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

| | | |
|---|---|---|
| **D.S., Appellant** | ) | |
| **and** | ) | **Docket No. 10-1602** |
| | ) | **Issued: April 11, 2011** |
| **DEPARTMENT OF THE NAVY, NORFOLK NAVAL SHIPYARD, Portsmouth, VA, Employer** | ) | |

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

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On June 1, 2010 appellant filed a timely appeal from the March 31, 2010 merit decision of the Office of Workers' Compensation Programs denying a request for modification of a wage-earning capacity determination and denying a recurrence of disability claim. Pursuant to the Federal Employees' Compensation Act[1] and 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 modify the Office's July 24, 1995 wage-earning capacity determination or to establish that he sustained a recurrence of disability on September 7, 2009.

[1] 5 U.S.C. § 8101 *et seq.*

## ***FACTUAL HISTORY***

The Office accepted that on October 25, 1988 appellant, then a 27-year-old shipyard worker, sustained a lumbosacral strain, degenerative disc at L5-S1 and bilateral L5 spondylolysis due to lifting a portion of a concrete sidewalk. Appellant was totally disabled from work for a period and received disability compensation from the Office. He began participating in an Office-sponsored vocational rehabilitation program designed to help return him to work.

On July 28, 1994 a functional capacity evaluation (FCE) was performed. The results of the FCE indicated that appellant should pursue vocational opportunities within a light/light medium physical demand range on a full-time basis with restrictions of lifting up to 40 pounds occasionally.[2] On December 19, 1994 appellant began working as a fabric worker with a private employer, for 40 hours a week.[3] The position did not require lifting more than 40 pounds, carrying more than 30 pounds or engaging in repetitive trunk bending. Appellant was allowed to switch between standing and sitting as needed.[4]

In a July 24, 1995 decision, the Office adjusted appellant's compensation to reflect his ability to earn actual wages as a fabric worker.[5]

On December 3, 1996 Dr. Bruce I. Tetalman, an attending Board-certified physiatrist, noted that appellant reported that he was able to work without missing time. He diagnosed spondylolitic radiculitis, medically stable and resolved and lumbar disc disease.

The evidence of record does not contain any indication that appellant received regular medical treatment for his back condition between early 1997 and mid 2008.[6] In a report dated October 13, 2008, Dr. Hansen discussed the diagnostic testing of record indicating that computed tomography scanning from March 24, 1992 showed spondylosis at L5 and facet degenerative disease at L5-S1 with spondylolisthesis of L5 on S1.[7] He stated that appellant complained of low back pain in the midline area which moved into his upper buttocks and posterolateral thighs. The pain was aggravated by activity and lifting. Dr. Hansen indicated that appellant's examination was notable for decreased range of motion upon lumbar flexion. Appellant had

[2] Appellant received treatment for his back problems from Dr. Robert B. Hansen, a Board-certified neurologist, and Dr. David M. Biondi, an osteopath and Board-certified neurologist.

[3] Appellant started working for Atlantic Enterprises and later became a fabric worker at another private employer, B & B Manufacturing Company, due to the financial instability of Atlantic Enterprises.

[4] Appellant had more than 10 years of sewing experience prior to starting work as fabric worker. He worked for B & B Manufacturing Company until July 1997.

[5] The wages at B & B Manufacturing Company were lower than those at Atlantic Enterprises and the Office based its wage-earning capacity determination on those lower wages.

[6] The only record of a back examination by a physician during this period is dated November 8, 2002. Appellant reported that he had low back pain but that he did not regularly take medication except for Motrin. In an October 8, 2002 work capacity evaluation form, Dr. Hansen indicated that appellant could occasionally lift up to 40 pounds and frequently lift up to 30 pounds.

[7] Dr. Hansen indicated that appellant had not undergone diagnostic testing of his back for 15 years.

good strength and reflexes in his legs and tenderness to palpation of his lumbosacral paraspinal muscles, sacroiliac joints bilaterally and trochanteric bursae. Dr. Hansen noted that appellant continued working despite experiencing low back pain related to his work-related conditions. He recommended that appellant participate in a pain management program and undergo sacroiliac joint injection.

The findings of October 23, 2008 magnetic resonance imaging (MRI) scan testing of appellant's low back showed grade I spondylolisthesis at L5-S1 due to bilateral L5 spondylolysis and foraminal stenoses most prominent at L5-S1 with no critical central canal stenosis. Dr. Hansen continued to periodically examine appellant and noted that he reported having low back pain which was aggravated by activity.

On September 11, 2009 Dr. Hansen noted that appellant reported experiencing much more pain than before with pain shooting from his low back down into his right buttock and right foot. The pain was worse with sleeping and prolonged sitting. On examination appellant exhibited limited flexion. Dr. Hansen diagnosed low back pain, sciatica, lumbar spondylosis and unspecified neuritis/neuralgia. On October 5, 2009 he noted that appellant reported that he still had "terrible pain" in his low back that radiated down into both legs along with numbness and tingling.

The findings of October 15, 2009 MRI scan testing showed minimal disc desiccation and foraminal stenosis at L3-4, minimal broad-based disc protrusion and mild foraminal stenosis (without significant central canal stenosis) at L4-5 and Grade 1 anterolisthesis and moderate foraminal stenosis (without spondylolysis) at L5-S1. The thecal sac was abutted at L5-S1 but not effaced. A January 14, 2010 electromyogram (EMG) and nerve conduction velocity testing showed a chronic, bilateral L5-S1 radiculopathy. Appellant continued to undergo periodic sacroiliac joint injections to treat his back pain.

In late 2009, appellant was working as a shop foreperson for Doug's Machine Shop.[8] In a claim for compensation (Form CA-7) signed on February 5, 2010, he alleged that he was unable to perform any work from September 7 to October 20, 2009. In a claim for recurrence of disability (Form CA-2a) signed on February 5, 2010, appellant claimed that he sustained a recurrence of disability on September 7, 2009 due to his October 25, 1988 employment injury.[9] In work certificates from September and October 2009, several attending physicians with illegible signatures indicated that he was disabled from work for periods between September 7 and October 20, 2009.

In a February 25, 2010 letter, the Office advised appellant of the standards for modifying a wage-earning capacity determination and for establishing a recurrence of disability. It requested that he submit additional factual and medical evidence in support of his claim. In an

[8] On September 26, 2001 appellant began working as a machinist for Doug's Machine Shop.

[9] Regarding how the recurrence of disability started, appellant stated, "The recurrence of disability happened over a three-week period. I believe that it was due to the increase of work, which increased the speed of work to keep up with demands." It appears that beginning October 20, 2009 appellant started working 20 hours a week (rather than 40 hours a week) at Doug's Machine Shop.

undated letter received on March 19, 2010, appellant described his back and leg symptoms and detailed his job duties at Doug's Machine Shop, including answering telephone calls, writing reports and operating grinding and milling machines (for one-hour at a time). He submitted a job description indicating that the work at the machine shop did not require lifting more than 10 pounds, reaching above shoulder level, twisting, bending or stooping.

In a March 15, 2010 report, Dr. Hansen stated that appellant had reported chronic back pain since his October 25, 1988 employment injury but had generally been able to return to work on a full-time basis. He noted that appellant remained out of work from September 7 to 19, 2009 and stated, "Over several weeks, however, he underwent an acceleration of pain, such that he had to be taken out of work in September of this year. There was no particular inciting incident. There was not a reinjury *per se*." Dr. Hansen indicated that he regarded this work stoppage more as "an exacerbation of a previously existing injury" and noted that appellant's return to work has been at a reduced level of four hours a day. He felt that this [was] medically appropriate given the fact that [appellant] has proven unable to tolerate an eight-hour day."

Dr. Hansen further stated that the findings of January 14, 2010 EMG and NVC testing showed chronic bilateral L5-S1 radiculopathies and an October 15, 2009 MRI scan of the back showed a disc protrusion at L4-5. At L5-S1 there was additional degenerative change and that there was loss of disc height and protrusion of the disc, such that it abutted the thecal sac.[10] A previous lumbar MRI scan performed on October 23, 2008 showed similar findings along with facet arthritis. Dr. Hansen provided a diagnosis of chronic low back pain relating to degenerative lumbar spine disease noting that facet arthritis, lumbar degenerative disc disease and lumbar region pain were specifically identified on MRI scanning. He stated that appellant displayed evidence for these conditions over several years on serial MRI scanning and indicated that, symptomatically, he had exacerbations of chronic low back that flowed from these changes. Dr. Hansen noted that appellant had not sustained a reherniation of a lumbar disc. He did not believe that appellant was a candidate for surgery, but rather he was a candidate for ongoing conservative care and appropriate work modification. Dr. Hansen indicated that the nature of appellant's back injury was such that he was expected to continue to have problems and noted that he had been engaged in physical therapy with an intent to provide strengthening of the core muscles and to develop a sustainable therapeutic exercise program. He recommended that appellant transitioned from supervised physical therapy to a sustainable, self-directed program that could continue at a facility such as the YMCA. Dr. Hansen stated:

> "In my opinion, [appellant's] ongoing difficulties with his back relate to the initial injury that occurred in 1988. He has been entirely consistent with his presentation to this clinic. As mentioned above, we have seen [appellant] over the span of better than a decade. There has been no reason to suspect that he is anything other than faithfully representing his difficulties. I think it is to [appellant's] credit that he does attempt ongoing efforts at work. The aggregate of his back pain is such that he is currently unable to tolerate any more than a four-hour day. We have imposed additional work restrictions. [Appellant] should not work in a

[10] Dr. Hansen indicated that grade I anterolisthesis was also observed.

stooped or bent position. He should not be engaged in heavy lifting. There is a weight limitation of 10 pounds."[11]

In a March 31, 2010 decision, the Office denied appellant's request for modification of the July 24, 1995 wage-earning capacity determination and denied his claim for a recurrence of disability.

## ***LEGAL PRECEDENT***

Once a loss of wage-earning capacity is determined, a modification of such a determination is not warranted unless there is a material change in the nature and extent of the employment-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was in fact erroneous.[12] The burden of proof is on the party attempting to show the award should be modified.[13]

Section 8115(a) of the Act provides that the "wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity."[14] The Board has stated, "Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure."[15] However, wage-earning capacity may not be based on an odd-lot or make-shift position designed for an employee's particular needs or a position that is seasonal in an area where year-round employment is available.[16] Office procedures direct that a wage-earning capacity determination based on actual wages be made following 60 days of employment.[17]

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record

[11] Dr. Hansen completed a work capacity form on March 15, 2010 which further detailed these recommended work restrictions.

[12] *George W. Coleman*, 38 ECAB 782, 788 (1987); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

[13] *Jack E. Rohrabaugh*, 38 ECAB 186, 190 (1986).

[14] 5 U.S.C. § 8115(a).

[15] *Floyd A. Gervais*, 40 ECAB 1045, 1048 (1989); *Clyde Price*, 32 ECAB 1932, 1934 (1981). Disability is defined in the implementing federal regulations as "the incapacity, because of an employment injury, to earn the wages the employee was receiving *at the time of injury*." (Emphasis added.) 20 C.F.R. § 10.5(f). Once it is determined that the actual wages of a given position represent a employee's wage-earning capacity, the Office applies the principles enunciated in *Albert C. Shadrick*, 5 ECAB 376 (1953), in order to calculate the adjustment in the employee's compensation.

[16] *See James D. Champlain*, 44 ECAB 438, 440-41 (1993); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7a(1) (July 1997).

[17] *Id.* at Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7c (December 1993).

establishes that he can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative, and substantial evidence a recurrence of total disability and show that he cannot perform such light duty. As part of this burden the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.[18]

## ***ANALYSIS***

The Office accepted that on October 25, 1988 appellant sustained a lumbosacral strain, degenerative disc at L5-S1 and bilateral L5 spondylolysis. In a July 24, 1995 decision, it adjusted his compensation to reflect his ability to earn actual wages as a fabric worker. In late 2009, appellant was working as a shop foreperson for Doug's Machine Shop. In a February 5, 2010 Form CA-7, he alleged that he was unable to perform any work from September 7 to October 19, 2009. In a February 5, 2010 Form CA-2a, appellant claimed that he sustained a recurrence of disability on September 7, 2009 due to his October 25, 1988 employment injury.[19]

The Board finds that appellant did not meet his burden of proof to modify the Office's July 24, 1995 wage-earning capacity determination. Appellant has not argued or otherwise shown that the July 24, 1995 wage-earning capacity determination was erroneous. This wage-earning capacity determination was properly based on his actual wages as a full-time fabric worker for a private employer.[20]

Appellant also has not shown that there was a material change in the nature and extent of his employment-related condition. He submitted a March 15, 2010 report in which Dr. Hansen, an attending Board-certified neurologist, reported appellant's complaints of increased symptoms, but this report does not contain a well-rationalized opinion showing that there was a material change in his employment-related condition.

Dr. Hansen stated that appellant had reported chronic back pain since his October 25, 1988 employment injury but had complained of increased symptoms beginning in September 2009.[21] He stated that the findings of January 14, 2010 EMG testing showed chronic

[18] *Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Terry R. Hedman*, 38 ECAB 222, 227 (1986). 20 C.F.R. § 10.5(x) provides, "*Recurrence of disability* means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness. This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force) or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations."

[19] It appears that beginning October 20, 2009 appellant started working 20 hours a week (rather than 40 hours a week) at Doug's Machine Shop.

[20] There is no indication that the fabric worker position was an odd-lot or make-shift position designed for appellant's particular needs. *See supra* note 16.

[21] In September 11, 2009 report, Dr. Hansen noted that appellant reported experiencing much more pain than before with pain shooting from his low back down into his right buttock and right foot. The report does not contain any notable objective findings.

bilateral L5-S1 radiculopathies and that an October 15, 2009 MRI scan of the back showed degenerative changes and disc protrusions at L4-5 and L5-S1. Dr. Hansen noted, however, that there had been no lumbar disc reherniation relative to earlier diagnostic studies. He provided a diagnosis of chronic low back pain relating to degenerative lumbar spine disease noting that facet arthritis, lumbar degenerative disc disease and lumbar region pain were specifically identified on MRI scanning.[22] The Board notes that Dr. Hansen's reported findings beginning in September 2009 are not notably different than those that had been observed since appellant sustained his employment injury on October 25, 1988. Appellant's claim was accepted for degenerative disc at L5-S1 and bilateral L5 spondylolysis and he consistently complained of radiculopathies in his legs since October 1988. Dr. Hansen's assertion that appellant could not work for the period September 7 to 19, 2009 and could only work four hours a week beginning September 20, 2009 appears to have been based on appellant's self-reported symptoms rather than any objectively-measured material change in his employment condition.

Moreover, Dr. Hansen provided an equivocal opinion on the cause of the current signs and symptoms he observed.[23] In a portion of his report, he stated that appellant's condition was related to the October 1988 injury and noted, "Over several weeks, however, he underwent an acceleration of pain, such that he had to be taken out of work in September of this year. There was no particular inciting incident. There was not a reinjury *per se*." However, in another portion of his report, Dr. Hansen indicated that he regarded appellant's work stoppage in September 2009 as "an exacerbation of a previously existing injury." Therefore, it is unclear whether he was attributing appellant's current condition to the October 25, 1988 employment injury or some later injury that occurred while working for a private employer. Dr. Hansen did not provide medical rationale to explain the connection between the October 1988 injury and appellant's condition in late 2009. Such medical rationale is especially necessary as the evidence of record contains limited indications of medical treatment of appellant's back condition between early 1997 and mid 2008.[24]

The Board notes that appellant also did not show that he had been retrained or otherwise vocationally rehabilitated such that a modification of the Office's July 24, 1995 wage-earning capacity determination would be justified. For these reasons, appellant has not met his burden of proof to modify the Office's July 24, 1995 wage-earning capacity determination.

[22] Dr. Hansen did not believe that appellant was a candidate for surgery, but rather he was a candidate for ongoing conservative care and appropriate work modification.

[23] *See Leonard J. O'Keefe*, 14 ECAB 42, 48 (1962); *James P. Reed*, 9 ECAB 193, 195 (1956) (finding that an opinion which is equivocal or speculative is of limited probative value regarding the issue of causal relationship).

[24] On appeal appellant argued that his claim was established by the fact that Dr. Hansen had provided an opinion that his degenerative disc disease would worsen over time. However, for the reasons explained above, Dr. Hansen's reports do not show that appellant suffered a material change in his injury-related condition. In work certificates from September and October 2009, several attending physicians with illegible signatures indicated that appellant was disabled from work for periods between September 7 and October 20, 2009. However, these physicians did not provide any opinion on the cause of this disability or otherwise provide an opinion that his injury-related condition had materially changed.

The Board further finds that appellant has not established that he sustained a recurrence of disability on or after September 7, 2009. Although Dr. Hansen asserted that appellant could not work for the period September 7 to 19, 2009 and could only work four hours a week beginning September 20, 2009, he did not provide adequate medical rationale in support of this opinion. He did not describe the October 25, 1988 employment injury in any detail or explain how it could have been competent to cause increased disability on the alleged dates. Dr. Hansen did not describe appellant's limited-duty work or explain how a work-related condition caused him to have total disability from September 7 to 19, 2009 or increased partial disability beginning September 20, 2009. Moreover, it is unclear whether Dr. Hansen was attributing appellant's condition beginning in September 2009 to the October 25, 1988 employment injury or some later injury that occurred while working for a private employer. As noted above, the work certificates from several attending physicians with illegible signatures recommending disability for dates between September and October 2009 did not provide any opinion on the cause of this disability. For these reasons, the Office properly denied appellant's claim for a recurrence of disability beginning September 7, 2009.

## ***CONCLUSION***

The Board finds that appellant did not meet his burden of proof to modify the Office's July 24, 1995 wage-earning capacity determination or to establish that he sustained a recurrence of disability on September 7, 2009.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the March 31, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 11, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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