

FACTUAL HISTORY

On April 21, 1999 appellant, then a 43-year-old heavy equipment mechanic leader, injured his mid and lower back that day when his office chair collapsed. He began modified duty. A May 13, 1999 magnetic resonance imaging (MRI) scan study of the lumbar spine demonstrated mild annular bulges at L3-4 and L4-5. On December 23, 1999 the employing establishment determined that appellant was medically unfit for military duty, effective January 1, 2000. Appellant retired that day because he did not meet medical retention standards.

On May 24, 2000 OWCP accepted that appellant sustained an employment-related low back strain and right lateral femoral cutaneous neuropathy, based on an April 10, 2000 report from Dr. Steven Lancaster, a Board-certified orthopedic surgeon, who provided a second opinion evaluation. Appellant was placed on the periodic compensation rolls as of January 2, 2000. He was referred for vocational rehabilitation and, in June 2000, secured employment as a school bus driver. On March 22, 2001 OWCP reduced appellant's wage-loss compensation based on his actual earnings as a school bus driver. On June 12, 2002 it issued a formal decision, finding that his actual earnings fairly and reasonably represented his wage-earning capacity and adjusted his compensation accordingly.

In January 2007 appellant came under the care of Dr. Kevin B. McBride, Board-certified in family medicine.² In a January 12, 2007 report, Dr. McBride reviewed the history of injury and provided findings on physical examination including mild paralumbar spasm and pain with back motion. He diagnosed lumbar strain with continued symptoms from the 1999 employment injury and right lateral femoral cutaneous neuropathy, symptoms intermittent. Dr. McBride advised that appellant was medically cleared for work but should avoid strenuous activity and heavy lifting. He submitted reports of annual examinations. On June 4, 2008 Dr. McBride diagnosed chronic lower back pain, rule out recurrent lumbar strain. He indicated that an MRI scan study did not show significant findings and an electrodiagnostic study was essentially normal. Dr. McBride recommended stretching exercises and medication. On April 16, 2009 he advised that appellant complained of increased low back pain and burning and tingling in his left leg. Physical examination was normal. Dr. McBride advised that appellant's condition seemed to be more of a myofascial pain syndrome. On December 18, 2009 he reiterated his findings and conclusions.

In January 2010 OWCP referred appellant to Dr. David B. Lotman, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated March 2, 2010, Dr. Lotman reviewed the history of injury, a statement of accepted facts and the medical record. Appellant reported that he was self-employed as a handyman and did light work with a tractor. He had no regular treatment for his back condition. Dr. Lotman stated that appellant described a daily ache in the lower back with numbness and tingling in the right thigh continually present. He was aware of a loss of sensation involving the lateral portion of the right calf and S1 distribution of the right foot. Physical examination of the lumbosacral spine demonstrated that it was midline with equal leg lengths. Lumbar lordosis was normal, there is no spasm or tenderness to palpation of the sacroiliac joints or the sciatic notches and appellant complained of

² No medical reports are in the record dated between June 12, 2000 and January 12, 2007.

discomfort with back range of motion. Trendelenburg demonstrated hip adductor weakness bilaterally and sitting and straight leg raising was negative bilaterally. Strength was normal and symmetric, Babinski down going and no clonus. Dr. Lotman noted that, using the pinwheel, there was decreased sensation over the lateral thigh and calf and over the lateral right foot. He advised that various tests for symptom magnification were negative. In answer to specific OWCP questions, Dr. Lotman found that appellant's low back strain had resolved and his symptoms and physical examination were not consistent with lateral femoral cutaneous neuropathy. He stated that, if appellant ever had the condition, it had resolved. Appellant's findings were most consistent with a right-sided S1 radiculopathy. Dr. Lotman recommended an MRI scan study and updated electrodiagnostic studies.

An April 12, 2010 MRI scan of the lumbar spine demonstrated a developmentally narrow spinal canal with mild degenerative disc bulging and facet arthropathy producing mild bilateral foraminal stenosis and minimal canal stenosis at L3-4 and L4-5. An April 20, 2010 electrodiagnostic study of the lower extremities suggested chronic L5 radiculopathy.

In an April 26, 2010 report, Dr. Lotman reviewed the MRI scan and electrodiagnostic studies. He advised that appellant did not have evidence of lateral femoral cutaneous neuropathy on physical examination or electrodiagnostic studies, and it and the MRI scan study demonstrated chronic L5 radiculopathy on the left, which was not consistent with appellant's right lower extremity symptoms. Dr. Lotman concluded that, based on the studies, appellant could return to work at his date-of-injury position with permanent restrictions of no twisting and a 40-pound lifting restriction.

On January 7, 2011 Dr. McBride reviewed Dr. Lotman's reports and advised that appellant had chronic L5 radiculopathy, based on his examinations and a review of Dr. Lotman's assessment. He advised that appellant was fit to return to his date-of-injury position with the restrictions provided by Dr. Lotman.

On March 8, 2012 OWCP proposed to modify appellant's wage-earning capacity determination by reducing his compensation to zero. Based on the opinions of Dr. Lotman and Dr. McBride, he no longer had residuals of the accepted medical conditions or disability due to the 1999 employment injury and was able to return to the date-of-injury position.

Appellant disagreed with the proposed termination, maintaining that he continued to have symptoms of the employment injury and his underlying condition was unchanged. He submitted medical evidence previously of record dated May 25 to September 21, 1999, a publication pertaining to lateral femoral cutaneous neuropathy and a position description dated January 1980.

By decision dated April 18, 2012, OWCP modified appellant's wage-earning capacity to zero and terminated his compensation benefits effective that day. It found that the weight of the medical opinion evidence rested with the opinions of Dr. Lotman, OWCP's referral physician, and Dr. McBride, appellant's attending physician.

Appellant timely requested a hearing that was held on August 15, 2012. He discussed 1999 medical evidence and Dr. Lancaster's April 2000 evaluation. Appellant disagreed with

Dr. Lotman's findings and conclusions. He described daily back pain and a burning sensation and numbness in his thigh since the 1999 employment injury. Appellant previously drove a school bus for about three years and was now self-employed as a handyman and truck driver. At the time he was injured, he was doing mostly administrative and supervisory work and was there to assist other mechanics. The only reason appellant was discharged from federal service was that he was no longer in the military, a requisite of his employment.

In a November 1, 2012 decision, an OWCP hearing representative found that the weight of the medical evidence rested with the opinions of Dr. Lotman and Dr. McBride and affirmed the April 18, 2012 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. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.³ OWCP's procedure manual provides that, "[i]f 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. 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."⁴ 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.⁵ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁶

In addition, Chapter 2.814.11 of OWCP's procedure manual contains provisions regarding the modification of a formal loss of wage-earning capacity. The relevant part provides that a formal loss of wage-earning capacity will be modified when: (1) the original rating was in error; (2) the claimant's medical condition has changed; or (3) the claimant has been vocationally rehabilitated. OWCP procedures further provide that the party seeking modification of a formal loss of wage-earning capacity decision has the burden to prove that one of these criteria has been met.⁷ It is not precluded from adjudicating a limited period of employment-related disability when a formal wage-earning capacity determination has been issued.⁸

³ *Katherine T. Kreger*, 55 ECAB 633 (2004).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (October 2009).

⁵ *Stanley B. Plotkin*, 51 ECAB 700 (2000).

⁶ *Id.*

⁷ *See* Federal (FECA) Procedure Manual, *supra* note 4 at Chapter 2.814.11 (October 2009).

⁸ *Sandra D. Pruitt*, 57 ECAB 126 (2005).

OWCP accepted that on April 21, 1999 appellant sustained an employment-related lumbosacral strain and right lateral femoral cutaneous neuropathy.

ANALYSIS

The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁹ OWCP has the burden to establish that the June 12, 2002 wage-earning capacity determination should be modified. Appellant retired from the employing establishment in January 2000. Beginning in June 2000, he worked as a school bus driver. He later became self-employed as a handyman and truck driver. Dr. McBride began treating appellant in 2007. While he initially noted that appellant had continued symptoms from the 1999 employment injury, Dr. McBride reported degenerative changes on MRI scan study and essentially normal electrodiagnostic findings. On April 16, 2009 he advised that appellant's condition seemed to be more of a myofascial pain syndrome.

In January 2010 OWCP referred appellant to Dr. Lotman for a second opinion evaluation. In a report dated March 2, 2010, Dr. Lotman noted the history of injury and a review of the statement of accepted facts and medical record. He addressed appellant's complaint of daily low back pain, continual numbness and tingling in the right thigh, and loss of sensation involving the lateral portion of the right calf and S1 distribution of the right foot. Dr. Lotman performed a physical examination and found that appellant's low back strain had resolved and his symptoms and physical examination were not consistent with lateral femoral cutaneous neuropathy, opining that, if appellant ever had the condition, it had resolved. He advised that appellant's findings were most consistent with a right-sided S1 radiculopathy and recommended additional studies. On April 26, 2010 Dr. Lotman reviewed an April 12, 2010 MRI scan study of the lumbar spine and an April 20, 2010 electrodiagnostic study of the lower extremities. He advised that appellant did not have evidence of lateral femoral cutaneous neuropathy on physical examination or electrodiagnostic studies, and it and the MRI scan study demonstrated chronic L5 radiculopathy on the left, which was not consistent with appellant's right lower extremity symptoms. Dr. Lotman concluded that, based on these studies, appellant could return to work at his date-of-injury position with permanent restrictions of no twisting and a 40-pound lifting restriction.

On January 7, 2011 Dr. McBride reviewed Dr. Lotman's reports and opined that appellant had chronic L5 radiculopathy, based on his examinations and a review of Dr. Lotman's assessment. He agreed that appellant was fit to return to his date-of-injury position within the restrictions provided by Dr. Lotman.

The Board finds that, based on the opinions of Dr. Lotman and Dr. McBride, residuals of appellant's accepted conditions have resolved. The physicians found that appellant could return to his date-of-injury job. Thus, OWCP met its burden of proof to modify the June 12, 2002 wage-earning capacity determination on April 18, 2012.

Appellant may request modification of the wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

⁹ *Id.*

CONCLUSION

The Board finds that OWCP met its burden of proof to modify the June 12, 2002 wage-earning capacity decision.

ORDER

IT IS HEREBY ORDERED THAT the November 1, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 12, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board