

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

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M.C., Appellant )

and )

**DEPARTMENT OF LABOR, MINE SAFETY &  
HEALTH ADMINISTRATION, Norton, VA,  
Employer** )

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**Docket No. 09-1974  
Issued: July 13, 2010**

*Appearances:*  
*Appellant, pro se*  
*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 July 29, 2009 appellant filed a timely appeal from a May 21, 2009 decision of the Office of Workers' Compensation Programs denying his request for modification of a loss of wage-earning capacity decision and authorization for surgery. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

**ISSUES**

The issues are: (1) whether appellant met his burden of proof to establish that modification of the March 30, 2001 loss of wage-earning capacity determination is warranted; and (2) whether the Office properly denied authorization of his request for surgery.

**FACTUAL HISTORY**

This is the third appeal before the Board. In a July 12, 2006 decision, the Board found that the cases were not in posture for decision and remanded them to the Office for proper

assemblage and consolidation of the claims.<sup>1</sup> The Board noted that appellant filed multiple claims for injuries to the same part of his body and the Office should have doubled the case files. The Board found that the medical evidence was split between the two case records and remanded the case for consolidation of appellant's prior claims to be followed by a decision on the merits. In the second appeal, the Board on January 21, 2009 issued an order remanding the case.<sup>2</sup> The Board set aside an October 30, 2007 hearing representative's decision, which affirmed a July 14, 2004 denial of appellant's recurrence claim and his request for authorization of cervical and lumbar fusion surgeries. The Board noted that the claim raised the issue of whether modification of a March 30, 2001 loss of wage-earning capacity determination was warranted. The facts of the case as set forth in the Board's prior orders are incorporated by reference.<sup>3</sup> The relevant medical and factual evidence is set forth.

On March 18, 2004 appellant filed a claim for a recurrence of total disability beginning March 11, 2004. On March 11, 2004 Dr. Dwight L. Bailey, a treating physician Board-certified in family medicine with a subspecialty in geriatric medicine, diagnosed progressive lumbar and cervical pain and the development of increasing upper extremity weakness and paresthesia. Dr. Bailey opined that, although appellant had returned to work, he was currently totally disabled due to progressive lower back and neck pain.

On March 29, 2004 Dr. Bailey diagnosed lumbar and cervical disc disease and fibrositis. Appellant had persistent weakness and pain in his lower extremities and numbness in both arms. On physical examination, there was cervical tenderness with pain on extension, rotation and flexion of the neck, diffuse lumbosacral tenderness, right and mid-left scapula trigger points, decreased lower extremity strength, decreased knee extension strength and good bilateral knee reflexes. Dr. Bailey noted that appellant complained of loss of sensation to his upper and lower extremities. He found that appellant was totally disabled. On April 15, 2004 Dr. Bailey diagnosed severe cervical and lumbar disc disease with herniated cervical and lumbar discs based on recent cervical and lumbar magnetic resonance imaging (MRI) scans. He reiterated that appellant was totally disabled.

In a report dated April 28, 2004, Dr. Morgan P. Lorio, an examining Board-certified orthopedic surgeon, diagnosed neck pain, bilateral upper extremity radiculopathy, cervical spine

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<sup>1</sup> Docket Nos. 06-157 and 06-158 (issued July 12, 2006).

<sup>2</sup> Docket No. 08-651 (issued January 21, 2009).

<sup>3</sup> On April 1, 1992 appellant, a 41-year-old mine safety and health inspector, filed a traumatic injury claim alleging that he injured his lower back on March 31, 1992 while moving office furniture. The Office assigned claim file number xxxxxx747 and accepted the claim for a low back strain. Appellant returned to his regular full-time work on April 5, 1993 with subsequent intermittent periods of disability. On July 29, 1994 the Office accepted a claim for a recurrence of disability beginning April 3, 1993. On January 5, 1996 appellant filed a traumatic injury claim alleging that he injured his neck, shoulders and lower back on January 4, 1996 due to his employment duties and assigned claim file number xxxxxx685. The Office accepted the claim for lumbar and cervical strains. On January 14, 1997 appellant filed a traumatic injury claim alleging that he injured his lower back, neck and shoulders on January 13, 1997 in the performance of duty. The Office accepted the claim for low back strain, aggravation of cervical and lumbar degenerative disc disease and L5-S1 radiculopathy and assigned claim file number xxxxxx209. Claim file numbers xxxxxx209, xxxxxx685 and xxxxxx747 were combined with xxxxxx747 as the master file number.

stenosis, low back pain with radiculopathy, degenerative disc disease changes at L3-S1, left side L5-S1 disc herniation, L5-S1 modic end plate changes and C4-7 degenerative with disc disease with bulging disc at C4-7. On physical examination, he noted a negative Spurling's test and bilateral cervical paraspinal, occipital, rhomboid, lumbar paraspinal and trapezius tenderness. Range of motion included 10 degrees flexion and extension with minimal difficulty and approximately 35 degrees left and right rotation with pain. A three-level anterior cervical fusion and C4-7 and PLIF L5-S1 was recommended.

In a May 13, 2004 report, Dr. Bailey diagnosed herniated cervical and lumbar discs due to the employment injury. He stated that appellant's disability was a recurrence and that a referral physician had recommended surgery. On a June 16, 2004 Dr. Bailey opined that appellant's condition had worsened since he had been on light-duty work.

In a June 24, 2004 report, Dr. Richard T. Sheridan, a second opinion Board-certified orthopedic surgeon, diagnosed resolved low back and cervical strains and resolved temporary aggravation of degenerative disc disease of the lumbar and cervical spines. He found that disability due to the March 11, 2004 work event had resolved. On physical examination, Dr. Sheridan noted no cervical tenderness and a full range of motion. As to the lumbar spine, he reported no abnormal flexion or rotation and no paravertebral spasm. Range of lumbar motion included 70 degrees flexion, 30 degrees extension and 30 degrees bilateral rotation. A review of a cervical MRI scan revealed C5-6, C6-7 and C4-5 disc bulges and spinal stenosis. A lumbar MRI scan showed L4-S1 narrowing with a L5-S1 extruded disc fragment lying inferior to the disc space at L5-S1. Dr. Sheridan advised that there were no objective findings to support any continued cervical condition. With regard to the proposed surgery, he found no evidence of active radiculopathy. Therefore, the recommendation for cervical and lumbar fusion surgery was not supported by clinical finding or medically necessary. Dr. Sheridan concluded that the July 11, 2002 functional capacity evaluation was no longer valid and advised that appellant was capable of performing the duties of a mine safety and health specialist.

In a July 21, 2004 report, Dr. Lorio reviewed Dr. Sheridan's report and disagreement with his conclusions. He reiterated that the surgery performed as would improve appellant's quality of life. Dr. Lorio noted that appellant's cervical spine MRI scan clearly demonstrated moderate to severe cervical stenosis which was secondary to soft tissue encroachment upon the cord. He related that appellant demonstrated a myelopathic gait and was symptomatic for stenosis. Dr. Lorio advised that the recommended surgery allowed the potential for recovery and without surgery it was not realistic to expect appellant to return to work.

On September 2, 2004 Dr. Bailey diagnosed lumbar and cervical disc disease with a L5-S1 herniated disc. He opined that appellant's back and neck conditions had worsened since his return to work.

On January 4, 2005 Dr. Bailey reiterated that appellant was disabled from work. On March 16, 2005 report he reported that appellant's cervical and lumbar disc disease exacerbations limited his ability to perform his work duties. Dr. Bailey related that appellant was unable to sit or stand for more than 15 to 20 minutes at a time or walk short distances. As a result of the exacerbation of pain, appellant has developed L3-4 and L6 tenderness, sacroiliac tenderness, some left leg weakness, C3-7 diffuse tenderness and decreased lumbar range of

motion. Dr. Bailey found that appellant was permanently and totally disabled due to lumbar and cervical disc disease.

In a dated May 21, 2009 decision, the Office denied appellant's request for modification of the March 30, 2002 wage-earning capacity determination and authorization for surgery. It found that the opinion of Dr. Sheridan, represented the weight of medical evidence.

### **LEGAL PRECEDENT -- ISSUE 1**

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.<sup>4</sup> Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.<sup>5</sup> 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 unless the claimant requests resumption of compensation for total wage loss.<sup>6</sup> 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>7</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>8</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>9</sup>

Section 8123(a) of the Federal Employees' Compensation Act provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.<sup>10</sup>

### **ANALYSIS -- ISSUE 1**

The Office accepted the conditions of low back and cervical strains, aggravation of lumbar and cervical degenerative disc disease, L5-S1 radiculopathy and authorized an L5-S1

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<sup>4</sup> *D.M.*, 59 ECAB \_\_\_\_ (Docket No. 07-1230, issued November 13, 2007).

<sup>5</sup> *Katherine T. Kreger*, 55 ECAB 633 (2004); *see Robert H. Merritt*, 11 ECAB 64 (1959).

<sup>6</sup> 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).

<sup>7</sup> Federal (FECA) Procedure Manual, *supra* note 6. *See Harley Sims, Jr.*, 56 ECAB 320 (2005).

<sup>8</sup> *See supra* note 4; *Stanley B. Plotkin*, 51 ECAB 700 (2000); *Tamra McCauley*, 51 ECAB 375 (2000); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

<sup>9</sup> *Id.*; *Jack E. Rohrbaugh*, 38 ECAB 186, 190 (1986).

<sup>10</sup> 5 U.S.C. § 8123(a). *See W.D.*, 60 ECAB \_\_\_\_ (Docket No. 09-188, issued August 21, 2009); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

laminotomy microdiscectomy. Appellant did not submit evidence showing that the Office's March 31, 2001 wage-earning capacity determination was erroneous. Rather, he requested a resumption of compensation for total wage loss beginning March 11, 2004. Appellant contends that he is unable to perform the modified duties of a mine safety and health specialist. Because a formal decision of his loss of wage-earning capacity was in place when he filed the claim, the Office properly adjudicated the case as a request for modification of an established loss of wage-earning capacity.<sup>11</sup> There is no evidence of record that appellant has been retrained or otherwise vocationally rehabilitated.

Dr. Bailey submitted a report that diagnosed progressive lumbar and cervical pain and increasing upper extremity weakness and paresthesia which resulted in appellant's total disability. He reiterated his opinion that appellant was totally disabled due to his lumbar and cervical degenerative conditions. On June 16 and September 2, 2004 reports Dr. Bailey noted that appellant's condition had worsened since he had been on light-duty work. On March 16, 2005 he reiterated that appellant's cervical and lumbar disc disease limited his ability to perform his work duties and that he was permanently disabled from performing the duties of the selected position.

The Office referred appellant to Dr. Sheridan, for a second opinion examination. Dr. Sheridan found no objective evidence of any cervical condition and diagnosed resolved cervical and low back strains. He advised that the temporary aggravation of lumbar and cervical degenerative disc disease had also resolved. Dr. Sheridan opined that appellant was able to perform sedentary duty in the position rated. The Office found that the March 30, 2001 wage-earning capacity determination should remain undisturbed as there was insufficient evidence that appellant's condition had materially changed such that he was unable to perform the duties of a mine safety and health specialist.

The Board finds a conflict of medical opinion between Dr. Bailey, for appellant, and Dr. Sheridan, for the government, regarding the nature of appellant's residuals of his accepted conditions and capacity to perform the duties of the rated position. Section 8123(a) of the Act provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.<sup>12</sup> When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.<sup>13</sup> Therefore, the case will be remanded to the Office for resolution of the conflict.

On remand, the Office should refer appellant, the case record and an updated statement of accepted facts, to an appropriate Board-certified specialist to determine if his medical condition

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<sup>11</sup> See *Katherine T. Kreger*, *supra* note 5; *Sharon C. Clement*, 55 ECAB 552 (2004); Federal (FECA) Procedure Manual, *supra* note 7.

<sup>12</sup> 5 U.S.C. § 8123(a); *Y.A.*, 59 ECAB \_\_\_\_ (Docket No. 08-254, issued September 9, 2008); *Bryan O. Crane*, 56 ECAB 713 (2005).

<sup>13</sup> *M.A.*, 59 ECAB \_\_\_\_ (Docket No. 07-1344, issued February 19, 2008); *Elaine Sneed*, 56 ECAB 373 (2005); *Delphia Y. Jackson*, 55 ECAB 373 (2004).

has materially changed. Following this and any other development deemed necessary, it shall issue an appropriate decision on whether the March 30, 2001 wage-earning capacity determination should be modified.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8103 of the Act<sup>14</sup> provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances and supplies prescribed or recommended by a qualified physician, which the Office considers likely to cure, give relief, reduce the degree or the period of disability or aid in lessening the amount of the monthly compensation.<sup>15</sup> In interpreting section 8103, the Board has recognized that the Office has broad discretion in approving services provided under the Act.<sup>16</sup> The only limitation on the Office's authority is that of reasonableness.<sup>17</sup> Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.<sup>18</sup>

Section 8123(a) of the Act provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.<sup>19</sup>

### **ANALYSIS -- ISSUE 2**

As noted above, the Office accepted the conditions of low back and cervical strains, aggravation of lumbar and cervical degenerative disc disease, L5-S1 radiculopathy and authorized L5-S1 laminotomy microdiscectomy. On April 28, 2004 Dr. Lorio requested authorization for a three-level cervical fusion and PLIF L5-S1 surgery. The Office denied appellant's claim based on the opinions of Dr. Sheridan, a Board-certified orthopedic surgeon who performed a second opinion examination. The Board finds that there is a conflict in medical opinion between appellant's physician, Dr. Lorio and the Office's physician, Dr. Sheridan, as to whether the recommended surgeries to cervical and lumber spine are medically warranted.

Dr. Lorio diagnosed neck pain, bilateral upper extremity radiculopathy, cervical spine stenosis, low back pain with radiculopathy, degenerative disc disease changes at L3-S1, left side

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<sup>14</sup> 5 U.S.C. §§ 8101-8193.

<sup>15</sup> 5 U.S.C. § 8103; *see R.L.*, 60 ECAB \_\_\_\_ (Docket No. 08-855, issued October 6, 2008); *Thomas W. Stevens*, 50 ECAB 288 (1999).

<sup>16</sup> *A.O.*, 60 ECAB \_\_\_\_ (Docket No. 08-580, issued January 28, 2009).

<sup>17</sup> *D.C.*, 58 ECAB 629 (2007); *Mira R. Adams*, 48 ECAB 504 (1997).

<sup>18</sup> *L.W.*, 59 ECAB \_\_\_\_ (Docket No. 07-1346, issued April 23, 2008); *P.P.*, 58 ECAB 673 (2007); *Daniel J. Perea*, 42 ECAB 214 (1990).

<sup>19</sup> 5 U.S.C. § 8123(a). *See W.D.*, 60 ECAB \_\_\_\_ (Docket No. 09-188, issued August 21, 2009); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

L5-S1 disc herniation, L5-S1 modic end plate changes and C4-7 degenerative with disc disease with bulging disc at C4-7. Cervical fusion and lumbar fusion surgeries were recommended. On July 21, 2004 Dr. Lorio reviewed Dr. Sheridan's report and reiterated that surgery be performed as it would improve appellant's quality of life and without surgery, it was not realistic to expect his to return to work.

Dr. Sheridan determined that examination of appellant did not support the requested three-level cervical fusion or lumbar surgery. He noted that there was no evidence of active radiculopathy and no clinical evidence to support that such surgery was medically necessary.

The case will be referred to an impartial medical specialist to resolve the conflict regarding the necessity of the requested surgery.<sup>20</sup> On remand, the Office should refer appellant, together with the case file and the statement of accepted facts, to an appropriate specialist for an impartial medical evaluation. After such further development as it deems necessary, the Office should issue an appropriate decision regarding appellant's request for surgery.

### **CONCLUSION**

The Board finds that this case is not in posture for a decision as to whether modification of appellant's wage-earning capacity determination is warranted. The Board further finds that the case is not in posture for a decision regarding whether surgery is warranted for treatment of his cervical and lumbar spine.

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<sup>20</sup> See *supra* note 12.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 21, 2009 is set aside and remanded for further proceedings consistent with the above opinion.

Issued: July 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