United States Department of Labor
Employees' Compensation Appeals Board

M.B., Appellant	)	
and	)	**Docket No. 09-1923**
	)	**Issued: July 1, 2010**
DEPARTMENT OF THE NAVY, NORFOLK NAVAL SHIPYARD, Portsmouth, VA, 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 July 22, 2009 appellant filed a timely appeal from a May 13, 2009 decision of the Office of Workers' Compensation Programs which denied modification of a February 4, 2003 loss of wage-earning capacity determination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

ISSUE

The issue is whether appellant established that a modification of the Office's February 4, 2003 wage-earning capacity determination is warranted.

FACTUAL HISTORY

This is the third appeal to the Board. In an August 4, 2004 decision, the Board affirmed a January 30, 2004 Office decision that determined the constructed position of cashier 2 represented appellant's wage-earning capacity.[1] In an order dated July 25, 2008, the Board set

[1] Docket No. 04-909 (issued August 4, 2003).

aside Office decisions that denied appellant's recurrence of disability claim. The Board found that his claim for temporary total disability compensation raised the issue of whether modification of the February 4, 2003 loss of wage-earning capacity decision was warranted. The Board remanded the case to the Office to further consider this issue. The facts of the case are set forth in the Board's prior decision and are incorporated herein by reference.[2]

In a February 23, 2005 duty status report, Dr. Antonio Quidgley-Nevares, a treating Board-certified physiatrist, diagnosed mechanical low back pain and found that appellant was capable of working an eight-hour day with restrictions. He could lift up to five pounds for three hours a day; sit and stand intermittently for up to four hours a day; walk up to three hours a day; no climbing, kneeling, pushing, pulling or twisting; up to one hour of bending, stooping and reaching above the shoulder; and up to eight hours of simple grasping and fine manipulation.

In reports dated December 17, 2004 through April 11, 2005, Dr. Quidgley-Nevares diagnoses mechanical low back pain, sleep disorder and myofascial pain. Appellant related to Dr. Quidgley-Nevares that he believed that the work restrictions provided by his prior treating physician were inappropriate. Dr. Quidgley-Nevares recommended a functional capacity evaluation to determine appellant's work capability.

On March 22, 2005 the Office received a functional capacity evaluation summary report from Robert Collins, a physical therapist, who advised that appellant was capable of performing sedentary work.

On August 18, 2005 Dr. Mark Bergsten, a treating osteopath, diagnosed mechanical low back pain, sleep disorder, myofascial pain and bilateral lower extremity paresthesia restricted to the posterior calves.

In a May 5, 2006 report, Dr. Quidgley-Nevares noted that he had treated appellant since November 16, 2004. An August 11, 2004 magnetic resonance imaging (MRI) scan revealed no significant change from a January 7, 2004 scan. Dr. Quidgley-Nevares diagnosed mechanical low back pain with bilateral lower extremity posterior calf parasthesias. He advised that appellant's lower extremity paresthesias was "a significant change from his initial visit as he did not have paresthesias at that time." Work restrictions included no lifting more than five pounds, no overhead reaching and restrictions on standing, walking and sitting.

On May 11, 2006 appellant filed a claim for a recurrence of total disability beginning December 17, 2004.

On September 8, 2006 Dr. Quidgley-Nevares diagnosed lumbar spondylosis and radiculitis with a history of L5-S1 degenerative disc disease and myofascial pain syndrome. He stated that appellant had a significant change in his work-related injury as a result of the

[2] On July 20, 2000 appellant, then a 39-year-old apprentice welder, injured his mid and lower back while burning metal plate. The Office accepted the claim for a lumbar strain and assigned claim file number xxxxxx223. On December 15, 2000 appellant injured his back while pulling welding lines and moving a portable welding machine. The Office accepted the claim for a lumbar strain and assigned claim file number xxxxxx558. It accepted appellant claim for a recurrence of disability beginning April 13, 2001.

development of numbness and pain in both calves. A physical examination revealed 5/5 bilateral lower extremity strength; decreased bilateral calve sensation; tenderness in both calves and bilateral lumbar paraspinals, left rhomboid and thoracic paraspinals; and increased lumbosacral range of motion which was worse with rotation and extension. Dr. Quidgley-Nevares concluded that appellant was unable to return to his date-of-injury job due to low back and myofascial pain and claustrophobia.

On July 29, 2007 Dr. Quidgley-Nevares opined that appellant's myofascial pain syndrome was related to the accepted employment injury and a significant worsening of the accepted lumbar strain. He provided definitions of myofascial pain and spondylosis and how these conditions could be related to appellant's lumbar strain. Dr. Quidgley-Nevares noted that "the spondylosis and arthritic changes cannot be attributed to his initial injury with a degree of medical certainty," but concluded "the relationship between the myofascial pain and the lumbar sprain do show a clear worsening of his approved claim which in turn lead to the restrictions."

In a September 11, 2007 duty status report, Dr. Quidgley-Nevares advised that appellant was capable of working four hours per day with restrictions. The restrictions included four hours of sitting; one to two hours of pushing, pulling, standing and walking; one hour of reaching above the shoulder, a five-minute break every two hours; and no squatting, climbing or kneeling. Additional progress notes from Dr. Quidgley-Nevares listed appellant's compliant of chronic pain and diagnosed lumbago, lumbar strain, lumbar radiculopathy and chronic pain syndrome. A June 3, 2008 thoracic MRI scan revealed no abnormality while a cervical MRI scan showed degenerative changes.

By decision dated November 3, 2008, the Office denied appellant's claim for a recurrence of disability.

On November 7, 2008 appellant requested an oral hearing before an Office hearing representative and a telephonic hearing was held on March 2, 2009.

By decision dated May 13, 2009, the Office hearing representative affirmed the November 3, 2008 decision, as modified. The hearing representative found that there was no evidence that appellant had been retrained or vocationally rehabilitated. He also found the medical evidence insufficient to establish a material change in the nature and extent of appellant's accepted condition.

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.[3] 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 if a formal loss of wage-earning capacity decision has been issued, the rating should be left in place

[3] *D.M.*, 59 ECAB ___ (Docket No. 07-1230, issued November 13, 2007).

[4] *Katherine T. Kreger*, 55 ECAB 633 (2004); *see Robert H. Merritt*, 11 ECAB 64 (1959).

unless the claimant requests resumption of compensation for total wage loss.[5] 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.[6]

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.[7] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[8]

ANALYSIS

Appellant has not submitted sufficient medical evidence relevant to establish a material change in his accepted lumber spine condition that would render him unable to perform the duties of a cashier 2.[9] For a physician's opinion to be relevant on this issue, the physician must address the duties of the constructed position.[10] The medical evidence submitted by appellant following the loss of wage-earning capacity determination does not address how his accepted condition had materially changed such that he became unable to perform the duties of cashier 2.

The evidence received by the Office regarding modification of the February 4, 2003 wage-earning capacity determination includes a March 22, 2005 functional capacity report from Mr. Collins a physical therapist, an August 18, 2005 report from Dr. Bergsten, a treating osteopath and medical treatment records from February 23, 2005 through June 3, 2008 from Dr. Quidgely-Nevares, a treating Board-certified physiatrist.

Neither the March 22, 2005 functional capacity summary report nor the August 18, 2005 by Dr. Bergsten are sufficient to warrant modification of the wage-earnings capacity determination. Mr. Collins concluded that appellant was capable of performing sedentary work in the March 22, 2005 report while Dr. Bergsten provided no opinion as to appellant's work ability.

The Board also finds Dr. Quidgely-Nevares' medical reports are insufficient. Dr. Quidgely-Nevares advised in a February 23, 2005 duty status report, that appellant was able to work an eight-hour day with restrictions. Reports for the period December 17, 2004 through April 11, 2005 do not address the issue of appellant's work capability other than his opinion that

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995). *See Mary E. Marshall*, 56 ECAB 420 (2005).

[6] Federal (FECA) Procedure Manual, *supra* note 5. *See Harley Sims, Jr.*, 56 ECAB 320 (2005).

[7] *See D.M.*, 59 ECAB ___ (Docket No. 07-1230, issued November 13, 2007); *Stanley B. Plotkin*, 51 ECAB 700 (2000); *Tamra McCauley*, 51 ECAB 375 (2000); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

[8] *Id.; Jack E. Rohrabaugh*, 38 ECAB 186, 190 (1986).

[9] *See Phillip S. Deering*, 47 ECAB 692 (1996).

[10] *See Darletha Coleman*, 55 ECAB 143 (2003).

the work restrictions provided by his former treating physician were erroneous. In a May 5, 2006 report, Dr. Quidgley-Nevares advised that appellant's bilateral lower extremity paresthesias was "a significant change from his initial visit as he did not have paresthesias at that time." He provided work restrictions which included no lifting more than five pounds, no overhead reaching and restrictions on standing, walking and sitting. On September 8, 2006 Dr. Quidgley-Nevares opined that appellant had a significant change in his work-related injury as a result of the development of numbness and pain in both calves. He advised that appellant was unable to return to his date-of-injury job due to his low back pain, myofascial pain and claustrophobia. In his July 29, 2007 report, Dr. Quidgley-Nevares opined that appellant's myofascial pain syndrome was directly related to his accepted employment injury and a significant worsening of the accepted lumbar strain. He concluded that the development of myofascial pain and spondylosis constituted a worsening of appellant's condition, which he opined that could lead to restrictions. In a September 11, 2007 duty status report, Dr. Quidgley-Nevares stated that appellant was capable of working four hours a day with restrictions. He provided no opinion as to appellant's work capability in progress notes dated March 3 and June 3, 2008.

The Board finds that the reports of Dr. Quidgley-Nevares are insufficient to establish that appellant's accepted condition has materially changed. He did not provide a reasoned explanation as to how appellant's accepted lumbar strain had materially worsened such that he was unable to perform the duties of the constructed cashier 2 position. Dr. Quidgley-Nevares also did not address the restrictions of the cashier 2 position as applicable to appellant. The Office has not accepted degenerative disc disease, lumbago, radiculopathy, spondylosis or a myofascial pain condition as employment related. The brief treatment records described symptoms of lower back pain and bilateral lower extremity parasthesias in the calves but did not discuss this further. Dr. Quidgley-Nevares attributed the myofascial pain to appellant's lumbar strain and opined that it was a clear worsening of the condition. However, he did not provide a reasoned explanation supporting this conclusion beyond advising as to the definition of myofascial pain.

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. He, therefore, did not meet his burden of proof to establish modification of the February 4, 2003 wage-earning capacity determination.[11]

CONCLUSION

The Board finds that appellant did not submit sufficient evidence to justify modification of the Office's February 4, 2003 loss of wage-earning capacity determination.

[11] *T.M.*, 60 ECAB ____ (Docket No. 08-975, issued February 6, 2009); *Elbert Hicks*, 55 ECAB 151 (2003).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 13, 2009 is affirmed.

Issued: July 1, 2010
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