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

| | | |
|---|---|---|
| **DENNIS W. GRIFFITH, Appellant** | ) | |
| **and** | ) | **Docket No. 04-987** |
| | ) | **Issued: October 29, 2004** |
| **U.S. POSTAL SERVICE, POST OFFICE, West Sacramento, CA, Employer** | ) | |

*Appearances:*
*Dennis W. Griffith, pro se*
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

### ***JURISDICTION***

On March 10, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated January 20, 2004, finding that appellant had failed to establish a recurrence of disability effective June 4, 2001. Pursuant to 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 met his burden of proof to establish that he sustained a recurrence of disability effective June 4, 2001.

### ***FACTUAL HISTORY***

On October 8, 1997 appellant, then a 48-year-old letter carrier, filed an occupational disease claim alleging that carrying a 60-pound mailbag daily resulted in back pain radiating into his lower extremities. In a November 7, 1997 report, Dr. Afra Guity, an orthopedist, stated that

x-rays revealed nerve root compression at L4-5 on the left side, general stenosis at L4-5 and L3-4 and a central right disc herniation or bulging at L3-4 and recommended surgical intervention. Appellant underwent left-sided laminotomy-discectomy and foraminotomy with resection of lateral recess stenosis at the L4-5 level. The Office accepted appellant's claim for back strain and later, herniated disc. The surgery was also authorized.

In a July 15, 1998 report, Dr. Charles Miller, an orthopedic surgeon and Office referral physician, stated that appellant was totally disabled from his work-related injury and would remain so for at least four more months. In a September 22, 1998 report, Dr. Paul Slosar, an orthopedic surgeon, stated that appellant presented with 60 percent pain in his back and 40 percent in his left leg. He stated that results of a magnetic resonance imaging (MRI) scan taken on August 14, 1997 showed multiple degenerative disc changes throughout the lumbar spine with all levels effected, except L2-3 which had School's nodes, but had reasonable maintenance of disc integrity and hydration. Dr. Slosar noted severe degenerative narrowing and loss of hydration at L3-4, L1-2, L4-5 and L5-S1 with moderate protrusions at the L4-5 level on the left. He noted that a review of an April 13, 1998 MRI scan showed the same degenerative changes at the same levels with postsurgical changes at the L4-5 level but no disc herniation. Dr. Slosar noted that there was significant spondylosis in the facet joints at all levels except L2-3. He added that this was a very difficult situation and further surgery is not indicated due to the severity of appellant's back condition. He added that appellant is permanently disabled from being a letter carrier.

In a November 29, 1998 report, Dr. Miller stated that appellant reported that his back pain was still present but considerably improved. He noted that appellant walked with a normal gait, could heel toe walk and had good posture. Dr. Miller noted that a recent MRI scan showed no evidence of disc herniation but there was fibrosis at L4-5 on the left that was a permanent postsurgical anatomy change. He added that appellant had preexisting degeneration in the lumbar spine at multiple levels. Dr. Miller opined that appellant was capable of working 4 hours day with no lifting, pushing or pulling more than 20 pounds and should rest every 10 minutes.

On February 19, 1999 the employing establishment offered appellant a job as modified a clerk casing mail and occasionally delivering express mail. On March 10, 1999 the Office found that the job consistent with his medical restrictions. On March 5, 1999 appellant accepted the job "under duress" and started work on April 10, 1999.

On April 14, 1999 the Office referred appellant for an independent medical examination to resolve the conflict between Drs. Slosar and Miller, regarding the extent of appellant's disability. In a June 10, 1999 report, Dr. David Chen, a Board-certified surgeon and the Office independent medical examiner (IME), stated that appellant presented with pain in his lower back that radiated into his left and occasionally his right, leg and at times into his toes. On examination he found subjective pain in the lower back and that appellant could forward flex with his finger tips to mid thigh level. He noted limitation to leg raising on the right and left at 50 degrees and there was a positive Lasegue's test, but no muscle weakness. Dr. Chen added that upon review of the records he noted a preexisting desiccation of the L1-2, L2-3 and L5-S1 levels, that were asymptomatic. He also stated that there may be a right-sided disc protrusion at the L3-4 disc but that it was not causing any symptomatology. Dr. Chen opined that appellant's

prognosis to return to his date-of-injury job was poor as he had failed back syndrome. He added that appellant's total disability ceased on November 23, 1998 and agreed that appellant could perform his current limited-duty position 20 hours a week.

In a June 25, 1999 decision, the Office found appellant's job as a modified clerk represented his wage-earning capacity.

On July 7, 1999 appellant filed a notice of recurrence of total disability stating the twisting and turning required of his limited-duty job caused back pain. In an October 5, 1999 treatment note, Dr. William McCurry, a family practitioner, stated that appellant presented in considerable back pain, but had returned to work 20 hours a week.[1]

The record also contains a July 30, 1999 postal investigative report, alleging that appellant had been observed and photographed lifting a 5-gallon gas can that appeared to be full and exceeding his 20-pound lifting restriction. According to the report, appellant was also observed riding a sit mower, twisting and turning while operating a weed cutter and carrying 22-pound cement blocks in each hand while loading them on and off a truck. Also noted in the report was that appellant told his supervisor on July 23, 1999 that he could not lift more than 20 pounds and that he could not bend or stoop. It was also noted in the report that at no time did appellant stretch or touch his back while working in his yard.

The Office referred this report and photos to Dr. McCurry, appellant's treating physician, who stated in a February 24, 2000 report that after reviewing the investigative materials appellant did not appear to have the back problem he represented. He increased appellant's medical restrictions to working 8 hours day and lifting no more than 40 pounds.

In February 29, 2000 report, the employing establishment increased appellant's job duties to 8 hours a day and set the lifting restrictions at no greater than 40 pounds. The Office found these changes suitable and in a March 23, 2000 letter, appellant accepted the job, again "under duress." In an April 4, 2000 letter, Dr. McCurry stated that appellant sought his help to increase his medical restrictions, but he denied the request and told appellant that he lacked credibility and should find another treating physician.

Results of a February 3, 2001 MRI scan showed some desiccation of the disc at L1-2 and mild posterior annular bulge. At L2-3 no disc protrusion was found and at L3-4 there was some desiccation of the disc and focal right paramidline posterior disc protrusion. The results were described as unchanged since the April 1998 study. At L4-5 there was indication of a left laminotomy but no recurrent disc protrusion. At L5- S1 there was some desiccation of the disc and mild broad-based posterior annular bulge/posterior vertebral endplate spurring. The findings at L4-5 and L5-S1 were considered to be unchanged since the 1998 study.

In an April 17, 2001 report, Dr. Kevin Lawson, Board-certified in orthopedic surgery, stated that appellant presented with left leg and back pain. According to Dr. Lawson, appellant

[1] There is no indication in the record that the Office ever adjudicated this claim and appellant appears to have returned to work on his own.

said that he was forced back to full-time light-duty work after being observed leaning against a ladder, sitting on a lawn mower and using a weed eater for five minutes. He diagnosed chronic low back pain, severe degenerative disc disease at L5-S1 with probable foraminal encroachment at L4-5 and L5-S1 and noted that appellant was narcotic dependent. On May 31, 2001 Dr. Lawson set appellant's medical restrictions at 4 hours a day with a 20-pound weight limit.

On June 11, 2001 appellant submitted a Form CA-7 for wage loss for four hours a day effective June 4, 2001. He later expanded his wage-loss claim to include the period June 17 to August 11, 2001. Appellant submitted treatment notes form Dr. William Harden, an orthopedist, who wrote that appellant presented with back pain. On examination he could not fully extend his back, walked with a clear antalgic gait and was slow and cautious in his movements, which Dr. Harden described as consistent with chronic back syndrome.

In a January 28, 2003 decision, the Office denied appellant's recurrence effective June 4, 2001 due to insufficient medical evidence. On February 7, 2003 appellant requested an oral hearing and later submitted an August 6, 2003 form report from Dr. Harden that indicated that he had lumbar disc disease and was not expected to recover. Appellant also submitted an April 25, 2000 report from Dr. Richey that stated that appellant presented with constant low back pain that radiated into his left leg. On examination he noted moderate antalgic posturing and difficulty ambulating, but appellant could toe and heel walk. He diagnosed significant lumbar disc disease, particularly at L1-2, L3-4, L4-5 and L5-S1 with scar tissue at L4-5.[2]

At the October 21, 2003 hearing appellant testified that he had been prosecuted for insurance fraud but all charges were dropped. He also stated that he dropped Dr. McCurry as his doctor because he lost credibility with appellant. Appellant also stated that he never worked outside his restrictions and was in continuous pain.

In a January 20, 2004 decision, the hearing representative affirmed the January 28, 2003 decision finding the medical evidence insufficient to establish a recurrence of disability.

## ***LEGAL PRECEDENT***

An individual who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which compensation is claimed is causally related to the accepted injury.[3] This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound

[2] The record does not indicate where Dr. Richey was from or his specialty, only that he was a referral from Dr. Harden.

[3] *Charles H. Tomaszewski*, 39 ECAB 461, 467 (1988); *Dominic M. DeScala*, 37 ECAB 369, 372 (1986).

medical rationale.[4] Where no such rationale is present, medical evidence is of diminished probative value.[5]

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]

The Office's procedure manual provides that, "[i]f 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. In this instance the CE [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity."[7]

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

## ***ANALYSIS***

In this case, the Office developed the evidence and determined that the issue presented was whether appellant had established a recurrence of disability on June 4, 2001. Under the circumstances of this case, however, the Board finds that the issue presented was whether the June 25, 1999 wage-earning capacity determination should be modified.

According to the evidence of record on April 10, 1999 appellant returned to work as a modified clerk 20 hours a week. The medical evidence from Dr. Miller and Dr. Chen, the IME, supported that appellant could perform the modified position. On July 7, 1999 appellant stopped work due to back pain caused by the twisting and turning required by the modified position. Reports from Drs. McCurry and Lawson stated that appellant stopped work due to pain. The Board has held that, when a wage-earning capacity determination has been issued and appellant

[4] *Mary S. Brock*, 40 ECAB 461, 471-72 (1989); *Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

[5] *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988).

[6] *See Sharon C. Clement*, 55 ECAB ____ (Docket No. 01-2135, issued May 18, 2004).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

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

[9] *Id.*

submits evidence with respect to disability for work, the Office must evaluate the evidence to determine if modification of wage-earning capacity is warranted.[10]

As noted above, the Office's procedure manual directs the claims examiner consider the criteria for modification when the claimant requests resumption of compensation for "total wage loss."[11] This section of the procedure manual covers the situation when a claimant has stopped working. If there is a claim for increased disability that would prevent a claimant from then Chapter 2.814.11 of performing the position that was the basis for a wage-earning capacity decision, the Procedure Manual applies. In this case, appellant submitted evidence of an increased partial disability that prevented him from working in the 20-hour per week modified position. The Board finds that the Office should have considered the issue of modification of the wage-earning capacity determination.

## ***CONCLUSION***

The Board finds that appellant's recurrence claim raised the issue of whether a modification of the June 25, 1999 wage-earning capacity decision was warranted and the case must be remanded for an appropriate decision on this issue.

[10] *See Sharon C. Clement*, *supra* note 6. The Board notes that consideration of the modification issue does not preclude the Office from acceptance of a limited period of employment-related disability, without a formal modification of the wage-earning capacity determination. *Id.* at n.10, slip op. at 5; *Cf. Elsie L. Price,* 54 ECAB ____ (Docket No. 02-755, issue July 23, 2003) (acceptance of disability for an extended period was sufficient to establish that modification of the wage-earning capacity determination was warranted).

[11] *Supra* note 7.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the March 4, 2004 decision by the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: October 29, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member