

recurrence of disability commencing August 12, 1998. Appellant asserted that he sustained a spontaneous worsening of an accepted July 16, 1995 lumbar strain and a herniated L4-5 disc. However, the Board found that the medical evidence established that appellant's lumbar condition on and after August 12, 1998² was due to his private-sector employment from April to August 1998 performing repetitive heavy lifting at a tire shop. The Board further found that this private-sector employment constituted an intervening cause, breaking the legal chain of causation from an accepted July 16, 1985 lumbar strain and herniated L4-5 disc. The Board found that the Office failed to consider if a March 13, 2002 report from Dr. Divakar Krishnareddy, an attending Board-certified orthopedic surgeon, was sufficient to require modification of a January 28, 1998 wage-earning capacity determination. The Board remanded the case to the Office for further development and issuance of an appropriate decision. The law and the facts of the case as set forth in the Board's prior decision are hereby incorporated by reference.

On remand of the case, the Office reviewed the record to determine if the evidence warranted modification of the January 28, 1998 wage-earning capacity determination.

By decision dated May 10, 2005, the Office denied modification of the January 28, 1998 wage-earning capacity determination. The Office found that Dr. Krishnareddy's March 13, 2002 report established that appellant's medical condition on and after August 12, 1998 was due to his private-sector employment at a tire shop in 1998. The Office found that appellant had not met the criteria to modify the January 28, 1998 wage-earning capacity determination as he had not established a material change in his disability, that the original rating was in error or that he had been vocationally rehabilitated.

In a February 16, 2006 letter, appellant requested reconsideration. He asserted that his lumbar condition worsened spontaneously in August 1998 without any intervening injury. Appellant submitted additional evidence.

In a June 16, 2005 report, Dr. Gurvinder Deol, an attending Board-certified orthopedic surgeon, noted a history of 1985 lumbar injury and that appellant worked for five months in 1998. On examination, he observed lumbosacral tenderness with restricted range of motion. Dr. Deol related appellant's symptoms of lower extremity paresthesias. He diagnosed axial back pain and probable degenerative lumbosacral disc disease. Dr. Deol obtained an August 4, 2005 lumbar magnetic resonance imaging (MRI) scan showing mild disc bulges at L4-5 and L5-S1 and degenerative facet changes at L5-S1 causing neural foraminal narrowing.

In a September 22, 2005 report, Dr. Robert J. Wilson, an attending Board-certified physiatrist, noted reviewing medical records that were "somewhat incomplete." He stated that in 1992 appellant worked for a "tire company for about four to five months with no recurrent injury but difficulty keeping up with the pace and limitations because of his ongoing back pain and discontinued after about five months." Dr. Wilson stated that an impression of "[w]ork injury 1985 with ongoing nonspecific mechanical low back pain" and degenerative spondylosis at L4-5 and L5-S1. He opined that the lumbar spondylosis combined with facet degenerative arthritis

² Appellant did not return to work. He received compensation for partial disability.

“probably contribute[d] to his mechanical back pain with components of possibly lumbar radiculopathy bilaterally and referred leg symptoms.” Dr. Wilson also diagnosed “[p]sychosocial factors interfering with physical functioning with significant work disability and issues since injury 1985.” He submitted chart notes through December 22, 2005.

In a January 19, 2006 report, Dr. Wilson opined that appellant’s original injury in 1985 “was the ultimate causation of his current back problems. The return to work issue, although aggravating his pain, which caused him to discontinue working ... was not a new injury. It was aggravation of a preexisting problem and [appellant] continue[d] with the ongoing back pain as related to injury of 1985.” Dr. Wilson submitted periodic chart notes.

In a March 1, 2006 note, Dr. Wilson diagnosed degenerative L4-5 and L5-S1 discs.³ He opined that appellant’s condition appeared to be an ongoing problem from his work injury of 1985, based on the medical records and his limited time of treating appellant. Dr. Wilson submitted chart notes through October 9, 2006 describing appellant’s continued lumbar symptoms.

By decision dated October 31, 2006, the Office denied modification of the January 28, 1998 loss of wage-earning capacity determination.

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.⁴

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 CE [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity.”⁵

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

³ A January 25, 2006 discogram showed “[p]osterior annular tears with degenerative painful L4-5 and L5-S1 disc.”

⁴ See *Sharon C. Clement*, 55 ECAB 552 (2004).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

rehabilitated, or the original determination was, in fact, erroneous.⁶ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁷

ANALYSIS

The Office accepted that appellant sustained a July 16, 1985 lumbar injury. By decision dated January 28, 1998, the Office issued a wage-earning capacity determination. Appellant then alleged a recurrence of total disability commencing August 12, 1998. The Office issued September 7, 2000, May 30, 2001 and February 19, 2002 decisions finding that the wage-earning capacity determination should remain undisturbed as the medical evidence did not establish a spontaneous worsening of the accepted condition. These decisions appropriately adjudicated the modification of wage-earning capacity issue.⁸ However, in its June 7, 2002 decision, the Office improperly failed to review the wage-earning capacity determination.⁹ The Board remanded the case for further development.

On remand of the case, appellant submitted medical evidence which he asserted established that his accepted lumbar condition worsened spontaneously, thus diminishing his wage-earning capacity. Such a worsening is one of the three criteria for modifying a standing wage-earning capacity determination.¹⁰ Dr. Deol, an attending Board-certified orthopedic surgeon, submitted a June 16, 2005 report noting the 1985 lumbar injury and that appellant performed unspecified work for five months in 1998. He diagnosed back pain and probable degenerative lumbosacral disc disease. However, Dr. Deol did not opine that there was a material change in appellant's accepted lumbar condition. Thus, his opinion is insufficient to warrant modification of the wage-earning capacity determination.¹¹

Dr. Wilson, an attending Board-certified physiatrist, noted in a September 22, 2005 report that the medical records he reviewed were "somewhat incomplete." He related that appellant experienced back pain when working for a tire company in 1992. However, appellant worked for the tire company in 1998, not 1992. The Board therefore finds that Dr. Wilson's opinion is of diminished probative value as it is based on an incomplete and inaccurate factual and medical history.¹² In a January 19, 2006 report, he opined that appellant's private-sector employment

⁶ *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

⁷ *Sue A. Sedgwick*, *supra* note 6.

⁸ Federal (FECA) Procedure Manual, Chapter 2.814.9(a), *supra* note 5.

⁹ *See Sharon C. Clement*, *supra* note 4. The Board notes that consideration of the modification issue does not preclude the Office from acceptance of a limited period of employment-related disability, without a formal modification of the wage-earning capacity determination. *Id.* at n.4; *Cf. Elsie L. Price*, 54 ECAB 734 (2003) (acceptance of disability for an extended period was sufficient to establish that modification of the wage-earning capacity determination was warranted).

¹⁰ *Katherine T. Kreger*, *supra* note 6 (to warrant modification of a standing wage-earning capacity determination, a claimant must establish that the original determination was in error, that he has been rehabilitated, or that he sustained a work-related worsening of the accepted injury or condition).

¹¹ *Id.*

¹² *Beverly R. Jones*, 55 ECAB 411 (2004).

aggravated his preexisting lumbar condition. Dr. Wilson then changed his opinion in a March 1, 2006 note, stating that appellant's lumbar condition was an "ongoing problem from his work injury of 1985." The Board finds that the contradictory nature of his opinion further diminishes its probative quality.¹³

The Board finds that the medical evidence is insufficient to establish that appellant sustained a worsening of the accepted lumbar injuries that would necessitate modification of the January 28, 1998 wage-earning capacity determination. Therefore, the Office's October 31, 2006 decision is proper under the law and the facts of the case.

CONCLUSION

The Board finds that the Office properly denied appellant's request to modify the wage-earning capacity decision of January 28, 1998.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 31, 2006 is affirmed.

Issued: June 21, 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

¹³ *Kathy A. Kelly*, 55 ECAB 206 (2004).