

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

_____)
D.D., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Decatur, IL, Employer)

Docket No. 14-1503
Issued: November 24, 2014

Appearances:

Alan J. Shapiro, Esq., for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On June 18, 2014 appellant, through his attorney, filed a timely appeal from a May 14, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP) denying modification of its loss of wage-earning capacity determination. 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 this case.

ISSUE

The issue is whether appellant established that the July 30, 2009 loss of wage-earning capacity determination should be modified.

FACTUAL HISTORY

This case has previously been before the Board. By decision dated September 5, 2012, the Board set aside a September 14, 2011 decision denying modification of the July 30, 2009 loss

¹ 5 U.S.C. § 8101 *et seq.*

of wage-earning capacity determination.² The Board noted that appellant filed a recurrence of disability beginning January 26, 2011 after his limited-duty position was withdrawn and his hours reduced under the National Reassessment Program (NRP). The Board remanded the case for OWCP to apply FECA Bulletin No. 09-05. In a decision dated November 18, 2013, the Board affirmed an April 30, 2013 OWCP decision finding that appellant did not have any permanent impairment of the lower extremities.³ The facts and circumstances as set forth in the prior decisions are hereby incorporated by reference. The facts relevant to the instant appeal are set forth.

After remand by the Board, in a decision dated October 25, 2012, OWCP denied modification of its July 30, 2009 loss of wage-earning capacity decision. On May 1, 2013 an OWCP hearing representative affirmed the October 25, 2012 decision. He found that OWCP applied FECA Bulletin No. 09-05 and determined that appellant had not established that the wage-earning capacity should be modified either because the position was makeshift or because his condition materially worsened.

The record reflects that appellant continued to work in his part-time modified position until he stopped work on August 15, 2011. He returned to work on November 18, 2011 for eight hours a day in his previous limited-duty employment. The position required appellant to perform his usual duties with frequent breaks and no overtime.

On September 10, 2012 appellant alleged that he sustained hip and low back pain due to factors of his federal employment. OWCP accepted the claim for lumbar sprain under claim file number xxxxxx064. It doubled the case record into the current claim file number xxxxxx054.

In a report dated September 10, 2012, Dr. Patrick A. Hartman, Board-certified in family practice, evaluated appellant for low back pain. Appellant identified the reason for his visit as low back and bilateral hip pain from an employment injury. Dr. Hartman diagnosed low back pain. In a duty status report dated September 10, 2012, he diagnosed low back strain and provided work restrictions, including lifting and carrying up to five pounds and standing and walking for two hours a day. The duty status report listed the date of injury as September 7, 2012. Dr. Hartman checked "yes" that the history of injury given by appellant

² On February 23, 2006 appellant, then a 40-year-old letter carrier, filed a traumatic injury claim alleging that on February 16, 2006 he experienced left shoulder pain while casing mail. OWCP accepted the claim, assigned claim file number xxxxxx054, for a left displaced cervical intervertebral disc. It further accepted that on January 18, 2006 appellant sustained lumbar strain and herniated discs at L1-2 and L5-S1. OWCP assigned the claim file number xxxxxx218. It combined both file numbers into claim file number xxxxxx054. On July 28, 2008 appellant underwent a right laminectomy and discectomy at L5-S1. He also underwent cervical surgeries on October 8 and 27, 2008. On April 2, 2009 appellant accepted a position with the employing establishment casing and carrying mail for eight hours a day with no overtime and frequent breaks. By decision dated July 30, 2009, OWCP reduced his compensation to zero based on its finding that his actual earnings beginning April 2, 2009 fairly and reasonably represented his wage-earning capacity.

³ Docket No. 13-1562 (issued November 18, 2013). By decision dated January 20, 2012, OWCP granted appellant a schedule award for a 13 percent left upper extremity impairment. In a decision dated July 24, 2012, it denied his claim for a schedule award of the lower extremities. On September 20, 2012 an OWCP hearing representative set aside the July 24, 2012 decision. In decisions dated October 23, 2012 and April 30, 2013, OWCP again determined that appellant was not entitled to a schedule award of the lower extremities.

corresponded to that on the claim form of lower back and hip pain. He completed duty status reports dated September 2012 to August 2013 providing the same work restrictions but listing the date of injury as February 16, 2005. Dr. Hartman again checked “yes” that the history provided corresponded to that described on the form of hip and low back pain.

In a report dated September 17, 2012, Dr. Hartman found that appellant’s back was slowly improving from being off work. On October 1, 2012 he diagnosed hip and low back pain and increased his lifting restrictions to 10 pounds. On November 5, 2012 Dr. Hartman related that appellant heard something pop when he bent over to get his shoes and experienced radiating pain into his right leg. He diagnosed radicular pain. In a report dated November 26, 2012, Dr. Hartman diagnosed back pain with little change and the same restrictions. In progress reports dated December 2012 through July 2013, he provided findings on examination and discussed his treatment of appellant for low back pain.

On October 18, 2012 appellant filed a claim for compensation (Form CA-7) requesting compensation for time lost from September 8 to October 19, 2012. On August 9, 2013 he filed a claim for compensation from September 13, 2012 through August 9, 2013.

By letter dated August 28, 2013, OWCP informed appellant that it had received his claim for compensation and noted that his physician submitted duty status reports beginning September 10, 2012 with increased work restrictions. It found that the date of injury on the reports changed from September 7, 2012, the date of his occupational disease under claim file number xxxxxx064, to February 16, 2005. OWCP provided appellant 30 days to submit reasoned medical evidence that his condition had materially worsened.

On August 27, 2013 the employing establishment indicated that appellant worked either full or part time from January 2011 until he stopped work on August 15, 2011. Appellant returned to work on November 18, 2011 and worked full time until he stopped work on September 12, 2012 because it did not have work available.

In a report dated September 12, 2013, Dr. Hartman opined that appellant was unable to work beginning September 7, 2012 due to hip and low back pain. He stated, “Etiologies are often complex and mixed problems seem to be at play here.”

By decision dated October 8, 2013, OWCP denied modification of its July 30, 2009 loss of wage-earning capacity determination. It found that appellant did not establish that his condition materially worsened.⁴

In a report dated October 10, 2013, Dr. Hartman advised that appellant was seen to “discuss his [w]orkers’ [c]ompensation for the [employing establishment].” He diagnosed chronic low back pain and noted that he was not working.

On October 14, 2013 appellant, through his attorney, requested a telephone hearing before an OWCP hearing representative.

⁴ OWCP noted that a March 29, 2013 magnetic resonance imaging scan study showed no disc herniations.

In a report dated November 11, 2013, Dr. Hartman noted that appellant “presents for [w]orkers’ [c]ompensation follow up.” He diagnosed low back and hip pain and found that his work restrictions had not changed. November 11, 2013 x-rays showed mild bilateral hip degenerative changes.

On December 17, 2013 Dr. Hartman evaluated appellant for low back pain and weakness in his leg. He provided a specific diagnosis of low back pain and increased leg weakness. On January 14, 2014 Dr. Hartman advised that an electromyography (EMG) revealed radiculopathy at L5-S1 of undetermined age. On February 13, 2014 he noted that he was following up on appellant’s back injury, which had not changed, and he diagnosed continued low back pain.

At the telephone hearing, held on March 12, 2014, appellant related that he was currently receiving disability retirement compensation. He related that his supervisor told him to pursue his claim under the 2005 work injury rather than the 2012 occupational disease claim. After appellant filed his September 2012 occupational disease claim, he provided new work restrictions to the employing establishment, but the employing establishment was unable to provide work within the new restrictions. Counsel attributed the worsening of appellant’s condition to his 2012 occupational disease claim, assigned claim file number xxxxxx064 and accepted for lumbar strain. An OWCP hearing representative advised appellant to claim disability compensation under claim file number xxxxxx064. He informed counsel that even if the cases were administratively doubled, claims for disability should be filed under the specific file number.

On February 13, 2014 Dr. Hartman diagnosed continued low back pain. In a report dated March 18, 2014, he stated, “[Appellant] presents for review of his low back pain that has been ongoing. He has multiple medical problems, but he says his low back pain is persistent since his injury in the [employing establishment].” Dr. Hartman diagnosed low back pain.

In a report dated March 18, 2014, Dr. Hartman indicated that appellant’s left leg pain “clearly seems to be related to his L5-S1 radiculopathy” confirmed by EMG. He recommended an evaluation by a specialist.

On April 17, 2014 Dr. Hartman provided examination findings and diagnosed low back pain with restrictions “as ordered.”

By decision dated May 14, 2014, an OWCP hearing representative affirmed the October 8, 2013 decision. The hearing representative found that appellant had not established that he sustained a material worsening of his condition from his February 16, 2005 injury such that he was disabled from his modified employment as of September 13, 2012.

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.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 cervical disc displacement and root lesions due to a February 16, 2005 work injury under claim file number xxxxxx054. It further accepted that on January 18, 2006 he sustained a herniated lumbar disc and lumbar strain under claim file number xxxxxx218 and combined the claims under claim file number xxxxxx054. On April 2, 2009 appellant accepted a position with the employing establishment casing and carrying mail for eight hours a day with no overtime and frequent breaks. By decision dated July 30, 2009, OWCP reduced his compensation to zero after finding that his actual earnings as a modified mail carrier beginning April 2, 2009 fairly and reasonably represented his wage-earning capacity.

The employing establishment reduced appellant's hours under NRP as of January 26, 2011. Appellant filed a recurrence of disability beginning that date. By decision dated September 5, 2012, the Board set aside OWCP decisions denying modification of the wage-earning capacity determination and remanded the case for OWCP to apply FECA Bulletin No. 09-05. On remand, in decisions dated October 25, 2012 and May 1, 2013, OWCP found that appellant had not established that modification of the wage-earning capacity decision was warranted.

Appellant worked part time until August 15, 2011, when he stopped work. On November 18, 2011 he returned to work for eight hours a day in his modified position. On September 10, 2012 appellant filed an occupational disease claim, accepted by OWCP for lumbar sprain under claim file number xxxxxx064. He provided increased work restrictions to the employing establishment. The employing establishment did not have work available within appellant's increased restrictions. On October 18, 2012 appellant filed a claim for compensation beginning September 8, 2012.

In his claim for compensation, appellant has not alleged that the employing establishment withdrew his modified duties or reduced his hours under NRP. He also has not contended that the original loss of wage-earning capacity determination was in error. Instead, appellant argues

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

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

⁷ *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Tamra McCauley*, 51 ECAB 375, 377 (2000).

⁸ *Id.*

that his condition worsened such that he was unable to perform his modified work duties. He has the burden of proof to show a material change in the nature and extent of an injury-related condition.⁹

The Board finds that appellant has not submitted medical evidence sufficient to establish that he was unable to perform the duties of his April 2, 2009 position. In duty status reports dated September 10, 2012 to August 11, 2013, Dr. Harman diagnosed either low back strain or low back pain and provided work restrictions, including no lifting over five pounds. He checked “yes” that the history of injury given by appellant corresponded to that on the claim form of low back and hip pain. The Board has held, however, that an opinion on causal relationship which consists only of a physician checking “yes” to a medical form question on whether the claimant’s condition was related to the history given is of little probative value. Without explanation or rationale for the conclusions reached, such report is insufficient to establish causal relationship.¹⁰

In a report dated September 10, 2012, Dr. Hartman diagnosed low back and bilateral hip pain. In progress notes dated September 17 and October 1, 2012, he listed findings on examination and discussed work restrictions. On November 5, 2012 Dr. Hartman diagnosed radicular pain, noting that appellant heard a pop when he bent over to get his shoes. In progress notes dated November 26 through July 11, 2013, he treated appellant for low back pain. Dr. Hartman did not, however, specifically relate any diagnosed condition or total disability to the February 16, 2005 or January 18, 2006 work injuries. Medical evidence that does not offer any opinion regarding the cause of an employee’s condition is of diminished probative value on the issue of causal relationship.¹¹

On September 12, 2013 Dr. Hartman stated that appellant was not able to work as of September 7, 2012 as a result of pain in his hip and low back. He related that the etiology of his condition was complicated and appeared to result from different factors. As Dr. Hartman did not relate any condition to employment, his opinion is insufficient to meet appellant’s burden of proof to show a material change in his injury-related condition.

In a report dated October 10, 2013, Dr. Hartman noted that appellant wanted to discuss his workers’ compensation claim. He diagnosed chronic low back pain. On November 11, 2013 Dr. Hartman advised that appellant was seen in follow-up for workers’ compensation. He diagnosed low back and hip pain and noted that his work restrictions had not changed. On December 17, 2013 Dr. Hartman diagnosed low back pain and increased leg weakness. In a January 14, 2014 progress report, he noted that an EMG showed L5-S1 radiculopathy of an unknown age. Dr. Hartman diagnosed low back pain. On February 13, 2014 he noted that he was following up on appellant’s back injury, which had not changed. Dr. Hartman diagnosed low back pain. While he indicated that appellant was seeking treatment for workers’ compensation, he did not relate any diagnosed condition to a work injury or attribute the

⁹ See *Harley Sims Jr.*, 56 ECAB 320 (2005); *Tamra McCauley*, 51 ECAB 375 (2000) (the burden of proof is on the party attempting to show modification of the wage-earning capacity determination).

¹⁰ *Cecelia M. Corley*, 56 ECAB 662 (2005); *Deborah L. Beatty*, 54 ECAB 334 (2003) (the checking of a box “yes” in a form report, without additional explanation or rationale, is insufficient to establish causal relationship).

¹¹ See *A.D.*, 58 ECAB 149 (2006); *Michael E. Smith*, 50 ECAB 313 (1999).

increased work restrictions to employment.¹² Consequently, Dr. Hartman's reports are of diminished probative value.

Appellant has not submitted a probative medical opinion establishing a material change in the nature and extent of his accepted condition of February 16, 2005. As discussed at the hearing, if he believes that he sustained disability due to his accepted September 2012 occupational disease, he should pursue a claim for compensation under that alternate file number.

Appellant 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 appellant has not established that the July 30, 2009 loss of wage-earning capacity determination should be modified.

ORDER

IT IS HEREBY ORDERED THAT the May 14, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 24, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

¹² *Id.*