

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

M.C., Appellant

and

**DEPARTMENT OF LABOR, MINE SAFETY &
HEALTH ADMINISTRATION, Norton, VA,
Employer**

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**Docket No. 12-83
Issued: October 24, 2012**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

Appellant, on October 20, 2011, filed a timely appeal from an August 3, 2011 decision 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.

ISSUE

The issue is whether appellant met his burden of proof to establish that a modification of OWCP's March 30, 2001 loss of wage-earning capacity (LWEC) determination is warranted as of March 11, 2004.²

¹ 5 U.S.C. § 8101 *et seq.*

² The August 3, 2011 decision also modified the LWEC decision effective July 5, 2011. However, as that portion of the decision was not adverse to appellant, the Board has no jurisdiction over that aspect of appellant's case. 20 C.F.R. § 501.3(a).

FACTUAL HISTORY

This case has previously been before the Board. In the first appeal, the Board issued a decision on July 12, 2006 which found that the cases were not in posture and remanded the cases to OWCP for proper assemblage and consolidation of the claims.³ The Board noted that, as appellant filed multiple claims for injuries to the same part of his body, OWCP should have doubled the case files in accordance with its procedures. In addition, the Board noted that the August 23, 2005 OWCP hearing representative's decision was contained in both Docket No. 06-157 and Docket No. 06-158. The Board also found that the medical and factual evidence referenced was split between the two case records. Lastly, the Board determined that since OWCP incompletely associated the current claim filed by appellant either together or with his prior claims, it remanded the case to OWCP for consolidation of all his prior claims for the same part of the body, to be followed by a *de novo* decision on the merits of the claim to protect his appeal rights.

In the second appeal, the Board on January 21, 2009 issued an order remanding the case.⁴ The Board set aside an October 30, 2007 OWCP's hearing representative's decision which affirmed a July 14, 2004 OWCP decision. The July 14, 2004 decision denied appellant's claim for a recurrence of disability beginning March 11, 2004 and his request for authorization for cervical fusion and lumbar fusion surgeries. The Board found that appellant's recurrence claim should have been handled as a request for modification of the March 30, 2001 LWEC.

In the fourth appeal on July 13, 2010, the Board found the case not in posture for decision on the issues of modification of a March 30, 2001 LWEC and OWCP's denial of authorization for surgery.⁵ The Board found that there was an unresolved conflict in the medical opinion evidence between Dr. Dwight D. Bailey, appellant's treating Board-certified family practitioner, and Dr. Richard T. Sheridan, a second opinion Board-certified orthopedic surgeon, as to the nature of appellant's residuals from his accepted conditions and his capacity to perform the duties of the rated position. The Board also found an unresolved conflict in the medical opinion evidence between Dr. Sheridan and Dr. Morgan P. Lorio, a treating Board-certified orthopedic

³ Docket Nos. 06-157 & 06-158 (issued July 12, 2006).

⁴ Docket No. 08-651 (issued January 21, 2009).

⁵ Docket No. 09-1974 (issued July 13, 2010).

surgeon, as to whether surgery for the lumbar and cervical spines was medically warranted. The facts and the circumstances of the Board's prior decisions are incorporated by reference.⁶ The relevant medical and factual evidence is set forth below.

The relevant evidence from the prior appeal includes a March 30, 2001 LWEC determination, which was based upon wages earned as a mine safety and health specialist. The position description noted the job as primarily sedentary; occasional travel to mine and field offices; and ability to sit or stand as infrequently or frequently as needed. The duties of the position included reviewing reports; preparing paperwork; provided guidance and technical assistance; performing part 50 audits which may include driving to mine office to audit mine records; and assisting in planning and training courses for inspectors.

To resolve the outstanding conflict in medical opinion, OWCP referred appellant to Dr. Yogesh Chand, a Board-certified orthopedic surgeon. It noted that Dr. Bailey had concluded that appellant was totally disabled from performing the duties of the selected position of mine safety and health specialist while Dr. Sheridan concluded that appellant was capable of performing the sedentary job duties of the position. OWCP also related that Dr. Sheridan opined that appellant only sustained a temporary aggravation of his lumbar and cervical degenerative disc disease, which has resolved. It requested that Dr. Chand address the following: to describe any objective findings relative to the accepted employment injuries; whether the effects of the employment injuries had ceased and if not to report the prognosis; whether appellant's accepted conditions of low back and cervical strains and temporary aggravation of lumbar and cervical degenerative disc disease materially changed and if so to provide supporting objective evidence; if employment-related residuals did exist, did they limit his activities; whether any employment-related residuals prevented him from performing his employment duties with or without limitations; to provide any work restrictions; include any recommendations for further treatment; whether appellant is capable of working eight or four hours a day with restrictions and in either case to complete a work capacity evaluation; and to provide any rationalized medical opinion supporting a conclusion that he is disabled from any form of work.

On September 28, 2010 Dr. Chand, based upon a review of the medical evidence, statement of accepted facts and physical examination, diagnosed neck sprain with progressive post-traumatic osteoarthritis and low back sprain with progressive post-traumatic osteoarthritis which he attributed to the March 31, 1992 employment injury. A physical examination revealed a normal gait, moderate to severe stiffness in neck range of motion, no tenderness of the thoracic spine, mild tenderness in the lumbosacral area and normal bilateral leg neurological function. Dr. Chand reviewed objective evidence including magnetic resonance imaging (MRI) scans

⁶ On April 1, 1992 appellant, then a 41-year-old mine safety and health inspector, filed a traumatic injury claim alleging that he injured his lower back on March 31, 1992 while moving office furniture. OWCP assigned claim File No. xxxxxx747 and accepted the claim for a low back strain. Appellant returned to his regular full-time work on April 5, 1993 with subsequent intermittent periods of disability. On July 11, 1994 OWCP accepted a claim for a recurrence of disability beginning April 3, 1993. On January 5, 1996 appellant filed a traumatic injury claim alleging that he injured his neck, shoulders and lower back on January 4, 1996 due to his employment duties and assigned claim File No. xxxxxx685. OWCP accepted the claim for lumbar and cervical strains. On January 14, 1997 appellant filed a traumatic injury claim alleging he injured his lower back, neck and shoulders on January 13, 1997 in the performance of duty. OWCP accepted the claim for low back strain, aggravation of cervical and lumbar degenerative disc disease and L5-S1 radiculopathy and assigned claim File No. xxxxxx209. It combined claim File Nos. xxxxxx209, xxxxxx685 and xxxxxx747 with xxxxxx747 as the master file number. Appellant retired from the employing establishment effective April 3, 2005.

performed on February 19, 2009 and June 21, 2010 and x-ray interpretations performed on April 28, 2004 and May 17, 2010, and provided his interpretation. He opined that appellant's medical condition had materially changed as he required surgical procedures for the lumbar spine and neck and had developed spinal stenosis in both areas. Dr. Chand concluded that appellant was capable of working an eight-hour day with restrictions based on his ability to perform some type of activity at home. He related that appellant was capable of performing sedentary work which allowed change of positions with restrictions. The restrictions identified by Dr. Chand included up to six hours of sitting; up to one hour of walking and standing; no kneeling, climbing, squatting, reaching, bending or operating a motor vehicle at work or to and from work; up to one-half hour of reaching above the shoulder and twisting; pushing, pulling and lifting up to 15 pounds eight hours a day; and breaks as necessary.

On December 8, 2010 OWCP authorized cervical and lumbar fusion surgery at L5-S1 and C4-7, which was performed on July 5, 2011.

On August 18, 2011 appellant elected to receive benefits under FECA effective July 5, 2011.

By decision dated August 3, 2011, OWCP disallowed in part appellant's request for modification of a March 30, 2011 LWEC. It found the evidence insufficient to warrant modification as of March 11, 2004 as the medical evidence established that, while appellant's condition had worsened, he was capable of working with restrictions. OWCP also found in the August 3, 2011 decision that the March 30, 2011 LWEC should be modified effective July 5, 2011, the date appellant underwent surgery.

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.⁷ Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.⁸ OWCP's Federal (FECA) 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.⁹ 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.¹⁰

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

⁷ *D.M.*, 59 ECAB 164 (2007); *Harley Sims, Jr.*, 56 ECAB (2005).

⁸ *T.M.*, Docket No. 08-975 (issued February 6, 2009); *Katherine T. Kreger*, 55 ECAB 633 (2004); *see Robert H. Merritt*, 11 ECAB 64 (1959).

⁹ 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).

¹⁰ Federal (FECA) Procedure Manual, *id.* *See Harley Sims, Jr.*, *supra* note 7.

rehabilitated or the original determination was, in fact, erroneous.¹¹ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.¹²

Section 8123(a) of FECA¹³ provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.¹⁴ When the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.¹⁵

When OWCP obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, it must secure a supplemental report from the specialist to correct the defect in his original report.¹⁶

ANALYSIS

OWCP accepted the conditions of low back and cervical strains, aggravation of lumbar and cervical degenerative disc disease, L5-S1 radiculopathy and authorized L5-S1 laminectomy microdiscectomy. On remand from the Board's July 13, 2010 decision, it referred appellant to Dr. Chand, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Drs. Bailey and Sheridan regarding appellant's ability to perform the duties of the rated position and whether he continued to have residuals from the accepted conditions.

A review of the record reveals that OWCP failed to properly identify the issue for Dr. Chand or to provide him properly developed questions. As noted above, the issue to be resolved is whether appellant was able to perform the duties of the rated position of mine safety and health specialist. When OWCP provided information for Dr. Chand for review, it failed to properly identify that issue for resolution. In the August 27, 2010 referral letter to Dr. Chand, OWCP stated that the issue concerned a conflict in the medical evidence relating to appellant's work tolerance limitations. The questions posed specifically dealt with this issue and included whether appellant's employment-related injuries had resolved and whether he was totally disabled for work. However, the conflict in the medical opinion evidence concerned whether appellant was capable of performing the duties of the position of mine safety and health specialist, which was the basis for a March 30, 2001 LWEC. It was not an issue of appellant's work tolerance limitations. Thus, the Board finds that OWCP failed to properly identify the

¹¹ See *D.M.*, *supra* note 7; *Stanley B. Plotkin*, 51 ECAB 700 (2000); *Tamra McCauley*, 51 ECAB 375 (2000); *Ernest Donelson, Sr.*, 35 ECAB 503 (1984).

¹² *Id.*; *Jack E. Rohrbaugh*, 38 ECAB 186 (1986).

¹³ 5 U.S.C. § 8123(a).

¹⁴ *Id.*; see *J.J.*, Docket No. 09-27 (issued February 10, 2009); *Y.A.*, 59 ECAB 701 (2008); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Geraldine Foster*, 54 ECAB 435 (2003).

¹⁵ *V.G.*, 59 ECAB 635 (2008); *Bryan O. Crane*, 56 ECAB 713 (2005).

¹⁶ *T.C.*, Docket No. 08-2112 (issued June 12, 2009); *Phillip H. Conte*, 56 ECAB 213 (2004); *Raymond A. Fondots*, 53 ECAB 637, 641 (2002); *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232 (1988).

issue and correctly develop the questions in its referral letter to Dr. Chand. As OWCP failed to properly identify the issue and correctly develop questions for Dr. Chand to answer, the Board finds OWCP erred in its reliance on Dr. Chand's opinion in denying modification of its March 30, 2001 LWEC. The case will be remanded to OWCP to correctly identify the issue and provide an accurate and complete list of questions to Dr. Chand so that his supplemental opinion will be based on the proper issue and correct questions relating to appellant's capability of performing the duties of the rated position of Mine Safety and Health Specialist. If Dr. Chand is unwilling or unable to clarify and elaborate on his opinion, the case should be referred to another appropriate impartial medical specialist. After such further development as OWCP deems necessary, an appropriate decision should be issued.

CONCLUSION

The Board finds that this case is not in posture for a decision, as there exists an unresolved conflict in the medical opinion evidence.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 3, 2011 is set aside in part and the case is remanded for further development consistent with this decision.¹⁷

Issued: October 24, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

¹⁷ *Supra* note 2.