United States Department of Labor
Employees' Compensation Appeals Board

C.W., Appellant	)	
and	)	**Docket No. 06-846**
	)	**Issued: September 14, 2007**
DEPARTMENT OF AGRICULTURE, FOREST SERVICE, GALLATIN NATIONAL FOREST, Bozeman, MT, 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 February 27, 2006 appellant filed a timely appeal of a September 15, 2005 decision of the Office of Workers' Compensation Programs which determined his wage-earning capacity and the December 8, 2005 decision denying further merit review. His appeal was also timely of the May 23 and August 30, 2005 decisions denying his claim for wage-loss compensation from March 14 to 25, 2005 and the November 3, 2005 decision denying merit review of these decisions. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits and nonmerits of the case.

ISSUES

The issues are: (1) whether the Office properly determined appellant's wage-earning capacity based on his actual earnings as a dispatch leader; (2) whether the Office properly denied his claim for compensation for the period March 14 to 25, 2005; and (3) whether the Office properly denied appellant's requests for reconsideration pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On August 20, 2003 appellant, then a 31-year-old temporary forestry technician, sustained injury while "packing up from the Bear Creek fire with a heavy load." He bent down to crawl under a log and injured his back. Appellant returned to work for the employing establishment in a light-duty capacity. The Office accepted the claim for acute lumbar strain, a reaction to a lumbar puncture and displacement of a lumbar intervertebral disc.

On September 22, 2003 the employing establishment offered appellant a modified-duty position as a forestry technician, a full-time position. The employing establishment noted that, although the position was temporary and expected to last through December 31, 2003, it could last longer depending on available work. Appellant accepted the offer and commenced work on December 15, 2003.

In a medical report dated March 18, 2004, Dr. John A. Vallin, a Board-certified physician, reviewed the history of injury. He listed his impression as mechanical low back pain, contained central to left paracentral L4-5 lumbar disc herniation and annular tear at L5-S1.

By letter dated March 24, 2004, the State of Montana offered appellant a position as a dispatch leader for the Department of Resources and Conservation at an hourly salary of $13.71. On April 2, 2004 appellant resigned from his position with the employing establishment in order to accept this position. He commenced his new employment on April 12, 2004.

On April 9, 2004 Dr. Vallin indicated that appellant had reached maximum medical improvement. He approved of appellant's sedentary position as a dispatch leader. Dr. Vallin noted, "It is my opinion he should be relegated to light/medium physical demand labor, though the position that he will be starting up requires only sedentary labor since he will be a dispatcher."

On May 14, 2004 the Office referred appellant to Dr. Maurice D. Brown, a Board-certified orthopedic surgeon, for a second opinion. In a report dated June 3, 2004, Dr. Brown stated that appellant's objective findings were consistent with lumbar strain/sprain, lumbar disc herniation and resultant sciatica medically connected to the work injury of August 19, 2003. He did not find that appellant had reached maximum medical improvement. Dr. Brown requested a magnetic resonance imaging (MRI) scan as appellant's symptoms had changed significantly. The MRI scan was performed on June 14, 2004. On September 30, 2004 Dr. Brown completed a work capacity evaluation indicating that appellant could sit for eight hours a day, stand and walk and reach above his shoulder for four hours a day, push, pull and lift up to 30 pounds for two hours a day and twist or squat one hour a day. He could do no climbing and could kneel for only ½ an hour a day.

By decision dated January 24, 2005, the Office had no loss of wage-earning capacity based on his actual earnings with the State of Montana. The Office noted that appellant demonstrated his ability to perform the duties of a dispatch leader for greater than 60 days.[1]

By letter dated February 16, 2005, appellant requested a review of the written record.

On March 29, 2005 appellant filed a claim for compensation for the period March 14 to 25, 2005. By letter dated April 13, 2005, the Office requested further information. On April 18, 2005 appellant stated that he was unable to work from March 6 to 26, 2005.

On May 16, 2005 appellant submitted medical reports by Dr. Bruce D. Mikesell, a Board-certified family practitioner. On May 2, 2005 Dr. Mikesell stated:

> "I am writing this letter to document that [appellant] was unable to work in any capacity from March 6 [to] 25, 2005 due to a temporary exacerbation of a previous low back pain with herniated nucleus pulpos[u]s and sciatica…."

In a note dated March 8, 2005, Dr. Mikesell stated that appellant had twisted his back the prior Sunday afternoon while getting out of a truck. He indicated that this resulted in an "exacerbation of previous [workers' compensation] injury." A March 25, 2005 MRI scan by Dr. William J. Birck, a Board-certified radiologist, revealed an increase in the size of the midline disc protrusion at L5 and minimal degenerative changes at L1-2 and L5-S1.

By decision dated May 23, 2005, the Office denied appellant's claim for wage-loss compensation from March 14 to 25, 2005.

In a report dated May 20, 2005, Dr. K.C. Brewington, II, a Board-certified neurosurgeon, noted that, on March 6, 2005, while working, appellant experienced persistent back pain all day. He diagnosed L4-5 degenerative disc disease and L4-5 bilateral subarticular recess stenosis with secondary right L5 radiculopathies.

In a report dated July 8, 2005, Dr. Brewington noted that appellant had never completely recovered from his original injury. He indicated that it was unclear what produced the exacerbation of the preexisting condition but that the diagnosis for the recurring condition was the same as the original injury. Dr. Brewington knew of no precipitating factors capable of causing the injury itself.

On July 14, 2005 appellant requested reconsideration of the May 23, 2005 decision denying his claim for loss of wages from March 14 to 25, 2005. By decision dated August 30, 2005, the Office denied modification of the May 23, 2005 decision.

By decision dated September 15, 2005, the hearing representative denied modification of the wage-earning capacity determination.

[1] The Office noted that appellant's weekly pay rate when disability began (effective September 9, 2003) was $441.69. The current rate for the job and step was $458.90. Appellant's current weekly wage was $550.65, which was greater than the current pay of the job he held at the time of the injury.

By letter dated October 13, 2005, appellant requested reconsideration of the hearing representative's September 15, 2005 decision. He contended that his position with the State of Montana was seasonal in nature and his annual wages were less than that of his date-of-injury position. In a September 21, 2005 medical report, Dr. Brewington indicated that appellant's disc protrusion was causing compression of the L5 roots and, therefore, his radiculopathy. He stated that the Office lacked an understanding as to the progression of appellant's symptoms.

On October 21, 2005 appellant requested reconsideration of the Office's August 30, 2005 decision denying wage loss from March 14 to 25, 2005. On November 3, 2005 the Office denied appellant's request for reconsideration without further merit review.

In a medical report dated November 4, 2005, Dr. Brewington reiterated that appellant never recovered from his original injury. In a letter dated November 22, 2005, appellant's current employer, the State of Montana, indicated that he worked as a dispatch leader and that his duties include overseeing the gathering of information, supervising personnel in the dispatch center and supporting training and radio operations. It was noted that appellant was a "guarantee seasonal employee; he is guaranteed at least six months of full time."

By decision dated December 8, 2005, the Office denied merit review of the September 15, 2005 decision.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[2] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[3]

Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity.[4] Generally, wages 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.[5]

[2] *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

[3] *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

[4] 5 U.S.C. § 8115(a).

[5] *Dennis E. Maddy*, 47 ECAB 259 (1995).

The Office's procedure manual provides guidelines for determining wage-earning capacity based on actual earnings:

> "a. *Factors considered*. To determine whether the claimant's work fairly and reasonably represents his or her WEC [wage-earning capacity], the CE [claims examiner] should consider whether the kind of appointment and tour of duty (see FECA PM 2-900.3) are at least equivalent to those of the job held on the date of injury. Unless they are, the CE may not consider the work suitable.
>
> "For instance, reemployment of a temporary or casual worker in another temporary or casual (USPS) position is proper, as long as it will last at least 90 days, and reemployment of a term or transitional (USPS) worker in another term or transitional position is likewise acceptable. However, the reemployment may not be considered suitable when:
>
> > (1) *The job is part-time* (unless the claimant was a part-time worker at the time of injury or sporadic in nature;
> >
> > (2) *The job is seasonal* in an area where year-round employment is available;
> >
> > (3) *The job is temporary* where the claimant's previous job was permanent."[6]

ANALYSIS -- ISSUE 1

The evidence reflects that appellant's firefighter position at the time of injury was a temporary job. Therefore, the Office may use actual wages in a temporary position to make a wage-earning capacity determination in this case.[7] Appellant worked in the position of dispatch leader for more than 60 days[8] and the temporary position was available for more than 90 days. Therefore, the Office properly followed its procedures in determining his wage-earning capacity based on his actual earnings. Appellant commenced work in the position with the State of Montana on April 1, 2004 earning a salary greater than his date-of-injury position. As noted, actual wages are generally the best measure of wage-earning capacity. The Board finds that the Office properly determined that appellant's actual wages earned in the position of dispatch leader fairly and reasonably represented his wage-earning capacity. The Office found that actual wages exceeded the current pay rate of the date-of-injury position and there is no contrary evidence.[9]

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[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (July 1997).

[7] *A.P.*, 58 ECAB ___ (Docket No. 06-1428, issued November 29, 2006).

[8] The procedure manual states that, after claimant has been working for 60 days, the Office will determine whether actual earnings fairly and reasonably represent wage-earning capacity. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993).

[9] Wage-earning capacity is determined by comparing the current pay rate for the date-of-injury position with the actual wages earned. 20 C.F.R. § 10.403 (1999).

The Board notes that the medical evidence demonstrates that the position of dispatch leader was suitable. In a report dated April 9, 2004, Dr. Vallin indicated that appellant could perform light/medium physical labor and that he could perform the position of dispatcher as it was sedentary. Dr. Brown, the second opinion physician, opined that appellant could perform a position where he sat for eight hours a day.

The Board finds that the Office properly found that appellant's actual wages as a dispatch leader fairly and reasonably represent his wage-earning capacity.

LEGAL PRECEDENT -- ISSUE 2

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition resulting from a previous injury or illness without a new or intervening injury.[10] In order to establish that his claimed recurrence of the condition was caused by the accepted injury, medical evidence of bridging symptoms between his present condition and the accepted injury must support the physician's conclusion of causal relationship.

Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.[11] Rationalized medical evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[12]

ANALYSIS -- ISSUE 2

Appellant contends that he was disabled from March 14 to 25, 2005 due to residuals of his accepted injury. The Board finds that the Office properly denied appellant's claim for compensation for this period.

Appellant sustained a work-related injury on August 20, 2003 which resulted in an acute lumbar strain, reaction to a spinal or lumbar puncture and displacement of lumbar intervertebral disc. Appropriate benefits were paid. Appellant returned to limited-duty work for the employing establishment, but resigned on April 2, 2004 to accept a new position with the State of Montana as a dispatch leader, a position he started on April 12, 2004. On March 29, 2005 he filed a claim for compensation for the period March 14 to 25, 2005. Appellant noted that he was unable to work in any capacity during this period due to a temporary exacerbation of a previous low back pain with herniated nucleous pulposus and sciatica. He noted that he was instructed by the State

[10] 20 C.F.R. § 10.5(x) (2002).

[11] *See Michael E. Smith*, 50 ECAB 313 (1999).

[12] *Jennifer Atkerson*, 55 ECAB 317 (2004).

of Montana's Department of Labor that he was unable to claim unemployment insurance benefits for the period March 13 to 27, 2005 due to his inability to work.

Both Dr. Mikesell and Dr. Brewington noted that appellant sustained a new work injury on March 6, 2005. At the time of the alleged recurrence, appellant had been working for the State of Montana for almost one year.

On March 8, 2005 Dr. Mikesell indicated that appellant twisted his back while getting out of the truck on or about March 6, 2005. He noted that this was an exacerbation of a previous workers' compensation injury and did not expect it to be permanent. In his March 14, 2005 note, Dr. Mikesell noted continued worsening of appellant's pain and spasms. On May 2, 2005 he indicated that appellant was unable to work in any capacity from March 6 to 25, 2005 due to a temporary exacerbation of a previous low back pain with herniated nucleous pulposus and sciatica. These reports identify that appellant twisted his back while getting out of his truck while at work for the State of Montana. Rather than support a "spontaneous" recurrence of disability Dr. Mikesell implicates a new injury.

In a report dated May 20, 2005, Dr. Brewington noted appellant's history that, on March 6, 2005, while working for the State of Montana, appellant experienced persistent back pain over the day. On July 8, 2005 he indicated that appellant never completely recovered from his original injury and noted that it was unclear what produced the exacerbation of the already preexisting condition. Dr. Brewington did not provide a rationalized explanation as to why appellant had a sudden recurrence of his accepted injury. Rather, he noted that appellant experienced back pain on March 6, 2005 while in employment with the State of Montana.

An award of compensation may not be based on surmise, conjecture, speculation or appellant's belief of causal relationship.[13] Appellant has not submitted rationalized medical evidence in support of his claim that he sustained a recurrence of his accepted injury. The Office properly denied appellant's claim for disability for the period March 14 to 25, 2005.

LEGAL PRECEDENT -- ISSUE 3

To require the Office to reopen a case for merit review under section 8128(a) of the Act, the Office's regulations provide that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[14]

ANALYSIS -- ISSUE 3

In a decision dated November 3, 2005, the Office denied appellant's request for reconsideration of the Office decisions dated May 23 and August 30, 2005, denying wage-loss

[13] *John D. Jackson*, 55 ECAB 465 (2004); *William Nimitz*, 30 ECAB 567 (1979).

[14] 20 C.F.R. § 10.606(b)(2)(iii).

compensation for the period March 14 to 25, 2005. Appellant did not submit any new relevant legal argument, nor did he allege that the Office erroneously applied or interpreted a specific point of law. Consequently, he is not entitled to a review of the merits of his claim based on the first and second requirements of section 10.606(b)(2). With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by the Office, the Board finds that appellant resubmitted Dr. Mikesell's May 2, 2005 report that was already in the record and had been previously considered by the Office. This report was, thus, insufficient to establish clear evidence of error on the part of the Office.

In a decision dated December 8, 2005, the Office denied merit review of the decision dated September 15, 2005 finding that appellant had zero percent loss of wage-earning capacity. In this case, appellant did not submit new factual evidence or advance a legal argument not previously considered by the Office. However, he did raise a new argument that his pay rate had been calculated incorrectly. The Office conducted a limited review and concluded that appellant's argument was without merit. The Office concluded that appellant's earnings in his job as a dispatcher were greater than the current wages of his date-of-injury position and thus there was no loss of wage-earning capacity. Accordingly, the Office properly conducted a limited review.

CONCLUSION

The Office properly reduced appellant's wage-earning capacity to zero, properly denied his claim for compensation for the period March 14 to 25, 2005 and properly denied appellant's requests for reconsideration pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 8, November 3, September 15, August 30 and May 23, 2005 are affirmed.

Issued: September 14, 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