCE) on February 12, 1998.

⁴ The employing establishment submitted an investigative memorandum dated November 25, 1998 which summarized videotape footage obtained from February 25 to July 14, 1998 of appellant performing physical activity, including landscaping and constructing a retaining wall. The Office determined that a new FCE was not likely to increase his wage-earning capacity and thus, declined to take action on the investigative report.

⁵ Dr. D'Auria based his previous findings regarding appellant's work restrictions on a 1998 FCE.

In a progress report dated March 6, 2003, Dr. D'Auria noted appellant's continued back and knee complaints. Appellant indicated that his condition had worsened such that he was limited to lifting up to 30 pounds, 30 minutes of standing, 15 minutes of sitting and 15- to 30-minutes of walking. Dr. D' Auria listed findings on physical examination and concluded that appellant's condition was unchanged but was "deteriorating since his last office visit."

In a report dated October 6, 2003, Dr. D'Auria diagnosed a lumbar fusion at L4-5 and S1 with hardware. He opined that appellant's accepted condition should be expanded from a lumbar sprain/strain to include the lumbar fusion at L4 through S1. Dr. D'Auria noted that he also had knee problems related to military service which were not due to his accepted work injury, but which limited his functional capacity. He determined that appellant continued to have work restrictions due to his low back condition. Dr. D'Auria opined that appellant could perform light duty for 2- to 4-hours a day "based on his tolerance to sitting of no greater than approximately 10 minutes and limited standing to approximately 25 minutes." He indicated that he based his findings on a February 1998 FCE.

Dr. D'Auria, in a report dated May 18, 2004, described appellant's knee complaints and listed findings on physical examination of the lumbar spine. He stated, "[Appellant] will send his present status update to the [employing establishment], as his complaints are in part attributed with a work-related injury of March 16, 1985. This pertains to the low back only."

In a report dated December 16, 2004, Dr. D'Auria discussed appellant's complaints of "constant low back pain" with numbness into his bilateral posterior legs. He reviewed the Office's December 8, 2004 letter and stated:

"As regards to substantiation on [appellant's] allegation that his knee and back complaints are worsening, we did a physical examination today that is compared with a previous physical examination we had done here on September 28, 1998. The correspondence indicates that he must show materially worsening from the date of October 30, 1998.

"In the reexamination of September 28, 1998, versus [appellant's] reexamination today six years later on December 16, 2004, his lumbar orthopedic findings indicate positive straight leg raise sooner with a lesser angle than previously. His lumbar range of motion has decreased in flexion and in extension. It remains essentially the same in lateral flexion."

Dr. D'Auria also discussed physical findings and magnetic resonance imaging (MRI) scan relevant to appellant's knee condition. He concluded that he was "essentially stable and stationary, but appellant does have slow progression in worsening of his condition or at least has over the last six years based on the findings of today's physical examination" compared with his 1998 physical examination.

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.⁶ Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.⁷

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 fact, erroneous.⁸ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁹

ANALYSIS

Appellant has not alleged and the record does not support that the October 13, 1998 wage-earning capacity determination was erroneous. Instead, in a letter dated October 22, 2003, he contended that his condition had worsened such that he was entitled to additional compensation. The issue, consequently, is whether appellant has established a material change in the nature and extent of his injury-related condition warranting modification of the October 13, 1998 wage-earning capacity decision.

In a report dated November 15, 2002, Dr. D'Auria evaluated appellant for the first time in four years. He noted his history of a lumbar fusion from L5 to S1 and bilateral knee surgery. Dr. D'Auria found that appellant could work four hours per day with limitations. He did not, however, address the relevant issue of whether his accepted employment injury of a lumbar strain and herniated disc at L4-5 worsened or explain how appellant's back condition prevented him from performing the position of parking lot attendant. As Dr. D'Auria did not address the relevant issue in this case, his report is of diminished probative value.

In a March 6, 2003 progress report, Dr. D'Auria noted that appellant described limitations of standing 30 minutes, sitting and walking 15 minutes and lifting 30 pounds. He concluded that his condition was unchanged but deteriorating. While Dr. D'Auria described appellant's belief regarding the extent of his limitations, he did not provide an independent determination of his physical capacity. Further, Dr. D'Auria did not explain his equivocal conclusion that appellant's condition was unchanged but deteriorating. Consequently, his opinion is of diminished probative value.¹⁰

In a report dated October 6, 2003, Dr. D'Auria opined that appellant had physical limitations due to his employment-related back condition and knee problems from prior military service. He found that, based on the results of the FCE appellant could perform 2- to 4-hours of

⁶ See 5 U.S.C. § 8115 (determination of wage-earning capacity).

⁷ *Sharon C. Clement*, 55 ECAB 552 (2004).

⁸ *Tamra McCauley*, 51 ECAB 375, 377 (2000).

⁹ *Id.*

¹⁰ *Kathy A. Kelley*, 55 ECAB 206 (2004) (medical opinions that are speculative or equivocal in character have little probative value).

light duty sitting approximately 10 minutes and standing around 25 minutes. Dr. D'Auria, however, did not explain his reliance on the 1998 FCE given his prior questioning of the evaluation's validity. In a report dated November 15, 1998, he reviewed videotapes and photographic evidence of appellant performing physical activities. Dr. D'Auria found that the visual evidence established that appellant could perform activities which he appeared unable to do when observed by physicians. He recommended a new FCE. As his reliance upon the 1998 FCE is inconsistent and unexplained in view of his November 16, 1998 finding that it was unreliable, Dr. D'Auria's opinion is insufficient to meet appellant's burden to show that his wage-earning capacity should be modified.

In a report dated May 18, 2004, Dr. D'Auria listed findings on examination of the spine and knees. He attributed appellant's low back complaints to his March 16, 1985 employment injury. As Dr. D'Auria did not address the relevant issue of whether appellant's condition worsened or whether he could perform the position of parking lot attendant, his report is of little probative value.

In a report dated December 16, 2004, Dr. D'Auria compared current findings on examination of the lumbar spine to an examination on September 28, 1998. He found that appellant had decreased lumbar flexion and extension and a "positive straight leg raise sooner with a lesser angle." Dr. D'Auria opined that his condition was basically stable with "a slow progression in worsening of his condition...." He did not comment, however, on the relevant issue of whether appellant could work as a parking lot attendant; therefore, his report is insufficient to meet appellant's burden of proof.¹¹

Appellant has the burden of proof to show a modification of his wage-earning capacity. He has not submitted sufficient medical evidence to establish a material change in the nature and extent of his injury-related conditions. Dr. D'Auria did not explain how appellant's accepted conditions would cause him to be totally disabled for work as a parking lot attendant. Appellant, consequently, has not shown that the Office's determination of his loss of wage-earning capacity should be modified.¹²

CONCLUSION

The Board finds that appellant has not established that the October 30, 1998 determination of his wage-earning capacity should be modified.

¹¹ In a progress report dated May 15, 2006, Dr. D'Auria declined to respond to a request for information regarding appellant's work restrictions and current condition.

¹² See *Elbert Hicks*, 55 ECAB 151 (2003).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 26 and February 21, 2006 are affirmed.

Issued: January 30, 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