

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

W.G., Appellant

and

**DEPARTMENT OF THE ARMY, ARMY
CORPS OF ENGINEERS, Mobile, AL, Employer**

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**Docket No. 11-1599
Issued: May 1, 2012**

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
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 28, 2011 appellant, through his attorney, filed a timely appeal from a May 12, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying modification of a July 15, 1998 loss of wage-earning capacity determination. 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 the case.

ISSUE

The issue is whether appellant met his burden of proof to establish that a modification of his July 15, 1998 loss of wage-earning capacity determination is warranted.

FACTUAL HISTORY

On June 9, 1997 appellant, then a 49-year-old surveying technician, filed a traumatic injury claim alleging that on March 12, 1997, while in travel status, he was rear-ended by

¹ 5 U.S.C. § 8101 *et seq.*

another vehicle and sustained neck and cervical injuries. OWCP accepted the claim for a cervical strain and cervical intervertebral disc disorder and authorized surgery which was performed on December 3, 1997.

On December 3, 1997 Dr. William B. Faircloth, a Board-certified orthopedic surgeon, performed an anterior cervical fusion at C3-4, anterior cervical discectomy at C3-4 and left iliac crest graft. He diagnosed herniated nucleus pulposus at C3-4 on the right. Thereafter, appellant was treated by Dr. Todd Volkman, a Board-certified orthopedic surgeon, who on January 8, 1998 diagnosed herniated disc at C3-4. Dr. Volkman advised that appellant could return to light office work in four weeks and full-time duties in eight weeks. He opined that appellant would be able to return to his date-of-injury job and would reach maximum medical improvement on March 3, 1998.

On February 19, 1998 appellant was offered a position as a light-duty full-time surveying technician with restrictions. The position was sedentary which required standing and sitting at will, performing and assisting with clerical work in the office including record keeping and adjusting records for the drafting section, subject to a lifting restriction of 10 pounds. On February 23, 1998 Dr. Volkman reviewed the job offer and opined that appellant was physically able to perform the duties. Appellant accepted the position on February 20, 1998.

In a March 16, 1998 functional capacity evaluation (FCE), Dr. Volkman indicated that appellant could perform most of the duties of his regular job with the exception of lifting up to 100 pounds. The FCE indicated that appellant could lift or carry up to 50 pounds and that he should avoid sustained cervical extension activities. In a March 25, 1998 work capacity evaluation, Dr. Volkman advised that appellant could work as per the FCE with no working on boats.²

By decision dated July 15, 1998, OWCP determined that appellant's actual earnings as a modified full-time surveying technician effective February 23, 1998 fairly and reasonably represented his wage-earning capacity and established that he had no loss of wage-earning capacity. Appellant's wage-loss benefits were reduced to zero.

In a report dated April 9, 2003, Dr. Volkman noted appellant's complaints of axial neck pain with the weather change but otherwise he was doing well. He advised that appellant wished to be released from his previous restrictions. Dr. Volkman agreed with the release noting that appellant was not in danger of harming his neck anymore than anyone else in the general population.

On January 30, 2009 appellant filed a claim for a schedule award. In a decision dated April 10, 2009, OWCP denied his claim.

Appellant came under the treatment of Dr. Edward M. Schnitzer, a Board-certified neurologist, who noted in a report dated January 4, 2010, appellant's complaints of recurrent aching neck pain and spasms. Dr. Schnitzer noted an essentially normal physical examination and diagnosed intervertebral cervical disc with myelopathy and cervical muscle strain. On

² Dr. Volkman indicated on May 20, 1998 that appellant could work on boats in protected waters.

February 26, 2010 he diagnosed cervical postlaminectomy syndrome, unspecified musculo-skeletal symptoms referable to the neck, deteriorated and long-term use of medications. Dr. Schnitzer noted that appellant was still working the same job.

The record indicates that appellant filed claims for compensation (Form CA-7), for intermittent wage loss, from January 26 to March 17, 2010. Also submitted was a Form CA-7a, time analysis form in which appellant indicated that he was disabled due to taking medication for his neck and knee pain.

Appellant submitted a March 29, 2010 report from Dr. Schnitzer who noted appellant presented with recurrent aching neck pain with spasm. Dr. Schnitzer noted that appellant was still working the same job though it was difficult at times due to pain. He noted findings upon examination of bilateral paraspinal and trapezius tenderness, normal gait, no paraspinal muscle spasm and normal strength in the upper and lower extremities. Dr. Schnitzer diagnosed intervertebral cervical disc with myelopathy, deteriorated, cervical muscle strain and long-term use of medications.

Appellant also filed CA-7 forms for the following periods April 2 to 22, 2010 and April 22 to June 7, 2010.

OWCP advised appellant that there was no medical documentation to substantiate his total disability for the periods in question and requested that he submit medical evidence establishing disability for work during the entire period claimed.

In a report dated April 14, 2010, Dr. Deborah Hart, a Board-certified psychiatrist, noted appellant's disorder had progressed and could be expected to periodically require unplanned medical leaves of absence. In a May 17, 2010 report, Dr. Schnitzer treated appellant for recurrent bilateral neck pain and spasms. He noted that appellant was still working the same job. Dr. Schnitzer noted findings of right lateral tilt of head, bilateral paraspinal and trapezius tenderness, normal gait, no paraspinal muscle spasm and normal strength in the upper and lower extremities. He diagnosed cervical muscle strain deteriorated, intervertebral cervical disc with myelopathy, deteriorated and long-term use of medications. On June 24, 2010 Dr. Schnitzer noted appellant's complaints of recurrent right sided neck pain with spasms radiating into the right shoulder and noted working was more difficult due to pain. He noted the physical examination was unchanged and diagnosed cervical muscle strain and intervertebral cervical disc with myelopathy. In a July 8, 2010 certificate of health care provider, Dr. Schnitzer noted appellant had persistent neck pain and required pain medication and was unable to perform his job duties. He noted appellant would be incapacitated for a continuous period of time due to his medical condition with episodic flare-ups which would require him to work part-time or prevent him from working his job because of his condition. Dr. Schnitzer noted it was medically necessary for appellant to be absent from work during the flare-ups. On July 21, 2010 he diagnosed cervical muscle strain and intervertebral cervical disc with myelopathy and noted that appellant was working a light-duty job. Dr. Schnitzer continued the same job as tolerated.

In a decision dated July 28, 2010, OWCP denied appellant's claim for compensation on the grounds that he failed to establish that his time missed from work was causally related to the accepted conditions.

On February 17, 2011 appellant requested reconsideration. He asserted that OWCP did not consider Dr. Hart's August 9, 2010 report which indicated that he was no longer able to work because of his physical and neuropsychological conditions which were caused by the March 12, 1997 work injury. Appellant submitted reports from Dr. Hart dated October 1, 2009 to August 9, 2010, who treated him since 2004 for depression. Dr. Hart diagnosed major depressive disorder, chronic, moderately severe, panic disorder without agoraphobia, post-traumatic stress disorder and chronic pain disorder, vertebral disc disorder, recurrent severe headaches and status post vertebral surgery, occupational and social demise. She opined that appellant's work-related injury and resultant surgical intervention led to chronic pain disorder which precipitated the onset of major depressive and anxiety symptoms. In an April 14, 2010 certificate of health care provider, Dr. Hart noted that appellant had a number of chronic, irreversible medical, orthopedic, neurologic and psychiatric problems for several years. She advised that he was presently incapacitated. Appellant submitted reports from Dr. Schnitzer dated September 15 to December 17, 2010, who noted appellant's physical examination was unchanged and diagnosed intervertebral cervical disc with myelopathy, cervical muscle strain and long term use of medication. In reports dated January 26 to April 27, 2011, Dr. Schnitzer noted that appellant experienced recurrent neck pain radiating into the right shoulder with spasms and was not working due to an inability to perform his job. He noted no changes in the physical examination and diagnosed intervertebral cervical disc with myelopathy, deteriorated, cervical muscle strain, deteriorated and long-term use of medication.

By decision dated May 12, 2011, OWCP denied modification of the wage-earning capacity determination. It advised that appellant failed to establish grounds to warrant modification of a formal loss of wage-earning capacity decision.

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.³ Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.⁴ 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.⁵ 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.⁶

Once 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

³ *D.M.*, 59 ECAB 164 (2007).

⁴ *Katherine T. Kreger*, 55 ECAB 633 (2004); see *Robert H. Merritt*, 11 ECAB 64 (1959).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995). See *Mary E. Marshall*, 56 ECAB 420 (2005).

⁶ Federal (FECA) Procedure Manual, *supra* note 5. See *Harley Sims, Jr.*, 56 ECAB 320 (2005).

the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was, in fact, erroneous.⁷ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁸

ANALYSIS

OWCP accepted that appellant sustained a cervical strain and cervical intervertebral disc disorder as a result of the March 12, 1997 employment injury. Appellant accepted the position of modified full-time surveying technician on February 20, 1998. By decision dated July 15, 1998, OWCP found his actual earnings in this position fairly and reasonably represented his wage-earning capacity. Appellant filed a Form CA-7, claim for compensation for total disability for the period January 26 to June 7, 2010. The question is whether he established that the July 15, 1998 wage-earning capacity decision should be modified.

Appellant did not allege that the original loss of wage-earning capacity determination was erroneous or that he had been retrained or otherwise vocationally rehabilitated. He has contended that reports from Dr. Hart establish that he was no longer able to work because of his physical and neuropsychological conditions which were caused by the March 12, 1997 work injury. The Board finds that the record does not contain medical evidence establishing that appellant's accepted work-related conditions, cervical strain and cervical intervertebral disc disorder, had materially changed during the period January 26 to June 7, 2010.

Appellant submitted February 26 to June 24, 2010 reports from Dr. Schnitzer which noted appellant's pain and that appellant continued to work. Dr. Schnitzer did not indicate at that time that appellant was unable to work due to a material change in his accepted conditions. The Board notes that this evidence does not provide any rationalized medical opinion explaining how appellant's accepted conditions materially changed such that he could no longer perform the duties of his survey technician position. Rather, Dr. Schnitzer notes that appellant was still working. Likewise, in July 21 to December 17, 2010 reports, he did not indicate that appellant was disabled from his position or did not specifically address how his condition had materially changed such that he no longer could perform his modified surveyor technician duties. Rather, Dr. Schnitzer continued appellant's job duties as tolerated.

In a July 8, 2010 certificate of health care provider, Dr. Schnitzer noted that appellant was unable to perform his job duties, specifically frequent lifting. He noted appellant's persistent neck pain incapacitated him with episodic flare-ups. In reports dated January 26 to April 27, 2011, Dr. Schnitzer noted that appellant experienced recurrent neck pain and was not working due to an inability to perform his job. He diagnosed intervertebral cervical disc with myelopathy, deteriorated, cervical muscle strain, deteriorated and long-term use of medication. These reports are insufficient to establish a material change in appellant's accepted conditions warranting modification of the 1998 wage-earning capacity determination. Although supportive of the fact that appellant was experiencing neck pain in general, Dr. Schnitzer did not describe a

⁷ See *D.M.*, *supra* note 3; *Stanley B. Plotkin*, 51 ECAB 700 (2000); *Tamra McCauley*, 51 ECAB 375 (2000); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

⁸ *Id.*; *Jack E. Rohrabough*, 38 ECAB 186, 190 (1986).

change of the accepted conditions or explain how the accepted conditions had materially worsened such that appellant was unable to work at the modified job offered at the employing establishment.⁹ The need for medical rationale or reasoning is especially important since Dr. Volkman, on April 3, 2003, advised that appellant could work without restrictions.

Appellant submitted an April 14, 2010 report from Dr. Hart who noted that his disorder had progressed and that he could be expected to periodically require unplanned medical leaves of absence. Other reports dated October 1, 2009 to August 9, 2010, provided diagnoses such as major depressive disorder, chronic, panic disorder and post-traumatic stress disorder. Dr. Hart opined that appellant's work-related injury and resultant surgical intervention led to chronic pain disorder which precipitated the onset of major depressive and anxiety symptoms. She indicated that he was incapacitated due to an episodic period of decompensation. These reports are insufficiently rationalized to establish a material change in appellant's accepted conditions as Dr. Hart attributes his disability to emotional conditions not accepted by OWCP as being employment related.¹⁰ Dr. Hart's opinion does not address the job duties of the survey technician or provide a rationalized medical opinion explaining how residuals of the conditions accepted by OWCP caused disability or how appellant's condition had materially changed such that he no longer could perform the sedentary duties. Thus, this evidence is insufficient to show a material change in the nature and extent of the injury-related condition.

For these reasons, appellant has not established that the July 15, 1998 wage-earning capacity determination should be modified.

CONCLUSION

The Board finds that OWCP properly denied modification of the established July 15, 1998 wage-earning capacity determination.

⁹ Where residuals of an accepted employment-related condition prevent an employee from performing regular duties, physical ailments that preexisted the accepted condition must be taken into consideration. Physical ailments acquired subsequent to and unrelated to the accepted injury are excluded from any wage-earning capacity determination. *Lee A. Dent*, 54 ECAB 704 (2003).

¹⁰ See *Jaja K. Asaramo*, 55 ECAB 200 (2004) (where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he bears the burden of proof to establish that the condition is causally related to the employment injury).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 12, 2011 is affirmed.

Issued: May 1, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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