

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

E.W., Appellant)
and) Docket No. 12-1961
DEPARTMENT OF THE NAVY, NORTH) Issued: May 9, 2013
ISLAND NAVAL AIR REWORK FACILITY,)
San Diego, CA, Employer)

)

Appearances:

James J. Cunningham, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

JURISDICTION

On September 24, 2012 appellant, through his attorney, filed a timely appeal from an August 30, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) denying modification of a wage-earning capacity determination.¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant has established that OWCP's October 8, 2010 loss of wage-earning capacity determination should be modified.

¹ Appellant requested an oral argument. The Board denied appellant's request in a separate order. Thus, the Board, in its discretion, has decided the appeal on the record.

² 5 U.S.C. § 8101 *et seq.*

On appeal, appellant asserts that OWCP reduced his compensation based on “outdated and irrelevant” evidence, ignoring his physicians’ opinions that he was totally and permanently disabled for work.

FACTUAL HISTORY

This matter has previously been before the Board. By decision and order issued March 4, 1998,³ the Board reversed an October 10, 1995 OWCP decision rescinding acceptance of a recurrence of disability on the grounds that there was a conflict of medical opinion at the time of the rescission regarding whether an accepted L3-4 disc herniation and lumbar sprain occurring on June 21, 1979 had spontaneously worsened on November 1, 1989. The law and facts of the case as set forth in the Board’s prior decision and order are incorporated by reference.

OWCP denied the November 1, 1989 recurrence of disability by decisions dated May 11, and October 4, 1999 and July 18, 2000, based on the April 19, 1999 report of Dr. Gregory H. Schwab, a Board-certified orthopedic surgeon and impartial medical examiner, who opined that appellant had no residuals of accepted lumbar injuries. In support of his recurrence claim, appellant had submitted a March 16, 2000 report from Dr. Edwin W. Reiner, an attending orthopedic surgeon, and a January 27, 2000 report from Dr. Anthony Markarian, an attending Board-certified orthopedic surgeon, both opining that appellant remained disabled for work due to the accepted L3-4 central disc herniation, as well as spinal stenosis and left thigh atrophy.⁴ OWCP then obtained an impartial medical opinion from Dr. Vert Mooney, a Board-certified orthopedic surgeon, who submitted April 11 and 27, 2002 reports finding appellant disabled for work due to occupationally-related degenerative disc disease, particularly severe at L4-5.⁵ On February 26, 2004 it accepted that appellant sustained a recurrence of disability commencing November 1, 1989. Appellant received compensation on the daily rolls retroactive to November 1, 1989 and on the periodic rolls beginning on June 13, 2004.

Dr. Rebecca Zeiner, an attending Board-certified family practitioner, submitted reports from July 8, 2005 to August 12, 2008 diagnosing numbness and weakness of the left leg and foot due to lumbar degenerative disc disease.⁶ She found appellant totally disabled for work as of December 18, 2008. In a December 4, 2009 report, Dr. Zeiner found that appellant had reached maximum medical improvement and remained totally and permanently disabled for work.

OWCP obtained a second opinion from Dr. Philip Z. Wirganowicz, a Board-certified orthopedic surgeon, who submitted a November 11, 2009 report reviewing the medical record

³ Docket No. 96-549 (issued March 4, 1998); *Order Granting Petition for Correction*, affirming March 4, 1998 decision and order (issued January 28, 1999).

⁴ From April 10 to November 3, 1989, appellant worked at a private-sector aircraft company, earning \$16.00 an hour. From June 6, 1990 to March 15, 1996, he worked as a usher in a sports stadium. In 1995, appellant worked at 29 events for a total of 163.75 hours. He worked occasionally as an usher through 2000.

⁵ Dr. Mooney initially provided March 22 and July 9, 2001 reports that OWCP found did not answer the questions posed to him.

⁶ Dr. Mooney submitted an October 17, 2005 report concurring that appellant remained totally disabled for work due to work-related degenerative disc disease.

and a statement of accepted facts. He noted that appellant was diagnosed with prostate cancer in 2002, and had hypertension and diabetes. On examination, Dr. Wirganowicz found atrophy of the left thigh and calf and 4/5 left leg weakness. He diagnosed a work-related L3-4 lumbar disc herniation with stenosis and persistent protrusion, chronic bilateral L5-S1 radiculopathy and left leg weakness. Dr. Wirganowicz opined that the left leg weakness, subjective numbness and visible atrophy were all related to the accepted 1979 lumbar injuries. He found that appellant had attained maximum medical improvement. On January 9, 2010 Dr. Wirganowicz opined that appellant could perform light work for eight hours a day, with lifting, pulling and pushing limited to 25 pounds. Appellant could sit for up to eight hours a day and perform all other activities up to four hours a day.

On February 19, 2010 OWCP referred appellant for vocational rehabilitation services. Appellant met with a vocational rehabilitation counselor on March 31, 2010 and completed vocational testing demonstrating average skills. The counselor implemented a private-sector reemployment plan as the employing establishment could not accommodate appellant's medical restrictions.

In an April 13, 2010 report, Dr. Lindy C. O'Leary, an attending physician Board-certified in occupational medicine, found appellant totally disabled for work due to worsening degenerative lumbar disc disease and lumbar radiculopathy. She stated in a May 7, 2010 report that residuals of the accepted lumbar injuries did not prevent appellant from participating in vocational rehabilitation. However, Dr. O'Leary found him unable to participate in vocational rehabilitation due to unspecified underlying conditions.

On June 16, 2010 the vocational rehabilitation counselor completed a labor market survey showing that entry-level jobs as an Assembler, Small Products I, DOT (U.S. Department of Labor, *Dictionary of Occupational Titles*) #706.684-022 and Assembler, Small Products II, DOT #739.687-030, were reasonably available in appellant's commuting area, with starting wages of \$400.00 a week. The positions were both sedentary, with lifting up to 20 pounds. The counselor noted that both positions were commensurate with appellant's vocational experience as an aircraft production supervisor and within the medical limitations provided by Dr. Wirganowicz on January 9, 2010. The counselor implemented a 90-day new employer placement plan commencing June 23, 2010. Appellant refused to sign the plan and stated that he did not wish to return to work.

In a July 6, 2010 letter, appellant asserted that he was medically unable to participate in vocational rehabilitation due to lumbar pain and left leg weakness. He noted that his physicians had found him totally disabled for work.

From July 6 to August 17, 2010, the vocational rehabilitation counselor identified 21 small product assembler jobs available in appellant's commuting area. The counselor noted that appellant did not pursue any of the job contacts.

In a July 7, 2010 letter, OWCP advised appellant that he had 30 days in which to submit medical evidence demonstrating that he was unable to perform the selected small products assembler positions. Appellant submitted an August 13, 2010 report from Dr. O'Leary, finding him permanently and totally disabled due to progressive osteoarthritis, left leg numbness and

weakness, hypotonia, chronic left-sided lumbar radiculopathy and an unstable gait. OWCP closed the vocational rehabilitation effort on August 20, 2010.

By notice dated September 7, 2010, OWCP advised appellant that it proposed to reduce his wage-loss compensation under sections 8106 and 8115 of FECA⁷ by his projected earnings of \$400.00 a week as an Assembler, Small Products I. Appellant was afforded 30 days to present evidence or argument establishing that the selected position was not suitable. In response, he resubmitted Dr. O'Leary's August 13, 2010 report.

By decision dated October 8, 2010, OWCP reduced appellant's wage-loss compensation effective October 24, 2010, based on his projected ability to earn \$400.00 a week in the selected position of Assembler, Small Products I. It found that the position properly represented his wage-earning capacity as it was within his medical and vocational capacities. OWCP found that the selected position was reasonably available in appellant's commuting area, based on the vocational rehabilitation counselor's June 16, 2010 labor market survey.

In December 15, 2010 and April 20, 2011 letters, appellant's counsel requested modification of the October 8, 2010 loss of wage-earning capacity determination. He asserted that diabetes was a relevant factor in the disability determination as appellant was diagnosed after the accepted lumbar injuries. Counsel submitted additional medical evidence.

On December 4, 2009 Dr. Zeiner diagnosed stage 3 chronic diabetic kidney disease, anemia, lumbar radiculopathy, degenerative lumbar disc disease and chronic low back pain. In a November 3, 2010 report, Dr. O'Leary stated that appellant remained totally and permanently disabled for work due to back pain and left leg numbness and weakness. She noted that appellant's left leg numbness could be diabetic neuropathy. On February 24, 2011 Dr. O'Leary diagnosed spinal claudication with severe central canal stenosis at L3-4.⁸ She referred appellant to Dr. Timothy Armstrong, a Board-certified neurologist, who diagnosed mild chronic L5-S1 radiculopathy on April 19, 2011.

By decision dated July 28, 2011, OWCP denied modification of the October 8, 2010 wage-earning capacity determination. It found that the additional medical evidence submitted did not establish that the injury-related condition had worsened or that the original rating was in error. Appellant did not assert or establish that he had been vocationally rehabilitated.

In September 16 and December 15, 2011 letters, appellant and counsel requested modification of the October 8, 2010 loss of wage-earning capacity determination. Counsel asserted that new medical evidence established that appellant was totally disabled for work due to spinal stenosis, which he acknowledged was not an accepted condition. He provided additional medical evidence.

⁷ 5 U.S.C. §§ 8106 and 8115.

⁸ A December 13, 2010 lumbar magnetic resonance imaging (MRI) scan showed lumbar spondylosis at L3-4 and L4-5 and scattered degenerative facet changes.

In July 20 and September 7, 2011 reports, Dr. O'Leary opined that appellant's spinal stenosis and arthritis had worsened such that he could not work or participate in vocational rehabilitation. Appellant also had "multiple other medical problems that would prevent him from returning [to] work or participating in a vocational rehabilitation program." He had difficulty with walking and activities of daily living. On August 16, 2011 Dr. Daniel A. Green, an attending Board-certified orthopedic surgeon, recommended a laminectomy to address lumbar stenosis and relieve appellant's leg pain.⁹

By decision dated January 31, 2012, OWCP denied modification of the October 8, 2010 wage-earning capacity determination on the grounds that the evidence submitted did not establish that the original determination was in error, that appellant had been vocationally rehabilitated, or that the accepted L3-4 disc herniation and lumbar strain worsened such that he could no longer perform the selected small parts assembler position. It noted that appellant's physicians continued to attribute his disability to nonoccupational conditions arising after the June 21, 1979 injuries.

In a June 13, 2012 letter, counsel again requested modification of the October 8, 2010 wage-earning capacity determination. He asserted that new medical evidence established that the accepted lumbar injuries had worsened such that appellant could no longer perform the selected position of small products assembler. Counsel submitted a March 28, 2012 report from Dr. O'Leary, reiterating that appellant's arthritis and spinal stenosis had progressed, increasing the numbness and weakness in his left leg. Dr. O'Leary noted "multiple other medical problems that would prevent him from returning to work or participating in a vocational rehabilitation program. She found that appellant remained permanently and totally disabled for work. Dr. O'Leary proffered that Dr. Wirganowicz would also have found appellant totally disabled for work in his current state.

By decision dated August 30, 2012, OWCP denied modification of the October 8, 2010 wage-earning capacity determination on the grounds that the evidence submitted did not establish that the original determination was in error, that appellant had been vocationally rehabilitated, or that the accepted L3-4 disc herniation and lumbar strain worsened such that he could no longer perform the selected small parts assembler position.

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.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

⁹ August 17, 2011 lumbar x-rays showed degenerative disc space narrowing at L5-S1, mild spurs at multiple levels, degenerative facet sclerosis at L4-5 and L5-S1.

¹⁰ See *Sharon C. Clement*, 55 ECAB 552 (2004).

rehabilitated, or the original determination was, in fact, erroneous.¹¹ 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 CE [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity.”¹² The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.¹³

ANALYSIS

OWCP accepted that appellant sustained an L3-4 disc herniation and lumbar sprain as a result of a June 21, 1979 work injury. Dr. Zeiner, an attending Board-certified family practitioner, found appellant totally disabled for work as of December 18, 2008 due to degenerative disc disease, a condition not accepted by OWCP. Dr. Wirganowicz, a Board-certified orthopedic surgeon and second opinion physician, found appellant capable of full-time light duty as of January 9, 2010. On October 8, 2010 OWCP determined that he could perform the duties of Assembler, Small Products I and reduced his compensation to reflect his wage-earning capacity in this constructed position. The issue is whether appellant established that the October 8, 2010 wage-earning capacity decision should be modified.

Once OWCP found that appellant could perform the duties of a small products assembler, the issue nor is whether there has been a material change in his work-related condition that would render him unable to perform those duties.¹⁴ Appellant did not allege that he had been retrained or otherwise vocationally rehabilitated. He contended that reports from Dr. O'Leary, an attending physician Board-certified in occupational medicine, and Dr. Zeiner, an attending Board-certified family practitioner, established that appellant was no longer able to work because of conditions caused by the June 21, 1979 work injuries. For a physician's opinion to be relevant on this issue, the physician must address the duties of the constructed position.¹⁵ The Board finds that the record does not contain medical evidence establishing that appellant's accepted work-related injuries, an L3-4 lumbar disc herniation and a lumbar sprain, had materially worsened so that he could no longer serve in the selected position.

Following the wage-earning capacity determination, appellant requested its modification on December 15, 2010 and September 16, 2011, asserting that the accepted injuries had materially worsened such that the selected assembler position was no longer medically suitable. He submitted a December 4, 2009 report from Dr. Zeiner diagnosing diabetes, kidney disease, anemia, radiculopathy and degenerative disc disease, conditions not accepted by OWCP. Appellant also provided reports from Dr. O'Leary dated from November 3, 2010 through

¹¹ *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995). See *Harley Sims, Jr.*, 56 ECAB 320 (2005).

¹³ *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

¹⁴ *Phillip S. Deering*, 47 ECAB 692 (1996).

¹⁵ *Id.*

September 7, 2011, finding him totally disabled for work due to spinal claudication with central canal stenosis at L3-4, arthritis and “multiple other medical problems.” Dr. Armstrong, a Board-certified neurologist, diagnosed lumbar radiculopathy, and Dr. Green, a Board-certified orthopedic surgeon, diagnosed lumbar stenosis. However, OWCP did not accept that spinal claudication, stenosis, arthritis or lumbar radiculopathy were related to the accepted injuries. If OWCP has not accepted a condition as employment related, appellant has the burden of proof to establish causal relationship.¹⁶ Appellant’s physicians did not provide sufficient rationale explaining how and why the accepted L3-4 disc herniation and lumbar sprain caused the nonaccepted conditions.¹⁷ Therefore, this evidence is insufficient to establish a basis for modification of the loss of the wage-earning capacity decision.

Counsel again requested modification of the October 8, 2010 wage-earning capacity determination on June 13, 2012, asserting a worsening of the accepted conditions. He submitted a March 28, 2012 report from Dr. O’Leary finding appellant totally disabled for work due to worsening spinal stenosis and arthritis. As set forth above, OWCP did not accept arthritis or spinal stenosis as causally related to the herniated L3-4 disc or lumbar strain. It denied modification by decision dated August 30, 2012, finding that appellant had not established a worsening of the accepted injuries. As Dr. O’Leary again attributed appellant’s disability to nonaccepted conditions, OWCP’s denial of modification was proper.

Appellant did not meet his burden of proof to establish a material change in the nature and extent of his injury-related condition, that the original determination was in fact erroneous or that he was vocationally rehabilitated. He failed to establish that the October 8, 2010 wage-earning capacity determination should be modified.

On appeal, appellant asserts that OWCP reduced his compensation based on “outdated and irrelevant” evidence, ignoring his physicians’ opinions that he was totally and permanently disabled for work. As stated, his physicians did not attribute his disability for work to the accepted injuries, but to conditions not established as related to those injuries. Appellant did not meet his burden of proof to establish that the accepted herniated disc and lumbar sprain worsened such that he was no longer capable of performing the selected small products assembler position. He may request modification of the wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

CONCLUSION

The Board finds that OWCP properly denied modification of the October 8, 2010 wage-earning capacity determination.

¹⁶ See *Jaja K. Asaramo*, 55 ECAB 200 (2004).

¹⁷ *Deborah L. Beatty*, 54 ECAB 340 (2003).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 30, 2012 is affirmed.

Issued: May 9, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board