

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

L.L., Appellant)	
)	
and)	
)	Docket No. 12-1912
)	Issued: April 22, 2013
DEPARTMENT OF AGRICULTURE,)	
Albuquerque, NM, Employer)	

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 18, 2012 appellant, through his counsel, filed a timely appeal from a May 7, 2012 merit 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.

ISSUES

The issues are: (1) whether OWCP properly denied modification of appellant’s loss of wage-earning capacity determination; and (2) whether appellant has established a recurrence of disability as of June 13, 2011.

FACTUAL HISTORY

On July 28, 1999 appellant, then a 29-year-old engineering technician, filed a traumatic injury claim, alleging that he sustained a back injury as a result of a work-related incident which

¹ 5 U.S.C. § 8101 *et seq.*

occurred on June 30, 1999. OWCP accepted his claim for a lumbar strain, L3 pars defect, arthrodesis status and cauda equine syndrome. Appellant returned to work and intermittently stopped work. He underwent a lumbar fusion at L3-4 on January 17, 2002, which was accepted by OWCP. Appellant continued to receive medical treatment for back pain.

By decision dated July 2, 2007, OWCP noted that appellant had been employed on the date of injury in a full-time position, but determined that his part-time earnings since April 16, 2007 as an engineering technician fairly and reasonably represented his wage-earning capacity.

On June 13, 2011 appellant filed a recurrence claim, stating that his back injuries prohibited him from working. In a supplemental statement dated June 13, 2011, he explained that he had gained excessive weight because it had been difficult to exercise due to his accepted condition. Appellant also noted that his blood pressure was elevated and he was borderline stage 2 diabetic. He requested authorization for bypass surgery.

OWCP received medical reports in support of the recurrence claim. In a progress note dated April 25, 2011, Dr. W.H. King, Jr., a Board-certified orthopedic surgeon, related that appellant had returned for review of his functional capacity evaluation. He related that appellant's physical capabilities could not be specifically determined because appellant continued to suffer from chronic low back pain. It was also noted that appellant had episodes of labile blood pressure which prevented him from participating in much of the motion measurement testing. Dr. King diagnosed status post lumbar fusion, lumbar spondylosis, chronic pain syndrome secondary to work-related injury causing "chronic aggravation." He concluded that appellant would continue working in a light-duty capacity for four days a week, four hours a day.

OWCP also received a July 7, 2011 report from Dr. Neal Frauwirth, a Board-certified pain management physician. After noting appellant's history of injury, and appellant's pain complaints, Dr. Frauwirth diagnosed postlaminectomy syndrome of the lumbar region, thoracic or lumbosacral neuritis or radiculitis, degeneration of lumbar disc, lumbar sprain and other chronic pain.

In a September 27, 2011 decision, OWCP denied appellant's recurrence claim on the grounds that the medical evidence did not establish that he was unable to perform his restricted work duties due to a worsening of the accepted condition.

On October 12, 2011 appellant requested a hearing.

Along with his request, appellant submitted additional medical reports. Progress notes from Dr. Frauwirth with dates ranging from July 2011 to January 2012 reiterated the diagnoses of appellant's condition from his July 7, 2011 report and noted appellant's continuing pain complaints.

Emergency room records from the Skyridge Medical Center dated December 7, 2011 related that appellant was diagnosed with acute muscle spasm, after experiencing difficulty with urination and right flank pain, with gastrointestinal complaints.

An x-ray report from Dr. Brent Barrow, a Board-certified diagnostic radiologist, dated January 1, 2012 stated that appellant had a history of back pain and previous surgery. Views of the lumbar spine showed prior fixation of the lumbar spine at L3-4. The intervertebral space was well maintained. Appellant was status post decompression L3-4, and L2, with no evidence of fracture, spondylosis, vertebral heights were maintained and bony alignment was preserved.

Appellant also submitted a January 9, 2012 medical report from Dr. Timothy Crumpler, Board-certified in internal medicine, who noted appellant's low back pain had increased during the past two and a half weeks. Dr. Crumpler related that x-ray examination of appellant's lumbar spine showed no acute fracture. He diagnosed acute and chronic low back pain.

The hearing was held on February 16, 2012. Appellant testified that since approximately 2010 he had to lift heavier items, exceeding his five-pound lifting restriction. He also testified that he had to walk more to perform his work duties. Appellant stated that his back pain increased and he filed a new claim for occupation disease, but the claim was converted to a recurrence claim by OWCP. He also noted that he had fallen in 2005 or 2007 but did not seek medical care. Appellant mentioned that he was involved in a minor automobile accident. The hearing representative explained that appellant needed to submit a rationalized medical opinion explaining how his work stoppage was causally related to the accepted 1999 work injury. Appellant was granted 30 days to submit additional evidence.

Appellant thereafter submitted additional progress notes from Dr. Frauwirth dated January 19, February 15 and March 14, 2012. These notes continued to relate appellant's pain complaints and the diagnoses of his condition.

By decision dated May 7, 2012, the hearing representative denied appellant's recurrence claim on the grounds that he failed to establish increased disability causally related to the 1999 injury. The hearing representative also found that appellant had not presented sufficient evidence to modify the previously issued loss of wage-earning capacity determination.

LEGAL PRECEDENT -- ISSUE 1

Once a loss of wage-earning capacity is determined, a modification of such a 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,² or the original determination was, in fact, erroneous.³

In determining whether the claimant's work fairly and reasonably represents wage-earning capacity, OWCP should consider whether the kind of appointment and tour of duty are at least equivalent to those of the job held on the date of injury.⁴

² See *D.M.*, 59 ECAB 164 (2007); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

³ *P.C.*, 58 ECAB 405 (2007).

⁴ *T.B.*, Docket No. 11-447 (issued December 16, 2011); *O.V.*, Docket No. 11-98 (issued September 30, 2011).

ANALYSIS -- ISSUE 1

The Board finds that OWCP's July 2, 2007 wage-earning decision was erroneous. In determining whether the claimant's work fairly and reasonably represents his wage-earning capacity, OWCP should consider whether the kind of appointment and tour of duty are at least equivalent to those of the job held on the date of injury. Unless they are, the claims examiner may not consider the work suitable.⁵ The record reveals that appellant's date-of-injury job as an engineering technician was a full-time position. As OWCP found that the actual earnings in appellant's part-time position fairly and reasonably represented his wage-earning capacity, and a part-time position is not equivalent to a full-time position, the Board finds that OWCP abused its discretion in determining appellant's loss of wage-earning capacity determination. Appellant's July 2, 2007 wage-earning capacity determination was erroneously issued and is set aside.

LEGAL PRECEDENT -- ISSUE 2

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition resulting from a previous injury or illness without an intervening cause or a new exposure to the work environment that caused the illness. It can also mean an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.⁶

An employee who claims a recurrence of disability due to an accepted employment injury has the burden of proof to establish by the weight of substantial, reliable and probative evidence that the disability for which he or she claims compensation is causally related to the accepted injury. This burden requires that an employee furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.⁷ Where no such rationale is present, the medical evidence is of diminished probative value.⁸ While the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, it must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty.⁹

ANALYSIS -- ISSUE 2

If a wage-earning determination is properly in place and appellant alleges a recurrence of disability, the claim for recurrence of disability is treated as a claim for modification of the

⁵ *Id.*

⁶ *J.F.*, 58 ECAB 124 (2006); 20 C.F.R. § 10.5(x).

⁷ *Ronald A. Eldridge*, 53 ECAB 218 (2001).

⁸ *Mary A. Ceglia*, 55 ECAB 626, 629 (2004); *Robert H. St. Onge*, 43 ECAB 1169 (1992).

⁹ *Ricky S. Storms*, 52 ECAB 349 (2001).

wage-earning capacity determination.¹⁰ The wage-earning capacity determination remains in place until modified. In this case, the hearing representative evaluated appellant's claim as both a request for modification of the loss of wage-earning capacity determination, and as a claim for recurrence of disability. As the wage-earning capacity determination has been found to be erroneous, it is now proper to consider whether appellant sustained a recurrence of disability.

OWCP accepted that appellant sustained lumbar conditions diagnosed as lumbar strain, L3 pars defect, arthrodesis status, cauda equine syndrome and that he underwent lumbar fusion causally related to his June 30, 1999 injury. Appellant returned to work part time, with restrictions, as an engineering technician on April 16, 2007. He subsequently filed a recurrence claim on June 13, 2011. The issue is whether appellant experienced a spontaneous change in the nature and extent of a medical condition attributable to the June 30, 1999 employment injury.

As appellant was working part time at the time of the alleged recurrence he must establish that he had increased disability causally related to the accepted injury.¹¹ The only medical reports that noted his history of injury and provided a diagnosis of his condition were the treatment notes signed by Dr. Frauwirth. However, Dr. Frauwirth's reports did not relate appellant's disability status; that is they did not offer an opinion that appellant could not perform his light-duty work. While his reports did provide summaries of appellant's pain complaints and his diagnoses, they also did not provide a rationalized medical opinion as to whether appellant's current condition was caused by his accepted 1999 work injuries. As such, Dr. Frauwirth's medical reports are of limited probative value in this matter.

In a report dated April 25, 2011, Dr. King related that appellant's physical capabilities could not be determined because he continued to experience chronic low back pain. He stated diagnoses of status post lumbar fusion, lumbar spondylosis and chronic pain syndrome. Dr. King however concluded that appellant could continue working in his light-duty capacity. He did not relate that appellant had any increased disability.

The reports from Dr. Crumpler and Dr. Barrow reviewed appellant's x-ray findings, but thereafter only related findings consistent with post status lumbar fusion. Neither of these physicians related that appellant had increased disability causally related to the accepted injury.

In the absence of rationalized medical opinion evidence, appellant failed to meet his burden of proof to establish that he had increased disability causally related to his accepted injury.

While appellant testified at the hearing that as of approximately 2010 he had to lift over five pounds and he had to walk more often to perform his job duties, he did not submit any evidence to substantiate his testimony. His testimony lacked specificity, and there is no supporting evidence of record. For these reasons, appellant has not established a recurrence of disability.

¹⁰ See *M.H.*, Docket No. 12-1594 (issued February 20, 2013).

¹¹ *Ricky S. Storms*, *supra* note 9.

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.

CONCLUSION

The Board finds that appellant's July 2, 2007 wage-earning determination was erroneously issued. The Board also finds that he did not establish that he sustained a recurrence of disability causally related to his June 30, 1999 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the May 7, 2012 decision of the Office of Workers' Compensation Programs is modified to reflect that the wage-earning capacity determination was erroneously issued. The May 7, 2012 decision is affirmed in finding that appellant has not established a recurrence of disability.

Issued: April 22, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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