



modified.<sup>1</sup> The law and facts of the previous Board decision are incorporated herein by reference.

Appellant submitted medical evidence dated May 3 to October 4, 2001 from Dr. Daniel Rhoads, an attending Board-certified orthopedic surgeon, who noted that he had refused surgery and continued to complain of low back pain. A July 2, 2002 magnetic resonance imaging (MRI) scan of the lumbosacral spine demonstrated spondylotic changes at L4-5 and L5-S1. An electromyography (EMG) study on July 10, 2002 was abnormal, revealing evidence of right acute and chronic lower lumbar radiculopathy most likely involving the L4-5 nerve roots. In reports dated July 15 and August 16, 2002, Dr. James G. White, III, Board-certified in neurosurgery, listed appellant's complaints of back pain and that he refused surgery. He diagnosed a degenerative L4 disc and advised that he saw no reason why appellant could not work. On August 6, 2002 Dr. Russell L. Ingram, a Board-certified family practitioner, advised that appellant was unable to work. Dr. Mohammad Z. Qureshi, a Board-certified internist, provided treatment notes dated August 23, 2001 to November 12, 2003, which diagnosed chronic back pain. Dr. Ingram furnished form treatment notes from July 19 to November 18, 2005 which diagnosed low back pain and right sciatica. On August 2, 2005 he advised that appellant was unable to work because his right sciatic nerve was pinched by a slipped disc.

A May 24, 2006 functional capacity evaluation advised that, due to the limited nature of the testing, it was difficult to predict whether appellant could work an eight-hour day. In a December 7, 2006 report, Dr. Robert B. Poczatek, a Board-certified physiatrist, noted appellant's complaint of low back pain with radiation to the right lower extremity and diagnosed lumbar radiculopathy.

On April 17, 2007 Dr. Ingram advised that appellant had significant leg pain and weakness due to sciatic involvement from a herniated lumbar disc.<sup>2</sup> On October 1, 2007 he advised that appellant had increased weakness in his right leg. Dr. Ingram concluded that appellant's loss of use in the right leg had increased 50 percent over the prior few months and that pain limited him by 90 percent. On November 6, 2007 he appended the report stating that appellant's weakness was due to a slipped disc.

On April 9, 2008 appellant asked that his wage-earning capacity determination be modified. He submitted an incomplete Form CA-7 claim and a March 26, 2008 attending physician's report in which Dr. Ingram advised that appellant had a disc herniation at T5-6 and a disc bulge at L4-5 with degenerative disc disease. Appellant checked a form box "yes," indicating that the condition was employment related, stating "per history and VA reports over the last several years." Dr. Ingram advised that appellant was totally disabled from May 14,

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<sup>1</sup> Docket No. 02-1918 (issued August 7, 2003). The initial accepted condition was lumbar strain. The record also indicates that displacement of lumbar intervertebral disc was accepted. Appellant's light-duty position required that he feed metal cans into a can crusher, sort glass and plastic bottles into drums, sort recycled paper, answer the telephone, take requests for recyclables pick-up, pull nails from boards for pallet rebuild operation and drive a three-ton truck for recyclables pick-up. Appellant was terminated by the employing establishment effective February 10, 2002, at the expiration of his appointment.

<sup>2</sup> The Board notes that on September 13, 2007 the Office granted appellant a schedule award for permanent impairment of the right leg.

2002, the date of his first examination, to the present. On April 9, 2008 he reiterated his findings.

By letter dated April 22, 2008, the Office informed appellant of the grounds needed to establish modification of a wage-earning capacity determination.

In a July 15, 2008 decision, the Office found that appellant had no disability on or after April 9, 2008 causally related to his accepted injury.

On August 7, 2008 appellant requested a review of the written record and submitted evidence previously of record. In an August 12, 2008 report, Dr. Ingram advised that appellant declined recommended back surgery, was in constant right leg pain that was made tolerable with OxyContin and had had hip surgery. Physical findings included increased weakness and he noted that appellant had to push up from a chair to rise, dragged his right leg when walking and walked flexed at the waist 20 to 30 degrees to reduce pain. Dr. Ingram concluded that appellant was limited to minimal, sedentary work.

In a November 18, 2008 decision, an Office hearing representative found that appellant had not established that modification of the March 27, 2001 wage-earning capacity decision was warranted, as the opinion of Dr. Ingram was not sufficiently rationalized.

### **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.<sup>3</sup> 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 [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity."<sup>4</sup> 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.<sup>5</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>6</sup>

In addition, Chapter 2.814.11 of the procedure manual contains provisions regarding the modification of a formal loss of wage-earning capacity. The relevant part provides that a formal

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<sup>3</sup> *Katherine T. Kreger*, 55 ECAB 633 (2004).

<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

<sup>5</sup> *Stanley B. Plotkin*, 51 ECAB 700 (2000).

<sup>6</sup> *Id.*

loss of wage-earning capacity will be modified when: (1) the original rating was in error; (2) the claimant's medical condition has changed; or (3) the claimant has been vocationally rehabilitated. The party seeking modification of a formal loss of wage-earning capacity decision has the burden to prove that one of these criteria has been met. If the Office is seeking modification, it must establish that the original rating was in error, that the injury-related condition has improved or that the claimant has been vocationally rehabilitated.<sup>7</sup>

### ANALYSIS

The Office accepted that appellant sustained a lumbar sprain and displacement of a lumbar intervertebral disc. The Board notes that he did not submit evidence to show that the Office's March 17, 2001 wage-earning capacity determination was erroneous<sup>8</sup> or that he was retrained or otherwise vocationally rehabilitated. The Board further finds that the medical evidence submitted is insufficient to show that there was a material change in the nature and extent of his injury-related condition. The medical evidence includes reports from Drs. Rhoads, Qureshi and Poczatek which did not address whether appellant's injury-related condition had worsened or address his ability to work. In 2002, Dr. White advised that he saw no reason that appellant could not return to work. These reports do not establish a worsening of appellant's injury-related condition and are therefore insufficient to establish that the March 17, 2001 wage-earning capacity decision should be modified.<sup>9</sup>

The Board also finds Dr. Ingram's reports insufficient to meet appellant's burden. Dr. Ingram advised on August 6, 2002 that appellant was unable to work. On April 17, 2007 he advised that appellant had significant leg pain and weakness due to sciatic involvement from a herniated disc. In November 2007, Dr. Ingram advised that increased weakness caused a 50 percent increase in loss of use, with a 90 percent pain impairment due to a slipped disc. On March 26, 2008 he opined that appellant had been totally disabled since May 14, 2002 due to a disc herniation at T5-6 and a disc bulge at L4-5 with degenerative disc disease. On August 12, 2008 Dr. Ingram noted that appellant was in constant pain made tolerable with OxyContin and had had hip surgery. He reported physical findings of increased weakness, that appellant had to push up from a chair to rise, dragged his right leg when walking and walked flexed at the waist to reduce pain. Dr. Ingram concluded that appellant was limited to minimal, sedentary work.

The reports of Dr. Ingram are insufficient to establish that appellant's accepted condition has materially changed. He did not provide a reasoned explanation as to appellant's accepted lumbar strain on displaced lumbar disc had materially worsened such that he was unable to perform the duties of his light-duty position.<sup>10</sup> The Office has not accepted a thoracic spine condition or degenerative disc disease as employment related. The brief treatment records

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<sup>7</sup> See Federal (FECA) Procedure Manual, *supra* note 4 at Chapter 2.814.11 (June 1996).

<sup>8</sup> *Katherine T. Kreger*, *supra* note 3; *Sharon C. Clement*, 55 ECAB 552 (2004); Federal (FECA) Procedure Manual, *supra* note 4.

<sup>9</sup> See *Darletha Coleman*, 55 ECAB 143 (2003).

<sup>10</sup> *Id.*

described symptoms of increased pain and weakness and reported that appellant had had hip surgery but did not discuss this further.

Appellant has the burden of proof to show that a modification of his wage-earning capacity is warranted but has not submitted sufficient medical evidence to establish a material change in the nature and extent of his injury-related conditions. The Office therefore properly denied modification of the March 27, 2001 wage-earning capacity determination.<sup>11</sup>

### **CONCLUSION**

The Board finds that appellant did not meet his burden of proof to establish that a March 27, 2001 wage-earning capacity decision that reduced his compensation to zero should be modified.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated November 18 and July 15, 2008 are affirmed.

Issued: January 15, 2010  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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

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<sup>11</sup> *T.M.*, 60 ECAB \_\_\_\_ (Docket No. 08-975, issued February 6, 2009).