



herniated disc at L4-5. The Office noted that appellant had a preexisting condition as a result of a 1989 nonemployment-related injury to his low back and neck. Appellant returned to limited-duty work with physical restrictions on April 16, 1998.<sup>1</sup> However, his temporary position expired on July 7, 1998 and was not renewed.

By decision dated September 25, 1998, the Office issued a retroactive loss of wage-earning decision finding that appellant's actual earnings as a temporary letter carrier fairly and reasonably represented his wage-earning capacity. As appellant's wages met or exceeded the wages of his date-of-injury job, the Office reduced his compensation. On April 13, 1999 after a review of the written record an Office hearing representative affirmed this decision. In a September 25, 2000 decision, the Board affirmed the wage-earning capacity determination.<sup>2</sup>

On October 21, 2000 Dr. John J. McCloskey, an attending Board-certified neurosurgeon, referred appellant for diagnostic testing. On November 16, 2000 appellant underwent a lumbar discography at L3-4, L4-5 and L5-S1. Dr. Jeffrey T. Laseter, an attending surgeon, diagnosed a displaced lumbar disc at L4-5, degenerative disc disease and mild to moderate spinal stenosis. Based on the study, Dr. McCloskey noted that appellant was not a surgical candidate.

On May 9, 2001 appellant filed a claim for a recurrence of disability commencing April 9, 2001. On June 26, 2001 the Office denied his claim, noting that he did not submit sufficient medical evidence to establish a recurrence of disability due to his accepted injury.<sup>3</sup>

In an April 6, 2002 report, Dr. McCloskey, a Board-certified neurosurgeon, stated that appellant had chronic cervical syndrome with evidence of multilevel degenerative disc disease, particularly at C5-6, and chronic post-traumatic low back syndrome with a degenerated L4 disc.<sup>4</sup> By history, appellant's low back condition was related by aggravation to the 1998 injury. In a June 30, 2002 response to an Office inquiry, Dr. McCloskey responded to the question: "Has [appellant] experienced a 'material worsening' of his 'accepted condition,' and if so what is that worsening in medical/diagnostic term?" He noted that appellant's 1998 injury had aggravated preexisting degenerative changes which worsened, resulting in a herniated disc with chronic pain into the leg. Dr. McCloskey noted that there had been no new injury to the back since April 1998, noting normal "wear and tear." He stated that the 2000 lumbar discogram revealed a displaced disc at L4-5 and, therefore, a worsening of appellant's condition. Dr. McCloskey advised that appellant was restricted to sedentary work, should not stand or walk for more than two hours a day, not engage in any bending, stooping or crouching and should not lift items over 10 pounds. Appellant was also allowed to change positions frequently. On November 22, 2002 Dr. McCloskey stated that appellant had symptomatic lumbar disc disease, particularly at L4-5.

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<sup>1</sup> Appellant returned to sedentary work with lifting restricted to no greater than 10 pounds.

<sup>2</sup> Docket No. 99-2246 (issued September 24, 2000).

<sup>3</sup> Appellant did not seek review of this decision and it is not an issue in the present appeal. *See* 20 C.F.R. § 501.2(c).

<sup>4</sup> The record reflects that appellant was treated by Dr. McCloskey following an injury to his back in private employment in 1989. On May 29, 1998 Dr. McCloskey advised that a review of a recent lumbar myelogram looked virtually the same as one obtained in 1990.

He concluded that appellant was permanently limited to sedentary or light-duty work. Dr. McCloskey advised that appellant reached maximum medical improvement on March 6, 2000.

In a report dated January 18, 2003, Dr. McCloskey diagnosed chronic post-traumatic low back syndrome with degenerated and painful L4 disc and a chronic cervical syndrome with disc herniation. He noted that appellant's cervical condition was related to an injury sustained while serving with the army in Germany in 1983. However, appellant's low back and leg symptoms related to his accepted injury. On January 30, 2003 Dr. McCloskey indicated that appellant sustained permanent impairment to his lower extremities. On October 15, 2003 he noted that surgery was never recommended and appellant had been unable to return to work. Dr. McCloskey advised that appellant required pain management and physical therapy and had been found permanently disabled by the Social Security Administration.

The Office referred appellant to Dr. Timothy D. Jackson, a Board-certified orthopedic surgeon, for a second opinion. In a January 30, 2004 report, Dr. Jackson diagnosed lumbar spine degenerative disc disease, worse at L4-5. He noted that appellant's inability to perform the letter carrier position he was doing on April 1, 1998 was due to a permanent aggravation of his preexisting lumbar disc disease. Dr. Jackson estimated that 10 percent of appellant's residual symptoms were related to the April 1, 1998 injury while 90 percent was related to his preexisting condition and other risk factors such as age and the natural progression of the degenerative disease. He noted objective findings of diminished sensation in a dermatomal distribution in the left lower extremity consistent with L4-5 nerve root dysfunction. Dr. Jackson noted that appellant was not capable of performing the mail carrier job duties he was doing on April 1, 1998. He concluded that, due to the aggravation and acceleration of the degenerative disease to appellant's lumbar spine, there was a steady decline in his medical condition, so his date of maximum medical improvement would probably be in the late 1998 or 1999 time frame.

A February 9, 2004 magnetic resonance imaging (MRI) scan was interpreted by Dr. James W. Ballard, a Board-certified radiologist, as showing degenerative disc disease with a large centrally extruded disc fragment at L4-5.

Appellant was seen by Dr. Brian Tsang, Board-certified in anesthesiology and pain medicine, on April 30, 2004 for low back pain. Dr. Tsang noted his symptoms of back pain and left lower extremity radiculopathy, myofascial pain, muscle spasm and sacroiliac arthropathy. He recommended a home exercise program and adjusted appellant's medications.

On July 7, 2004 the Office issued schedule awards for 10 percent impairment of the left leg and 7 percent impairment of the right leg. The period of the awards was from May 9, 2004 to April 16, 2005.

By letter dated July 29, 2004, appellant stated that he was writing with regard to his claim for lost wages. He stated that his claim was denied on October 31, 2003 for the period commencing July 8, 1998. On August 23, 2004 appellant filed a request for reconsideration.

In a nonmerit decision dated November 5, 2004, the Office noted that no decision was issued on October 31, 2003. On that date, it had forwarded a copy of the June 26, 2001 decision to appellant. The Office denied appellant's request for reconsideration with regard to his wage-earning capacity on the basis that it was untimely filed and failed to establish clear evidence of error.

On December 7, 2004 appellant appealed his case to this Board. By decision dated July 19, 2005, the Board set aside the November 5, 2004 decision, finding that appellant's claim should have been adjudicated as a request for modification of the September 25, 1998 wage-earning capacity determination.<sup>5</sup>

In a February 1, 2005 report, Dr. McCloskey advised that appellant's back, left hip and thigh pain were getting worse and he was experiencing spasms in his low back, continuing neck and left shoulder pain with numbness and tingling in the left forearm and fingers. In a September 28, 2005 note, he stated that appellant was totally disabled for work. Dr. McCloskey noted that appellant's condition has continued to worsen and that he was no longer able to do even sedentary activities from November 16, 2000.

On December 15, 2005 appellant underwent a provocative discography of the lumbar spine at L2-3, L3-4, L4-5 and L5-S1. On December 19, 2005 Dr. McCloskey stated that the only abnormality from the discogram was at L4-5 and found that appellant was a surgical candidate. On December 31, 2005 Dr. McCloskey recommended surgical decompression at L4-5 on the left and a transverse process fusion and pedicle screw fixation at L4-5.

The Office requested that Dr. Jackson clarify his medical opinion. On January 20, 2006 Dr. Jackson noted that the Office had accepted appellant's claim for aggravation of a lumbar strain and herniated lumbar disc. He agreed with these diagnoses with the addition of L4-5 lumbar degenerative disc disease. Dr. Jackson recommended proceeding with the recommended lumbar discectomy and fusion surgery. With regard to appellant's ability to do the limited-duty position he held in 1998, he noted that appellant was limited in mobility and walking and used a cane frequently for ambulation. Dr. Jackson opined that appellant "would have some difficulty with some of the lifting and pushing and pulling activities likely required with stamping mail and clerical duties within this job description. He would have limitations of being able to sit for any significant length of time without frequently being able to change positions."

On March 17, 2006 appellant underwent surgery on the L4-5 disc.

In a decision dated April 6, 2006, the Office found that appellant's wage-earning capacity dated September 25, 1998 was not in error. It accepted that he sustained a recurrence of disability commencing January 20, 2006, the date of Dr. Jackson's medical report. However, prior to January 20, 2006, there was no medical evidence that appellant was disabled from work in a limited-duty capacity.

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<sup>5</sup> Docket No. 05-462 (issued July 19, 2005).

In a June 12, 2006 medical report, Dr. McCloskey advised that appellant was convalescing satisfactorily from surgery. He indicated that in reviewing his records, appellant has been totally disabled since his work injury in 1998.

On July 12, 2006 appellant requested reconsideration of the April 6, 2006 decision. He disagreed that the recurrence of disability was found to commence January 20, 2006, arguing that it should be earlier.

By decision dated October 31, 2006,<sup>6</sup> the Office modified the April 6, 2006 decision. It found that appellant's condition had materially worsened as of May 9, 2004, the date of the schedule award. Therefore, he was entitled to wage-loss compensation from April 17, 2005 to January 19, 2006, the period following the expiration of the schedule award. The Office determined, however, that prior to May 9, 2004 the loss of wage-earning capacity determination did not warrant modification.

### **LEGAL PRECEDENT**

It is well established that either a claimant or the Office may seek to modify a formal loss of wage-earning capacity determination.<sup>7</sup> 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.<sup>8</sup> The burden of proof is on the party attempting to prove that the wage-earning capacity determination should be modified.<sup>9</sup>

### **ANALYSIS**

The Office accepted that appellant sustained a work-related injury on April 1, 1998. His claim was accepted for an aggravation of a lumbar strain and herniated disc L4-5. He returned to work on April 16, 1998 performing limited duty and remained in his temporary position until July 7, 1998, when it was not renewed. By decision dated September 25, 1998, the Office determined that appellant's actual earnings as a temporary letter carrier represented his wage-earning capacity.

Appellant seeks modification of the wage-earning capacity determination. The Office has accepted that appellant's condition materially worsened as of the date of his schedule award of May 9, 2004. As appellant received compensation under the schedule award from May 9, 2004 through April 16, 2005, the Office awarded wage-loss compensation commencing

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<sup>6</sup> This decision superseded a decision issued by the Office on October 11, 2006.

<sup>7</sup> See *Gary L. Moreland*, 54 ECAB 638 (2003).

<sup>8</sup> *George W. Coleman*, 38 ECAB 782, 788 (1987); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

<sup>9</sup> *Tamara McCauley*, 51 ECAB 375, 377 (2000); *Jack E. Rohrbaugh*, 38 ECAB 186, 190 (1986); see also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11(a) (April 1995).

April 17, 2005. Appellant contends, however, that his disability commenced prior to May 9, 2004. The Board finds, however, that the medical evidence of record does not establish his claim.

The record reflects that appellant was treated by Dr. McCloskey, who returned him to limited-duty work on April 16, 1998 subject to specified physical limitations. He stopped work on July 7, 1998 not due to any total disability supported by the medical evidence. Rather, the record reflects that the temporary positions at the employing establishment were abolished.

The medical evidence does not support a change in the nature of appellant's accepted condition causing total disability prior to May 9, 2004. Appellant was referred for a discography in 2000 by Dr. McCloskey. This matter was subject to appellant's 2001 claim for a recurrence of disability commencing April 9, 2001. The Office found in a June 26, 2001 decision that the medical evidence did not support appellant's claim of total disability as of that date. In fact, subsequent reports from Dr. McCloskey reiterated appellant's partial capacity for the work he was performing on which the wage-earning capacity was made. In a June 30, 2002 report, he advised that appellant was restricted to sedentary work, with no walking or standing for more than two hours and no lifting in excess of 10 pounds and the ability to change position frequently. Dr. McCloskey noted that appellant was permanently limited to sedentary or light-duty work and had reached maximum improvement as of March 6, 2000. This evidence does not support appellant's claim of total disability during this time period.

Dr. McCloskey continued to treat appellant for his low back condition, noting in 2003 that surgery had not been recommended and that he had been found disabled by the Social Security Administration. The records from the physician do not address appellant's incapacity for the limited-duty work he was performing which formed the basis for the wage-earning capacity determination. Although appellant may have been found disabled by the Social Security Administration, this does not establish that he was totally disabled for work under the Act. It is well established that in determining whether an employee is disabled under the Act, the findings of the Social Security Administration are not determinative.<sup>10</sup> The Social Security Act and the Federal Employees' Compensation Act have different standards of medical proof on the issue of disability.<sup>11</sup>

Appellant was referred for examination by Dr. Jackson, who provided findings on January 30, 2004 noting the L4-5 disc herniation and degenerative disc disease. The Board notes that the report of Dr. Jackson noted that the employment injury had caused an aggravation and acceleration of appellant's degenerative disease process. He stated that appellant's maximum improvement was sometime in late 1998 or 1999. However, in addressing the issue of disability for work, Dr. Jackson did not address the limited-duty work appellant was performing when rated under the wage-earning capacity decision. Rather, Dr. Jackson noted that appellant was not able to perform the duties he had been performing when injured on April 1, 1998 due to the aggravation of his preexisting degenerative disease. This evidence does not establish appellant's claim that he was totally disabled prior to May 9, 2004. In turn, Dr. Tsang examined appellant

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<sup>10</sup> *Freddie Mosley*, 54 ECAB 255 (2002).

<sup>11</sup> *See Dona M. Mahurin*, 54 ECAB 309 (2003).

and reported on April 30, 2004, noting his symptoms of left lower extremity radiculopathy with muscle spasm and pain. However, Dr. Tsang did not address the relevant issue of disability for the limited-duty work on or after July 7, 1998 when the temporary-duty position expired. This evidence does not support total disability due to a material change in the accepted condition prior to May 9, 2001. Appellant has not established that modification of the 1998 wage-earning capacity decision is warranted.

**CONCLUSION**

The Board finds that appellant has not established that modification of his wage-earning capacity determination is warranted.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated October 31, 2006 are affirmed.

Issued: May 20, 2008  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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