

FACTUAL HISTORY

On September 20, 1990 appellant, then a 37-year-old machine tool operator, filed a traumatic injury claim (Form CA-1) alleging that on September 18, 1990 he injured his back when a machine part slipped out of his hand, jerking him. OWCP accepted back sprain, thoracic region and sprain of the lumbosacral joint (ligament). He began limited duty and received intermittent continuation of pay. On December 5, 1990 OWCP accepted thoracic strain.

By letter dated July 17, 1992, the employing establishment informed OWCP that appellant had been medically disqualified for his position as machine tool operator and that his pay ended that day. It noted that a permanent position suitable for his limitations had not been found and that he had applied for Office of Personnel Management (OPM) retirement. The employing establishment attached a March 27, 1992 letter of separation addressed to appellant, and a claim for compensation (Form CA-7), signed by him, for ongoing compensation commencing July 18, 1992. Appellant elected FECA compensation effective July 18, 1992. He was placed on the periodic compensation rolls.

On November 12, 1996 appellant returned to part-time work as a clerk with the employing establishment.² In December 1996, the employing establishment indicated that he was working in the modified position for 36 hours per pay period. Appellant thereafter filed claims for continuing partial wage-loss compensation (Form CA-8) beginning November 12, 1996. OWCP obtained pay rate information and paid partial wage-loss compensation.

By decision dated February 19, 1997, OWCP determined that appellant's position as a part-time clerk represented his wage-earning capacity and reduced his compensation effective January 5, 1997.

Appellant continued employment in the modified position until September 24, 1998 when he was separated by the employing establishment due to a RIF.³ He filed a claim for compensation (Form CA-7) for compensation commencing on that date. By letter dated November 6, 1998, OWCP verified that appellant was in receipt of partial compensation benefits, based on his return to work for 36 hours each pay period. It noted that appellant's net compensation each 28 days was \$682.74.

On February 22, 1999 appellant elected OPM retirement benefits, effective March 1, 1999, at which time the partial wage-loss compensation benefits ceased.

In correspondence dated April 9, 2012, appellant requested to receive FECA compensation, rather than retirement benefits. In a letter dated September 9, 2012, he noted that

² The record contains a notice of personnel action (Form 50b) indicating that appellant had a career appointment as a part-time clerk, effective November 10, 1996.

³ By letter dated May 21, 1998, the employing establishment informed appellant that, as a result of a reduction in overall manpower authorizations, it was necessary that his position be eliminated. It noted that, in accordance with governing regulations, a retention register had been established, but no vacancy existed for which he was qualified. Appellant was to be separated in September 1998.

he had been laid off due to a RIF in May 1998, and that from June 1998 he had been receiving disability retirement. Appellant believed that he had been placed on disability retirement in error and should have been receiving FECA benefits. He requested a return to FECA benefits, effective June 1998. He forwarded an incomplete, unsigned notice of recurrence (Form CA-2a).

On December 4, 2012 OWCP returned the CA-2a form to appellant. It advised him that he needed to sign and complete the form, and he should have the employing establishment complete the second page of the form. OWCP specifically asked appellant to explain in detail why he was laid off and to submit medical evidence explaining how his condition since June 1998 was related to the September 18, 1990 employment injury.

In an August 18, 2015 letter, appellant requested that his case be reopened for total disability FECA compensation.⁴

On April 7, 2016 OWCP received a signed and completed CA-2a form dated October 1, 2012. Appellant noted that the date of recurrence was May 21, 1998 and alleged that his chronic back pain, caused by severe back arthritis, was due to the employment injury, and that his back had never gotten better, only worse. He indicated that in the years 1998 to 2007 he had worked as a cook and cutting grass.

Appellant submitted evidence previously of record along with an August 1, 2013 electromyography (EMG) study which was consistent with right S1 radiculopathy.⁵

By letter dated April 21, 2016, OWCP informed appellant that the accepted conditions were sprain of back, thoracic region, and sprain of lumbosacral joint.⁶ Appellant was informed of the evidence needed to support a recurrence claim. In a May 25, 2016 letter, OWCP noted that a formal wage-earning capacity decision had been issued on February 19, 1997 and informed him of the criteria needed to modify that decision. In a second letter of that day it asked appellant to provide information on the alternative work he had performed from 1998 to 2007.

On June 21, 2016 OWCP received a letter from appellant in which he explained that he had worked for the Albany Housing Coalition as a cook. Appellant stated that the 1990 employment injury had never gone away such that presently his chronic back pain was unbearable. He implied that, at the time of the RIF, he had been forced to take disability retirement when he should have been placed on FECA compensation.

⁴ Alan J. Shapiro, Esquire, who began representing appellant on February 5, 2013 notified OWCP on December 14, 2015 that he was no longer representing appellant.

⁵ The evidence previously submitted included an April 14, 1992 report from Dr. Yong C. Bradley, at the employing establishment health clinic, who advised that appellant had permanent limitations. In a December 15, 1994 report, Dr. Ralph Quade, a Board-certified orthopedic surgeon, diagnosed chronic back discomfort, provided physical restrictions, and advised that appellant could not return to his regular job. In a December 8, 1999 report, Dr. Keith S. Nussbaum diagnosed subluxation complex at L5-S1, lumbar sprain/strain, and lumbar radiculitis.

⁶ It is unclear when OWCP accepted sprain of the lumbosacral joint. The two statements of accepted facts found in the record merely indicate that thoracic strain is the accepted condition.

Appellant submitted medical records from the Albany, NY, Veterans Affairs Medical Center (VAMC). These included a May 2, 2013 lumbar spine magnetic resonance imaging (MRI) scan, which demonstrated moderate-to-severe disc space and facet joint degenerative changes with canal narrowing. A March 24, 2014 lumbar MRI scan noted no significant change. Clinical records dating from January 29, 1998 to January 12, 2016 included complaints of chronic back pain beginning on February 10, 1998 when a physician assistant referred him to physical therapy. A November 6, 2003 report from Dr. Manish R. Sharma, a resident physician, noted a complaint of low back pain and diagnosed memory loss, intermittent abdominal pain, and cocaine dependence. In notes dated February 12 and May 6, 2004, he noted appellant's complaint of low back pain. Dr. Sharma additionally diagnosed Crohn's disease, gastroesophageal reflux disease, and hyperlipidemia. In notes dated August 12, 2004 to April 13, 2006, Dr. Seema K. Patel, a resident physician, also noted a history of multiple medical problems including a traumatic brain injury at the age of 17 and appellant's complaint of acute and chronic low back pain. Dr. Michael Krastins, Board-certified in internal and geriatric medicine, began treating appellant on May 18, 2006. He noted a history of multiple medical issues and appellant's complaint of significant low back pain. On January 1, 2008 Dr. Krastins additionally diagnosed plantar fasciitis, major depressive disorder, impulse control disorder, degenerative disease of the knee and lumbar spine, and obstructive sleep apnea.

Appellant began pain management on May 13, 2008. In a February 19, 2009 report, Dr. Krastins noted appellant's complaints of chronic neck pain. On February 11, 2010 he noted medical issues, including chronic pain syndrome in the feet, lower back, and left arm. Dr. Krastins continued to treat appellant for his multiple medical problems through December 10, 2012. Dr. Donald E. Courts, Board-certified in family medicine, provided treatment notes dated January 15 and April 8, 2013. He described appellant's complaint of chronic low back pain that limited walking to 15 minutes. In an April 24, 2013 report, Dr. Ethan Loeb, a Board-certified internist, diagnosed low back pain of unknown cause.

On May 6, 2013 Dr. Krastins noted lumbar MRI scan findings and reiterated his earlier diagnoses. On August 19, 2013 he noted the EMG study findings. In a clinic note dated January 9, 2014, Dr. Frank Lore, a Board-certified physiatrist, noted a history of closed head injury in 1971 while appellant was in the Navy and a low back injury with lumbar fracture. He described complaints of acute or chronic low back pain and recommended a lumbar MRI scan. In reports dated March 6, May 27, and December 8, 2014, and January 12, 2016, Dr. Krastins discussed appellant's continued medical problems. He noted the March 24, 2014 lumbar MRI scan findings, reporting mild-to-moderate degenerative joint disease of the thoracolumbar spine and mild-to-moderate central canal stenosis. On January 12, 2016 Dr. Krastins noted that appellant's chronic back pain was controlled with capsaicin cream and that he did not require oral medication.

By decision dated June 27, 2016, OWCP found that appellant had failed to provide sufficient medical evidence to warrant a modification of the February 19, 1997 wage-earning capacity decision.

Appellant timely requested a hearing with OWCP's Branch of Hearings and Review. At the hearing, held on October 12, 2016, he testified that following the RIF, he only worked cutting

grass and at a home for homeless veterans. Appellant maintained that he could no longer work due to the employment injury.

By decision dated November 14, 2016, an OWCP hearing representative noted that the employing establishment conducted a RIF on May 21, 1998, that appellant's position was terminated due to the RIF, and that by form signed and dated on February 22, 1999 he had elected to receive OPM benefits. She found the medical evidence submitted insufficient to establish a change in the nature and extent of the injury-related condition and denied modification of the February 19, 1997 LWEC.

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.⁷

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless it meets the requirements for modification.⁸ Section 2.1501 of OWCP procedures contains provisions regarding the modification of a formal LWEC.⁹ The relevant part provides that a formal LWEC will be modified when: (1) the original rating was in error; (2) the claimant's medical condition has materially changed; or (3) the claimant has been vocationally rehabilitated.¹⁰

OWCP procedures further provide that the status of an employee with an established wage-earning capacity whose job is eliminated due to a RIF, facility closure, or some other form of downsizing, does not change with regard to receipt of FECA benefits unless the claimant has demonstrated that one of the three criteria for modification of an LWEC exists.¹¹

The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.¹²

ANALYSIS

OWCP issued a February 19, 1997 decision finding that appellant's actual earnings as a part-time clerk represented his wage-earning capacity and reduced his compensation

⁷ *Katherine T. Kreger*, 55 ECAB 633 (2004).

⁸ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity*, Chapter 2.1501 (June 2013).

¹⁰ *Id.* at § 2.1501.3(a).

¹¹ *Id.* at § 2.1501.6.

¹² *Jennifer Atkerson*, 55 ECAB 317 (2004).

accordingly. Appellant continued that position until September 24, 1998 when he was separated from employment under a RIF. He continued to receive partial wage-loss compensation until he elected OPM retirement benefits, effective March 1, 1999.

On April 7, 2016 OWCP received a claim for recurrence (Form CA-2a) signed and dated October 1, 2012 requesting total disability compensation. Appellant noted that the date of recurrence was May 21, 1998 and alleged that his chronic back pain, caused by severe back arthritis, was due to the employment injury.

As a formal wage-earning capacity was in effect at the time of the claimed recurrence of total disability, it is incumbent upon appellant to show a basis for modification of that decision to be entitled to any wage-loss compensation. The status of an employee with an established wage-earning capacity whose job is eliminated due to a RIF, facility closure, or some other form of downsizing, does not change with regard to receipt of FECA benefits unless the claimant has demonstrated that one of the three criteria for modification of an LWEC exists.¹³ Appellant did not allege that he had been retrained or otherwise vocationally rehabilitated or that the original wage-earning capacity determination was erroneous. Furthermore, the evidence does not establish a material change in his employment-related conditions.

The accepted conditions in this case are sprain of back, thoracic region, and sprain of lumbosacral joint. Appellant submitted copious evidence from the Albany VAMC dated from January 29, 1998 to January 12, 2016. None of these reports, however, noted the employment injury, provided a cause of any diagnosed condition, or provided a reasoned explanation as to how his accepted conditions had worsened such that he was unable to perform the duties of the part-time job on which his wage-earning decision was based. These included MRI scans of the lumbar spine and numerous treatment notes in which physicians' diagnoses included chronic back pain. In an April 24, 2013 report, Dr. Loeb diagnosed low back pain of unknown cause. Appellant also submitted reports from Drs. Sharma, Patel, Krastins, Courts, and Lore. These reports speak to a back condition and a series of other maladies. However, none of these submissions address the causal nature of the alleged change in his condition and how it affected his ability to work.

It is appellant's burden of proof to establish that the February 19, 1997 LWEC should be modified. The medical evidence submitted either did not address his ability to work or it did not attribute any diagnoses or limitations to the accepted conditions.¹⁴

Thus, the Board finds that appellant failed to submit sufficient medical evidence to establish a material change in the nature and extent of his injury-related conditions and, therefore, he did not meet his burden of proof to show that the February 19, 1997 LWEC should be modified.¹⁵

¹³ *Supra* note 9 at, Chapter 2.1501.6.

¹⁴ *See Elbert Hicks*, 55 ECAB 151 (2003).

¹⁵ *See J.H.*, Docket No. 16-0314 (issued May 12, 2016).

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 did not meet his burden of proof to establish that a February 19, 1997 LWEC should be modified.

ORDER

IT IS HEREBY ORDERED THAT the November 14 and June 27, 2016 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 25, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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