United States Department of Labor
Employees' Compensation Appeals Board

E.C., Appellant	)	
and	)	**Docket No. 10-766**
	)	**Issued: January 21, 2011**
DEPARTMENT OF THE NAVY, NAVAL AIR SYSTEMS COMMAND, Patuxent River, MD, Employer	)	

Appearances:
Norman F. Nivens, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 27, 2010 appellant, through his attorney, filed a timely appeal from the August 26, 2009 merit decision of the Office of Workers' Compensation Programs denying his claim for a period of disability and for modification of a 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 case.

ISSUE

The issue is whether appellant met his burden of proof to modify the Office's wage-earning capacity determination or to establish that he had total disability during the period January 1, 1999 to August 30, 2008.

FACTUAL HISTORY

The Office accepted that on April 24, 1962 appellant, then a 34-year-old truck driver, sustained a lumbar sprain and aggravation of spondylolisthesis (L4 on L5) with myelopathy due

to pulling a heavy box from one end of a truck to another.[1] He underwent several authorized lumbar surgeries and received compensation from the Office for periods of disability. On June 11, 1970 appellant underwent spinal fusion surgery at L4 through S1. He underwent hemilaminectomy, foraminotomy and microdissection surgery at L2-3 on May 16, 1991 and fusion surgery with instrumentation at L2 through L5 on April 9, 1992. The procedures were authorized by the Office and were performed by Dr. George F. Martin, an attending Board-certified neurosurgeon.

In October 1981 Dr. Jerry L. Rasco, an attending Board-certified orthopedic surgeon, stated that appellant could work with restrictions including working up to 20 hours a week and lifting, pushing and pulling up to 10 pounds. In reports from 1982, he indicated that appellant's condition had not changed in any significant way. In August 1982 an Office medical adviser stated that Dr. Rasco's reports showed that appellant could work in the constructed position of telephone solicitor on a part-time basis. A state employment survey from May 1982 showed that the position was reasonably available in appellant's commuting area.

In a September 15, 1982 decision, the Office adjusted appellant's compensation to reflect its determination that he was capable of earning wages in the constructed position of telephone solicitor for 20 hours a week.

On September 26, 1994 Dr. Martin, an attending Board-certified orthopedic surgeon, removed appellant's lumbar instrumentation. The procedure was authorized by the Office. Due to increased disability caused by this work-related surgery, appellant received disability for total disability beginning September 26, 1994.[2] In a January 17, 1995 report, Dr. Martin indicated that appellant was again capable of performing work as a telephone solicitor. Effective March 15, 1995, appellant's compensation was adjusted to reflect his ability to work as a telephone solicitor for 20 hours a week.

In a May 12, 1995 report, Dr. Martin stated that appellant did not have any abnormal motion of his lumbar spine and noted that he had "a solid fusion of L2 to S1." Appellant reported having pain up and down his spinal axis. In a June 20, 1996 report, Dr. Donald Van Fossan, an attending Board-certified neurologist, indicated that appellant reported pain over his lumbosacral spine but noted that straight leg raising was negative and muscle and sensory tests were normal. Appellant complained of diffuse pain throughout the examination but Dr. Van Fossan did not find him to be in any acute distress and found he was able to sit for over an hour.

In March 11 and April 1, 1998 form reports, Dr. Mark N. Taylor, a Board-certified occupational medicine physician with Kaiser Permanente, stated that appellant had "total disability" and was "not fit for any work." Appellant had reported that he took a misstep and jarred his back and experienced increased symptoms. In a January 16, 1999 form report, Dr. Taylor stated that appellant had a flare-up of chronic pain and posited that he was "not

[1] Appellant stopped work around the time of his April 24, 1962 injury and did not return.

[2] On August 12, 1994 Dr. Martin stated that about six weeks after his surgery appellant would be able to work as a telephone solicitor.

capable of any work in my opinion." In an information disclosure form completed on June 10, 2003, Dr. Jestin Cheng, an attending Board-certified internist, indicated that appellant was "totally disabled and need letter stating his condition regarding his chronic back pain." On July 16, 2003 he stated that appellant was "a patient of mine who has been on permanent and total disability for over 30 years."

In a March 24, 2007 report, Dr. Kevin F. Hanley, an attending Board-certified orthopedic surgeon, indicated that appellant sustained a back disc injury at work on April 24, 1962 due to pulling a heavy cart filled with electrical equipment. He indicated that appellant's functional capabilities were very limited in that he could only sit or stand for a very brief period of time and walk for about 10 minutes. Dr. Hanley stated:

> "First of all, it is clear that [appellant] continues … original industrial injury in 1962. At the present time he is seen by a physician intermittently for medication monitoring and that is the only treatment he is receiving. I do not believe that further surgical intervention is reasonable. Objectively, [appellant] has marked limitation of range of motion. He has hypokinesis. [Appellant] has a positive straight leg raising test. Subjectively, he has chronic constant pain requiring heavy use of narcotic medication.
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> "Appellant is following a clinical course that is one of a downward spiral and he will not get better in the future but rather will continue to worsen. There is absolutely no way in the world that he is fit for any kind of work duty and clearly not fit for work as a part-time telephone solicitor. The amount of medication [appellant] is taking causes significant mentation problems, he [cannot] sit for long, he [cannot] bend, he [cannot] concentrat[e] and in my opinion it is clear, on the basis of this examination, that this gentleman is permanently and totally disabled from his work and that permanent total disability is a consequence of his April 1962 injury."

On September 18, 2007 appellant requested that the Office's wage-earning capacity determination be modified to reflect that he could not perform any work.

In a March 14, 2008 report, Dr. Hanley discussed appellant's multiple back surgeries which he believed occurred at the level of his accepted back condition. He noted his belief that there had been a material change in appellant's work-related condition and stated:

> "[Appellant's] objective findings today are limitation of range of motion of the spine, decreased neurologic function, pain with activities -- all of which, again, having nothing to do with the fact that he is 80 years old. Obviously the aging process leads to deterioration of the surrounding supporting structures of the spine and one's health in general, and one [cannot] deny that his capabilities from a functional standpoint today are limited because of his age, but that is not the primary reason why he has residual problems in his spine. He has residual problems in his spine because he was hurt on the job in 1962 and that he had to have surgeries to manage that problem. Those surgeries were, unfortunately, unsuccessful and caused him to worsen as opposed to get better.

> "[Appellant's] condition has changed -- not for the better but clearly has changed for the worse -- because the process of mechanical instability initiated by the 1962 industrial injury has lead to progressive and accelerated degeneration of the spinal axis. This is confirmed in imaging studies that have been done over the years…. I believed that [appellant] was unfit to do the work of a telephone solicitor at the time of my initial evaluation, he is clearly unfit now, and in the interim has not had any new or addition injury but rather has experienced the natural progression of his injured spinal axis, a process which would not have occurred simply on the basis of aging."

On April 15, 2008 appellant again requested that the Office's wage-earning capacity determination be modified.

In an August 27, 2008 report, Dr. Robert S. Ferretti, an attending Board-certified orthopedic surgeon, indicated that appellant's present diagnosis was chronic low back pain postlaminectomy syndrome. This diagnosis was deemed to be medically connected to factors of employment by direct cause. Dr. Ferretti indicated that the initial injury of a lumbar strain and disc disorder with a myelopathy resulted in four low back surgical procedures, with the development of progressive chronic pain syndrome, but no evidence of continuing active neurological involvement. The work-related factors of disability consist of the objective findings of a solid spinal fusion at L2 though the S1 level, accepted severe restriction in the range of motion of the back, flattening of a lumbar lordosis due to spinal effusion and restricted straight leg raising due to chronic hamstring tightness. Dr. Ferretti stated:

> "The prognosis should be considered very guarded in that there would be no anticipated permanent or long[-]term improvement in the chronic low back pain syndrome with any form of treatment. Medical treatment is limited to medications for symptomatic relief including narcotic provisions for chiropractic care for flares estimated six treatments a year, which seems to be the only treatment modality with results and temporary relief besides the medication.
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> "The period of total disability by history extends from 1969, at which time modified work was discontinued. At that time he should have been able to continue with modified work consistent with a telephone solicitor up until 1999 when his chronic low back pain syndrome progressed requiring narcotic medication and no other specific medical treatment indicated to relieve the pain, despite the studies showing a solid fusion and no neurological structure compression….
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> "I have reviewed the [j]ob [d]escription for telephone solicitor, part time. Based on my present evaluation, this 80-year-old individual has become unemployable, which is estimated to have begun in 1[9]99. This is due to a combination of a progression of the effects of his work injury and multiple surgeries with the development of chronic pain syndrome and age-related factors, including the progression of degenerative changes in the spine and deficits involving the speech, hearing and cognition with total disability divided equally 50/50 between work-related and naturally occurring factors."

In an October 15, 2008 letter, the Office advised appellant that beginning August 31, 2008 he would receive compensation for total disability based on the August 27, 2008 report of Dr. Ferretti. On November 13, 2008 appellant requested an adjustment to his compensation benefits retroactive to January 1999.

In a December 23, 2008 letter, the Office advised appellant that Dr. Ferretti did not provide adequate support in his August 27, 2008 report for the proposition that he had work-related total disability since January 1999. In a March 23, 2009 letter, counsel argued that the reports of Dr. Hanley and Dr. Ferretti, at the very least required remanding the case to the Office for further development of the evidence in relation to appellant's claim for modification of the Office's wage-earning capacity determination and his claim for total disability beginning in January 1999.

In an August 26, 2009 decision, the Office denied appellant's claim on the grounds that he had not shown that the Office's wage-earning capacity determination should be modified or that he had total disability during the period January 1, 1999 to August 30, 2008.

LEGAL PRECEDENT

Once a loss of wage-earning capacity is determined, a modification of such a determination is not warranted unless there is a material change in the nature and extent of the employment-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was in fact erroneous.[3] The burden of proof is on the party attempting to show the award should be modified.[4]

An employee seeking benefits under the Federal Employees' Compensation Act[5] has the burden of establishing the essential elements of his or her claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[6] The medical evidence required to establish a causal relationship between a claimed period of disability and an employment injury is rationalized medical opinion evidence.[7] However, it is well established that proceedings under the Act are not adversarial in nature, and while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.[8]

[3] *George W. Coleman*, 38 ECAB 782, 788 (1987); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

[4] *Jack E. Rohrabaugh*, 38 ECAB 186, 190 (1986).

[5] 5 U.S.C. §§ 8101-8193.

[6] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[7] *See Donna Faye Cardwell*, 41 ECAB 730, 741-42 (1990).

[8] *Dorothy L. Sidwell*, 36 ECAB 699, 707 (1985); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

ANALYSIS

The Office accepted that on April 24, 1962 appellant sustained a lumbar strain and intervertabral disc disorder with myelopathy. In a September 15, 1982 decision, it adjusted his compensation to reflect its determination that he was capable of earning wages in the constructed position of telephone solicitor for 20 hours a week. Appellant later claimed that the Office's wage-earning capacity determination should be modified and that he had total disability during the period January 1, 1999 to August 30, 2008 due to his work-related condition.

Before the Office and on appeal to the Board, counsel argued that the reports of Dr. Ferretti and Dr. Hanley, both attending Board-certified orthopedic surgeons, at the very least required remanding the case to the Office for further development of the evidence in relation to appellant's claim for modification of the Office's wage-earning capacity determination and his claim for total disability beginning in January 1999.

The Board notes that while none of the reports of Dr. Ferretti and Dr. Hanley are completely rationalized, they are consistent in suggesting that appellant's work-related condition had undergone a material change such that he could no longer earn wages in the constructed position of telephone solicitor, even on a part-time basis. The reports also suggest that for at least some period beginning in or after January 1999 appellant's work-related condition had worsened to the extent that he was unable to perform any work.

In an August 27, 2008 report, Dr. Ferretti provided an extensive discussion of appellant's work-related low back condition, including the long-term effects of several authorized surgeries, and posited that his work-related condition had materially worsened. He found that appellant should have been able to continue with part-time modified work consistent with a telephone solicitor position up until 1999 when his work-related chronic low back pain syndrome worsened to the extent that he required narcotic medication and no other specific medical treatment was indicated to relieve the pain. In March 24, 2007 and March 14, 2008 reports, Dr. Hanley also provided an extensive discussion of why he believed that appellant's work-related low back condition had materially worsened to the point that he could not work in the constructed position of telephone solicitor or perform any other type of work.

While the reports are not sufficient to meet appellant's burden of proof to establish his claim, they are sufficient to require the Office to further develop the medical evidence and the case record.[9]

Accordingly, the case will be remanded to the Office for further evidentiary development regarding whether appellant met his burden of proof to modify the Office's wage-earning capacity determination or to establish that he had total disability during the period January 1, 1999 to August 30, 2008. The Office should prepare a statement of accepted facts and obtain a medical opinion on this matter. After such development of the case record as the Office deems necessary, an appropriate decision shall be issued.

[9] *See Robert A. Redmond*, 40 ECAB 796, 801 (1989).

CONCLUSION

The Board finds that the case is not in posture regarding whether appellant met his burden of proof to modify the Office's wage-earning capacity determination or to establish that he had total disability during the period January 1, 1999 to August 30, 2008. The case is remanded to the Office for further development of the evidence.

ORDER

IT IS HEREBY ORDERED THAT the August 26, 2009 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: January 21, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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