

earning capacity (LWEC) determination.² The history provided by the Board noted that OWCP had accepted that appellant sustained a lumbar strain and a herniated L4-5 disc in the performance of duty on September 17, 1988. OWCP issued a December 18, 1991 LWEC decision, finding that the selected position of leasing consultant represented appellant's wage-earning capacity. Appellant's compensation was reduced to reflect his wage-earning capacity. He filed a claim for a recurrence of disability as of July 8, 2003, and the Board found that he had not submitted sufficient evidence to warrant modification of the LWEC decision. The history as provided by the Board in its prior decision is incorporated herein by reference.

On April 23, 2012 appellant submitted a notice of recurrence of disability commencing March 23, 2012. The medical evidence included a February 9, 2012 report from Dr. John Cazale, a Board-certified orthopedic surgeon, who indicated that appellant continued to have persistent back pain with radiculopathy. Dr. Cazale provided results on examination, and stated, "At one time, it was mentioned about a possible fusion, but [appellant] opted not to have fusion in the past." Dr. Cazale noted that appellant had been given medication due to persistent problems and increased pain and a magnetic resonance imaging (MRI) had been scheduled. In an MRI scan report dated March 23, 2012, Dr. Edward Soll, a radiologist, diagnosed postoperative changes at L5-S1 with markedly narrowed disc, spondylosis at L3-4 and L4-5 without herniation and evidence suggesting lumbarization of S1 bilaterally.

In a report dated March 30, 2012, Dr. Cazale noted the MRI scan results and stated that appellant needed a laminectomy and discectomy and one-level fusion at L5-S1. He stated that appellant was unable to work at the present time.

In a report dated June 15, 2012, Dr. Rand Voorhies, a Board-certified neurosurgeon, provided a review of medical records and results on examination. He stated that appellant had a "recurrent disc" as well as severe axial joint pain and he agreed that fusion surgery was warranted.

In a decision dated July 27, 2012, OWCP denied the claim for compensation commencing March 23, 2012. It found the evidence was not sufficient to warrant modification of the December 18, 1991 LWEC.

Appellant requested a hearing before an OWCP hearing representative. The medical evidence submitted included an August 22, 2012 report from Dr. Voorhies, who described in detail the proposed fusion surgery. Appellant also submitted an August 2, 2012 report from Dr. Cazale reiterating his opinion that appellant needed back surgery.

OWCP referred the case to an OWCP medical adviser for an opinion as to whether the proposed surgery should be authorized. In a report dated October 15, 2012, the medical adviser opined that the proposed surgery was causally related to the employment injury and was within the realm of accepted medical practice. The medical adviser also indicated that appellant's accepted conditions should include lumbar postlaminectomy syndrome.

² Docket No 08-1000 (issued April 22, 2009).

By decision dated November 28, 2012, the hearing representative affirmed the July 27, 2012 decision.³ The hearing representative found the medical evidence did not establish a modification that the LWEC was warranted as of March 23, 2012.

LEGAL PRECEDENT

An LWEC 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. Compensation payments are based on the LWEC determination and it remains undisturbed until properly modified.⁴

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, or the original determination was, in fact, erroneous.⁵ The burden of proof is on the party attempting to show a modification of the loss of wage-earning capacity determination.⁶

ANALYSIS

In the present case, appellant has claimed disability commencing March 23, 2012. Since there was an existing LWEC determination in place, the issue is whether the LWEC determination should be modified.⁷ The Board notes that the issue in the current appeal is not a claim for compensation as of the date of authorized lumbar surgery. Even if a proposed surgery is authorized by OWCP, this does not in itself establish that a claimed period prior to the proposed surgery warrants a modification of an existing LWEC determination.⁸ The issue is whether the medical evidence establishes a material change in the nature or extent of the employment-related condition, such that appellant cannot perform the duties of the selected LWEC position.⁹

A review of the medical evidence in this case does not establish a material change in the nature and extent of an employment-related condition as of March 23, 2012 that would require modification of the existing LWEC determination. The MRI scan was performed on March 23, 2012, and Dr. Cazale opined on March 30, 2102 that appellant required lumbar fusion surgery.

³ The record also contains an October 2, 2012 decision denying a request for reconsideration of the February 7, 2008 decision as untimely and failing to show clear evidence of error. Appellant did not request review of this decision.

⁴ See *Sharon C. Clement*, 55 ECAB 552 (2004).

⁵ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

⁶ *Id.*

⁷ *Katherine T. Kreger*, 55 ECAB 633 (2004).

⁸ See *P.M.*, Docket No. 12-825 (issued November 6, 2012); *R.W.*, Docket No. 12-282 (issued June 12, 2012).

⁹ *Id.*; see also *Elbert Hicks*, 55 ECAB 151 (2003).

He did not discuss whether the MRI scan results represented a material change in the employment-related condition. Dr. Cazale had noted in his February 9, 2012 report that fusion surgery had previously been discussed, but appellant had opted not to have surgery. Moreover, he did not discuss whether appellant could no longer perform the duties of the selected position of leasing consultant. Dr. Cazale briefly stated in the March 30, 2012 report that appellant could not work, but the record indicated that appellant had not worked at the employing establishment since 1990 and Dr. Cazale did not provide any additional explanation as to an employment-related disability. The August 2, 2012 report does not provide any additional relevant information. The Board finds that Dr. Cazale did not provide probative medical evidence of a material change in appellant's employment-related condition that would disable him for the selected position as of March 23, 2012.

Dr. Voorhies provided an opinion in his June 15, 2012 report that fusion surgery was warranted based on examination and the medical evidence. He described the proposed surgery in an August 22, 2012 report. Dr. Voorhies did not discuss the medical issues noted above: (1) whether there was a material change in an employment-related condition on or about March 23, 2012, and (2) if so, did the change result in the inability to perform the duties of the selected position of leasing consultant.

Appellant did not provide any evidence of error in the December 18, 1991 LWEC determination. The Board finds that he has not established a basis for modification of the LWEC determination in this case. Appellant did not show a material change in the employment-related condition as of March 23, 2012 or meet any requirement for modification of the LWEC determination.

On appeal, appellant argues that OWCP's medical adviser approved a recurrence of disability in his October 15, 2012 report, but the opinion of the medical adviser was that the proposed surgery was employment related and medically reasonable, without discussing disability. As noted above, the claim for compensation in this case did not commence with a date of surgery. For the reasons stated, the Board finds that appellant did not meet his burden of proof to establish an LWEC modification as of March 23, 2012. Appellant may request modification of the LWEC determination, supported by new evidence or argument, at any time before OWCP.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish a modification of the December 18, 1991 LWEC determination as of March 23, 2012.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 28, 2012 is affirmed.

Issued: April 25, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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