

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

S.B., Appellant)
and) Docket No. 10-1018
DEPARTMENT OF HOMELAND SECURITY,)
TRANSPORTATION SECURITY) Issued: April 8, 2011
ADMINISTRATION, Oakland, CA, Employer)

)

Appearances:

Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 3, 2010 appellant filed a timely appeal from a February 1, 2010 merit decision of the Office of Workers' Compensation Programs. Pursuant to the Federal Employees' Compensation Act¹ and 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 appellant established that a modification of the March 7, 2006 wage-earning capacity determination was warranted.

FACTUAL HISTORY

On December 16, 2003 appellant, then a 35-year-old security screener, filed a traumatic injury claim (Form CA-1) alleging that he sustained a right shoulder injury on

¹ 5 U.S.C. § 8101 *et seq.*

December 15, 2003. He picked up a bag and felt a pop in his right shoulder. The Office accepted the claim for a right shoulder sprain, acromioclavicular strain/sprain and right rotator cuff tear. Appellant underwent right shoulder surgery on April 8, 2004. He received compensation for wage loss and was referred for vocational rehabilitation services.

In a report dated November 14, 2005, a rehabilitation specialist advised that appellant had begun work as an investigator for a private company on October 24, 2005 at \$13.00 per hour. By report dated December 14, 2005, the rehabilitation specialist noted that appellant would receive a promotion in the next pay period to \$18.00 per hour.

The Office prepared a wage-earning capacity worksheet finding that the current pay rate for the date-of-injury position was \$665.77. By decision dated March 7, 2006, it determined that appellant had actual earnings of \$720.00 per week, which fairly and reasonably represented his wage-earning capacity. The Office found that he had no loss of wage-earning capacity and his compensation for wage loss was reduced to zero.

On June 20, 2009 appellant claimed a recurrence of disability commencing June 14, 2009. He stated that the pain in his right shoulder progressively worsened.

In a report dated June 22, 2009, Dr. Wesley Chan, a physiatrist, provided a history that appellant initially injured his right shoulder in a lifting incident in 2003. He provided results on examination and diagnosed right shoulder impingement, status post surgical correction of a labral tear. On June 29, 2009 Dr. Chan stated that over the past year appellant's right shoulder pain had become progressively worse. He diagnosed right shoulder strain and impingement, stating that appellant could continue with his current work restrictions. Dr. Chan opined that "this represents a flare up of his previous injury to his right shoulder as I am not able to identify any new injury." In a report dated August 3, 2009, he diagnosed right shoulder impingement and stated that appellant was feeling "about the same." Dr. Chan noted that appellant denied any new injury or trauma to the right shoulder.

By decision dated August 17, 2009, the Office denied modification of the 2006 wage-earning capacity determination. It found the medical evidence was not sufficient to establish an employment-related disability commencing June 14, 2009.

Appellant requested a telephonic hearing before an Office hearing representative, which was held on November 10, 2009. At the hearing, he addressed his self-employment as an investigator in April 2009.

In a report dated October 12, 2009, Dr. Bradley Crow, an orthopedic surgeon, provided a history and results on examination. He diagnosed chronic right shoulder pain. On November 9, 2009 Dr. Crow advised that appellant would undergo right shoulder arthroscopic surgery. The record establishes that appellant underwent surgery on December 31, 2009.

By decision dated February 1, 2010, the Office hearing representative affirmed the August 17, 2009 decision. The hearing representative found appellant did not establish that modification of the wage-earning capacity determination was warranted.

LEGAL PRECEDENT

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.² The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.³

ANALYSIS

In the present case, the Office issued a wage-earning capacity determination on March 7, 2006 based on appellant's actual earnings as a private investigator. Appellant filed a claim for compensation commencing June 14, 2009. As the March 7, 2006 wage-earning capacity determination was in place on June 14, 2009, the issue is whether the Office should modify the existing wage-earning capacity determination.⁴

With respect to the standard for modification, appellant did not argue or submit evidence that the original determination was erroneous. The evidence does not establish that appellant had been retrained or otherwise vocationally rehabilitated since the March 7, 2006 decision. Appellant did submit medical evidence with respect to his right shoulder condition. The issue is whether the medical evidence established a material change in the nature and extent of the employment-related condition.

Appellant received treatment from Dr. Chan on June 22, 2009, with a diagnosis of right shoulder impingement. The Board notes that this is not an accepted employment-related condition. Appellant's right shoulder impingement must be established as causally related to the December 15, 2003 employment injury, and the medical evidence must establish a material change in the condition. Dr. Chan did not provide any opinion, with supporting medical rationale, on causal relationship to the employment injury.⁵ He generally listed a history of a 2003 injury. While Dr. Chan stated that appellant denied any trauma or new injury, he did not explain the relationship between the diagnosed condition in June 2009 to the December 15, 2003 employment injury. Having symptoms after an employment injury is not sufficient, without supporting rationale, to establish causal relationship.⁶ Dr. Chan did not establish a material

² *Sue A. Sedgwick*, 45 ECAB 211 (1993).

³ *Id.*

⁴ See *K.R.*, Docket No. 09-415 (issued February 24, 2010).

⁵ Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on the issue of whether there is a causal relationship between a diagnosed condition and the identified employment factor. The opinion of the physician must be based on a complete factual and medical background, must be of reasonable medical certainty and supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant. *Jennifer Atkerson*, 55 ECAB 317, 319 (2004).

⁶ See *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996) (because the employee is symptomatic after an injury is not sufficient to establish causal relationship without supporting rationale).

change in an employment-related condition. In a June 29, 2009 report, he referred to a flare up, but he indicated that the work restrictions remained unchanged. Dr. Chan's subsequent reports do not establish a material change in the injury-related condition.

As to the December 31, 2009 surgery performed by Dr. Crow, there is no probative evidence that the need for surgery was causally related to the 2003 employment injury. Dr. Crow diagnosed a chronic right shoulder pain, but did not provide a rationalized medical opinion on causal relationship to the accepted conditions. He did not address the need for additional surgery in 2009 or how there had been a material change in appellant's conditions since the prior surgery of 2004.

The Board finds that the medical evidence of record does not establish a material change in an employment-related condition on or after June 14, 2009. It is appellant's burden to establish a modification of a wage-earning capacity determination is warranted. For those reasons, the Board finds appellant did not meet his burden of proof.⁷

CONCLUSION

The Board finds appellant did not establish that modification of the March 7, 2006 wage-earning capacity determination was warranted.

⁷ The Board's jurisdiction is limited to evidence that was before the Office at the time of the February 1, 2010 final decision. 20 C.F.R. § 501.2(c)(1). Evidence received after that date will not be reviewed by the Board on this appeal.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 1, 2010 is affirmed.

Issued: April 8, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

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