United States Department of Labor
Employees' Compensation Appeals Board

D.I., Appellant	)	
and	)	**Docket No. 10-2040**
	)	**Issued: June 1, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Birmingham, AL, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 5, 2010 appellant filed a timely appeal from the May 24, 2010 merit decision of the Office of Workers' Compensation Programs denying his request for modification of a wage-earning capacity determination and his claim for recurrence of total disability. Pursuant to the Federal Employees' Compensation Act 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 March 3, 2009 wage-earning capacity determination or to establish that he sustained a recurrence of total disability due to his October 19, 2006 work injury.

FACTUAL HISTORY

The Office accepted that on October 19, 2006 appellant, then a 53-year-old letter carrier, sustained a lumbar strain and herniated disc at L3-L4 when he twisted his back while trying to avoid being struck by carpet rolls that had fallen near his letter cage. On January 31, 2007 appellant underwent Office-authorized surgery, including lumbar decompression at L2 through

L4 and a microdiscectomy at L3 and L4. He returned to light-duty work as a modified city carrier on May 1, 2007.

In a March 3, 2009 decision, the Office reduced appellant's compensation to zero based on its determination that his actual earnings as a modified city carrier fairly and reasonably represented his wage-earning capacity. It determined that appellant had no loss of wages in this position when compared to his date-of-injury position.

On August 20, 2009 appellant filed a Form CA-7 (claim for compensation) for the period July 3 to August 15, 2009. The employing establishment noted that appellant had returned to light-duty work on August 18, 2009.[1] In reports from August 2009, Dr. Joel D. Pickett, an attending Board-certified neurosurgeon, noted that appellant reported having increasing radicular pain in his left leg over the prior few months. Dr. Pickett discussed the possibility of appellant undergoing additional low back surgery.[2]

In a November 5, 2009 decision, the Office denied wage-loss compensation for the period July 3 to August 15, 2009 finding that there was no basis to modify the prior loss of wage-earning capacity decision of March 3, 2009.

On November 24, 2009 appellant filed a Form CA-2a (notice of recurrence) alleging he sustained a recurrence of total disability on November 19, 2009. He asserted that the recurrence occurred because he was turning to park his work vehicle on that date and he bumped the curb with the vehicle and jerked his back. This incident caused him to experience shooting pain in his back.

In a December 2, 2009 letter, the employing establishment challenged the recurrence claim for the reason that appellant had filed a new CA-l form to claim a new injury on November 29, 2009. On December 10, 2009 the Office requested that he provide additional information regarding his recurrence of disability claim.

Appellant sought treatment at an emergency room on November 20, 2009. He was discharged with a diagnosis of back pain. In a December 18, 2009 report, Dr. Pickett stated that appellant was being seen as he ran into a curb with his vehicle about three to four weeks prior. Since that time, appellant experienced intensely worse lower back pain that radiated down both his legs. Dr. Pickett stated that appellant was neurologically intact, but the right leg pain was a new finding. He recommended new magnetic resonance imaging (MRI) scan.

In a January 20, 2010 decision, the Office denied appellant's claim for a recurrence of total disability beginning November 19, 2009. It found that his recurrence claim was not established because he had claimed a new injury on November 19, 2009 when he bumped the curb in his work vehicle.

[1] In an October 29, 2009 decision, the Office denied authorization for additional back surgery consisting of a microlaminectomy at L3 and L4.

[2] The record also contains disability notes in which Dr. Pickett recommended that appellant stop work in September and October 2009.

In a March 17, 2010 letter, the employing establishment challenged appellant's recurrence of disability claim stating that his work restrictions had not been changed. The employing establishment noted that he was offered another modified job on April 20, 2009 based on an attending physician's work restrictions.

In a March 8, 2010 letter to appellant's counsel, Dr. Pickett stated that appellant had a filling defect on myelogram consistent with nerve root compression at L4-5 due to stenosis or a possible disc herniation. He stated that appellant's absent knee reflex correlated with that area of the anatomy and distribution of pain. Dr. Pickett recommended a microdiscectomy, but he did not discuss the claimed recurrence of disability of November 19, 2009.

Appellant requested a telephone hearing with an Office hearing representative. During the April 6, 2010 hearing, counsel argued that the incident of November 19, 2009 did not cause a new injury, but rather caused an exacerbation of the previous condition sustained on October 19, 2006. Appellant testified that on November 19, 2009 he was turning his vehicle around and his foot slipped on the gas pedal. The vehicle came off the curb and he experienced a sharp pain in his lower back. Appellant testified that Dr. Pickett told him that the November 19, 2009 incident did not cause any further damage, but rather it accelerated the pain of his previous injury. He was off work for a day or two after November 19, 2009. Appellant testified that he went back to his previous modified-duty work, but the employer tried to add more arduous lifting duties to his work restrictions. Counsel stated that Dr. Pickett's December 18, 2009 report showed that the November 19, 2009 incident aggravated appellant's herniated disc.

The employing establishment advised by letter dated April 12, 2010 that appellant was involved in the National Assessment Reemployment/Reassignment interview and was offered a job based on an attending physician's work restrictions. The employing establishment stated that appellant declined the job offer, but noted that he had bid on this job and was now working within the same restrictions.

Appellant submitted medical records dated October 19, 2006 to April 9, 2010 from the Spine & Neurological Center along with the reports for a June 15, 2009 lumbar MRI scan, August 12, 2009 lumbar computerized tomography (CT) scan and myelogram and January 9, 2010 lumbar MRI scan.

In a May 24, 2010 decision, the Office hearing representative affirmed the January 20, 2010 decision. She determined that appellant had not met his burden of proof to modify the Office's March 3, 2009 wage-earning capacity determination or to establish that he sustained a recurrence of total disability beginning November 19, 2009.

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.[3] The burden of proof is on the

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

party attempting to show the award should be modified.[4] The Board has held that a new injury does not constitute a material change in the nature and extent of the original injury-related condition such that a wage-earning capacity determination should be modified.[5]

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."[6] 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."[7] However, wage-earning capacity may not be based on an odd-lot or make-shift position designed for an employee's particular needs.[8] Office procedures direct that a wage-earning capacity determination based on actual wages be made following 60 days of employment.[9]

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 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.[10]

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

[5] *M.E.*, Docket No. 07-2306 (issued March 24, 2008).

[6] 5 U.S.C. § 8115(a).

[7] *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.

[8] *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).

[9] *See* Federal (FECA) Procedure Manual, *id*. at Chapter 2.814.7c (December 1993).

[10] *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."

ANALYSIS

The Office accepted that on October 19, 2006 appellant sustained a lumbar strain and herniated disc at L3-L4 when he twisted his back while trying to avoid being struck by carpet rolls that had fallen near his letter cage. Appellant returned to light-duty work as a modified city carrier on May 1, 2007. In a March 3, 2009 decision, the Office reduced his compensation to zero based on its determination that his actual earnings as a modified city carrier fairly and reasonably represented his wage-earning capacity. On August 20, 2009 appellant filed a Form CA-7 for the period July 3 to August 15, 2009. On November 24, 2009 he filed a Form CA-2A for a recurrence of total disability on November 19, 2009.

The Board finds that appellant did not meet his burden of proof to modify the Office's March 3, 2009 wage-earning capacity determination. Appellant has not alleged or otherwise shown that the original wage-earning capacity determination was in fact erroneous. He worked in the modified city carrier position for almost two years before the Office made its wage-earning capacity determination. There is no evidence that the position was an odd-lot or make-shift position designed for appellant's particular needs.[11]

Appellant also did not establish a material change in the nature and extent of his employment-related condition. The record contains several reports, including those dated between August and October 2009, in which Dr. Pickett, an attending neurosurgeon, noted appellant's report of increased symptoms and suggested that he had disability due to his low back condition. However, Dr. Pickett did not provide any opinion that appellant sustained a material change in his accepted work-related condition sustained on October 19, 2006. Appellant claimed that his injury-related condition changed for the worse after a November 19, 2009 incident that occurred when his work vehicle bumped into a curb; but the November 19, 2009 incident involves a possible new injury rather than a material change in the work-related injury condition that was sustained prior to the issuance of the March 3, 2009 wage-earning capacity determination. As noted, the Board has held that a new injury does not constitute a material change in the nature and extent of the original injury-related condition such that a wage-earning capacity determination should be modified.[12]

Appellant also has not met his burden of proof to show that he sustained a work-related recurrence of total disability in mid 2009. The reports of Dr. Pickett indicated disability beginning in August 2009 but these reports do not provide any opinion that the disability was related to the accepted low back injuries of October 19, 2006. Moreover, appellant has not explained why he felt that the possible new injury he reported as occurring on November 19, 2009 constituted a spontaneous change in his medical condition as a result of the October 19, 2006 work injury. Appellant claimed that his modified job duties were changed such that he sustained a recurrence of total disability. However, the employing establishment disputed appellant's claim in this regard and he has not submitted sufficient evidence to establish such a change.

[11] *See supra* notes 8 and 9. The record also does not reveal that appellant was retrained or vocationally rehabilitated.

[12] *See supra* note 5.

For these reasons, appellant has not shown that the Office's March 3, 2009 wage-earning capacity determination should be modified or that he has established a recurrence of total disability due to the October 19, 2006 work injury.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to modify the Office's March 3, 2009 wage-earning capacity determination or to establish that he sustained a recurrence of total disability due to the October 19, 2006 work injury.

ORDER

IT IS HEREBY ORDERED THAT the May 24, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 1, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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