United States Department of Labor
Employees' Compensation Appeals Board

C.W., Appellant	)	
and	)	**Docket No. 07-1816**
	)	**Issued: January 16, 2009**
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
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 28, 2007 appellant filed a timely appeal of a May 8, 2007 decision denying modification of a decision of the Office of Workers' Compensation Programs dated March 21, 2006 denying his claim for recurrence. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction to review the merits of the case.

ISSUE

The issue is whether the Office properly denied compensation for the periods March 6 to 25, 2005 and commencing September 15, 2005.

FACTUAL HISTORY

On August 21, 2003 appellant, then a 31-year-old temporary fire forestry technician, filed a traumatic injury claim alleging that he sustained a back injury while "packing out" from the Bear Creek fire with a heavy load. He 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. Appellant returned to work for the employing establishment on December 15, 2003. On April 2, 2004 he resigned his position with the employing establishment and on April 12, 2004 he commenced employment with the State of Montana as a dispatch leader for the Department of Resources and Conservation at an hourly salary of $13.71. By decision dated January 24, 2005, the Office determined that appellant had no loss of wage-earning capacity based on his actual earnings with the State of Montana.[1]

On March 29, 2005 appellant filed a claim for compensation for the period March 14 through 25, 2005. On April 8, 2005 he filed a claim for compensation for the period March 6 through 25, 2005. In a letter dated April 8, 2005, appellant indicated that he had been instructed by the State of Montana's Department of Labor that he was not eligible for unemployment insurance benefits for the weeks of March 13 through 19 and March 20 through 27, 2005 due to his inability to work. He further noted that he was now claiming compensation benefits for the period March 6 through 12, 2005 as the State of Montana had now determined that he was also ineligible for benefits for this period of time. In support thereof, appellant submitted a copy of a decision by the State of Montana's Department of Labor finding that he was ineligible for unemployment benefits beginning March 6, 2005 because he was not able to work and a decision by the same agency finding that an overpayment occurred because of improper payment of benefits. In further support of his claim, appellant submitted a medical note dated May 2, 2005 by Dr. Bruce D. Mikesell, a Board-certified family practitioner, indicating that he was unable to work in any capacity from March 6 through 25, 2005 due to a temporary exacerbation of a previous low back pain with herniated nucleus pulposus and sciatica. Dr. Mikesell noted that appellant twisted his back the prior Sunday while getting out of a truck. Appellant further submitted a report from a magnetic resonance imaging (MRI) scan conducted on March 25, 2005, which indicated an interval increase in size of the midline disc protrusion at L5 compared to the last examination and this is now moderate in size and could conceivably be affecting the L5 nerve roots. He filed another claim for compensation for the period March 6 through 25, 2005 on May 16, 2005.

By decision dated May 23, 2005, the Office denied appellant's claim for compensation for the period March 14 through 25, 2005. On July 14, 2005 appellant requested reconsideration and, by decision dated August 30, 2005, the Office denied modification of the May 23, 2005 decision. By decision dated November 3, 2005, the Office denied merit review.[2]

On October 20, 2005 appellant claimed a recurrence of his accepted injury on September 15, 2005.

In a physician's note dated September 15, 2005, Dr. Carter E. Beck, a Board-certified neurosurgeon, indicated that appellant was to take time off from work "starting today until next Monday." He noted that appellant was experiencing extreme muscle spasm secondary to

[1] Following affirmances by the Office, the Board upheld this determination on appeal. Docket No. 06-846 (issued September 14, 2007).

[2] These decisions, denying appellant's claim for disability for the period from March 14 to 25, 2005, were also upheld in the Board's decision of September 14, 2007. *Id.*

compressed nerve root irritation and that it would be beneficial to appellant to rest, treat with steroids and muscle relaxants.

Dr. Mikesell referred appellant to Dr. K.C. Brewington, II, a Board-certified neurosurgeon. In a May 20, 2005 initial report, Dr. Brewington indicated that appellant had L4-5 degenerative disc disease, L4-5 bilateral subarticular recess stenosis and right L5 radiculopathies secondary to subarticular recess stenosis. In a June 17, 2005 report, he recommended proceeding with decompression of the bilateral L5 roots. In a July 8, 2005 report, Dr. Brewington noted that appellant never completely recovered from his original disability. He noted that it was unclear what produced the exacerbation of the already preexisting condition. Dr. Brewington noted that the original injury was prone to recurrence and that he knew of no precipitating factors capable of causing the condition by itself. In a September 21, 2005 report, he noted that appellant's radiculopathies and stenosis were due to the lumbar disc displacement, as was stated in his initial consult of May 20, 2005. In an October 14, 2005 report, Dr. Brewington discharged appellant from his care as he no longer needed a surgeon but did recommend further follow-up with another physician. In a note dated November 4, 2005, he noted that, although appellant may have worked after his injury, this did not make him less injured.

A repeat MRI scan was performed on October 6, 2005. This MRI scan was interpreted as showing a mild degree of degenerative-appearing facet arthrosis in the lower lumbar spine, a small Schmorf's node deformity within the superior endplate of L5 and a mild broad-based appearing disc bulge at L1-2 which is eccentric to the right. It was noted that there was no evidence for focal disc herniation spinal stenosis or definite nerve root impingement.

In a January 19, 2006 report, Dr. Randale C. Sechrest, a Board-certified orthopedic surgeon, diagnosed acute exacerbation of discogenic pain.

By decision dated March 31, 2006, the Office denied appellant's claim. It noted that appellant claimed wage loss for total temporary disability from March 6 through 26, 2005 and from September 15 through 18, 2005 and wage loss for medical appointments from September 19 through October 15, 2005. The Office noted that appellant's treating physician, Dr. Brewington, had not provided a medically rationalized opinion based on a complete and accurate factual and medical history, which concluded that appellant suffered a material worsening of the accepted work-related conditions without intervening cause on the dates claimed. It noted that the medical records showed a series of acute exacerbations, but no material worsening in the nature and extent of the accepted conditions. Therefore, the Office denied appellant's claims for recurrence and wage loss for temporary total disability and medical appointments, which it found constituted a claim to modify the formal zero loss of wage-earning capacity decision issued on January 24, 2005.

In a medical report dated August 4, 2006, Dr. Sechrest indicated that appellant was suffering from the sequelae from his disc injury which occurred in 2003. He noted that appellant has continued to work full time although he has had restricted duties. Dr. Sechrest noted that he did not see the need for any ongoing care at this point in time although, if appellant does have flare-up of pain or increase in symptoms, this would require intermittent treatment.

On December 5, 2006 appellant requested reconsideration. In support thereof, he submitted a statement from a direct protection coordinator at the Montana Department of Natural Resources dated March 12, 2006 wherein he indicated that appellant had been in their employ since April 14, 2004 and during this time appellant had not sustained any work-related injuries. Furthermore, he noted that, to the best of his knowledge, appellant had sustained no nonwork-related injuries during this time period. In a note dated March 16, 2006, appellant indicated that he had a permanent partial disability due to a herniated lumbar disc injury that had never fully resolved. He denied any new injuries.

By decision dated May 8, 2007, the Office denied modification of its March 31, 2006 decision. It noted that none of the factual and medical evidence provided establishes that appellant sustained a *bona fide* recurrence of disability related to the approved work injury, nor that modification of the formal loss of wage-earning capacity rating was warranted.

LEGAL PRECEDENT

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.[3] The burden of proof is on the party attempting to show modification of wage-earning capacity determination.[4] However, 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.[5]

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.[6] 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.

ANALYSIS

Initially, the Board notes that in its prior decision it affirmed the Office's finding that the Office properly denied compensation for the period March 14 to 25, 2005.[7] No further evidence on this issue was submitted subsequent to the prior appeal on this issue. Therefore, the Board

[3] *D.M.*, 59 ECAB __ (Docket No. 07-1230 issued November 13, 2007); *Tamara McCauley*, 51 ECAB 375 (2000).

[4] *P.C.*, 58 ECAB ___ (Docket No. 06-1954 issued March 6, 2007); *Harley Sims, Jr.*, 56 ECAB 320 (2005).

[5] *Katherine T. Kreger*, 55 ECAB 633, 636 n.5 (2004).

[6] 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.

[7] S*upra* at note 1.

will not review its prior determination that appellant was not entitled to compensation for the period from March 14 to 25, 2005.

For the period March 6 through 13, 2005 the evidence consists of the same evidence considered in denying appellant's claim from March 14 through 25, 2005. At that time appellant had been working for the State of Montana for almost one year. The reports of Dr. Mikesell support that appellant twisted his back while getting out of his truck while working for the State of Montana and that, rather than support a spontaneous change in medical condition resulting from the previous injury, these reports implicate a new injury. Neither of these reports indicate that there was a recurrence of appellant's injury-related condition. Accordingly, the Office properly denied appellant's claim for compensation for the period March 6 through 13, 2005 as there was no recurrence of disability.

With regard to the limited time period commencing September 15, 2005, the Board finds that the Office also properly denied appellant's claim for compensation as he has not established a recurrence of this time period. Dr. Beck, in his note dated September 15, 2005, indicated that appellant should take some time off of work as he was "experiencing extreme muscle spasm secondary to compressed nerve root irritation...." He never linked this condition to the accepted injury of August 19, 2003. Dr. Brewington's reports do not support a spontaneous change in the nature and extent of appellant's injury-related condition. In fact, in his September 21, 2005 report, he noted that appellant's radiculopathies and stenosis were due to lumbar disc displacement as he stated in his initial consult of May 20, 2005. As the May 20, 2005 consult noted these injuries, the change did not occur on September 18, 2005. The report on the October 6, 2005 MRI scan and the reports of Dr. Sechrest made no notation as to causal relationship between the findings in that report and appellant's accepted injury.

The Board finds that appellant submitted no medical evidence which establishes a spontaneous change in his medical condition resulting from the accepted injury or illness without a new or intervening injury during these limited periods. Consequently, appellant failed to carry his burden of proof to establish a recurrence of disability.

CONCLUSION

The Board finds that the Office properly denied appellant's claim for compensation for the periods from March 6 to 13, 2005 and commencing September 15, 2005.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 8, 2007 is affirmed.

Issued: January 16, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge, dissenting:

The record reflects that following appellant's August 19, 2003 injury, accepted for lumbar strain, lumbar puncture and a displaced lumbar disc, he returned to light-duty office work at the employing establishment until his resignation on April 2, 2004. Thereafter, he secured employment with the State of Montana as a dispatch leader for the Department of Resources and Conservation, upon which the wage-earning capacity determination was based.[1]

Appellant filed claims for wage-loss compensation from March 6 through 25, 2005 and as of September 15, 2005. He submitted treatment records from Dr. Bruce D. Mikesell, a Board-certified family practitioner and attending physician. On February 3, 2005 appellant was seen for bilateral pain radiating into both lower extremities, primarily on the right. On March 8, 2005 Dr. Mikesell noted that appellant had twisted his back the prior Sunday afternoon while exiting his truck.[2] He diagnosed an exacerbation of appellant's prior workers' compensation injury. Appellant underwent a magnetic resonance imaging (MRI) scan on March 25, 2005 which

[1] Appellant noted that his duties at the Northern Rockies Coordination Center were sedentary in an office environment, consisting primarily of using a computer and telephone to conduct dispatch operations. Sedentary duty was approved by appellant's then treating physician, Dr. John A. Vallin.

[2] In an October 19, 2005 statement, appellant noted that he drove from his house to his office to download a document from the internet for a class at the University of Montana. After arriving back home, he described increasing pain and cramping in his low back, stating: "the only thing I can point to was that while driving home I twisted to the right while sitting in my pickup truck to check traffic directly prior to the onset of the increased symptoms."

revealed minimal degenerative changes present at L1-2 and L5-S1 but no additional disc protrusion identified. In a May 2, 2005 note, Dr. Mikesell advised that appellant was unable to work from March 6 through 25, 2005 due to a temporary exacerbation of low back pain. He noted that appellant had a herniated nucleus pulposus and sciatica.

In a May 23, 2005 decision, the Office denied appellant's claim for compensation finding that the medical evidence of record was not sufficient to establish that his disability was due to his accepted injury.

Appellant requested reconsideration and submitted a May 20, 2005 report from Dr. K.C. Brewington, II, a neurosurgeon, who reviewed appellant's history of injury and his complaint of persistent pain over the right buttock. Dr. Brewington noted that on March 6, 2005 appellant again experienced persistent burning pain into the right calf. A review of diagnostic studies noted degenerative disc disease at L4-5 and L5-S1 with moderate to severe stenosis of the lumbar spine with compression of the nerve roots. He recommended additional studies. On June 15, 2005 appellant underwent a nuclear medicine bone scan of the lumbar spine suggestive of subtle end plate activity at L5-S1 of questionable significance, most likely representing a degenerative change. No asymmetry or abnormal activity was identified within the posterior elements or facets of the lumbar spine. On June 17, 2005 Dr. Brewington diagnosed L5-S1 degenerative disc disease and noted that appellant was a good candidate for decompression surgery which the physician attributed to the August 2003 injury.

It is an accepted principle of workers' compensation law and the Board has so recognized, that when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause.[3] The Board has quoted with approval the observation of Professor Larson:

> "[O]nce the work-connected character of any injury, such as a back injury, has been established, the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause…. [S]o long as it is clear that the real operative factor is the progression of the compensable injury, associate with an exertion that in itself would not be unreasonable [under] the circumstances. A different question is presented, of course, when the triggering activity is itself rash in light of claimant's knowledge of his condition."[4]

[3] Larson, *The Law of Workers' Compensation* § 13.00.

[4] *John R. Knox*, 42 ECAB 193 (1990). Larson at § 10.02 *Complications of Initial Injury*.

The Office previously denied appellant's claim for wage loss. The Board affirmed, finding that the medical reports of record established 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."[5] However, on further consideration of the evidence, I find this to be inaccurate. I can find no evidence to suggest that appellant's twisting of his back on Sunday, March 6, 2005 while driving his truck to observe traffic or exiting the vehicle related to his duties as a dispatcher with the State of Montana. Moreover, there is no evidence to establish that any exertions made while driving or exiting the pickup truck were rash or otherwise unreasonable in light of his accepted low back condition. The medical evidence contemporaneous to appellant's claimed disability consists of the treatment records of Dr. Mikesell and Dr. Brewington, both of whom attributed his need for medical treatment and disability back to the accepted employment injury while in federal service. Dr. Mikesell described appellant's back condition as an exacerbation of his accepted herniated disc condition. Dr. Brewington obtained additional diagnostic testing. He noted that appellant had never recovered from the accepted back injury and attributed his complaints of radiculopathy to the progression of his accepted condition and back disease. I would remand the case for further development of the medical evidence on this issue. The evidence of record is not sufficient to establish any intervening injury related to appellant's sedentary employment with the State of Montana.

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

[5] Docket No. 06-846 (issued September 14, 2007).