

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

R.H., Appellant

and

**DEPARTMENT OF DEFENSE, SHARPE
DEPOT, Stockton, CA, Employer**

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**Docket No. 10-1738
Issued: March 2, 2011**

Appearances:

*Capp P. Taylor, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 18, 2010 appellant, through his attorney, filed a timely appeal of a March 8, 2010 merit decision of the Office of Workers' Compensation Programs denying his claim for additional compensation benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether appellant met his burden of proof to modify the Office's August 30, 1994 wage-earning capacity determination.

FACTUAL HISTORY

On July 25, 1990 appellant, then a 32-year-old woodworker, filed a traumatic injury claim alleging that he injured his back lifting a box and placing it inside a carton in the performance of duty. The Office initially accepted his claim for lumbar strain. Appellant filed a recurrence of disability on July 9, 1991 alleging that he required back surgery. The Office

accepted a herniated disc at L5-S1 and entered him on the periodic rolls. On August 18, 1991 appellant underwent a left hemilaminectomy and disc excision at L5-S1.

Appellant returned to light-duty work four hours a day on August 21, 1992. He stopped work on March 18, 1993 alleging an emotional condition.¹

By decision dated January 12, 1994, the Office granted appellant a schedule award for eight percent impairment of his left lower extremity.

Appellant participated in vocational rehabilitation services. By decision dated August 30, 1994, the Office reduced his compensation benefits based his actual earnings as a woodworker for four hours a day effective August 21, 1992. It found that this position fairly and reasonably represented his wage-earning capacity.

Dr. Leonard E. Forrest, a physician Board-certified in physical medicine and rehabilitation, examined appellant on February 21, 2005 and noted that his back symptoms had not changed.² Appellant reported increased leg symptoms including weakness and loss of control. Dr. Forrest reexamined him on February 7, 2007 and noted complaints of pain in the low back and down both legs as well as loss of control of the right leg. He recommended additional diagnostic studies. A magnetic resonance imaging (MRI) scan of March 1, 2007 revealed mild to moderate disc bulging at L5-S1 resulting in right-sided foraminal stenosis as well as degenerative disc disease at L3-4 and L4-5 with disc protrusions at both levels and nerve root impingement. Nerve conduction studies on March 12, 2007 demonstrated evidence of chronic radiculopathy involving the left lower extremity. Dr. Forrest examined appellant on March 12, 2007 and recommended medication. On March 21, 2007 he found that appellant was totally disabled and did not anticipate any improvement. Dr. Forrest examined him on April 4, 2007 and recommended physical therapy. Appellant returned to work in private employment in July 2007 working 37.5 hours a week.

Dr. Forrest examined appellant on June 18, 2008 and noted that appellant was terminated from his employment. He recommended additional testing. On June 23, 2008 appellant underwent electrodiagnostic testing which demonstrated a disc bulge at L3-4, L4-5 and L5-S1 with foraminal narrowing. Dr. Forrest reviewed this report and found that appellant had compression involving the right L5 nerve root and left L3 nerve compromise. He recommended injections. On September 17, 2008 Dr. Forrest noted that appellant underwent the first injection, but symptoms had recurred in his pelvis, left hip and groin. He stated that appellant's pain seemed to be worse and recommended additional studies. On September 24, 2008 appellant underwent an MRI scan which demonstrated a left-sided chondroid lesion in his hip. Dr. Forrest examined him on November 25, 2008 and noted his complaints of left foot pain and burning. He opined that appellant was not going to be able to do any meaningful, gainful employment.

Appellant filed a recurrence of disability on December 4, 2008. He stated that he stopped private sector work January 31, 2008 and that this was not a recurrence claim, but a worsening of

¹ Appellant has additional claim numbers xxxxxx776 and xxxxxx474.

² Dr. Forrest noted that he last examined appellant in August 2003.

his accepted employment injury. Appellant developed left side pain due to nerve damage which was permanent. In a letter received by the Office on December 15, 2008, he stated that his back condition had progressively worsened and that he had no ability to earn income. Appellant requested compensation for total disability.

In a letter dated February 6, 2009, the Office requested additional factual and medical evidence in support of appellant's claim. On February 13, 2009 appellant replied that he was claiming disability as of November 25, 2008. He alleged that, following his surgery, scar tissue developed and damaged the nerves in his spine resulting in loss of sensation to his left lower extremity. In a report dated January 28, 2009, Dr. Mark D. Netherton, a Board-certified anesthesiologist, noted appellant's July 1990 history of injury and listed his report of pain. He found radiation of pain in the L5-S1 nerve distribution into the left foot. Dr. Netherton diagnosed postlumbar laminectomy syndrome and lumbar plexus disorder.

Dr. Forrest completed a report on February 24, 2009 and opined that appellant's current condition was related to his July 25, 1990 employment injury. He stated that appellant had no new injuries only "some general worsening of the condition."

By decision dated March 26, 2009, the Office denied appellant's claim for recurrence of disability on January 31, 2008. It also denied modification of the August 30, 1994 wage-earning capacity decision. The Office found that the medical evidence did not provide an adequate factual background to establish a material change in the nature and extent of appellant's injury-related condition.

Dr. Forrest completed a form report on March 24, 2009 and reiterated that appellant was totally disabled.

Appellant requested a telephonic hearing on April 17, 2009. At the August 14, 2009 hearing, he described radiating pain that descended from his hip to his foot. On August 24, 2009 Dr. Forrest recommended new electrodiagnostic studies. Appellant underwent an MRI scan on September 1, 2009 which demonstrated disc space narrowing at L3-4 and stenosis and compression of the left third and fourth nerve roots. At L4-5 disc level he had disc protrusion with annular tearing and stenosis. The L5-S1 level demonstrated diffuse shallow protrusion of the disc material and potential compression of the S1 nerve root. In reports dated September 17, 2009, Dr. Forrest found that appellant's electrodiagnostic studies were consistent with acute and chronic radiculopathy. He stated that the acute findings represented a change from the 2007 study and possible L3 and L4 radiculopathies. Dr. Forrest advised that the new MRI scan demonstrated worsening on the left side including disc protrusion and spondylosis change. He recommended surgery for the findings at L3-4.

On October 15, 2009 Dr. Forrest stated that appellant had not experienced any new injuries to his low back since 1990. He compared appellant's MRI scans to find that his spinal condition was worsening. Dr. Forrest stated, "It is my opinion that the degenerative conditions as exhibited at L3-S1 are causally related to the original incident of July 25, 1990. It is not unusual for a surgical patient such as [appellant] to develop spinal disc problems adjacent to the surgical site and as such would be considered a natural progression of the original injury." He

provided work restrictions of change at will between sitting, standing, walking, no lifting from the floor, no carrying more than 20 pounds and occasional reaching overhead.

By decision dated November 13, 2009, an Office hearing representative noted that appellant returned to light-duty work and continued to work in the light-duty position. The Office then issued a retroactive wage-earning capacity determination based on this position in 1994. The Office hearing representative found that the medical evidence was not sufficiently rationalized to establish that appellant had sustained a material change in the nature and extent of the injury-related condition.

Dr. Steven C. Poletti, a Board-certified orthopedic surgeon, completed a report on November 4, 2009 and noted appellant's history of injury. He reviewed the diagnostic studies and diagnosed instability with radiculopathy secondary to disc disruption L5-S1 and L3-4.

Appellant, through his attorney, requested reconsideration on January 8, 2010 based on Dr. Forrest's October 15, 2009 report.

By decision dated March 8, 2010, the Office denied modification of its prior decisions. It reviewed the additional medical evidence and found it insufficient to support a causal relationship between appellant's current lumbar condition and his accepted employment injury.

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

Section 8115(a) of the Federal Employees' Compensation Act provides that the wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity.⁵ The Board has stated, generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.⁶ However, wage-earning capacity may not be based on an odd-lot or make-shift position designed for an employee's particular needs or a position

³ *K.S.* 60 ECAB ____ (Docket No. 08-2105, February 11, 2009); *George W. Coleman*, 38 ECAB 782, 788 (1987).

⁴ *Id.*

⁵ 5 U.S.C. § 8115(a).

⁶ *K.S.*, *supra* note 3; *Floyd A. Gervais*, 40 ECAB 1045, 1048 (1989). Disability is defined in the implementing regulations as the incapacity, because of an employment-related injury to earn the wages the employee was receiving at the time of the injury. 20 C.F.R. § 10.5(f). Once it is determined that the actual wages of a given position represent an employee's wage-earning capacity, the Office applies the principles enunciated in *Albert C. Shadrick*, 5 ECAB 376 (1953) in order to calculate the adjustment in the employee's compensation.

that is seasonal in an area where year-round employment is available.⁷ Wage-earning capacity may only be based on a temporary or part-time position if the position held by the employee at the time of injury was a temporary or part-time position.⁸

Office procedures direct that a wage-earning capacity determination based on actual wages be made following 60 days of employment.⁹ The procedures provide for a retroactive determination where an employee has worked for at least 60 days, the employment fairly and reasonably represents the claimant's wage-earning capacity and work stoppage did not occur due to any change in the claimant's injury-related condition.¹⁰

ANALYSIS

On appeal, appellant's attorney alleged that the Office did not properly weigh the new medical evidence and that Dr. Forrest's reports were sufficiently detailed, based on a proper factual background and well rationalized to establish a change in the nature and extent of appellant's injury-related condition.

Appellant has not alleged that the original wage-earning capacity determination was erroneous or that he was vocationally rehabilitated. Instead his argument is that he has experienced a material change in the nature and extent of his injury-related condition warranting modification of the August 30, 1994 wage-earning capacity determination. In support of his claim, appellant submitted reports from his attending physician, Dr. Forrest, dated February 24 and October 15, 2009 opining that appellant's current condition was related to his accepted 1990 employment injury. Dr. Forrest found general worsening of appellant's back and opined that the changes he found on MRI scans were related to appellant's 1990 employment injury. He stated, "It is not unusual for a surgical patient such as [appellant] to develop spinal disc problems adjacent to the surgical site and as such would be considered a natural progression of the original injury." This statement is the only medical reasoning offered by Dr. Forrest in support of his opinion that appellant's current condition is employment related rather than due to degenerative changes or private sector employment. While the medical opinion of a physician supporting causal relationship does not have to reduce the etiology of a disease or condition to an absolute certainty, neither can such opinion be speculative or equivocal.¹¹ Dr. Forrest's statement regarding the etiology of appellant's current back condition is speculative. He states that it is not unusual for a surgical patient to develop additional spinal problems, but did not offer a clear statement of why he believed this to be the case in appellant's situation. Dr. Forrest did not provide any discussion of any other explanation for appellant's condition and did not explain

⁷ *James D. Champlain*, 44 ECAB 438, 440-41(1993); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7a(1) (July 1997).

⁸ *Id.* at Chapter 2.814.7a(1), (3) (July 1997).

⁹ *Id.* at Chapter 2.814.7c (December 1993).

¹⁰ *Id.* at Chapter 2.814.7e (December 1993).

¹¹ *Samuel Senkow*, 50 ECAB 370 (1999).

why he felt that a surgery 20 years in the past would result in changes to appellant's spine which he found did not occur until after 2005.

For the previously listed reasons, the Board finds that Dr. Forrest's reports are not sufficient to meet appellant's burden of proof and the Office properly denied modification of its 1994 wage-earning capacity determination.

CONCLUSION

The Board finds that appellant has not met his burden of proof to modify the 1994 wage-earning capacity determination.

ORDER

IT IS HEREBY ORDERED THAT the March 8, 2010 decision of Office of Workers' Compensation Programs is affirmed.

Issued: March 2, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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