

ISSUE

The issue is whether appellant met his burden of proof to establish modification of a November 22, 2002 loss of wage-earning capacity determination.

On appeal appellant contends that his accepted skin condition has worsened without any intervening cause or break in the chain of causation. He argues that he is totally disabled from working due to his accepted employment condition.

FACTUAL HISTORY

This case has previously been before the Board. In a decision dated September 3, 2002, the Board reversed an OWCP decision dated September 5, 2000 concerning a loss of wage-earning capacity determination.³ In reaching its determination, the Board found that OWCP had failed to consider all the medical evidence from appellant's treating psychologists and failed to provide sufficient rationale regarding the suitability of the constructed position. Thus, the Board found OWCP had improperly reduced appellant's wage-loss compensation based on its finding that he was capable of performing the constructed position of credit clerk. The facts and circumstances as referred to in the prior Board decision are incorporated herein by reference.

On December 10, 1986 appellant, then a 33-year-old sandblaster, filed an occupational disease claim (Form CA-2) alleging bilateral hand contact dermatitis. He noted that on April 2, 1985 he first obtained medical care for his condition, but did not realize until September 17, 1986 that the condition was due to working with paint and paint thinner. He did not initially stop work. OWCP accepted the claim for contact dermatitis.

The record contains a Notification of Personnel Action (Form SF-50) notifying appellant that his employment was terminated effective March 14, 1992 due to a reduction-in-force. Appellant thereafter received wage-loss compensation as of March 14, 1992. He was placed on the periodic rolls as of April 3, 1994.

In a letter dated September 2, 1999, D.G., payroll coordinator, with the Berkeley County School District, verified that appellant was employed with the school district as a child care attendant. Appellant's employment began on August 9, 1999 with a gross pay for the school year of 1999 to 2000 of \$8,366.74. In a December 8, 2000 letter, J.F., principal, Goose Creek High School verified that appellant was employed as a classroom assistant at the school since August 1999.

By decision dated November 22, 2002, OWCP reduced appellant's wage-loss compensation effective November 3, 2002 based on its finding that his actual wages as a child care attendant of \$160.94 per week fairly and reasonably represented his wage-earning capacity. It noted that because he had shown the ability to perform the duties of the position for 60 days or more, the position was considered suitable to his partially disabled condition. OWCP then applied the *Shadrick* formula to calculate appellant's loss of wage-earning capacity.⁴ This

³ Docket No. 01-2002 (issued September 3, 2002).

⁴ *Albert C. Shadrick*, 5 ECAB 376 (1953).

calculation showed that, effective November 3, 2002, appellant had a loss of wage-earning capacity of 30 percent. The payment of wage-loss compensation every four weeks was \$1,143.60.

The record contains yearly reports from 2007 to 2011 by Dr. Pierre Jaffe, a treating Board-certified dermatologist. In the annual reports for this period, Dr. Jaffe noted that appellant's dermatitis condition was under control. On February 8, 2007 he indicated that the dermatitis was controlled by the job change to teaching and current environment. Dr. Jaffe, in reports dated February 16, 2009, February 17, 2010, and February 18, 2011, noted that appellant also suffered from hyperhidrosis (excessive sweating), which was controlled by medication.

In a January 12, 2012 report, Dr. Jaffe noted that appellant was seen for his yearly visit and that both appellant's atopic dermatitis and hyperhidrosis were under control with medication. He completed a work capacity evaluation (Form OWCP-5c) on January 12, 2012 indicating that appellant was totally disabled for work and noted that he should avoid heat.

Dr. Jaffe, in a June 8, 2012 report, reiterated findings from his January 12, 2012 report. He noted that appellant's symptoms and medical condition were controlled by current treatment. Dr. Jaffe opined that appellant's condition went back over 27 years and would persist indefinitely.

A statement of accepted facts dated July 5, 2012 noted that appellant's claim had been accepted for allergic contact dermatitis, however, appellant had nonwork-related conditions of degenerative disc disease, lumbar spinal stenosis, and lumbar spondylosis. Appellant underwent a minimally invasive lumbar decompression bilaterally at L5-S1 and L4-5 on August 2, 2010.

On August 9, 2012 OWCP referred appellant for a second opinion evaluation with Dr. Elizabeth Sherertz, a Board-certified dermatologist, for an assessment of his employment-related condition. Dr. Sherertz diagnosed contact dermatitis and other eczema due to solvents, generalized hyperhidrosis, and right foot impetigo. She opined that appellant's contact dermatitis had not resolved. Dr. Sherertz further opined that his sweating and itching was unlikely due to the accepted contact dermatitis, but were more likely attributable to environmental factors such as airborne irritants, heat, and humidity.

In a February 6, 2014 report, Dr. Jaffe reported that appellant continued to suffer from his accepted chronic allergic dermatitis. Other diagnoses included hyperhidrosis, chronic exfoliative dermatitis, mild eczematization, and adjustment disorder with mixed emotions of depression and preoccupation with his health. Dr. Jaffe opined that appellant's condition had changed as his condition was now only partly controlled by medication. He reported that appellant's pruritus, continuous itching, and dermatitis had resulted in his skin thickening, hardening, and caused excoriations, as well as erythema. Dr. Jaffe further noted that appellant became depressed and anxious as the result of his chronic contact dermatitis. He noted that 50 percent of appellant's body was involved. Next, Dr. Jaffe reported that the skin condition was aggravated by heat, moisture, humidity, airborne irritants, chemicals, working in wet and humid environments, and sweat, causing pain and discomfort. He concluded that appellant was disabled from working as the stress of holding a job "appear[ed] to flare his rash" and his excessive sweating required multiple changes of clothes during the day. Dr. Jaffe also reported that appellant had episodes of

memory loss and headaches as well as periods of chronic neurodermatitis and tenseness. Appellant had related that his excessive sweating limited his ability to write, handle a steering wheel, and walk, due to weakness in his arms, feet, legs and hands. Dr. Jaffe opined that appellant's excessive sweating and skin breakouts caused stress and impaired his ability to perform daily functions.

In a letter dated May 5, 2014, appellant requested modification of the November 22, 2002 loss of wage-earning capacity determination as his condition and disability had materially worsened. In support of his claim, appellant attached an April 30, 2009 letter to Goose Creek School in which he resigned his position as child care attendant. He noted that he had resigned from the position due to the impact his excessive sweating had on his life including an inability to handle a steering wheel while driving and skin breakouts which caused emotional stress.

By decision dated October 10, 2014, OWCP denied appellant's request for modification of the November 22, 2002 loss of wage-earning capacity determination. It found that his current skin condition had been aggravated by new work factors. OWCP also found that the medical evidence established that appellant was disabled due to intervening nonwork-related degenerative lumbar and knee conditions.

Appellant requested an oral hearing before an OWCP hearing representative.

By decision dated September 3, 2015, an OWCP hearing representative affirmed the October 10, 2014 decision denying modification of the November 22, 2002 loss of wage-earning capacity determination. He found that appellant's change in his skin condition had been caused by the change in his child care attendant duties and was not a basis for modification of the loss of wage-earning capacity.

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 OWCP's procedure manual provides that, if 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.⁷ 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.⁸

⁵ *D.M.*, 59 ECAB 59 ECAB 164; *Harley Sims, Jr.*, 56 ECAB 320 (2005).

⁶ *Katherine T. Kreger*, 55 ECAB 633 (2004); *see Robert H. Merritt*, 11 ECAB 64 (1959).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501.2(b) (June 2013). *See Mary E. Marshall*, 56 ECAB 420 (2005).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501.3 (June 2013). *See Harley Sims, Jr.*, *supra* note 5.

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.⁹ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.¹⁰

The Board has held that a new injury does not constitute a material change in the nature and extent of the original injury-related condition such that a wage-earning capacity determination should be modified.¹¹

ANALYSIS

OWCP accepted that appellant sustained contact dermatitis as the result of working with paint and paint thinner in his job as a sandblaster. It paid him wage-loss compensation beginning March 14, 1992 due to the termination of his federal employment as the result of a reduction-in-force. By decision dated November 22, 2002, OWCP reduced appellant's wage-loss compensation based on his actual wages as a child care attendant. Appellant requested modification of the November 22, 2002 loss of wage-earning capacity determination in a May 5, 2014 letter.

The Board finds appellant has not met his burden of proof to modify OWCP's November 22, 2002 loss of wage-earning capacity determination. Appellant has not alleged or otherwise shown that the original loss of wage-earning capacity determination was erroneous. He worked in the child care attendant position for over three years before OWCP made its loss of wage-earning capacity decision. The loss of wage-earning capacity decision was properly based on his actual wages as a child care attendant working for a private employer.¹²

Appellant also did not establish a material change in the nature and extent of his employment-related condition. In support of his request for modification, he submitted reports from Dr. Jaffe including several annual reports covering the period 2007 to 2014. Dr. Jaffe opined that appellant's dermatitis was under control in his reports from 2007 to 2011 and in a June 8, 2012 report. He reported an additional condition of hyperhidrosis in his February 16, 2009 report. It was not until completing a January 12, 2012 OWCP-5c form that Dr. Jaffe determined that appellant was totally disabled and should avoid heat. In his attached report, Dr. Jaffe noted the conditions of atopic dermatitis and hyperhidrosis were controlled with medication. In the February 6, 2014 report, he diagnosed chronic allergic dermatitis, hyperhidrosis, chronic exfoliative dermatitis, mild eczematization, and adjustment disorder with mixed emotions of depression and preoccupation with his health. Dr. Jaffe opined that

⁹ See *D.M.*, *supra* note 5; *Stanley B. Plotkin*, 51 ECAB 700 (2000); *Tamra McCauley*, 51 ECAB 375 (2000); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

¹⁰ *Id.*; *Jack E. Rohrbaugh*, 38 ECAB 186, 190 (1986).

¹¹ *M.E.*, Docket No. 07-2306 (issued March 24, 2008).

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity*, Chapter 2.815.5(d) (June 2013).

appellant's condition had worsened as the condition was only partly controlled by medication and that appellant's skin condition had been aggravated by heat, moisture, humidity, airborne irritants, chemicals, working in wet and humid environments, and sweat. He also opined that appellant was disabled from working as a result of his excessive sweating, rash flare ups, and stress. Lastly, Dr. Jaffe noted that as a result of the excessive sweating and skin breakouts appellant had become stressed and his ability to perform daily functions was impaired.

The reports from Dr. Jaffe are insufficient to establish a material change in appellant's accepted condition of contact dermatitis. Dr. Jaffe did not describe a change of the accepted condition, based upon objective medical findings and rationale, or explain how it had materially worsened causing appellant to become unable to work as a child care attendant such that the wage-earning capacity determination should be modified.¹³ Rather, he attributed a worsening of appellant's condition to factors associated with his employment as a child care attendant and hyperhidrosis, a condition which arose subsequent to the accepted injury and was unrelated to his prior federal job. In addition, Dr. Jaffe suggests a possible new injury rather than a material change in the work-related condition that was sustained prior to the November 22, 2002 loss of wage-earning capacity determination. As noted above, the Board has held that a new injury does not constitute a material change in the nature and extent of the original injury-related condition such that a wage-earning capacity determination should be modified.¹⁴ Thus, these reports by Dr. Jaffe are of little probative value on the issue of whether appellant's employment-related contact dermatitis had materially changed to support modification of the wage-earning capacity determination.¹⁵

The record also contains an August 20, 2012 report from Dr. Sherertz, a second opinion Board-certified dermatologist, who opined that appellant's contact dermatitis had not resolved, but that his sweating and itching were attributable to environmental factors such as airborne irritants, heat, and humidity rather than to the accepted contact dermatitis. When OWCP referred appellant to Dr. Sherertz it was not for the purpose of modification of the loss of wage-earning capacity determination as the referral predated appellant's claim for modification. Thus it is not germane to the issue before the Board.¹⁶

¹³ Where residuals of an accepted employment-related condition prevent the employee from performing regular duties, physical ailments that preexisted the accepted condition must be taken into consideration. Physical ailments acquired subsequent to and unrelated to the accepted injury are excluded from any wage-earning determination. *Lee A. Dent*, 54 ECAB 704 (2003).

¹⁴ *M.E.*, *supra* note 10.

¹⁵ *See A.P.*, Docket No. 08-1822 (issued August 5, 2009) (rationalized medical opinion evidence is medical evidence based on a complete factual and medical background of reasonable medical certainty and supported by medical rationale explaining the opinion offered); *see also Sue A. Sedgwick*, 45 ECAB 211 (1993) (medical evidence must show a material change in the nature and extent of the employment-related condition).

¹⁶ *Id.*

As the medical evidence submitted by appellant fails to adequately describe a material worsening of his accepted work-related contact dermatitis, the Board finds that it is insufficient to establish that his loss of wage-earning capacity determination should be modified.¹⁷

On appeal appellant contends that his accepted employment condition has worsened without any intervening cause and, thus, modification of the November 22, 2002 loss of wage-earning capacity determination is warranted. As discussed above, the medical evidence of record does not establish that appellant's accepted contact dermatitis had worsened such that he was disabled from performing the position of child care attendant. While medical reports from both Dr. Jaffe and Dr. Sherertz support that appellant continues to suffer from contact dermatitis, they do not establish that he was disabled from performing the position of child care attendant due to the accepted condition.

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

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that modification of the November 22, 2002 loss of wage-earning capacity decision was warranted.

¹⁷ P.C., 58 ECAB 504 (2007).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 3, 2015 is affirmed.

Issued: August 24, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board