

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

F.I., Appellant)
)
and) **Docket No. 11-1540**
) **Issued: April 10, 2012**
DEPARTMENT OF TRANSPORTATION,)
U.S. MERCHANT MARINE ACADEMY,)
Kings Point, NY, Employer)

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On June 17, 2011 appellant, through his representative, filed a timely appeal from two March 14, 2011 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the December 5, 2001 work injury caused a cervical injury; and (2) whether appellant has met his burden to show that a modification of his constructed wage-earning capacity determination was warranted.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On December 5, 2001 appellant, a 54-year-old marine machinery mechanic, sustained a low back injury in the performance of duty while placing a grate in position on deck. His foot slipped, he dropped the plate, and he fell against a wall, remaining upright and wrenching his back.

On January 4, 2002 appellant learned that an imaging study showed disc disease with multilevel areas of bilateral impingement. He advised that his back was considerably improved, but he still had consistent symptomatology.

On January 8, 2002 appellant complained of upper extremity tingling over the past two weeks. He advised that as his low back symptomatology abated, he became more aware of pain in his left arm. Appellant now had continuous pain from the shoulder to fingertip level with tingling and numbness distally. X-rays showed multilevel disc disease involving the lower half of the cervical spine.

OWCP accepted appellant's claim for central and right-sided herniation at L3-4. It advised that his preexisting multilevel degenerative disc disease was not accepted to be related to the December 5, 2001 work injury.

A May 6, 2002 imaging study showed central disc protrusion at C3-4 with thecal sac indentation and no cord compression or stenosis; bulging disc at C4-5 without cord compression or stenosis; bulging disc with extensive degenerative change at C5-6 including disc space shortening, left posterolateral herniation with parallel posterior osteophyte formation impinging upon the exiting C6 and originating C7 nerve roots, and moderate bilateral bony foraminal stenosis; bulging disc at C6-7 with extensive degenerative change, broad central herniation with superior extrusion, thecal sac indentation, and mild bilateral foraminal stenosis; and dextroscoliosis at C7 with a mild clockwise rotary component.

On October 15, 2009 appellant explained that his original injury was to his lower back and neck and that this was noted on original injury and doctor reports. He stated that OWCP paid for original treatment of his neck, including imaging studies and therapy. The only problem appellant had with his neck after the first year was that he could not turn it all the way to the left. In May 2009 he started having pain in his neck and could not lift his left arm in a certain way without pain in the lower arm. Although OWCP told him that his neck was not part of the accepted injury, appellant stated that all OWCP had to do was read the original injury and doctor reports to confirm his neck injury.

Dr. Sidney L. Wallace, a Board-certified orthopedic surgeon and second-opinion physician, found that appellant was not completely disabled. He found that appellant could not return to heavy lifting but could be employed eight hours a day in some capacity with restrictions. Dr. Gary J. Voytik, the attending osteopath practicing in orthopedic surgery, found that appellant was completely disabled.

To resolve this conflict on the nature and extent of appellant's disability, OWCP referred appellant, together with the medical record and a statement of accepted facts, to Dr. R. William

Donaldson, a Board-certified orthopedic surgeon. OWCP provided Dr. Donaldson with a job description for the position of service station attendant and asked for an opinion on whether appellant was capable of performing the duties as described.

Dr. Donaldson examined appellant on November 10, 2009 and found no objective, positive evidence of any residual injury. He noted a subtle Waddell sign, suggesting a nonorganic etiology of some of appellant's subjective complaints. Dr. Donaldson diagnosed a cervical strain or sprain questionably related to the December 5, 2001 injury, since most of the symptomatology was not mentioned initially. In his opinion, there was no direct or obvious correlation between appellant's cervical spine condition and the work injury. There was no specific claimed aggravation that he could find in his review of the record. Further, appellant's subjective complaints of neck and left arm pain were not substantiated by objective findings.

With respect to whether appellant could perform the duties of a service station attendant, Dr. Donaldson referenced a functional capacity evaluation in 2006, which found appellant to be in the medium physical capacity range relative to work activities, specifically those of an auto mechanic or service station attendant. He explained that he would impose very little restriction on any specific work activity other than changing tires or having to lift and carry 50 pounds plus on more than an infrequent basis, and that was giving appellant the benefit of the doubt.

In a February 19, 2010 decision, OWCP denied appellant's cervical spine claim. It found that the weight of the medical evidence rested with Dr. Donaldson, who provided a comprehensive, well-reasoned opinion based on the medical record.

On September 3, 2010 an OWCP hearing representative affirmed. He also found that the weight of the medical evidence rested with Dr. Donaldson. The hearing representative noted that Dr. Voytik failed to address the employment incident and failed to indicate unequivocally and with medical rationale that appellant's diagnosed cervical condition was causally related to such. Further, he noted that Dr. Wallace failed to address the cervical spine.

Appellant requested reconsideration and submitted a December 10, 2010 report from Dr. Voytik who stated that he had seen appellant since 2008. Dr. Voytik was familiar with appellant's history of a slip and twist while carrying a heavy object. He noted no prior history of neck problems and the records indicated symptomatology contemporaneous to the incident. Symptoms were noted on January 8, 2002. Dr. Voytik diagnosed permanent aggravation of underlying degenerative disc disease in the cervical, thoracic and lumbar spines, permanent aggravation of spinal stenosis in the cervical and lumbar spines, and facet joint arthritis in the cervical, thoracic and lumbar spines.

Dr. Voytik noted a history of previous asymptomatic degenerative disc disease in the spine and stenosis with the onset of symptomatology following the December 7, 2001 incident. He explained that appellant had an underlying, although asymptomatic, condition of the spine, and therefore was not able to recover the way other individuals might who suffered a similar type of injury. Dr. Voytik stated that appellant may face a progression of degeneration at a faster pace than the normal progression of the aging process on the spine. He found that the injury caused appellant's facet joint arthritis in the cervical, thoracic and lumbar spines, though appellant was more predisposed. "Arthritis manifests itself with pain and stiffness. Prior to the

injury there was none by history and record.” Dr. Voytik noted appellant’s permanent restrictions.

In a decision dated March 14, 2011, OWCP reviewed the merits of appellant claim and denied modification of its prior decision. It found that Dr. Voytik offered no medical rationale. Dr. Voytik failed to provide objective findings to support a material worsening as a result of the December 5, 2001 work injury. Further, opinions based on the lack of symptoms before the injury were insufficient, without supporting medical rationale, to establish causal relationship.

Following Dr. Wallace’s opinion that appellant was only partially disabled and could work full time with restrictions, an OWCP vocational rehabilitation counselor found that appellant had the capacity to earn wages as a service station attendant. He conducted a labor market survey and found that the job was being performed in sufficient numbers as to make it reasonably available to appellant within his commuting area. Job growth for the position was positive. The Tennessee Department of Labor confirmed the weekly wage.

OWCP proposed to reduce appellant’s wage-loss compensation based on his capacity to earn wages in the constructed position of service station attendant. It found that the position was both medically and vocationally suitable.

In a decision dated February 17, 2010, OWCP finalized its wage-earning capacity determination and reduced appellant’s wage-loss compensation accordingly. It found that the opinion of Dr. Donaldson, the impartial medical specialist, established that appellant could perform the duties of a service station attendant. Dr. Donaldson had reviewed the occupational requirements and description of the position and agreed with a functional capacity evaluation in 2006, which found appellant to be in the medium physical capacity range relative to work activities, specifically those of an auto mechanic or service station attendant. He did not agree with Dr. Voytik’s finding of severe degenerative disc disease of the cervical and lumbar spine, as imaging studies did not support such severity.

On September 23, 2010 an OWCP hearing representative affirmed. He noted the submission of an “Employability Assessment Report” from a private rehabilitation and disability specialist, which reflected unsuccessful attempts to locate available positions within appellant’s commuting area and which concluded that such positions had gone the way of the shoe cobbler and telegraph operator. But the hearing representative found this evidence insufficient to alter the determination of the rehabilitation counselor, as the Tennessee Department of Labor and Workforce Development had produced documentation reflecting the existence of the selected position in sufficient numbers as to make it reasonably available, with positive job growth from 2004 to 2014.

Appellant requested reconsideration and argued that when contemplating suitable employment, conditions developed subsequent to the employment injury must be considered. Therefore, even if his cervical condition was not an accepted condition, OWCP still needed to consider it when contemplating suitable employment.

In a separate decision dated March 14, 2011, OWCP reviewed the merits of appellant’s claim and denied modification of its prior decision. It found that Dr. Donaldson addressed

appellant's cervical condition. Further, in a constructed wage-earning capacity decision, a subsequently acquired medical condition should not be considered. OWCP found no medical evidence in the record to support a material change in the nature and extent of the injury-related condition.

Appellant appeals both decisions dated March 14, 2011. His representative argues that OWCP failed to consider adequately the treating orthopedist's opinion on spinal condition and causation. Counsel also argues that OWCP failed to consider or discuss appellant's vocational expert and failed to consider appellant's preexisting cervical condition when adjudicating modification of the wage-earning capacity determination. He further argues that subsequent conditions should be considered in wage-earning capacity determinations just as they are in refusal of suitable work cases.

LEGAL PRECEDENT -- ISSUE 1

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.² An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his claim. When an employee claims that he sustained an injury in the performance of duty, he must submit sufficient evidence to establish that he experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. He must also establish that such event, incident or exposure caused an injury.³

Causal relationship is a medical issue,⁴ and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on whether there is a causal relationship between the claimant's diagnosed condition and the established incident or factor of employment. The opinion of the physician must be based on a complete factual and medical background of the claimant,⁵ must be one of reasonable medical certainty,⁶ and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the established incident or factor of employment.⁷

ANALYSIS -- ISSUE 1

In accepting appellant's injury claim for central and right-sided herniation at L3-4, OWCP accepted that he submitted sufficient evidence to establish a specific event, incident or

² 5 U.S.C. § 8102(a).

³ *John J. Carlone*, 41 ECAB 354 (1989).

⁴ *Mary J. Briggs*, 37 ECAB 578 (1986).

⁵ *William Nimitz, Jr.*, 30 ECAB 567, 570 (1979).

⁶ *See Morris Scanlon*, 11 ECAB 384, 385 (1960).

⁷ *See William E. Enright*, 31 ECAB 426, 430 (1980).

exposure occurring at the time, place and in the manner alleged. The question raised by appellant's October 15, 2009 correspondence is whether this incident also caused a diagnosed cervical condition.

The only medical opinion evidence that addresses this claim is the December 10, 2010 report from Dr. Voytik, the attending osteopath who began seeing appellant in 2008. Dr. Voytik stated that his review of the medical record indicated cervical symptomatology contemporaneous to the December 5, 2001 employment injury. Appellant's symptomatology was not contemporaneous; at least he did not contemporaneously report any symptoms. There is no mention in the medical record of a neck injury or neck complaint until January 8, 2002, when he gave a history of upper extremity tingling over the past two weeks. Appellant did not report this complaint four days earlier, however, when advised that an imaging study showed disc disease with multilevel areas of bilateral impingement. At that time, on January 4, 2002, he simply noted that his back was considerably improved, though he still had consistent symptomatology. Had appellant been suffering pain from the shoulder to fingertip level with tingling and numbness for the last couple of weeks, one would expect some mention of this problem on January 4, 2002.

None of this is adequately reflected or addressed in Dr. Voytik's December 10, 2010 report. Although he noted that appellant reported symptoms on January 8, 2002, he gave the mistaken impression that appellant's symptomatology was contemporaneous with the December 5, 2001 employment injury. To the extent that Dr. Voytik based his opinion on an inaccurate or incomplete history, the Board finds that his opinion has little probative value.⁸ To the extent that he did not reconcile appellant's one-month delay in reporting any neck or upper extremity complaints, the Board finds that his opinion is not well rationalized.⁹

In addition to the history of contemporaneous symptomatology, Dr. Voytik appeared to draw his conclusion from the fact that appellant's cervical spine was previously asymptomatic. The Board has held that when a physician concludes that a condition is causally related to an employment because the employee was asymptomatic before the employment injury, the opinion is insufficient, without supporting medical rationale, to establish causal relationship.¹⁰ Dr. Voytik offered no rationale to explain how, pathologically speaking, the December 5, 2001 employment injury caused or aggravated appellant's cervical condition or what objective findings demonstrated that a cervical injury occurred on December 5, 2001. By appellant's own account, the only neck problem he had a year after the injury was an inability to turn it all the way to the left, but in May 2009 he started having pain in his neck and could not lift his left arm in a certain way without pain in the lower arm. Dr. Voytik did not explain how the appearance of this symptomatology some seven and a half years after the incident at work was consistent with a traumatic work injury.

⁸ *James A. Wyrick*, 31 ECAB 1805 (1980) (physician's report was entitled to little probative value because the history was both inaccurate and incomplete). *See generally Melvina Jackson*, 38 ECAB 443, 450 (1987) (addressing factors that bear on the probative value of medical opinions).

⁹ *Ceferino L. Gonzales*, 32 ECAB 1591 (1981); *George Randolph Taylor*, 6 ECAB 968 (1954) (medical conclusions unsupported by rationale are of little probative value).

¹⁰ *Thomas D. Petrylak*, 39 ECAB 276 (1987).

He did not explain how he was able to distinguish, without speculation, an aggravation in 2001 from the normal progression of an aging spine. As Dr. Voytik left too many questions unanswered, the Board finds that his opinion on causal relationship is not sufficiently rationalized to establish appellant's cervical injury claim.

As appellant has not submitted probative medical opinion evidence to support that the December 5, 2001 employment injury also caused a cervical injury, the Board finds he has not met his burden of proof. The Board will affirm OWCP's March 14, 2011 decision denying his cervical injury claim.

Appellant argued that all OWCP had to do was read the original injury and doctor reports to confirm his neck injury. The factual and medical record makes no mention of a neck injury or neck complaints until a month after the fact. The truly contemporaneous reports do not support appellant's claim, and the later reports do not adequately explain how the December 5, 2001 employment injury caused a neck injury or what objective findings demonstrated that a cervical injury occurred on December 5, 2001. Appellant's representative argues that OWCP failed to consider adequately the treating orthopedist's opinion on spinal condition and causation, but OWCP's March 14, 2011 decision directly addresses Dr. Voytik's opinion.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

As noted earlier, FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty. In determining compensation for partial disability, 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. If the actual earnings of the employee do not fairly and reasonably represent his wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity as appears reasonable under the circumstances is determined with due regard to the nature of his injury, the degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment, and other factors or circumstances which may affect his wage-earning capacity in his disabled condition.¹¹

Once the loss of wage-earning capacity 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. The burden of proof is on the party attempting to show modification of the award.¹²

¹¹ 5 U.S.C. § 8115(a).

¹² *Daniel J. Boesen*, 38 ECAB 556 (1987).

ANALYSIS -- ISSUE 2

On February 17, 2010 OWCP issued a wage-earning capacity determination that reduced appellant's wage-loss compensation. Its vocational rehabilitation counselor had determined that appellant had the capacity to earn wages as a service station attendant. Dr. Donaldson, the orthopedic surgeon and impartial medical specialist, had established that the position was physically suitable. On September 23, 2010 a hearing representative affirmed the reduction of appellant's compensation.

In his request for reconsideration, appellant argued that when contemplating suitable employment, conditions developed subsequent to the employment injury must be considered. Therefore, even if his cervical condition was not an accepted condition, OWCP still needed to consider it when contemplating suitable employment.

This legal argument does not show that the February 17, 2010 determination was, in fact, erroneous. Appellant's argument would be relevant to a decision terminating compensation under 5 U.S.C. § 8106(c) for refusing suitable work. The issue here is OWCP's decision to reduce compensation under 5 U.S.C. § 8115(a) based on a capacity to earn wages in a constructed position.

In determining an employee's wage-earning capacity based on a position deemed suitable but not actually held, OWCP must consider the degree of physical impairment, including impairments resulting from both injury-related and preexisting conditions, but not impairments resulting from post injury or subsequently acquired conditions. Any incapacity to perform the duties of the selected position resulting from subsequently acquired conditions is immaterial to the loss of wage-earning capacity that can be attributed to the accepted employment injury and for which appellant may receive compensation.¹³

Thus, conditions developed subsequent to the employment injury need not be considered. Appellant submitted Dr. Voytik's December 10, 2010 report, but that report did not establish a traumatic neck injury on December 5, 2001 or a material change in the nature and extent of the accepted disc herniation at L3-4. As his request for modification of the February 17, 2010 wage-earning capacity determination did not meet one of the standards for modification, the Board finds that he did not meet his burden of proof. The Board will affirm OWCP's March 14, 2011 decision denying modification.

On appeal, appellant's representative argues that OWCP failed to consider or discuss appellant's vocational expert, but that is not the case. The hearing representative's September 23, 2010 decision directly addressed the "Employability Assessment Report" and explained that unsuccessful attempts to locate available positions within appellant's commuting area were insufficient to alter the determination of the rehabilitation counselor.

Appellant's representative also argues that OWCP failed to consider appellant's preexisting cervical condition when adjudicating modification of the wage-earning capacity determination. This was not an argument he made in his February 8, 2011 request for

¹³ B.S., Docket No. 11-890 (issued January 20, 2012).

reconsideration. Appellant had the burden to show that modification was warranted, and the argument he put forth was that OWCP must consider subsequent conditions and an argument that did not show error in the original determination. As for the argument now made on appeal, OWCP correctly noted that Dr. Donaldson addressed appellant's cervical condition and found the constructed position physically suitable.

Appellant's representative further argues that subsequent conditions should be considered in wage-earning capacity determinations just as they are in refusal of suitable work cases. As the Board has explained above, however, any incapacity to perform the duties of the selected position resulting from subsequently acquired conditions is immaterial to the loss of wage-earning capacity that can be attributed to the accepted employment injury and for which appellant may receive compensation.

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 met his burden to establish that the December 5, 2001 work injury caused a cervical injury. The Board also finds that OWCP properly denied modification of its constructed wage-earning capacity determination.

ORDER

IT IS HEREBY ORDERED THAT the March 14, 2011 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 10, 2012
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board