

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

D.E., Appellant)	
)	
and)	Docket No. 12-8
)	Issued: June 7, 2012
DEPARTMENT OF THE NAVY, NAVAL)	
RESEARCH LABORATORY, Patuxent, MD,)	
Employer)	
)	

<i>Appearances:</i> <i>Laurie Edgecomb</i> , for the appellant <i>No Appearance</i> , for the Director	Oral Argument April 18, 2010
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DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 3, 2011 appellant, through his representative, filed a timely appeal of an August 5, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying further review of his wage-earning capacity determination. Because over 180 days elapsed from the most recent merit decision of June 7, 2010 to the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's case pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration on the merits pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. On April 18, 1989 appellant, then a 35-year-old aircraft mechanic, sustained injury to his back when he stepped through a missing floor panel in an aircraft. OWCP accepted strains of the cervical spine and right shoulder with major depression. It entered appellant on the periodic rolls and compensated him for total disability. Appellant reported earnings as a store clerk. In a decision dated May 11, 1999, OWCP determined that his actual earnings of \$250.00 a week as a store clerk fairly and reasonably represented his wage-earning capacity. It found that appellant had a loss of wage-earning capacity of \$345.35 per week and authorized compensation benefits in the amount of \$1,336.00 every four weeks. The Board reviewed this decision on August 14, 2002 and found that his actual earnings as a store clerk fairly and reasonably represented his wage-earning capacity.² The Board found that appellant had earnings from November 7, 1997 through March 9, 1998 at the rate of \$6.25 per hour and that his position was not makeshift, part-time, seasonal sporadic or temporary. The Board found that his work stoppage did not occur because of any change in his injury-related condition affecting his ability to work, but rather because he was terminated for inappropriate behavior. The Board determined that as appellant had worked at this position successfully for more than 60 days, this position represented his wage-earning capacity and that it was appropriate for OWCP to perform a retroactive wage-earning capacity determination under the facts of the case. The facts and circumstances of the case as set out in the Board's prior decision are adopted herein by reference.

Appellant submitted a note dated September 4, 2002 from his treating physicians, Dr. George J. Mathews, a Board-certified neurosurgeon, and Dr. Shoba Mathews, a neurologist. They diagnosed chronic pain, panic attacks and fibromyalgia. Dr. G. Mathews opined that appellant was totally disabled. On February 12, 2003 he diagnosed fibromyalgia, chronic pain and lumbosacral disc disease. Dr. G. Mathews noted that appellant was able to do some wood work at home, but found that he was totally disabled. In a note dated March 12, 2003, he listed the diagnoses of chronic pain, fibromyalgia, depression, lumbosacral disc disease and tension headaches. Dr. G. Mathews reported that appellant was working on a limited basis, but stated that he remained totally disabled. On August 13, 2003 he stated that appellant had chronic pain and remained disabled. On January 7, 2004 Dr. G. Mathews noted that appellant kept himself busy by adding to and renovating his house.

Appellant underwent a magnetic resonance imaging (MRI) scan on March 7, 1996 which demonstrated degenerative disc disease at L3-4 and grade 1 spondylolisthesis of L5. Dr. S. Mathews completed a work capacity evaluation on July 6, 2006 and opined that he was totally disabled due to physical and emotional conditions. She completed a note on October 25, 2006 and stated that appellant was staying active with "handyman stuff" for exercise as well as rental properties, but found him totally disabled. On February 14, 2007 Dr. S. Mathews reiterated that he was totally disabled. On August 13, 2007 appellant underwent a cervical MRI scan, which demonstrated chronic multilevel degenerative disc changes and spondylosis with significant multilevel foraminal stenosis. A lumbar MRI scan on the same date demonstrated grade 1 spondylolisthesis L5-S1 with bilateral L5 spondylolysis and mild bi-foraminal attenuation,

² Docket No. 00-1848 (issued August 14, 2002).

multilevel degenerative disc changes and spondylosis and straightening compatible with strain and spasm. Dr. S. Mathews completed a work capacity evaluation on August 13, 2007 and opined that appellant was totally and permanently disabled. She again found him totally disabled on September 5 and October 3, 2007.

Dr. G. Mathews completed work capacity evaluation and found that appellant was totally disabled on September 10, 2008. He responded to questions from OWCP and stated that appellant was totally disabled. Dr. G. Mathews completed notes dated February 13 through December 24, 2008 and stated that appellant was experiencing difficulty performing most physical activities such as walking and standing. He continued to submit treatment notes describing these difficulties. Dr. G. Mathews also found that appellant was totally disabled on a work capacity evaluation dated July 2, 2009. In treatment notes dated July 8, August 5 and September 2, 2009, he stated that appellant had pain in the low back with pain radiating into the hip and knee. Dr. G. Mathews noted appellant's difficulty with urination and with performing most physical activities including standing and walking. In a telephone call on October 16, 2009 appellant's claims examiner stated that the weight of the medical evidence supported total disability and that he would adjust appellant's wage-loss compensation accordingly. OWCP accepted appellant's claim for the additional conditions of thoracic/lumbar spondylosis with complications on October 16, 2009.

Dr. S. Mathews completed a report on December 2, 1998 and stated that appellant was temporarily totally disabled and incapable of work due to his April 18, 1989 employment injury.

In a letter received by OWCP on December 7, 2009 appellant related his history of injury and treatment with Drs. G. Mathews and S. Mathews. He stated that he attempted to return to work in February 1990 and July 1991, but that in October 1993 his condition deteriorated and he stopped working in March 1994. Appellant noted that he worked in the private sector beginning on November 7, 1997, but was fired in January 1998. He noted that his full compensation benefits were reinstated on October 16, 2009 due to OWCP's acceptance of the conditions of thoracic and lumbar spondylosis with complications. Appellant requested retroactive compensation benefits beginning March 1998.

Appellant requested that OWCP reconsider reinstating full wage-loss benefits effective March 1998. In a report dated November 17, 2009, Dr. G. Mathews stated that he and Dr. S. Mathews had provided treatment for appellant since June 17, 1989. He stated that appellant had continually been disabled, with a few attempts to return to light-duty work which failed. Dr. G. Mathews stated that appellant's condition had deteriorated requiring pain management on a regular basis as well as treatment of emotional difficulties. He opined that appellant was totally and permanently disabled and was not a candidate for surgery.

Dr. G. Mathews submitted notes dated November 4 and 25 and December 23, 2009 which, stated that appellant was totally and permanently disabled and noted his symptoms of low back pain radiating into both legs.

OWCP informed appellant by letter dated March 10, 2010 that he was not entitled to retroactive total disability compensation to May 11, 1999, the date of his wage-earning capacity determination as the Board had upheld that decision. It noted that beginning July 2002

Dr. S. Mathews started to prescribe strong pain medication suggesting that appellant's condition changed at that point. OWCP advised appellant of the basis for modifying a loss of wage-earning capacity decision and requested a comprehensive narrative report addressing his condition.

In notes dated January 20 to March 17, 2010, Dr. G. Mathews opined that appellant was totally disabled and had low back pain radiating into his legs.

By decision dated June 7, 2010, OWCP denied appellant's claim for a recurrence of disability beginning in July 2002. It noted that he began receiving compensation for total disability on October 25, 2009. The claims examiner further noted that appellant had a prior loss of wage-earning capacity determination dated May 11, 1999.

Appellant requested reconsideration on February 9, 2011 and submitted a report dated December 15, 2010 from Dr. G. Mathews noting that he had treated appellant for moderately severe and constant pain in the neck, shoulders and arms with positive MRI scan findings of multiple level disc disease in the neck and lumbar spine. Dr. G. Mathews stated that appellant's condition had worsened and his medication had increased and that he had always required pain medication.

Appellant also resubmitted Dr. G. Mathews' November 17, 2009 report. He requested review of the wage-earning capacity determination and retroactive compensation. Appellant also submitted notes dated January 19 through April 27, 2011 from Dr. G. Mathews stating that appellant was totally and permanently disabled.

Appellant submitted a report from Dr. Mruthyunjaya Gonchigar, a Board-certified anesthesiologist,³ dated March 29, 2011 diagnosing lumbosacral spondylosis, lumbar radiculopathy, chronic pain syndrome, degenerated of cervical, thoracic and lumbar discs, cervical spondylosis and cervical radiculopathy. He also submitted reports dated April 21 and June 2 and 30, 2011 completed by Dr. Pauline N. Ignacio, a physician Board-certified in physical medicine and rehabilitation, who noted that his history of injury was well as diagnosing his current conditions of chronic cervical disc disease, chronic cervical radiculopathy, chronic lumbar disc disease, bilateral carpal tunnel syndrome, anxiety and depression.

In a decision dated August 5, 2011, OWCP declined to reopen appellant's claim for consideration of the merits on the grounds that he failed to submit relevant new evidence in support of his request for reconsideration.

LEGAL PRECEDENT

It is well established that either a claimant or OWCP may seek to modify a formal loss of wage-earning capacity determination. One 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 had been retrained

³ Dr. Gonchigar electronically signed this report on April 14, 2011.

or otherwise vocationally rehabilitated or the original determination was, in fact, erroneous.⁴ The burden of proof is on the party attempting to show modification.⁵ There is no time limit for appellant to submit a request for modification of a wage-earning capacity determination.⁶

ANALYSIS

OWCP issued a decision on May 11, 1999 finding that appellant had the capacity to earn \$250.00 a week based on his actual earnings in the private sector. The Board affirmed this decision on August 14, 2002. On October 16, 2009 OWCP reinstated appellant's compensation benefits for total disability. Appellant contends that his wage-earning capacity determination should be modified due to a change in the nature and extent of his injury-related condition. In a letter dated March 10, 2010, OWCP noted that beginning in July 2002 the medical evidence suggested that his employment-related condition could have changed, such that his wage-earning determination should be modified. It requested that appellant submit a comprehensive narrative medical report addressing when and how his medical condition changed in order to meet his burden of proof to modify the existing wage-earning capacity determination. By decision dated June 7, 2010, OWCP found that he had not submitted sufficient medical evidence and denied his claim for compensation.

In a letter dated February 9, 2011, appellant again alleged that his wage-earning capacity determination should be modified as the nature and extent of his injury-related condition had changed before 2009. OWCP considered his February 9, 2011 letter as a request for reconsideration of the prior wage-earning capacity determination under 5 U.S.C. § 8128(a). It found that the request was insufficient to warrant further merit review.

While appellant used the term reconsideration he asserted that the wage-earning capacity determination should be modified and that he was entitled to retroactive compensation. He contended that his injury-related condition had worsened and submitted medical evidence. The Board finds that the February 9, 2011 letter is a request for modification of OWCP's May 11, 1999 wage-earning capacity determination. This request for modification is not a request for review of OWCP's June 7, 2010 decision under 5 U.S.C. § 8128(a). Therefore, OWCP improperly adjudicated his February 9, 2011 letter as a request for reconsideration.⁷

As appellant has requested modification of the May 11, 1999 wage-earning capacity determination, the specific requirements of OWCP's regulations at section 10.606⁸ do not apply. The case will be remanded to OWCP to adjudicate his request for modification of the wage-earning capacity determination and issue an appropriate decision in the case.

⁴ *F.B.*, Docket No. 10-99 (issued June 21, 2010); *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sharon C. Clement*, 55 ECAB 552 (2004).

⁵ *Darletha Coleman*, 55 ECAB 143 (2003).

⁶ *W.W.*, Docket No. 09-1934 (issued February 24, 2010); *Gary L. Moreland*, 54 ECAB 638 (2003).

⁷ *See F.B.*, Docket No.10-99 (issued June 21, 2010); *M.J.*, Docket No. 08-2280 (issued July 7, 2009).

⁸ 20 C.F.R. § 10.606.

CONCLUSION

The Board finds that OWCP improperly denied appellant's requested modification of the May 11, 1999 wage-earning capacity determination.

ORDER

IT IS HEREBY ORDERED THAT the August 5, 2011 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded for further proceedings consistent with this decision.

Issued: June 7, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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