

disability claim dated August 23, 1988, stopped working on August 31, 1988 and received compensation for wage loss. By decision dated February 24, 1992, OWCP reduced appellant's compensation on the grounds that his wage-earning capacity was represented by the selected position of security guard.

The case was previously before the Board with respect to an overpayment of compensation, and by decision dated June 6, 1997, the Board adopted the findings and conclusions of an OWCP hearing representative in a December 6, 1994 decision.² Appellant continued to receive compensation based on loss of wage-earning capacity.

In a brief report dated April 16, 2007, Dr. Daniel Michael, an orthopedic surgeon, stated that appellant was seen for a yearly visit. He noted that appellant's back showed some limited extension and flexion, with no neurological deficit on strength or reflex examination. Dr. Michael stated that appellant's subjective complaints had not changed in several years.

OWCP referred appellant for a second opinion examination with Dr. Harold Alexander, an orthopedic surgeon. In a report dated September 11, 2008, Dr. Alexander provided a history and results on examination. He reported forward flexion and extension were limited, straight leg raising from sitting position is to 90 degrees without pain, knee jerks and ankle jerks were symmetrical and equal and there were no sensory deficits in the lower extremities. Dr. Alexander indicated that x-rays of the lumbosacral spine showed excellent preservation of the disc spaces with a few scattered mild degenerative spurs. He opined that appellant's "work injury of April 26, 1988 accepted for lumbar and thoracic strains has resolved." Dr. Alexander indicated that a functional capacity evaluation (FCE) could be helpful in determining any work restrictions. He stated that, in the absence of an FCE, his opinion was appellant could work in his date-of-injury job from an orthopedic point of view, as the only limitation was "self[-]imposed by the claimant because of pain."

By letter dated February 9, 2009, OWCP advised appellant that it proposed to modify the wage-earning capacity determination and terminate compensation for wage-loss and medical benefits. Appellant was advised to submit relevant evidence or argument within 30 days. In a decision dated April 8, 2009, OWCP modified the wage-earning capacity determination and terminated compensation effective April 12, 2009.

Appellant requested reconsideration, and by decision dated September 16, 2009, OWCP found that the request was insufficient to warrant merit review of the claim. This decision was affirmed by the Board on November 29, 2010.³

On February 23, 2010 appellant submitted a report dated May 13, 2009 from Dr. Dewey Jones who provided results on examination and diagnosed back spasm and chronic mechanical back pain. Dr. Jones stated that he did not see any obvious neurological deficits. On March 2, 2010 OWCP received a request for reconsideration.

² Docket No. 95-1036 (issued June 6, 1997).

³ Docket No. 10-1080 (issued November 29, 2010).

By decision dated April 26, 2010, OWCP reviewed the case on its merits and denied modification. In a letter dated March 17, 2011, appellant stated that he wanted to have his compensation reconsidered. He submitted a March 24, 2011 letter from his congressional representative, who stated that Dr. Alexander had requested an FCE but such examination was never scheduled.

In a decision dated April 29, 2011, OWCP reviewed the case on its merits and denied modification.

LEGAL PRECEDENT

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 the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.⁴ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁵

OWCP has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his employment, it may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.⁶

ANALYSIS

In the present case, it is, as noted above, OWCP's burden of proof to establish that the accepted conditions of lumbar and thoracic strains had resolved by April 12, 2009. The Board notes that the employment injury in this case occurred over 20 years earlier, on April 26, 1988. The only accepted conditions were the lumbar and thoracic strains. Appellant's attending physician, Dr. Michael indicated that appellant was only seen once a year, and on April 16, 2007 he noted appellant's "subjective complaints" remained unchanged. In addition, the second opinion physician, Dr. Alexander, provided an unequivocal opinion that appellant's employment injuries had resolved in his September 11, 2008 report. His report was based on a complete background and physical examination. Dr. Alexander noted x-rays showed only minimal degenerative changes.

The Board accordingly finds that the weight of the evidence established that the accepted conditions had resolved by April 12, 2009. OWCP met its burden of proof to modify the wage-earning capacity determination as the evidence established a material change in the employment-related condition. Moreover, it met its burden of proof to terminate compensation for wage-loss and medical benefits effective April 12, 2009 based on the weight of the medical evidence.

⁴ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

⁵ *Id.*

⁶ *Elaine Sneed*, 56 ECAB 373 (2005); *Patricia A. Keller*, 45 ECAB 278 (1993); 20 C.F.R. § 10.503.

Appellant's congressional representative noted that Dr. Alexander had referred appellant for an FCE to determine his work restrictions. The relevant opinion that the employment-related conditions had resolved would not be affected by an FCE. Any continuing work restrictions would not necessarily be employment related. It is appellant's burden of proof, once a termination of benefits is properly determined, to establish a continuing employment-related condition or disability.⁷ Appellant may request reconsideration with OWCP and submit relevant evidence regarding either the termination of benefits effective April 12, 2009, or a claim for an employment-related condition or disability after April 12, 2009.

CONCLUSION

The Board finds that OWCP met its burden of proof to modify the February 24, 1992 wage-earning capacity determination and terminate compensation effective April 12, 2009.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 29, 2011 is affirmed.

Issued: May 10, 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

⁷ *Talmadge Miller*, 47 ECAB 673, 679 (1996); *see also George Servetas*, 43 ECAB 424 (1992).