

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

G.P., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
U.S. COAST GUARD, Curtis Bay, MD, Employer)

Docket No. 14-1005
Issued: November 4, 2014

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 27, 2014 appellant filed a timely appeal from a November 21, 2014 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 the claim.

ISSUE

The issue is whether OWCP properly modified a March 28, 1996 wage-earning capacity determination and terminated compensation for wage-loss and medical benefits effective November 18, 2012.

FACTUAL HISTORY

OWCP accepted that on February 19, 1991 appellant, then a 26-year-old full-time marine machinery mechanic helper, sustained a back contusion, thoracic strain, lumbar strain and

¹ 5 U.S.C. § 8101 *et seq.*

lumbosacral strain when he fell backward onto a pallet. He stopped work on February 22, 1991, returned to work in a light-duty position on June 6, 1991, then again stopped work. Appellant received compensation on the daily rolls from July 19, 1991 to March 3, 1995 and then on the periodic rolls.²

Appellant was first followed by Dr. James C. Murphy, III, an attending Board-certified orthopedic surgeon, who noted a history of a severe back injury sustained in an August 3, 1988 slip and fall prior to the February 19, 1991 injury. In June 25, 1991 reports, Dr. Murphy noted L4-5 and L5-S1 disc degeneration with a slight right-sided L4-5 disc herniation demonstrated by a June 5, 1991 magnetic resonance imaging (MRI) scan. January 28, 1992 imaging studies showed spina bifida occulta at S1 and disc bulges at L4-5 and L5-S1. Dr. Murphy found appellant disabled for work for an indefinite period due to lumbar pain with bilateral radiculopathy.³

In reports from February 2, 1993 to May 16, 1994, Dr. Murphy opined that appellant's condition had improved such that he could return to light-duty work. As the medical evidence indicated that appellant could return to work in some capacity, on July 20, 1994, OWCP referred him for vocational rehabilitation services. A functional capacity evaluation⁴ showed that he could perform full-time medium-duty work, with lifting up to 60 pounds, no forward bending and limited stair climbing. As the employing establishment could not accommodate appellant's physical restrictions, the vocational rehabilitation counselor implemented a private sector reemployment plan. In December 1995, appellant obtained employment with a private sector delivery service. He began work on January 28, 1996, working 20 hours a week with a weekly salary of \$177.48. Appellant performed the position successfully through March 28, 1996 and continuing.

By decision dated March 28, 1996, OWCP determined that the position of driver/courier represented appellant's wage-earning capacity and reduced his wage-loss compensation effective January 28, 1996 based on his actual earnings with the private sector delivery company.⁵

In an August 10, 1999 report, Dr. Murphy noted appellant's continuing lumbar symptoms with left-sided radiculopathy.

² Appellant was terminated from the employing establishment on July 19, 1991 for allegedly making false statements on his employment application.

³ In a September 8, 1992 report, Dr. William J. Meyer, an attending Board-certified neurosurgeon, diagnosed L5 and S1 radiculopathies confirmed by electrodiagnostic and imaging studies. On October 22, 1992 OWCP obtained a second opinion from Dr. Myles D. Brager, a Board-certified orthopedic surgeon, who opined that appellant sustained a soft tissue injury that would not prevent him from returning to full duty.

⁴ On June 20, 1994 OWCP obtained another second opinion from Dr. Louis S. Halikman, a Board-certified orthopedic surgeon, who recommended a functional capacity evaluation as appellant's presentation was inconsistent.

⁵ On June 16, 1997 OWCP obtained a second opinion from Dr. Miraz A. Baiz, a Board-certified orthopedic surgeon, who recommended a functional capacity evaluation as appellant had residual left-sided lumbar radiculopathy.

From March 6, 2000 through December 14, 2011, appellant submitted periodic affidavits of earnings and employment (Form EN-1032) listing earnings of \$100.00 a week interspersed with long periods of unemployment. During this period, OWCP issued compensation based on constructed earnings of \$100.00 a week.

In a February 24, 2012 report, Dr. Gurtej Singh, an attending physician Board-certified in psychiatry and pain management, noted a history of the accepted 1991 injury but also that his complaints arose spontaneously. On examination, he found limited lumbar motion and bilaterally positive facet loading tests. Dr. Singh diagnosed low back pain, lumbosacral spondylosis and muscle spasm. He prescribed medication. Dr. Singh submitted periodic reports dated March 30, 2012 noting appellant's continued lumbar symptoms with bilateral radiculopathy.

On August 1, 2012 OWCP obtained a second opinion from Dr. Stuart J. Gordon, a Board-certified orthopedic surgeon, who reviewed a statement of accepted facts and the medical record. On examination, Dr. Gordon found tenderness to deep lumbar palpation and limited lumbar motion. He diagnosed "low back pain and spondylosis or degenerative disease." Dr. Gordon opined that the accepted February 19, 1991 injury had resolved without residuals and that appellant's ongoing symptoms were due to idiopathic degenerative disc disease. He opined that appellant could return to full duty in his date-of-injury position. Dr. Gordon noted that appellant required no further medical treatment or therapy related to the accepted injury.

By notice dated September 19, 2012, OWCP advised appellant that it proposed to modify its March 28, 1996 loss of wage-earning capacity determination by terminating his wage-loss and medical compensation benefits on the grounds that the accepted injury ceased without residuals. It noted that Dr. Gordon's opinion represented the weight of the medical evidence. Appellant was afforded 30 days to present evidence or argument establishing that the accepted February 19, 1991 lumbar injury remained active and disabling.

In response, appellant submitted reports from Dr. Singh dated from February 24 to October 15, 2012 noting appellant's continuing lumbar pain with radiculopathy. In an October 15, 2012 report, Dr. Singh noted that there was a gap in appellant's treatment from 1999 until he began following appellant in 2012. He opined that appellant's symptoms remained related to the February 1991 injury.

By decision dated November 7, 2012, OWCP modified its March 28, 1996 decision by terminating appellant's entitlement to wage-loss and medical compensation benefits effective November 28, 2012 on the grounds that the accepted lumbar injury had ceased without residuals. It accorded Dr. Gordon the weight of the medical evidence in finding a material change in appellant's condition such that he no longer had a loss of wage-earning capacity.

In a November 14, 2013 letter, appellant requested modification of the November 7, 2012 wage-earning capacity determination and reconsideration of the termination of his medical benefits. He asserted that he remained under continuous treatment since the 1999 injury, that Dr. Singh's reports established continuing disability for work and that Dr. Gordon did not perform a physical examination. Appellant submitted additional medical evidence.

In a January 28, 2013 report, Dr. Murphy noted examining appellant for the first time since 1999 and that appellant's complaints were "basically the same" but "slightly worse" than at his last visit. On examination, he found bilaterally positive straight leg raising tests. Dr. Murphy obtained x-rays showing some narrowing at L4-5. He diagnosed "[k]nown degenerative disc disease and probable facet arthritis lower lumbar spine."

A September 19, 2013 MRI scan showed lumbar spondylosis at L4-5 with mild central stenosis and a small disc protrusion with annular fissure and neural foraminal stenosis from L2 to S1 with clinically correlated radiculopathies.

In an October 23, 2013 report, Dr. Andrew D. Egger, an attending Board-certified physiatrist, provided a history of injury and treatment. On examination, he found diminished light touch sensation in the L4 and S1 distributions in the left foot, bilaterally positive straight leg, Faber, Fadir, posterior shear, sacral shear and pelvic rock signs. Dr. Egger diagnosed low back pain, lumbar disc displacement, lumbar disc degeneration and lumbar spondylosis without myelopathy. He opined that although he could not "prove or disprove injury to the lumbar spine" based on imaging studies, it was a "reasonable history of events." Dr. Egger commented that appellant continued to have positive radiologic findings, with marked narrowing at L5-S1 indicating a prior traumatic injury.

Appellant also submitted a November 4, 2013 report from a physician's assistant.

By decision dated November 21, 2013, OWCP denied modification of its November 6, 2012 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 lumbar injury had worsened such that he could no longer perform the driver/courier position. It noted that appellant's physicians continued to attribute appellant's disability to idiopathic degenerative conditions and not the accepted February 19, 1991 injury. OWCP also noted that Dr. Egger was incorrect in assuming that appellant's benefits were terminated due to "normalization of imaging."

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.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 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

⁶ See *Sharon C. Clement*, 55 ECAB 552 (2004).

⁷ *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

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.”⁸ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁹

With respect to termination of benefits, once OWCP has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.¹⁰ Having determined that an employee has a disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.¹¹ The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability. To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which require further medical treatment.¹²

ANALYSIS

OWCP accepted that appellant sustained a back contusion, thoracic strain, lumbar strain and lumbosacral strain as the result of a February 19, 1991 work injury. Following a vocational rehabilitation effort, appellant obtained private sector employment as a driver/courier as of January 28, 1996, working 20 hours a week. OWCP based its March 28, 1996 wage-earning capacity determination on this part-time position. It modified the original determination on November 7, 2012, finding that appellant had no loss of wage-earning capacity as the accepted injury had resolved without residuals. The issue is whether appellant established that the November 7, 2012 decision should be modified.

The Board finds that the original March 28, 1996 wage-earning capacity determination was procedurally erroneous because OWCP based its finding on a part-time position. As of March 28, 1996, the factors OWCP considered in evaluating whether actual earnings fairly and reasonably represented a claimant’s wage-earning capacity included determining if the position was temporary, make shift or part time.¹³ At the time of the accepted February 19, 1991 lumbar injury, appellant was employed as a full-time marine machinery mechanic helper. The driver/courier position he performed from January 28 to March 28, 1996 was part time, with a 20-hour a week schedule. OWCP did not set forth its reasoning for basing its wage-earning capacity determination on a part-time position when appellant worked full time as of the date of injury. There is no evidence that OWCP investigated the nature of the position to determine if it

⁸ 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).

⁹ *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

¹⁰ *Bernadine P. Taylor*, 54 ECAB 342 (2003).

¹¹ *Id.*

¹² *Furman G. Peake*, 41 ECAB 361 (1990).

¹³ *Debra R. McClendon*, Docket No. 96-1692 (issued May 14, 1998); *Mary Jo Colvert*, 45 ECAB 575 (1994). OWCP has since amended its procedure manual regarding the criteria for determining whether a position properly represents a claimant’s wage-earning capacity. See *supra* note 8 at Chapter 2.815.5(c) (June 2013).

was made part time in order to meet his particular needs or was otherwise not available in the open labor market. The Board notes that, on affidavits of earnings and employment from March 6, 2000 through December 14, 2011, appellant did not report earning more than \$100.00 a week, indicating that he remained a part-time employee. Additionally, OWCP did not obtain a position description for the driver/courier job. The Board finds that, under these circumstances, OWCP abused its discretion in determining that appellant's actual earnings in part-time reemployment fairly and reasonably represented his wage-earning capacity. Accordingly, the November 7, 2012 decision is set aside regarding the loss of wage-earning capacity determination.¹⁴ Upon return of the record, OWCP will determine whether, prior to November 18, 2012, there were any periods for which appellant did not receive appropriate wage-loss compensation and issue an appropriate decision.¹⁵

However, the Board further finds that OWCP properly terminated appellant's wage-loss and medical benefits effective November 18, 2012 on the grounds that the medical evidence did not establish any continuing residuals or disability on and after November 18, 2012 due to the accepted February 19, 1991 lumbar injury.¹⁶

OWCP accorded the weight of the medical evidence to Dr. Gordon, a Board-certified orthopedic surgeon and second opinion physician, who opined on August 1, 2012 that appellant no longer required treatment or therapy related to the accepted February 2, 1991 injury and that he could return to his regular duties. He explained that, based on a clinical examination, statement of accepted facts and the complete medical record, appellant's ongoing symptoms were unrelated to the accepted lumbar contusion and strains. The Board finds that Dr. Gordon's opinion was sufficiently rationalized to establish that appellant did not have injury-related residuals or disability on and after November 18, 2012.

Appellant submitted reports from several attending physicians. Dr. Murphy, a Board-certified orthopedic surgeon, had treated appellant for lumbar spasm and bilateral lumbar radiculopathies through August 10, 1999 but noted little change as of a January 28, 2013 examination. He did not opine that any residuals of the accepted injury required additional treatment. Dr. Egger, an attending Board-certified physiatrist, posited on October 23, 2013 that marked narrowing at L5-S1 indicated a possible traumatic injury. Dr. Singh, a Board-certified physiatrist and pain management specialist, submitted reports from February 24 to October 15, 2012 opining that appellant required continued medication and management due to bilateral

¹⁴ N.C., Docket No. 14-370 (issued May 5, 2014).

¹⁵ If a reduction of benefits based upon actual earnings is not properly determined to fairly and reasonably represent the employee's wage-earning capacity, an informal reduction of benefits utilizing the formula in *Albert C. Shadrick*, 5 ECAB 376 (1953) is proper rather than a formal loss of wage-earning capacity determination. *L.D.*, Docket No.12-81 (issued June 25, 2012); *D.C.*, Docket No. 09-1460 (issued April 19, 2010).

¹⁶ Having issued a formal wage-earning capacity determination on March 28, 1996, such decision typically remains in place unless it is modified. See *Katherine T. Kreger*, *supra* note 7. As explained, *infra*, however, this wage-earning capacity decision was procedurally flawed. Furthermore, in certain situations, if the medical evidence is sufficient to meet OWCP's burden of proof to terminate benefits, the same evidence may also negate a loss of wage-earning capacity such that a separate evaluation of the existing wage-earning capacity determination is unnecessary. See *A.P.*, Docket No. 08-1822 (issued August 5, 2009). The Board finds that, as explained *infra*, the medical evidence from Dr. Gordon discharges that burden.

lumbar radiculopathy attributable in part to the February 2, 1991 injury. However, these physicians did not explain how and why appellant's symptoms on and after November 18, 2012 were related to the accepted injury or required ongoing treatment. Their opinions are therefore insufficient to establish a continuing entitlement to medical benefits.¹⁷

Appellant also provided a November 4, 2013 report from a physician's assistant. As physician's assistants are not considered physicians under FECA, their medical opinions are of no probative medical value. *Vickey C. Randall*, 51 ECAB 357 (2000). Appellant also submitted copies of Dr. Singh's reports previously of record.

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 OWCP improperly denied modification of the November 7, 2012 wage-earning capacity determination. The Board further finds that OWCP properly terminated appellant's wage-loss and medical benefits effective November 18, 2012.

¹⁷ *D.L.*, Docket No. 11-1840 (issued April 9, 2012).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 21, 2014 is set aside in part regarding modification of the wage-earning capacity determination and affirmed in part regarding the termination of appellant's wage-loss compensation and medical benefits.

Issued: November 4, 2014
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