United States Department of Labor
Employees' Compensation Appeals Board

I.B., Appellant	)	
	)	**Docket No. 09-1887**
and	)	**Issued: June 23, 2010**
DEPARTMENT OF DEFENSE, NAVAL AIR STATION, Alameda, CA, 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 July 15, 2009 appellant filed a timely appeal of a February 10, 2009 decision of the Office of Workers' Compensation Programs denying modification of his wage-earning capacity determination.[1] Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly denied modification of appellant's February 1, 2000 wage-earning capacity determination.

On appeal, appellant contends that there were errors in the Office's determination of his wage-earning capacity and that he should have been permitted to pursue self-employment.

[1] On June 3, 2009 an Office hearing representative found that appellant's claim for augmented compensation was not in posture for a decision and remanded the case to the Office for further development. The Board has no jurisdiction to consider this issue as it is an interlocutory matter before the Office. *See* 20 C.F.R. § 501.2(c). *See also Scott R. Walsh*, 56 ECAB 353 (2005).

FACTUAL HISTORY

This case has previously been before the Board. On March 21, 2008 the Board set aside the Office's September 10, 2007 nonmerit decision denying appellant's request for reconsideration as untimely and failing to show clear evidence of error.[2] The case was remanded for a determination as to whether the evidence established that modification of a February 1, 2000 wage-earning capacity determination was warranted.

On July 20, 1993 appellant filed a traumatic injury claim alleging a neck injury when he fell on the front steps of the employing establishment. His claim was accepted for neck contusion, cervical sprain and disc dislocation/bulge at C5-6 and he was placed on the periodic rolls.

In an April 29, 1994 report, Dr. Eugene Mar, an attending physician, stated that appellant's condition was permanent and stationary. He diagnosed C5-6 central and right paracentral disc protrusion encroaching on the right lateral recess and right lateral foramen at that level. Dr. Mar found no evidence of cervical radiculopathy. Motor, sensory and reflexes of the upper extremity were within normal limits. In a May 6, 1994 work capacity evaluation, Dr. Mar found that appellant was able to work eight hours a day; however, he was permanently restricted from sitting for prolonged periods of time driving a truck and from driving a vehicle for more than 30 minutes at a time. He noted that appellant was a candidate for vocational rehabilitation. On June 21, 1994 appellant was referred for vocational rehabilitation counseling and placement.

In January 1996, appellant notified the Office that his cervical condition had worsened as he was experiencing severe pain in his neck and right shoulder. As Dr. Mar had moved to an unknown location, appellant sought approval for treatment by another physician. On January 25, 1996 the Office advised him that he had the right to choose his own physician.

In an April 5, 1996 report, Dr. S. Weisner, a treating physician with Kaiser Permanente, listed findings on examination. Cervical range of motion was decreased by 50 percent in all directions. Appellant had mild pain with palpation to the posterior cervical area. Spurling's maneuver caused pain in the base of the neck bilaterally. Dr. Weisner diagnosed cervical dysfunction.

In a May 1, 1996 report, Dr. Joseph M. Grant, a Board-certified orthopedic surgeon, provided a history of injury and treatment and findings on examination. He noted that appellant had experienced increased shoulder and neck pain over the previous several months. On examination, Dr. Grant found restriction in cervical range of motion mildly to the right causing some right trapezius pain. There was painful arc of motion of the right shoulder above 120 degrees of forward flexion and limitation of internal and external rotation. Dr. Grant diagnosed cervical spondylosis with mild radicular pain and right shoulder impingement syndrome. He recommended physical therapy for strengthening and range of motion of the shoulder as well as cervical spine stabilization. On June 5, 1996 Dr. Grant stated that appellant's neck condition precluded heavy work and repetitive overhead lifting.

[2] Docket No. 08-73 (issued March 21, 2008).

Pursuant to vocational rehabilitation services appellant received funds to obtain his bachelor's degree, which was projected to be completed within three semesters. An Office rehabilitation specialist reported on May 10, 1999 that, after 18 months, appellant had not completed his degree and it was uncertain as to what was needed to graduate. The Office directed the rehabilitation counselor to begin placement services in June 1998. Although appellant received more than 90 days of placement assistance, he failed to secure employment.

The rehabilitation specialist identified the position of assistant manager -- truck terminal (Department of Labor's *Dictionary of Occupational Titles* No. 184.1670110) as vocationally suitable and reasonably available in appellant's commuting area, based upon a local labor market survey. The counselor found the job vocationally suitable in light of appellant's educational background and more than 10 years of trucking industry experience. He stated that the position, which was classified as sedentary, appeared to be suitable and medically based upon Dr. Mar's May 1994 report. The counselor noted that there did not appear to be any current medical evidence of record and that it was unclear whether appellant was still under active medical treatment. With respect to the salary of the selected position, the rehabilitation specialist noted entry level wages in the area and found that appellant was capable of earning $576.92 a week in the position.

By letter dated August 9, 1999, the Office notified appellant that it proposed to reduce his compensation on the grounds that he was capable of earning $576.92 a week as an assistant manager -- truck terminal. It based its determination of his physical capacity to perform the duties of the position on Dr. Mar's March 14, 1994 report.

In a February 1, 2000 decision, the Office reduced appellant's compensation to reflect his wage-earning capacity as an assistant manager -- truck terminal with wages of $576.92 a week. It found that the constructed position represented his wage-earning capacity and was physically suitable based on Dr. Mar's May 1994 restrictions.

In an undated letter received on May 3, 2007, appellant noted that his circumstances had proven that he was virtually unemployable due to his worsened physical condition. In an undated letter received by the Office on June 12, 2007, he requested reconsideration of the February 1, 2000 wage-earning capacity decision. Appellant argued that the original decision was in error and that he was not capable of work as his accepted cervical condition had significantly worsened. He submitted medical reports dated July 25 and August 22, 2003 and March 7 and June 13, 2007 from Dr. Grant, which addressed his cervical and shoulder conditions.

In a June 5, 2008 decision, the Office denied modification of the February 1, 2000 wage-earning capacity determination on the grounds that the evidence failed to establish that the original rating was in error or that appellant's medical condition had worsened such that he was incapable of performing the duties of the selected position.

On June 23, 2008 appellant requested an oral hearing. In an April 30, 2008 report, Dr. James H. Rhee, a Board-certified physiatrist, noted that he had limited involvement with appellant and was unable to make any recommendations regarding the type of suitable employment.

On February 10, 2009 an Office hearing representative affirmed the June 5, 2008 decision finding that a modification of the February 1, 2000 wage-earning capacity was not warranted.

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.[3]

Section 8115(a) of the Federal Employees' Compensation Act[4] provides that, if actual earnings of the employee do not fairly and reasonably represent his or her wage-earning capacity or if the employee has no actual earnings, the wage-earning capacity as appears reasonable under the circumstances is determined with due regard to: (1) the nature of the injury; (2) the degree of physical impairment; (3) his or her usual employment; (4) age; (5) his or her qualifications for other employment; (6) the availability of suitable employment; and (7) other factors or circumstances which may affect wage-earning capacity in his or her disabled condition.[5]

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."[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]

The Office must initially determine appellant's medical condition and work restrictions before selecting an appropriate position that reflects his vocational wage-earning capacity. The Board has stated that the medical evidence upon which the Office relies must provide a detailed

[3] *Katherine T. Kreger*, 55 ECAB 633 (2004).

[4] 5 U.S.C. §§ 8101-8193.

[5] *Id.* at § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

[7] *Stanley B. Plotkin*, 51 ECAB 700 (2000).

[8] *Id.*

description of appellant's condition.[9] Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.[10]

ANALYSIS

Appellant has the burden of proof to establish that modification of the February 1, 2000 wage-earning capacity determination was warranted.[11] The Board finds error in the 2000 determination that the Office failed to obtain reasonably current medical evaluation to determining whether the constructed position of assistant manager -- truck terminal was medically suitable to appellant's limitations.

The Office determined that the selected position was medically suitable on the grounds that the required duties of the position were within the restrictions provided by Dr. Mar in a May 6, 1994 report. It is well established that a wage-earning capacity determination must be based on a reasonably current medical evaluation.[12] Dr. Mar's report addressing appellant's work restrictions was issued nearly six years prior to the Office's February 1, 2000 decision. It does not constitute probative medical opinions that the selected position of assistant manager -- truck terminal was suitable to appellant's physical capacity to perform the duties of the job. In January 1996, appellant notified the Office that his cervical condition had worsened and he sought approval for treatment by another physician as Dr. Mar had moved to an unknown location. He provided 1996 reports from Dr. Grant, who addressed appellant's complaints of increasing cervical and shoulder pain and recommended restrictions. The report of the rehabilitation counselor who selected the position noted the absence of any current medical report. The Office relied on the 1994 report of Dr. Mar in making its wage-earning capacity determination. As it failed to secure a current medical opinion on appellant's capacity to perform the duties of the selected position, the Board finds that the Office did not discharge its burden of proof to reduce his wage-loss compensation. The Board will reverse the Office hearing representative's February 10, 2009 decision.[13]

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[9] *See William H. Woods*, 51 ECAB 619 (2000); *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

[10] *See M.A.*, 59 ECAB ___ (Docket No. 07-349, issued July 10, 2008). *See Carl C. Green, Jr.*, 47 ECAB 737, 746 (1996) (six-month-old medical reports are reasonably current for purposes of wage-earning capacity determination); *Cf. Keith Hanselman*, 42 ECAB 680 (1991) (two-year-old medical report and year-old work restriction evaluation form were not reasonably current for wage-earning capacity determination); *Anthony Pestana*, 39 ECAB 980 (1988) (three-year-old medical evaluation is not reasonably current for wage-earning capacity determination).

[11] *See Stanley B. Plotkin, supra* note 7.

[12] *See supra* note 10.

[13] This case can be distinguished from *M.A.*, 59 ECAB ___ (2008), where the Board found that the Office properly determined the employee's wage-earning capacity effective April 17, 2005 based on medical restrictions dated May 1, 2000. In *M.A.*, the employee's attending physician continued to treat him and submitted periodic reports through February 12, 2004 reaffirming the May 1, 2000 restrictions. In the instant case, there is no evidence that Dr. Mar examined appellant after his May 6, 1994, when he provided the recommended restrictions upon which the original February 1, 2000 wage-earning capacity determination was based nor did he reaffirm his original restrictions. In fact, the record reflects that Dr. Mar moved his practice and appellant was unsuccessful in his attempts to locate him for further treatment.

CONCLUSION

The Board finds that the Office improperly denied modification of the February 1, 2000 wage-earning capacity determination, as the original decision was erroneous. The Board finds that the Office did not meet its burden of proof in reducing appellant's compensation benefits, because it relied on outdated medical evidence to establish that he had the capacity to perform the selected position of assistant manager -- truck terminal.[14]

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 10, 2009 is reversed.

Issued: June 23, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[14] The Board notes that the issue raised by appellant on appeal regarding his entitlement to reimbursement for his last semester at college pursuant to the vocational rehabilitation plan is not before the Board.