

1993 OWCP informed appellant that the claim filed on March 16, 1993 was considered a new injury and would be developed as a new compensation claim.² It accepted appellant's claim for lumbar sprain and L4-5 disc herniation and authorized lumbar surgeries which were performed on June 8, 1994 and July 27, 1995. Appellant returned to work in a full-time light-duty position on January 10, 1997.

Appellant treated with Dr. Magdy Boulos, a Board-certified neurosurgeon, from April 7 to July 14, 1994, who diagnosed a work-related herniated ruptured disc at L4-5. On June 8, 1994 Dr. Boulos performed a lumbar microdiscectomy at L4-5. A January 18, 1995 discography at L3-4, L4-5, and L5-S1 indicated internal disc disruption and low back pain at L4-5 and L5-S1.

Appellant was treated by Dr. Bruce Rudin, a Board-certified orthopedist, from February 13 to July 27, 1995, for intractable disabling lower back pain after a failed L4-5 microdiscectomy. On July 27, 1995 Dr. Rudin performed a decompression of the right L5 nerve root and lateral recess, L4-5 and S1 spinal fusion with segmental instrumentation, and left iliac bone graft. He diagnosed spondylolisthesis at L5-S1 with possible internal disc disruption or postlaminectomy instability at L4-5. Appellant was treated by Dr. Rudin from August 7 to September 11, 1995 who noted marked improvement after the July 27, 1995 surgery.

On January 8, 1997 the employing establishment offered appellant a position as a permanent modified rehabilitation letter carrier, eight hours per day effective February 1, 1997. The position duties included setting up the carrier route for delivery, casing mail on other routes, and performing other duties as assigned within physical restrictions. The position was in compliance with the medical restrictions set forth by Dr. Rudin and based on a functional capacity report of November 25, 1996. On January 10, 1997 appellant accepted the job offer and returned to work in a modified letter carrier position.

In a decision dated November 5, 1997, OWCP reduced appellant's compensation effective that same date based on his ability to earn wages of \$36,577.00 a year as a modified letter carrier. It indicated that appellant had been employed in the position for over 60 days. OWCP concluded that the position of modified letter carrier represented appellant's wage-earning capacity.

Appellant requested an oral hearing which was held on May 24, 1999. In a decision dated August 2, 1999, an OWCP hearing representative affirmed the loss of wage-earning capacity decision dated November 5, 1997.

Appellant submitted reports from Dr. Rudin dated February 23, 2000 to August 8, 2001 who noted no change in appellant's overall symptomology. Dr. Rudin updated appellant's permanent medium-duty restrictions given the two level fusions. In reports dated February 24 to November 5, 2003, he noted appellant's x-rays revealed a solidly healed fusion. In a limited-duty reassessment form dated November 20, 2003, Dr. Rudin diagnosed spondylolisthesis and noted that appellant continued to have residuals of his work injury. He described appellant's permanent medium light-duty restrictions as limited bending and lifting. Dr. Rudin noted that maximum medical improvement occurred in August 2001.

² OWCP doubled this case with case number xxxxxx725 which had been accepted for lumbosacral strain.

On July 15, 2008 the employing establishment offered appellant a position as a permanent modified rehabilitation letter carrier, eight hours per day with a salary of \$51,252.00 effective the same date. The position duties included casing mail, assisting with auxiliary route 63, assisting with nixie and mark-up mail, and assisting with express mail delivery and mail pick up. The position was in compliance with the medical restrictions set forth by appellant's treating physician. On July 15, 2008 appellant accepted the position.

On May 21, 2009 the employing establishment offered appellant a position as a permanent modified rehabilitation letter carrier, eight hours per day with a salary of \$53,684.00 effective the same date. The position duties included casing mail and express mail delivery. The position was in compliance with the medical restrictions set forth by appellant's treating physician on March 21, 2009. On May 21, 2009 appellant accepted the position under protest.

On June 3, 2013 appellant submitted a claim for recurrence of disability (Form CA-2a) on April 17, 2013 due to his accepted work injuries of March 16, 1993. He stated that, after returning to work from the original injury, his duties were modified to align with the restrictions identified as permanent. Appellant noted that since his return to work in 1996 he had pain and limited mobility which was managed with medication, physical therapy, and time off work. He indicated that as the years progressed the pain became more persistent and difficult to manage. Appellant advised that on April 16, 2013 he experienced intense pain. He indicated that his walking was limited and he could not lift his legs.

Appellant submitted a June 3, 2013 report from Dr. Rudin who diagnosed degenerative lumbar disc and noted that he was unable to perform his current duties as a modified letter carrier. In reports dated June 20 and August 5, 2013, Dr. Rudin noted that appellant had experienced a severe flare up of symptoms of low back pain and lower extremity weakness on April 17, 2013. He described appellant's symptoms as emanating from the sacroiliac joint, adjacent to the two-level spinal fusions. Dr. Rudin diagnosed lumbar sprain and degeneration of lumbar or lumbosacral intervertebral disc. He opined that appellant's current condition was wholly causally related to his work injury of March 16, 1993 and that he was totally disabled from his position at the employing establishment.

By letter dated July 12, 2013, OWCP advised appellant of the type of evidence needed to establish his claim for a recurrence of disability on April 17, 2013 and particularly requested that he submit a physician's reasoned opinion addressing the relationship of his claimed recurrent disability and the original work injury.

On September 9, 2013 OWCP referred appellant for a second opinion evaluation by Dr. Willie E. Thompson, a Board-certified orthopedist. In his report dated September 30, 2013, Dr. Thompson reported his review of the records provided to him and provided results on examination. He diagnosed failed back syndrome secondary to the March 16, 1993 injury, finding that appellant continued to have residuals of that injury and recommended surgery. Dr. Thompson opined that appellant was not able to perform his regular duties, but he could perform the modified mail carrier duties as described in the job offer of May 22, 2009. In a work capacity evaluation dated September 30, 2013, he reiterated that appellant was capable of performing his modified position.

In a decision dated October 7, 2013, OWCP denied appellant's claim for a recurrence of disability, finding the evidence of record failed to establish a change in the nature and extent of his injury-related disability or a change in the nature of his light-duty job.

On October 17, 2013 appellant requested his claim be expanded to include sexual dysfunction and request coverage for his 1996 surgery for a penile implant.

Appellant also requested an oral hearing of the October 7, 2013 decision. At the hearing he submitted reports from Dr. Rudin dated September 28, 1994 to August 18, 2006, previously of record. In reports dated May 2 to June 3, 2013, Dr. Rudin noted treating appellant for low back and right leg pain and administered right S1 joint injections which provided temporary relief from pain. Dr. Rudin diagnosed degenerative lumbar disc and noted that appellant had been disabled from work since April 17, 2013.

Appellant was treated by Dr. James G. Moran, an osteopath, from April 24 to May 2, 2013, for back and right leg pain. Dr. Moran diagnosed thoracic or lumbosacral neuritis or radiculitis and found appellant disabled from work. An April 24, 2013 magnetic resonance imaging scan revealed minimal retrolisthesis of L2-3, diffuse disc bulge with foraminal protrusion and canal stenosis, and mild right foraminal narrowing at L3-4. An electromyogram dated August 28, 2013 revealed chronic bilateral L4-5 motor radiculopathy and axonal motorsensory peripheral polyneuropathy.

In a decision dated July 8, 2014, an OWCP hearing representative affirmed the October 7, 2013 decision which denied appellant's claim for a recurrence of disability.

On September 15, 2014 appellant requested reconsideration. He submitted a report from Dr. C. Obi Onyewu, a Board-certified orthopedist, dated September 9, 2014, who noted a history of appellant's work injury on March 16, 1993. Dr. Onyewu noted that on April 17, 2013 appellant stopped work due to a worsening of his original work injury on March 16, 1993. He opined that appellant could not return to work at the employing establishment. Dr. Onyewu noted that appellant returned to work in a limited-duty position in 2009 and sustained a worsening pathology of the lumbar spine. He opined to a reasonable degree of medical probability that the treatment appellant was receiving at the spine center was causally related to the March 16, 1993 work injury.

In a decision dated December 10, 2014, OWCP denied modification of the prior decision denying appellant's claim for a recurrence of disability.

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.³ Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a

³ See *Sharon C. Clement*, 55 ECAB 552 (2004).

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.⁴ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁵

Once OWCP issues a formal decision on wage-earning capacity, the rating should be left in place until the claimant requests resumption of compensation for total wage loss for more than a limited period of disability, in which instance OWCP will need to evaluate the request according to the customary criteria for modifying a formal wage-earning capacity determination.⁶

ANALYSIS

OWCP accepted that on March 16, 1993 appellant sustained a lumbosacral sprain, lumbar sprain, and L4-5 disc herniation. Appellant returned to a light-duty job on January 10, 1997. On November 5, 1997 OWCP reduced appellant's compensation based on his ability to earn wages as a modified letter carrier, which he had been employed for over 60 days. It concluded that the position of modified letter carrier, with restrictions consistent with his physician's recommendation, represented appellant's wage-earning capacity. On June 3, 2013 appellant filed a claim for recurrence of disability, beginning April 17, 2013, causally related to the accepted work-related injury of March 16, 1993.

OWCP developed the evidence and determined that the issue presented was whether appellant had established a recurrence of disability on April 17, 2013. Under the circumstances of this case, however, the Board finds that the issue presented was whether the November 5, 1997 wage-earning capacity determination should be modified.

The Board has held that, when a wage-earning capacity determination has been issued, and appellant submits evidence with respect to disability for work, OWCP must evaluate the evidence to determine if modification of the wage-earning capacity is warranted.⁷

OWCP regulations and procedures provide that a claim for recurrence of disability is not available where OWCP has issued a loss of wage-earning capacity determination pursuant to 5 U.S.C. § 8115. Under that circumstance, the only method for claiming additional wage-loss compensation is through a request to modify that determination.⁸ The Board finds that OWCP

⁴ *Tamra McCauley*, 51 ECAB 375, 377 (2000).

⁵ *Id.*

⁶ *Katherine T. Kreger*, 55 ECAB 633 (2004).

⁷ *See supra* note 3.

⁸ 20 C.F.R. § 10.104(c); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2(c) (June 2013).

failed to properly adjudicate this claim as a modification of the wage-earning capacity determination.⁹

CONCLUSION

The Board finds that OWCP's December 10, 2014 decision must be remanded for proper development of the claim as a request for modification of the November 5, 1997 wage-earning capacity decision rather than as a recurrence of disability.

ORDER

IT IS HEREBY ORDERED THAT the December 10, 2014 decision of the Office of Workers' Compensation Programs is set aside and remanded for further development of the case after which a *de novo* decision shall be issued.

Issued: January 28, 2016
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

⁹ See *Francis C. Vela*, Docket No. 04-1000 (issued October 27, 2004) (where the Board found that OWCP improperly developed the evidence as a claim for a recurrence of disability rather than as a request for modification of an existing loss of wage-earning capacity determination).