

File Number:  
HR14-D-H

RECEIVED MAY 18 2015

U.S. DEPARTMENT OF LABOR

OFFICE OF WORKERS' COMP PROGRAMS  
PO BOX 8300 DISTRICT 50  
LONDON, KY 40742-8300  
Phone: (202) 693-0045

MAY - 8 2015

Date of Injury:  
Employee:

Dear Mr.

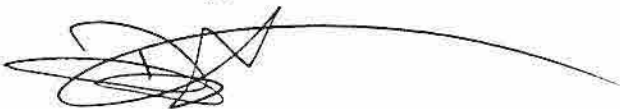
This is in reference to your workers' compensation claim. Pursuant to your request for a hearing, the case file was transferred to the Branch of Hearings and Review.

Your case file has been returned to the District Office at:

US DEPARTMENT OF LABOR  
OFFICE OF WORKERS' COMP PROGRAMS  
PO BOX 8300 DISTRICT 6 JAC  
LONDON, KY 40742-8300

If you disagree with the decision attached to this letter, you have the right to submit new evidence to the Office of Workers' Compensation Programs and request reconsideration of the case or, if you have no additional evidence to present to the Office of Workers' Compensation Programs, you may appeal the decision to the Employees' Compensation Appeals Board.

Sincerely,



David Leach  
Hearing Representative

PAUL H FELSER  
ATTORNEY AT LAW  
PO BOX 10267  
SAVANNAH, GA 31412

*If you have a disability (a substantially limiting physical or mental impairment), please contact our office/claims examiner for information about the kinds of help available, such as communication assistance (alternate formats or sign language interpretation), accommodations and modifications.*

RECONSIDERATION: If you have additional evidence, not previously considered, which you believe is pertinent, you may request, in writing, the OWCP reconsider this decision. Such a request must be received within one year of the date of the attached decision, clearly state the grounds upon which reconsideration is being requested, and be accompanied by relevant evidence not previously submitted, such as medical reports or affidavits, or a legal argument not previously made. Your request for reconsideration and the new evidence you are submitting should be sent to the

US DEPARTMENT OF LABOR  
OFFICE OF WORKERS' COMP PROGRAMS  
PO BOX 8300 DISTRICT 6 JAC  
LONDON, KY 40742-8300

In order to ensure that you receive an independent evaluation of the evidence, your case will be reconsidered by persons other than those who made this determination.

APPEALS: If you believe that all available evidence has been submitted, you have the right to appeal to the Employees' Compensation Appeals Board (ECAB) (20 C.F.R. 10.625). The ECAB will review only the evidence received prior to the date of this decision (20 C.F.R. Part 501). Effective November 19, 2008, ECAB has changed its Rules of Procedure on the time limit to appeal and has eliminated its practice of allowing one year to file an appeal. **Request for review by the ECAB must be made within 180 calendar days from the date of this decision.** More information on the new Rules is available at [www.dol.gov/ecab](http://www.dol.gov/ecab).

To expedite the processing of your ECAB appeal, you may include a completed copy of the AB 1 form used by ECAB to docket appeals available on the Department of Labor Web Site at [www.dol.gov/ecab](http://www.dol.gov/ecab). **You must mail your request to:**

**Employees' Compensation Appeals Board  
200 Constitution Avenue NW, Room S-5220  
Washington, DC 20210**

**U.S. DEPARTMENT OF LABOR**  
Office of Workers' Compensation Programs

DECISION OF THE HEARING REPRESENTATIVE

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In the matter of the claim for compensation under Title 5, U.S.C. Code 8101 et seq. of \_\_\_\_\_ claimant; Employed by the \_\_\_\_\_ KS; Case no. \_\_\_\_\_

Hearing was held by telephone on February 18, 2015. As a result, the decision of the Office dated June 27, 2014 is hereby affirmed, but modified, for the reasons set forth below:

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The issue for determination is whether the decision of the Office dated June 24, 2014, modifying the standing wage-earning capacity decision of October 30, 1998, was correct.

The claimant is an employee of the \_\_\_\_\_ where he was employed as a \_\_\_\_\_. The Office accepted that the claimant sustained a work-related injury in the performance of duty on \_\_\_\_\_ when he bent over a cart and felt pain in his back. The claim was approved for the following work-related medical condition: lumbar sprain. The claim was later expanded to include herniated disc at L4-L5 as an accepted medical condition. The claimant underwent approved lumbar fusion surgery on \_\_\_\_\_. He received ongoing wage-loss compensation on the OWCP "Periodic Roll". It is noted that the claimant also suffers from service-related, pre-existing conditions affecting his lower extremities, with bilateral knee surgeries.

The attending physicians, Dr. \_\_\_\_\_ and Dr. \_\_\_\_\_ provided permanent work restrictions for the claimant in a report dated \_\_\_\_\_. This was based on a Functional Capacity Evaluation (FCE) dated \_\_\_\_\_. In a report of \_\_\_\_\_ Dr. \_\_\_\_\_ indicated the claimant could work as Parking Lot Attendant, with frequent changes in position.

The Office issued a formal decision on October 13, 1998 reducing the claimant's wage-loss compensation based on his ability to earn wages as a \_\_\_\_\_

This selected position was identified during the Vocational Rehabilitation process as within the claimant's vocational ability, and was reasonably available within commuting distance of his residence. The Office found the duties of that position based were within the claimant's work capacity, based on work restrictions provided by the attending physicians.

On November 25, 2003 the claimant submitted a letter requesting modification of the prior wage-earning capacity decision, arguing that his condition had worsened and he could not work as a Parking Lot Attendant.

On March 7, 2005, the Office denied the claim for recurrence effective November 25, 2003. On September 6, 2005, the Board set that decision aside and remanded the case for the Office to consider whether the prior wage-earning capacity decision should be modified.

On February 21, 2006 the Office denied the request for modification of the prior wage-earning capacity decision. The finding was that the medical evidence of record failed to establish the claimant was unable to work as a

The claimant requested an appeal in the form of reconsideration by the District Office. On May 26, 2006, the Office again denied modification of the prior wage-earning capacity decision.

The Office brought the matter before the Employees' Compensation Appeals Board (ECAB). In a decision dated January 30, 2007, the Board affirmed the decisions of the Office with a finding that the medical evidence of record failed to show a change in the claimant's work-related condition that prevented him from working as a \_\_\_\_\_ Numerous reports submitted to the record by Dr. \_\_\_\_\_ failed to address that specific issue.

In a report of \_\_\_\_\_ Dr. \_\_\_\_\_ indicated that the claimant had recently undergone EMG and Nerve Conduction Studies of the lower extremity, which revealed a residual non-compressive right L5-S1 radiculopathy. He explained that this test objectively confirmed the reports of weakness by the claimant. The fusion was stable, but resulted in decreased range of motion in the lower back. He opined that these objective findings prevented the claimant from working as a \_\_\_\_\_ In support, a copy of the EMG/NCV report dated \_\_\_\_\_ was received.

On \_\_\_\_\_ Dr. \_\_\_\_\_ provided a permanent impairment evaluation of the claimant's lower extremities. He indicated the claimant was suffering from degenerative disc disease in the lumbar spine, and had undergone right Achilles tendon surgery in \_\_\_\_\_. The claimant was scheduled to undergo right and left total knee replacement.

On December 26, 2012 the claimant's attorney provided a letter arguing that the claim should be expanded to include conditions identified in the medical reports of \_\_\_\_\_ and \_\_\_\_\_. In a separate letter of the same date, the attorney indicated the claimant was requesting modification of the prior wage-earning capacity decision. He argued that the wage-earning capacity decision

should be vacated, and wage-loss compensation reinstated based on temporary total disability.

To further develop this issue, the Office referred the claimant for a second opinion examination with \_\_\_\_\_ MD, a Board-certified orthopedic surgeon. Dr. \_\_\_\_\_ provided his initial report of \_\_\_\_\_ and addendum reports dated \_\_\_\_\_ and \_\_\_\_\_. He provided his discussion of the history of injury and prior medical treatment records. He provided a current diagnosis of lumbar radiculopathy with failed back syndrome and aggravation of degenerative disc disease as work-related medical conditions. He indicated non-occupational conditions included degenerative arthritis of the knees, prostate cancer and diabetes. He further opined that the claimant was unable to work as a \_\_\_\_\_. He opined the claimant's work-related condition had changed on \_\_\_\_\_.

Based on the reports of Dr. \_\_\_\_\_ the Office issued a decision dated \_\_\_\_\_ that modified the prior wage-earning capacity decision of October 30, 1998. It was noted that the Office had received a written request on December 28, 2012 to modify the prior wage-earning capacity decision. The Office found that the claimant was entitled to wage-loss compensation effective December 28, 2012 and continuing based on temporary total disability.

The claimant disagreed with this decision and requested an appeal in the form of an Oral Hearing before the Branch of Hearings and Review. A Hearing was held on February 18, 2015. The claimant did not attend the Hearing; but in his place, his representative, Attorney Paul Felser offered argument on the record.

Attorney Felser argued that he agreed with modification of the prior wage-earning capacity decision, but disagreed with the date that the Office had used to reinstate the claimant's wage-loss compensation: \_\_\_\_\_ He noted that Dr. \_\_\_\_\_ had stated the work-related condition began to change in \_\_\_\_\_ and there was a progressive worsening that led to lumbar fusion and disability from work. Dr. \_\_\_\_\_ had specifically indicated that the claimant was unable to work as a \_\_\_\_\_. This was due to disability caused by the lumbar spine injury and bilateral knee injuries.

The attending physician, Dr. \_\_\_\_\_ had also provided his medical reports documenting a failed return to work attempt by the claimant in 2002 when the claimant was released to work on a trial basis, but was unable to tolerate it. The reports since that time documented a progressive decline in his condition. Attorney Felser argued that the claimant should not have been returned to work, under the circumstances, his benefits should not have been reduced based on an ability to work. Attorney Felser further noted that Dr. \_\_\_\_\_ had documented an objective change in the claimant's work-related condition in his reports in 2010 when he noted a compressive right L5-S1 radiculopathy shown by EMG and nerve conduction studies. If there was not enough evidence to vacate the wage-

earning capacity altogether, at the very least, this was medical evidence supporting that the claimant was not able to work as a since due to a worsening of his accepted work injury. His compensation should have been reinstated at an earlier date.

He noted that Dr. had provided a more recent report dated 2014 in which he noted the claimant's condition had progressively worsened since lumbar spine fusion surgery in . Although he had previously provided an opinion the claimant could return to work with restrictions, the claimant had attempted to return to his job as a parking attendant, and was not able to tolerate it. It was therefore his opinion the claimant was permanently, totally disabled from work since

Attorney Felser argued that both physicians were in agreement that the claimant had been disabled from work since and on that basis the wage-earning capacity decision should be vacated. Alternately, the claimant should be entitled to reinstatement of his compensation effective or based on the additional medical reports, as discussed. Attorney Felser noted that the Office must consider disability from both work-related and pre-existing conditions when determining whether a position would be suitable for the claimant.

At the conclusion of the Hearing, Attorney Felser asked that the record remain open for 30 days, to allow for the submission of additional evidence for the appeal. The request was granted, and the record held open. Following the conclusion of the Hearing, copies of the transcript were released to the claimant and the employer, and their comments were invited.

No additional information was received from the claimant or the employing agency, pertinent to the issue under consideration.

Based on my careful consideration of the evidence of record, I find the evidence of record at this time shows the Office met its burden when it reduced the claimant's wage-loss compensation based on the claimant's ability to earn wages as a parking lot attendant. The evidence supports that this position was medically and vocationally suitable to the claimant's work abilities.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of benefits.<sup>1</sup> Under section 8115(a), wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent his or her wage-earning capacity, or if the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his or her usual employment, age, qualifications

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<sup>1</sup> *David W. Green*, 43 ECAB 883 (1992).

for other employment, the availability of suitable employment and other factors and circumstances which may affect wage-earning capacity in his or her disabled condition.<sup>2</sup>

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an Office wage-earning capacity specialist for selection of a position, listed in the DOT or otherwise available in the open market, that fits the employee's capabilities with regard to his or her physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in *Albert C. Shadrick*,<sup>3</sup> will result in the percentage of the employee's LWEC.<sup>4</sup>

The Office must initially determine appellant's medical condition and work restrictions before selecting an appropriate position that reflects his vocational wage-earning capacity. The Board has stated that the medical evidence upon which the Office relies must provide a detailed description of appellant's condition.<sup>5</sup> Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.<sup>6</sup>

The decision of the Board dated January 30, 2007 makes it clear that the weight of medical evidence regarding the claimant's work capacity at the time that decision was issued rests with the attending physicians at that time, who provided their unequivocal opinions based on examination of the claimant and an FCE that the claimant was able to work in that position. I find that the current reports of record from Drs. \_\_\_\_\_ and \_\_\_\_\_ do not offer sufficient medical reasoning to explain how they can now second-guess the opinions of the physicians who examined the claimant at the time the \_\_\_\_\_ decision was issued, and found him able to work as a \_\_\_\_\_. The contemporaneous evidence is more convincing, and supports this position was within the claimant's work capacity. The decision to reduce the claimant's compensation based on his ability to earn wages as a \_\_\_\_\_ was also procedurally correct based on the evidence of record at the time it was issued.

The claimant has submitted a request for modification of the wage-earning capacity decision based on a worsening of his accepted work injury, preventing him from earning wages in that position.

Modification of a standing wage-earning capacity determination is not warranted unless there is a material change in the nature and extent of the injury-related

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<sup>2</sup> *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

<sup>3</sup> 5 ECAB 376 (1953).

<sup>4</sup> *Francisco Bermudez*, 51 ECAB 506 (2000); *James A. Birt*, 51 ECAB 291 (2000).

<sup>5</sup> See *William H. Woods*, 51 ECAB 619 (2000); *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

<sup>6</sup> *John D. Jackson*, 55 ECAB 465 (2004); *Carl C. Green, Jr.*, 47 ECAB 737, 746 (1996).

condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was erroneous.<sup>7</sup>

In the current case, the Office issued a decision dated June 27, 2014 with a finding that the medical evidence supports modification of the prior wage-earning capacity effective \_\_\_\_\_ and reinstated wage-loss compensation based on temporary total disability effective that date. On appeal, the claimant's attorney argued that wage-loss compensation should have been reinstated on an earlier date, as the medical evidence supports a change in the claimant's condition occurred prior to that time.

I find that the medical evidence does, in fact, support Attorney Felser's contention that the claimant's condition worsened to the extent that he could no longer work as a \_\_\_\_\_ effective \_\_\_\_\_ when Dr. \_\_\_\_\_ provided his reasoned opinion based on objective test results performed at that time, revealing that the claimant was suffering from residual right L5-S1 radiculopathy with weakness in the lower extremities and loss of range of motion in the spine, which caused him to be disabled from working as a Parking Lot Attendant. The second opinion reports of Dr. \_\_\_\_\_ fully support this conclusion. There is no medical evidence of file from any physician with a contrary medical opinion.

For the reasons set forth above, the decision dated June 27, 2014, is hereby affirmed, but modified to reflect that the position of \_\_\_\_\_ no longer represented the claimant's wage-earning capacity effective \_\_\_\_\_

The claimant's wage-loss compensation benefits based on temporary total disability should be reinstated effective \_\_\_\_\_. Furthermore, I find that the claim should be expanded to include L5-S1 radiculopathy as an accepted, work-related medical condition. The case is returned to the District Office for actions consistent with this decision.

Dated: MAY - 8 2015  
Washington, D.C.



DAVID S. LEACH  
Hearing Representative  
for  
Director, Office of Workers'  
Compensation Programs

<sup>7</sup> *Sue A. Sedgwick*, 45 ECAB 211, 215-16 (1993); *Elmer Strong*, 17 ECAB 226, 228 (1965).