

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

R.M., Appellant

and

**DEPARTMENT OF THE ARMY, CORPS OF
ENGINEERS, Portland, OR, Employer**

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**Docket No. 09-1092
Issued: January 13, 2010**

Appearances:
Howard L. Graham, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 16, 2009 appellant, through his representative, filed a timely appeal from the February 7 and November 13, 2008 merit decisions of the Office of Workers' Compensation Programs, which terminated his compensation for wage loss on the grounds that his employment injury no longer prevented him from returning to his date-of-injury position. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.

ISSUES

The issues are: (1) whether the Office met its burden of proof to terminate appellant's compensation for disability; and if so, (2) whether appellant has met his burden to establish that his August 17, 1997 employment injury continues to cause disability.

FACTUAL HISTORY

On August 17, 1997 appellant, then a 56-year-old cook aboard the dredge Yaquina, sustained a traumatic injury to his low back when he placed a turkey in the oven. The Office accepted his claim for other joint derangement (lumbar) and a herniated nucleus pulposus.

Concurrent conditions not due to the injury included L4-5 degenerative joint disease and bilateral hand tremor. Appellant underwent an L4-5 discectomy on December 12, 1997. He received compensation for temporary total disability on the periodic rolls. In a May 8, 2000 decision, the Office reduced compensation for wage loss to reflect appellant's capacity to earn wages in the constructed position of food service worker.

In December 2007, Dr. L. David Rutberg, a neurosurgeon, examined appellant at the Office's request. He noted appellant's complaints and history of injury. Dr. Rutberg reviewed appellant's medical chart from before the 1997 work injury through 2003, and he noted appellant's past medical history. With respect to the statement of accepted facts and the diagnostic code given for intervertebral disorder with myelopathy, he made the following observation:

"I would hasten to add that that is almost correct, but it should be intervertebral disc disorder with radiculopathy for at the level of L4-5 there is no longer a myelos or a spinal cord, but rather it is just the cauda equine or the collection termed the horse tail of nerve roots, hence it would be a radiculopathy and not a myelopathy."

Dr. Rutberg reviewed appellant's systems and described his findings on physical and neurologic examination. He diagnosed, among other conditions, status post left L4-5 discectomy, more probably than not, work related. After reviewing the Office's statement of accepted facts, Dr. Rutberg addressed the questions presented, including whether appellant continued to suffer residuals of the accepted diagnosed conditions:

"It is the considered ... opinion of this reviewing neurosurgeon that the patient does not continue to suffer residuals of the diagnosed conditions, either by direct cause, aggravation, precipitation or acceleration. His currently continuing problem is primarily myalgic and not neurologic or neuropathic."

Dr. Rutberg added that appellant's current physical limitations were related to his obesity and his coronary problems, which were not work related.

On January 7, 2008 the Office issued a notice of proposed termination of compensation for wage loss. It provided appellant with a copy of Dr. Rutberg's report, which served as the medical basis for the proposed termination. The Office found that this report represented the weight of the medical evidence and demonstrated that the accepted work injury no longer prevented appellant from returning to his date-of-injury position as a cook.

In a decision dated February 7, 2008, the Office terminated appellant's compensation for wage loss.

Appellant requested reconsideration. He contended argued that Dr. Rutberg speculated that his current problem was primarily myalgic and not neurologic or neuropathic. Appellant argued that Dr. Rutberg did not use the accepted medical standard of "reasonable medical certainty" and supplied no medical rationale to support his conclusion. He argued that Dr. Rutberg failed to explain when the accepted condition ceased to be disabling or when appellant's obesity began to be the primary factor in his physical limitations. Appellant asserted

an inconsistency in the doctor's finding of no residuals of the accepted employment injury and his report of significant work restrictions. Appellant added that there was no medical evidence in his file less than seven years old, so the Office failed to request current medical evidence or to ensure that Dr. Rutberg based his report on current information.

Appellant also submitted new medical evidence supporting that he had ongoing low back pain and left leg radiculopathy and that his current disability was causally related to the 1997 employment injury.

In a decision dated November 13, 2008, the Office reviewed the merits of appellant's case and denied modification of its February 7, 2008 decision. It found that Dr. Rutberg's opinion represented the weight of the medical evidence.

On appeal, appellant reiterated many of the arguments raised before the Office.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of his duty.¹ "Disability" means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.² When the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his employment, he is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity.³

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.⁴ After it has determined that an employee has disability causally related to his federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer causally related to the employment.⁵

Once the employee's loss of wage-earning capacity 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. The burden of proof is on the party attempting to show modification of the award.⁶

¹ 5 U.S.C. § 8102(a).

² 20 C.F.R. § 10.5(f).

³ *Bobby W. Hornbuckle*, 38 ECAB 626 (1987).

⁴ *Harold S. McGough*, 36 ECAB 332 (1984).

⁵ *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

⁶ *Daniel J. Boesen*, 38 ECAB 556 (1987).

If the Office issues a formal decision on loss of wage-earning capacity, the rating should be left in place, and any proposed change in the claimant's entitlement to compensation for wage loss should be evaluated according to the customary criteria for modifying a formal loss of wage-earning capacity determination.⁷

ANALYSIS -- ISSUE 1

The Office accepted appellant's claim that he sustained a traumatic low back injury in the performance of duty on August 17, 1997. It paid compensation for the resulting disability, or incapacity to earn the wages he was receiving at the time of injury. On May 8, 2000 the Office reduced appellant's compensation to reflect a capacity to earn wages as a food service worker, but on February 7, 2008 it terminated all compensation for wage loss. The Office therefore has the burden of proof to justify the February 7, 2008 termination. Because a formal loss of wage-earning capacity determination was in place, its burden, under the circumstances presented here, is to show a material change in the nature and extent of the injury-related condition.

The Office terminated compensation on the basis of the December 2007 second opinion obtained from Dr. Rutberg, a neurologist. It provided Dr. Rutberg with appellant's case file and a statement of accepted facts so he could base his opinion on a proper factual and medical background. Dr. Rutberg found that appellant did not continue to have residuals of the accepted medical conditions. However, he did not offer much in the way of medical rationale for his stated conclusion. Dr. Rutberg reviewed the relevant medical chart and provided a description of his clinical findings, but did not adequately explain how he reached the conclusion that appellant did not have ongoing residuals. He did not incorporate his clinical findings or address appellant's current complaints and symptoms. Dr. Rutberg did not attempt to explain when or how residuals of the accepted disc herniation resolved or when he believed that might have happened. By not presenting a clearer picture of the status of appellant's accepted condition over the years, based on the record he reviewed and the examination conducted, he did not fully state the basis on which his opinion was formed.

Dr. Rutberg did state that appellant's continuing problem was primarily myalgic, not neurologic or neuropathic, but this suggests that some neurologic or neuropathic component is still playing a role. The question remains whether some of appellant's continuing problem is also neurologic or neuropathic or related to the accepted herniated disc and surgery. Dr. Rutberg's single sentence addressing this does not resolve the issue.

Because the lack of medical reasoning diminishes the probative value of Dr. Rutberg's opinion, the Board finds that the Office did not meet its burden of proof to terminate appellant's compensation. The Board will reverse the Office's February 7 and November 13, 2008 merit decisions.

The Board's disposition of the first issue on appeal renders the second issue moot.

⁷ See *L.C.*, 60 ECAB ____ (Docket No. 08-2271, issued August 6, 2009) (where the Office modified its loss of wage-earning capacity determination and terminated compensation for wage loss). Cf. *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sharon C. Clement*, 55 ECAB 552 (2004) (where the claimant requested resumption of compensation for total wage loss through a recurrence claim).

CONCLUSION

The Board finds that the Office has not met its burden of proof to justify terminating appellant's compensation for wage loss. The medical evidence was not sufficiently well reasoned to establish that modification of the formal determination of wage-earning capacity was warranted.

ORDER

IT IS HEREBY ORDERED THAT the November 13 and February 7, 2008 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: January 13, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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