

On appeal, appellant contends that OWCP dismissed 23 years of medical history indicating that he still demonstrated residual symptoms from his original employment injury and therefore its decision was made in error.

FACTUAL HISTORY

On December 16, 1987 appellant, a 48-year-old supervisory equipment specialist, filed a traumatic injury claim (Form CA-1) alleging that he sustained a back injury in the performance of duty when he slipped, but did not fall, on wet tiles just inside a building entrance on December 15, 1987. OWCP accepted the claim for lumbar strain, herniated lumbar disc at L4-S1 and lumbosacral radiculopathy and authorized treatment and compensation benefits.³ On December 7, 1988 appellant underwent surgery on L4-S1.

On January 15, 1990 appellant returned to work full time in private employment as a field engineer with Preventive Maintenance Services, earning \$24,400.00 annually. He resigned from his position with the employing establishment effective March 1, 1990.

By decision dated February 26, 1991, OWCP determined that the actual wages appellant earned as a field engineer, \$469.23 weekly, fairly and reasonably represented his wage-earning capacity.

Appellant's private employment with Preventive Maintenance Services was terminated effective May 9, 1992.

OWCP referred appellant for a second opinion examination to evaluate the extent and degree of any remaining disability. In a July 13, 1993 report, Dr. Terrell Bounds, a Board-certified orthopedic surgeon, diagnosed status post excision of the disc at the lumbosacral junction and residual scarring at the L5 nerve root. He opined that appellant was not disabled and were his job to be modified he would be able to return to gainful employment.

On October 7, 2008 appellant underwent a lumbar laminectomy, discectomy L5-S1 on the right.

In a September 8, 2010 report, appellant's treating physician Dr. Douglas L. Stringer, a Board-certified neurosurgeon, diagnosed lumbar disc disease, neurogenic claudication and grade 1 spondylolisthesis at L4-5.

OWCP referred appellant for a second opinion examination to determine the nature and extent of any remaining disability causally related to the December 15, 1987 employment injury. In a November 1, 2010 report, Dr. James Caney Owen, Jr., a Board-certified orthopedic surgeon, diagnosed failed back syndrome with degenerated disc at L4-5 and L5-S1, residual neuropathic pain in the L5 and S1 dermatome levels in the right lower extremity. He concluded that appellant's employment-related conditions had not resolved. Dr. Owen opined that appellant still demonstrated residual symptoms from his employment injury, including a herniated nucleus

³ By decision dated November 30, 1992, OWCP denied appellant's claim for a right foot condition finding that the medical evidence did not establish causal relationship to the accepted back conditions.

pulposus (HNP) at L4-S1 with subsequent laminectomy and foraminotomy which resulted in scar tissue at the L5-S1 nerve roots which caused his present symptoms.

In a December 13, 2010 letter, appellant requested compensation for total disability and submitted a September 1, 2009 report by Dr. Stringer who opined that appellant was unable to work and would never be able to return to gainful employment.

By letter dated March 11, 2011, OWCP accepted appellant's December 13, 2010 letter as a request for modification of the February 26, 1991 loss of wage-earning capacity determination. It advised him of the three criteria required to modify the loss of wage-earning capacity decision and afforded him 30 days to submit additional evidence.

Subsequently, appellant submitted reports by Dr. Stringer dated June 3 and 16, 2011 reiterating his diagnoses and indicating that a June 4, 2010 magnetic resonance imaging scan of the lumbar spine revealed degenerative changes of L3 through S1, spinal stenosis at L3-4 with canal narrowed to seven millimeter, disc space narrowing and bulging disc of L4-5, severe bilateral neural foramina narrowing, disc osteophyte complex of L5-S1 with disc space narrowing and bilateral neural foramina narrowing. Dr. Stringer also reiterated his opinion that appellant was unable to work and was unemployable.

Appellant also submitted reports by Dr. Merle P. Stringer, a Board-certified neurosurgeon, dated March 10 through June 30, 2011. Dr. Stringer diagnosed disc degeneration, lumbago, lumbar disc disease, sacroiliitis, lumbar disc with myelopathy disorder and lumbar facet pain. On May 6, 2011 he opined that appellant was totally disabled from his previous occupation as field engineer.

By decision dated July 27, 2011, OWCP denied modification of the February 26, 1991 loss of wage-earning capacity determination. Adjudicating appellant's claim as a request to modify the loss of wage-earning capacity determination, it stated that the evidence failed to establish a change in the nature and extent of his injury-related condition, that he had been retrained or vocationally rehabilitated or that the original determination was erroneous.

On August 9, 2011 appellant requested a hearing before an OWCP hearing representative. He submitted reports dated July 13, August 16 and September 16, 2011 by Dr. Douglas Stringer and a July 26, 2011 report from Dr. Merle Stringer who reiterated their opinions and diagnoses. Appellant also submitted an August 18, 2011 report by Dr. Mark A. Giovanini, a Board-certified neurosurgeon, who opined that appellant's condition stemmed from his employment injury. On November 11, 2011 Dr. Giovanini recommended surgery.

OWCP approved lumbar spine fusion which appellant underwent on November 16, 2011.

A hearing was held *via* telephone before an OWCP hearing representative on December 15, 2011. Appellant provided testimony and the hearing representative held the record open for 30 days for the submission of additional evidence.

Subsequently, appellant submitted a December 29, 2011 report by Dr. Giovanini indicating that appellant was not released to work and was restricted to lifting 25 pounds

nonrepetitively. In a February 9, 2012 report, Dr. Giovanini stated that he would not recommend physical work at all.

By decision dated February 29, 2012, OWCP denied modification of the July 27, 2011 decision. It found that appellant failed to submit evidence sufficient to establish one of the three criteria required to modify the loss of wage-earning capacity 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.⁴ Section 8115(a) of FECA provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity.⁵ Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.⁶

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.⁷ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁸

ANALYSIS

OWCP accepted that appellant sustained a lumbar strain, herniated lumbar disc at L4-S1 and lumbosacral radiculopathy on December 15, 1987. On January 15, 1990 appellant secured a position in the private sector working as a field engineer, earning \$24,400.00 annually. He resigned from his position with the employing establishment effective March 1, 1990. On February 26, 1991 OWCP issued a loss of wage-earning capacity decision, finding that the wages he actually earned in the field engineer job was \$469.23 weekly, which fairly and reasonably represented his wage-earning capacity. In the February 29, 2012 decision, an OWCP hearing representative denied modification of the February 26, 1991 loss of wage-earning capacity determination. On December 13, 2010 appellant requested compensation for total disability, which OWCP accepted as a request for modification of the loss of wage-earning capacity determination.

⁴ See *Katherine T. Kreger*, 55 ECAB 633 (2004).

⁵ See 5 U.S.C. § 8115 (determination of loss of wage-earning capacity).

⁶ *Id.* at § 8115(a); see also *Loni J. Cleveland*, 52 ECAB 171 (2000).

⁷ See *Sharon C. Clement*, 55 ECAB 552 (2004).

⁸ See *Tamra McCauley*, 51 ECAB 375, 377 (2000); *T.M.*, Docket No. 08-975 (issued February 6, 2009).

OWCP referred appellant to Dr. Owen for a second opinion examination in order to determine the nature and extent of any disability causally related to the December 15, 1987 employment injury. In his November 1, 2010 report, Dr. Owen concluded that appellant's employment-related conditions had not resolved and opined that he still had residual symptoms from his employment injury, including a HNP at L4-S1 with subsequent laminectomy and foraminotomy which resulted in scar tissue at the L5-S1 nerve roots.

Subsequently, appellant submitted reports by Dr. Douglas Stringer dated June 3 through September 16, 2011 opining that he was unable to work and was unemployable. He also submitted reports by Dr. Merle Stringer dated March 10 through July 26, 2011 opining that he was totally disabled from his previous occupation as field engineer. OWCP approved lumbar spine fusion which appellant underwent on November 16, 2011. On February 9, 2012, after the approved surgery, Dr. Giovanini advised that he would not recommend appellant do physical work at all.

The Board finds this case is not in posture for a decision and must be remanded for further development of the medical evidence. When OWCP referred the case to Dr. Owen for a second opinion, it did not pose relevant questions to resolve the loss of wage-earning capacity issue. It should have inquired specifically whether the employment-related condition had worsened, thereby rendering him totally disabled. As OWCP attempted to develop the medical evidence, received additional medical evidence suggesting that appellant was totally disabled and authorized surgery, the case should be remanded for further development.

On remand, OWCP shall create a new statement of accepted facts and refer appellant to a new medical examination to determine whether he has a change in his employment-related medical condition that has rendered him totally disabled for work. After this and such other development of the medical evidence as it deems necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the February 29, 2012 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further action consistent with this decision of the Board.

Issued: January 22, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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