United States Department of Labor
Employees' Compensation Appeals Board

J.W., Appellant	)	
and	)	**Docket No. 11-167**
	)	**Issued: September 20, 2011**
U.S. POSTAL SERVICE, POST OFFICE, St. Louis, MO, 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 October 26, 2010 appellant, through his attorney, filed a timely appeal of a September 29, 2010 Office of Workers' Compensation Programs' (OWCP) merit decision. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 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 September 19, 2008 wage-earning capacity determination.

FACTUAL HISTORY

This case has previously been on appeal. On February 10, 2000 appellant, then a 36-year-old automobile mechanic, alleged that he hurt his lower back driving over bumps in the road on February 9, 2000. OWCP assigned File No. xxxxxx870 and accepted his claim for

[1] 5 U.S.C. § 8101 *et seq.*

lumbosacral strain on April 18, 2000. Dr. David Robson, a Board-certified orthopedic surgeon, and Dr. David Kennedy, a Board-certified orthopedic surgeon, performed bilateral lumbar laminectomy L3-4 and posterior spinal fusion with left iliac crest bone graft and steffe instrumentation at L3-4 on October 27, 2000. Dr. Robert Bernarid, a Board-certified orthopedic surgeon, performed an anterior L3-4 total discectomy, anterior L3-4 fusion with iliac crest graft and crushed cancellous bone on October 4, 2001. By decision dated November 19, 2003, OWCP found that appellant had been employed as a modified automotive technician since April 25, 2002 with wages of $757.00 a week. It found that this position fairly and reasonably represented his wage-earning capacity noting that his actual earnings exceeded those of his date-of-injury position. By decision dated December 1, 2003, OWCP granted appellant schedule awards for three percent impairment of each of his lower extremities. In a decision and order dated January 4, 2005,[2] the Board found that his actual earnings as a modified automotive technician fairly and reasonably represented wage-earning capacity and that he had no more than three percent impairment of each of his lower extremities for which he had received schedule awards.

Appellant filed a notice of traumatic injury on August 7, 2003 alleging that on August 5, 2003 he injured his low back pulling a floor jack with a vehicle on it. OWCP assigned File No. xxxxxx736 and accepted this claim for lumbosacral sprain on October 17, 2003. Appellant returned to light-duty work on October 28, 2003.

Appellant filed a claim on April 28, 2004 alleging that he injured his low back due to "getting up and down in the trucks and other duties." OWCP assigned File No. xxxxxx634 and accepted this claim for low back pain on June 4, 2004. This file number is the master file.

By decision dated October 26, 2006, OWCP denied appellant's request for permanent implantation of a pain pump. Appellant returned to work in private employment on May 18, 2008 working as a commercial accounts manager at AutoZone earning $12.80 per hour. His earnings statements noted that he worked approximately 80 hours during a two-week pay period at $12.80 per hour.

In a decision dated September 19, 2008, OWCP found that appellant's actual earnings as a commercial account manager for AutoZone with wages of $512.00 a week fairly and reasonably represented his wage-earning capacity. It noted that he had been employed since May 17, 2008 and that as he had worked for more than two months this position was suitable. OWCP further found that appellant had 55 percent wage-earning capacity and authorized compensation benefits.

In a note dated December 18, 2008, Dr. Hagop Tabakian, a physician specializing in pain management, examined appellant and diagnosed postlumbar laminectomy syndrome, lumbar radiculopathy, chronic low back pain, myofascial pain involving the lower back and hypertension. He stated that appellant had recently developed a sharp pain on both sides of his lower back. Appellant requested a lumbar brace due to postlaminectomy syndrome on December 21, 2008.

[2] Docket No. 04-1726 (issued January 4, 2005).

OWCP requested that appellant provide additional factual and medical evidence in support of his claim for recurrence of disability.

On January 5, 2009 appellant stated that his new supervisor at AutoZone had increased his work requirements, which exceeded his restrictions. For the first two months of private-sector employment, his supervisor was able to allow him to follow his established work restrictions. Appellant stated that a second supervisor required him to perform additional duties as his commercial work was decreasing. He stated that he could perform duties except for climbing ladders, putting up batteries, installing batteries and stocking shelves made his back, hips, legs and feet pain increase. Appellant's most recent supervisor, Tracy Barnum, began this position approximately four months into his employment and required him to perform all the duties available. He stated that, when he informed his supervisors that he could not perform the duties, Ms. Barnum would not accept his work restrictions and required new restrictions. Appellant consulted higher level supervisors who advised him to resign and put his reasons in writing. He then sought medical attention and Dr. A.J. Garces, a family practitioner, who removed him from work. In a note dated December 2, 2008, Dr. Garces stated that appellant was unable to work at his present job due to recurrent back pain. Appellant submitted statements from coworkers, Ronald Brommet and Aaron Bryant, supporting that appellant's work requirements increased and that Ms. Barnum did not attempt to apply his medical restrictions.

On May 17, 2007 Dr. Tabakian diagnosed postlumbar laminectomy syndrome and lumbar radiculitis. He stated, "[Appellant] has lumbar pain persistent after lumbar surgery. In addition he has radicular pain in both legs causing dysesthesia and occasional loss of motor control."

In a note dated January 22, 2009, Dr. Garces stated that appellant was unable to work due to excessive pain for an indefinite period. Appellant filed a claim for compensation on February 3, 2009 requesting benefits beginning December 2, 2008. In a letter dated February 27, 2009, OWCP requested additional and medical evidence in support of his claim explaining how his current condition was related to his accepted employment injuries and allowed 30 days for a response.[3]

On March 26, 2009 Dr. Tabakian noted that he had treated appellant for low back pain after failed back surgery. He stated that a few months after appellant returned to work he developed a new onset of pain in his lower back originating from his sacroiliac joints, which was different from his original pain. Dr. Tabakian stated that appellant was unable to tolerate his present work requirements and physical demands. Dr. Garces completed a note on April 1, 2009 and stated that appellant was unable to work due to recurrent back pain. He stated, "[Appellant] was taken off work because he reinjured his back by lifting over 15 pounds at work." Dr. Garces opined that appellant could not lift over 15 pounds, but could perform sedentary work.

[3] On June 14, 2007 appellant filed a claim for compensation requesting a schedule award. In a letter dated February 8, 2010, OWCP requested an impairment rating from his attending physician within 30 days. By decision dated March 23, 2010, it denied appellant's claim for a schedule award. Counsel requested an oral hearing. By decision dated August 20, 2010, the Branch of Hearings and Review remanded OWCP's March 23, 2010 decision addressing appellant's entitlement to a schedule award. By decision dated September 1, 2010, OWCP granted him schedule awards for 10 percent impairment of each of his lower extremities.

In a letter dated April 30, 2009, OWCP informed appellant that, as a formal wage-earning capacity decision was in place, he must submit sufficient evidence to establish that modification of that decision was appropriate. It provided him with a similar letter on February 8, 2010.

By decision dated April 1, 2010, OWCP denied appellant's claim for compensation from December 2, 2008 through December 3, 2009 finding that he had not submitted sufficient medical evidence to warrant modification of February 19, 2003 wage-earning capacity determination.

Counsel requested an oral hearing of this decision.

In a report dated June 18, 2010, Dr. Garces opined that appellant was totally disabled due to severe chronic unrelenting back pain. He stated that appellant's period of disability was indefinite and indicated that he could perform no activities.

Appellant testified at the oral hearing on July 12, 2010 regarding OWCP's April 1, 2010 decision. He noted that he began working at AutoZone on May 17, 2008 and that he earned $512.00 a week. Appellant stated that he stopped work on December 2, 2008 because he hurt his back again. He noted the change in managers and that he was required to perform more physically demanding duties including moving 3,000 rotors some of which weighed 75 pounds. Counsel stated that appellant had sustained a new injury at AutoZone and indicated that he was going to file a state workers' compensation claim.

By decision dated September 29, 2010, an OWCP hearing representative denied modification of the September 19, 2008 wage-earning capacity determination. The hearing representative found that appellant testified that he reinjured his back while performing the duties of his private-sector position, which would constitute the basis for consideration of a new injury based on new work factors rather than a worsened condition related to the original injury.

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.[4] Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn and not on actual wages lost.[5] Compensation payments are based on the wage-earning capacity determination, which remains undisturbed until properly modified.[6]

Modification of a standing wage-earning capacity 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

[4] 5 U.S.C. § 8115(a); *Lee R. Sires*, 23 ECAB 12, 14 (1971) (the Board held that actual wages earned must be accepted as the measure of a wage-earning capacity in the absence of evidence showing they do not fairly and reasonably represent the employee's wage-earning capacity); *K.R.*, Docket No. 09-415 (issued February 24, 2010).

[5] *K.R., id.*; *Roy Matthew Lyon*, 27 ECAB 186, 190 (1975). *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

[6] *See Sharon C. Clement*, 55 ECAB 552, 557 (2004).

erroneous.[7] OWCP'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. 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.[8] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[9]

The Board has held that OWCP may accept a limited period of disability without modifying a standing wage-earning capacity determination.[10] This occurs when there is a demonstrated temporary worsening of a medical condition of insufficient duration and severity to warrant modification of a wage-earning capacity determination.[11] This narrow exception is only applicable for brief periods of medical disability.

ANALYSIS

The issue is whether appellant has established a material change in the nature and extent of his injury-related condition warranting modification of the September 19, 2008 wage-earning capacity determination. OWCP has accepted that as a result of his three separate employment injuries he has sustained lumbar strain superimposed on his accepted surgeries of bilateral lumbar laminectomy L3-4 and posterior spinal fusion with left iliac crest bone graft and steffe instrumentation at L3-4 on October 27, 2000 and anterior L3-4 total discectomy, anterior L3-4 fusion with iliac crest graft and crushed cancellous bone on October 4, 2001. In the September 19, 2008 wage-earning capacity decision, it found that appellant's actual earnings as a commercial account manager for AutoZone with wages of $512.00 a week fairly and reasonably represented his wage-earning capacity. OWCP denied modification of this decision on September 29, 2010 finding that he had not submitted evidence establishing that the original decision was in error or that there was a material change in the nature and extent of the injury-related condition because the worsening was caused by his private-sector employment.

The Board finds that appellant has not submitted sufficient evidence to modify the wage-earning capacity decision. At the oral hearing, appellant testified that the original determination was correct noting that he worked at AutoZone for the period in question and that his earnings comported with those found by OWCP. He instead argued that the wage-earning capacity decision should be modified as he had an employment-related worsening of his accepted back conditions. Appellant submitted testimony and factual statements that his back condition worsened due to increasing physical requirements of his private-sector employment. He stated that Ms. Barnum required him to install batteries and stock shelves lifting up to 75 pounds.

[7] *Sue A. Sedgwick*, 45 ECAB 211, 215-16 (1993); *Elmer Strong*, 17 ECAB 226, 228 (1965).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995). *See also* FECA Transmittal 10-01 (issued October 5, 2009).

[9] *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

[10] *See Katherine T. Kreger*, 55 ECAB 633, 636 (2004).

[11] *Id.*

Appellant stated that these job requirements were beyond his work capacity and resulted in his current condition and disability. These factual statements do not support a finding that the September 19, 2008 wage-earning capacity should be modified as he developed a federal employment-related worsening of his accepted back conditions. Instead appellant and counsel argued that he sustained a new employment injury and would pursue a state workers' compensation claim.

While the initial employment injury must arise out of and in the course of the claimant's federal employment,[12] later nonindustrial injuries may also be compensable. In *Howard S. Wiley*, the Board held the following:

> "It is an accepted principle of work[ers'] compensation law that a second, nonindustrial injury is compensable if it is the direct and natural result of an earlier compensable injury. Where an accident is sustained as a consequence of disability residual to a previous industrial injury, it is deemed because of the chain of causation to arise out of and in the course of employment."[13]

Larson states the basic rule of compensable consequences:

> "[W]hen the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury, the rules that come into play are essentially based on the concepts of 'direct and natural results' and of claimant's own conduct as an independent intervening cause.
>
> "The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury."[14]

It is accepted that once the work-connected character of any condition is established, the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause. If a member weakened by an employment injury contributes to a later fall or other injury, the subsequent injury will be compensable as a consequential injury, if the further medical complication flows from the compensable injury, so long as it is clear that the real operative factor is the progression of the compensable injury, with an exertion that in itself would not be unreasonable in the circumstances.[15]

[12] *Bernard D. Blum*, 1 ECAB 1 (1947).

[13] *Howard S. Wiley*, 7 ECAB 126 (1954). The Board held that the employee's injury arising from a slip on the steps of his home was independent of a prior work-related injury and denied his claim for a recurrence of disability.

[14] 1 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 10.01 at p. 10.2 (2004).

[15] *S.M.*, 58 ECAB 166 (2006).

In support of his claim, appellant submitted reports Dr. Tabakian diagnosing postlumbar laminectomy syndrome, lumbar radiculopathy, chronic low back pain, myofascial pain involving the lower back and hypertension. Dr. Tabakian stated that appellant had recently developed a sharp pain on both sides of his lower back. On March 26, 2009 he stated that a few months after appellant returned to work he developed a new onset of pain in his lower back originating from his sacroiliac joints, which was different from his original pain. Dr. Tabakian stated that appellant was unable to tolerate the physical demands of his private-sector work. In a series of notes Dr. Garces stated that appellant was unable to work due to back pain. On April 1, 2009 he stated that appellant reinjured his back by lifting over 15 pounds at work.

The medical evidence establishes that the real causative factor in this case was appellant's duties in the private sector. The evidence establishes that appellant's condition was not a natural progression of his condition was instead triggered by an intervening factor arising independent of his federal employment, lifting in the performance of his private-sector employment. The Board finds that appellant's private-sector employment duties of heavy lifting constitute an independent and intervening cause of his current back condition and disability. Appellant's condition worsened but not due to the direct and natural progress of the accepted employment injury. An intervening factor independent of his federal employment -- heavy lifting while performing the duties of his private-sector employment resulted in his disability for work and thereby broke the chain of causation to federal employment. As the relapse cannot be considered injury related, appellant has not established a material change in the nature and extent of his injury-related condition. The Board will affirm the September 29, 2010 decision.

Appellant may request modification of the wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

CONCLUSION

The Board finds that appellant has not established a material change in the nature and extent of his injury-related condition, to warrant modification of the September 19, 2008 wage-earning capacity determination.

ORDER

IT IS HEREBY ORDERED THAT September 29, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 20, 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