United States Department of Labor
Employees' Compensation Appeals Board

J.R., Appellant	)	
and	)	**Docket No. 07-819**
	)	**Issued: March 26, 2008**
DEPARTMENT OF HOMELAND SECURITY, U.S. CUSTOMS & BORDER PROTECTION, Miami, FL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 5, 2007 appellant timely appealed the January 23, 2007 merit decision of the Office of Workers' Compensation Programs, which denied modification of a prior wage-earning capacity determination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant established a basis for modification of the Office's September 15, 1997 wage-earning capacity determination.

FACTUAL HISTORY

Appellant, a 50-year-old former marine enforcement officer, sustained employment-related back injuries on December 4, 1994, June 11, 1995 and April 26, 1996. He initially injured his back while traveling aboard a high-speed boat through rough seas in route to the Bahamas. The June 11, 1995 injury was also attributed to rough sea conditions, which appellant

described as a "confused 'chop'" due to heavy boating traffic. Appellant's April 1996 injury occurred when he slipped and fell on a boat ramp, landing on his buttock. His accepted conditions include back contusion, lumbar sprain, aggravation of intervertebral disc disorder and aggravation of displaced intervertebral lumbar disc.

Following his latest injury in 1996, appellant received permanent work restrictions that effectively precluded him from resuming his regular duties as a marine enforcement officer.[1] On April 28, 1997 the employing establishment offered appellant a permanent position as an evidence operations specialist (seizure and evidence custodian). Appellant's physician approved the job offer, which the Office found to be suitable. He returned to work June 30, 1997.[2]

On September 15, 1997 the Office issued a loss of wage-earning capacity determination. The Office found that the actual earnings appellant received as an evidence technician beginning June 30, 1997 fairly and reasonably represented his wage-earning capacity.

Appellant underwent Office-approved lumbar surgery on January 25, 2000. He received appropriate wage-loss compensation for temporary total disability and ultimately returned to his previous duties on June 26, 2000. Appellant later resigned his position with the employing establishment to accept alternative employment as a federal air marshal effective April 7, 2002. He worked as an air marshal for approximately eight months. From January 2003 through March 2004 there was no reported history of employment. Beginning in April 2004, appellant worked as a deputy sheriff with the Charlotte County Florida Sheriff's Office. In November 2004, appellant accepted employment as a police officer with Florida Atlantic University. During his probationary period appellant was asked to resign, which he did effective August 1, 2005.

On February 24, 2006 appellant filed a recurrence of disability (Form CA-2a). He alleged that he sustained a recurrence of disability beginning August 1, 2005, causally related to his April 26, 1996 employment injury. Appellant contended that he had been unable to return to work since August 1, 2005 due to excessive pain in the upper and lower regions of his spine. During May 2005, he began experiencing excessive pain while working. The low back pain he currently experienced was the same type of pain he experienced after his original April 26, 1996 injury. Appellant also reported pain in the neck region, radiating into his right arm. He attributed the neck and right arm pain to a severe cervical injury that reportedly occurred the same time he injured his lower back in April 1996. According to appellant, the severe cervical pain did not develop until 2005. He said he was unable to sit in a vehicle or chair for more than two hours at a time due to excessive cervical and lumbar pain.

The medical evidence relevant to the claim included recent x-rays and magnetic resonance imaging (MRI) scans of the cervical, thoracic and lumbar spines. Appellant also

[1] Appellant was precluded from standing on boats in choppy waters, twisting with heavy objects, and subduing perpetrators. He was also limited to lifting 50 pounds, which was later modified to 20 pounds.

[2] Appellant earned less as an evidence operations specialist than he previously earned as a marine enforcement officer. The Office, therefore, adjusted his wage-loss compensation to reflect his loss of wage-earning capacity.

submitted various reports from his surgeon, Dr. Kenneth L. Jarolem.[3] Beginning in May 2005 appellant was also treated by Dr. Anna Sottile, a Board-certified anesthesiologist specializing in pain management.

On May 4, 2005 Dr. Jarolem saw appellant for complaints of radiating right-sided arm pain down to the hand, as well as into the right intrascapular region. He noted that an April 19, 2005 thoracic MRI scan showed herniations at T8-9, T9-10 and T10-11. X-rays taken that day showed mild spondylitic changes in the thoracic spine and degenerative changes at C5-6 and C6-7. The lumbar spine x-ray showed a substantial fusion at L5-S1. Dr. Jarolem diagnosed cervical radicular pain, thoracic disc herniations and a solid lumbar fusion. He recommended that appellant obtain a cervical MRI scan.

A May 18, 2005 MRI scan revealed multilevel disc dessication and degenerative spondylosis. Disc bulges were evident at C3-4 through C6-7 and there was a broad-based disc herniation at C5-6, with central spinal canal stenosis and neural foraminal encroachment bilaterally. Based on the recent cervical MRI scan, Dr. Jarolem diagnosed right-sided radicular pain. He referred appellant to Dr. Sottile for epidural injections.

Dr. Sottile first examined appellant on May 26, 2005. She noted that he had "worked in law enforcement his entire career" and "[s]ometime in the mid-1990's he had a traumatic injury while working as a marine enforcement officer...." Dr. Sottile diagnosed right cervical radiculopathy, with differential diagnoses of cervical cyst syndrome and spondylosis. She also diagnosed myofascial pain and peripheral neuropathy. Dr. Sottile stated that appellant's cervical injury was not a recent injury and "appear[ed] to have occurred approximately [10] years ago or at the time of the traumatic injury in the 1990's." She explained that, because of the severity of appellant's lumbar condition, he did not seek medical treatment for the cervical injury when it occurred. Over time, however, the cervical pain worsened to the point where appellant required medical attention. Dr. Sottile recommended a series of cervical epidural steroid injections, which she administered over the next several months.

In a September 14, 2005 letter, Dr. Jarolem explained that he had been treating appellant for cervical, thoracic and lumbar pain, attributable to a work-related injury that occurred on the "rough seas" in approximately 1996.[4] He further indicated that appellant's current complaints "relate[d] back to the events ... while in rough seas." Dr. Jarolem's treatment notes for September 14, 2005 indicated that appellant had completed the series of cervical epidural steroid injections, with some noted improvement. Appellant presently complained mostly of severe low back pain radiating into his buttocks, with limited sitting tolerance. Dr. Jarolem recommended obtaining another lumbar MRI scan.

[3] Dr. Jarolem is a Board-certified orthopedic surgeon.

[4] Dr. Jarolem initially examined appellant on November 17, 1999 for complaints of low back pain and left-sided radiating leg pain. He reported a history of injury on April 26, 1996 when appellant "was caught on a 40 [foot] vessel in greater than 10-foot seas." Appellant reportedly "took a pounding coming back to shore and experienced the onset of low back pain and radiating leg pain." At the time, Dr. Jarolem did not report a history of injury involving either the cervical or thoracic spine.

Appellant returned to Dr. Sottile on December 7, 2005. However, this time he sought treatment for his low back condition. Dr. Sottile reported complaints of low back and left leg pain, which started in 1996 when appellant was at work as a vessel operator in route to the Bahamas. He was reportedly caught in a storm. The "waves were really high" and there was pounding on the boat, which was "so severe that [appellant] had low back pain going down the left leg." Dr. Sottile also noted that appellant had previously experienced numbness in the left foot. She also noted that appellant had undergone a lumbar fusion at L4-5, and subsequently his pain was reduced almost completely. But recently appellant experienced a flare-up of the left-sided lower back pain and tingling sensation, which interfered with his regular level of activity. Dr. Sottile diagnosed multilevel disc dessication, degenerative spondylosis and minimal retrolisthesis at L2-3. She also noted disc bulges at L1-2 and L4-5, postsurgical changes at L5-S1 and disc herniations at L2 and L3. On December 15, 2005 Dr. Sottile administered a left sacroiliac joint steroid injection. The relief from the initial injection was short term and appellant received additional lumbar injections over the next few months.

On March 3, 2006 appellant was seen by Dr. Jeff M. Steinberg, a Board-certified neurologist, who noted that appellant complained of headaches, which began during the past year and were presently occurring on a daily basis. Dr. Steinberg noted a prior medical history of post-traumatic herniated cervical and lumbar discs. He suspected that appellant was developing migraine headaches. In a May 12, 2006 report, Dr. Steinberg indicated that appellant's April 26, 1996 work-related injury was the cause of his herniated cervical disc, cervical radiculopathy and migraine headaches.

In a May 26, 2006 report, Dr. Sottile indicated that appellant's current lumbar condition was related to his April 1996 injury. She further noted that appellant's cervical condition initially went undiagnosed, but was also attributable to the April 1996 injury. Dr. Sottile stated that appellant had been incapable of working a full day since August 1, 2005, and his present functional limitations and restrictions were of such severity that he could not perform work activities at even the sedentary level described for an evidence technician.[5] In an August 7, 2006 report, Dr. Sottile reiterated her May 26, 2006 findings. She further noted that appellant suffered from severe cervicogenic headaches on a daily basis and was scheduled to undergo additional surgery.

Appellant underwent an anterior cervical corpectomy on August 7, 2006. Dr. Jeffrey B. Cantor, a Board-certified orthopedic surgeon, reported on August 11, 2006 that he had been treating appellant for upper extremity numbness, severe neck pain and spasms, and migraine headaches. He further noted that an MRI scan showed significant cervical stenosis at C3-4, C4-5 and C5-6. Dr. Cantor reported advanced left-sided degenerative spondylitic thickening from cervical trauma. He explained that appellant's spondylitic thickening was well advanced of the average 49-year-old male. Dr. Cantor noted that appellant advised him of a boating injury he sustained while employed by the Federal Government in 1996. He attributed appellant's current cervical impairment to the original traumatic injury in 1996. Dr. Cantor further noted that

[5] Dr. Sottile restricted appellant to a four-hour workday, with a 10-pound limitation on pushing, pulling and lifting. She also precluded all squatting, kneeling, climbing, twisting, bending and stooping. Dr. Sottile noted that appellant was able to sit for four hours and operate a motor vehicle for four hours. Additionally, appellant was limited to one hour of standing, one hour of walking, one hour of reaching and one hour of reaching above shoulder.

appellant denied being involved in an automotive accident resulting in a severe whiplash-type injury. He also noted that appellant exhibited some signs of relief of his symptoms following his recent surgery. Appellant was precluded from performing any strenuous activity during the recovery process.

By decision dated January 23, 2007, the Office denied modification of the September 15, 1997 wage-earning capacity determination.

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.[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 erroneous.[7] The burden of proof is on the party seeking modification of the wage-earning capacity determination.[8]

ANALYSIS

Appellant did not allege that he was retrained or otherwise vocationally rehabilitated or that the original September 15, 1997 wage-earning capacity determination was erroneous.[9] He states that, beginning August 1, 2005, he was unable to continue working. For appellant to prevail, he must demonstrate a material change in the nature and extent of the accepted injury-related condition. The Office has only accepted injuries to the lumbar spine as being employment related. However, appellant claims that he also sustained injuries to his cervical and thoracic spine on April 26, 1996.

Where appellant claims that a condition not accepted or approved by the Office was due to his employment injury, he bears the burden of proof to establish that the condition is causally

[6] *See Katherine T. Kreger*, 55 ECAB 633, 635 (2004).

[7] *Tamra McCauley*, 51 ECAB 375, 377 (2000).

[8] *Id.*

[9] On his February 24, 2006 Form CA-2a, appellant indicated that he had not received any educational or vocational training since leaving the Federal Government. He did, however, obtain certification to work as a police officer in Florida.

related to the employment injury.[10] Apart from the previously accepted lumbar conditions, there is evidence of multilevel degenerative disc disease and disc herniations in both the cervical and thoracic spine.

Dr. Jarolem attributed appellant's cervical and thoracic conditions to a 1996 injury on the "rough seas." When addressing appellant's cervical condition in May 2005, Dr. Sottile stated that this was not a recent injury and "appear[ed] to have occurred approximately [10] years ago or at the time of the traumatic injury in the 1990's." In subsequent reports, she described a 1996 injury at sea while in route to the Bahamas. In a May 26, 2006 report, Dr. Sottile specifically attributed the severe cervical pain appellant first reported in 2005 to the "original work injury" in April 1996. Dr. Cantor similarly attributed appellant's cervical condition to a 1996 boating injury. Dr. Steinberg related appellant's cervical condition and migraine headaches to an April 26, 1996 employment injury.

Dr. Steinberg's opinion on causal relationship is not probative as his reports do not describe a particular mechanism of injury. On March 3, 2006 he noted a prior medical history of "[p]ost-traumatic herniated cervical and lumbar dis[c]s." However, Dr. Steinberg did not elaborate. His May 12, 2006 report offers no additional insight other than identifying the particular date of injury. While Dr. Steinberg attributed appellant's cervical condition and migraine headaches to the "work-related injury on April 26, 1996," he neglected to describe what occurred on April 26, 1996. None of his reports mention appellant's April 26, 1996 slip and fall on the boat ramp. These reports also neglect to mention either of the two boating incidents in December 1994 and June 1995. Dr. Steinberg did not address any of the medical evidence contemporaneous to the accepted injuries. Without a proper history of injury, his opinion on causal relationship cannot be considered well rationalized.[11]

Similar deficiencies are noted with respect to the opinions of Drs. Jarolem, Sottile and Cantor. Each physician attributed appellant's cervical condition to an April 1996 boating injury. However, appellant was not on a boat in route to the Bahamas on April 26, 1996. He was at a public boat ramp in Fort Lauderdale, FL when he slipped on a slick surface and landed on his buttocks. Drs. Jarolem, Sottile and Cantor confused the December 4, 1994 rough seas boating incident with the April 26, 1996 dockside slip and fall incident. The physicians' respective opinions are of limited probative value because the reported history of injury is not only inaccurate, but also incomplete. Accordingly, appellant has not established that his cervical and thoracic conditions and his migraine headaches are employment related.

As to the issue of whether there was a material change in appellant's accepted lumbar condition, Dr. Sottile was the only physician to address appellant's ability to perform the limited-

[10] *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004). Causal relationship is a medical question, which generally requires rationalized medical opinion evidence to resolve the issue. *See Robert G. Morris*, 48 ECAB 238 (1996). A physician's opinion on whether there is a causal relationship between the diagnosed condition and the implicated employment factors must be based on a complete factual and medical background. *Victor J. Woodhams*, 41 ECAB 345, 352 (1989). Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factors. *Id.*

[11] *See Victor J. Woodhams*, *supra* note 10.

duty position he held until resigning in April 2002. In her May 26 and August 7, 2006 reports, she stated that appellant had been incapable of working a full day since August 1, 2005, and his present functional limitations and restrictions were of such severity that he could not perform work activities at even the sedentary level described for an evidence technician. However, Dr. Sottile did not exhibit any specific knowledge of appellant's prior duties as an evidence operations specialist. The only characteristic she noted was that it was "sedentary" work. Dr. Sottile did not fully explain how appellant's current low back condition was causally related to his employment injuries in 1994, 1995 or 1996. She merely offered an opinion without providing an explanation for her finding that appellant could no longer work full time as an evidence technician. Because of the above-noted deficiencies, the Board finds that Dr. Sottile's reports are insufficient to establish a material change in the nature and extent of appellant's injury-related lumbar condition. As such, the Office properly denied modification of the September 15, 1997 wage-earning capacity determination.

CONCLUSION

The Board finds that appellant has not established a basis for modifying the Office's September 15, 1997 wage-earning capacity determination.

ORDER

IT IS HEREBY ORDERED THAT the January 23, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 26, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board