

On June 11, 1973 appellant, then a 42-year-old ordnance worker, filed a traumatic injury claim alleging that on June 7, 1973 she felt a sharp pain in her right elbow while pulling tar out of funnels. She stopped work on February 8, 1974 and was terminated from the employing establishment effective that date. The Office accepted that appellant sustained lateral humeral

epicondylitis of the right elbow and entrapment of the right radial nerve by the right supinator muscle causing right lateral epicondylitis and paid compensation for periods of disability. On February 21, 1974 appellant underwent a right elbow arthrotomy. On December 9, 1980 she underwent a right lateral epicondylectomy of the right humerus with supinator arcade of Frohse release. Both procedures were authorized by the Office.<sup>1</sup>

On April 22, 1981 Dr. William B. Kleinman, an attending Board-certified orthopedic surgeon, indicated that appellant could not perform her preinjury position but was capable of performing limited-duty work which did not require lifting more than 10 pounds.

In a November 5, 1981 decision, the Office reduced appellant's compensation based on its determination that the selected position of appointment clerk represented her wage-earning capacity. The appointment clerk position involved scheduling appointments with employers or other employees with clients or customers by mail, telephone or in person and recording the times and dates of appointments in an appointment book. The position was sedentary and did not require lifting more than 10 pounds. An Office loss of wage-earning capacity specialist determined that the appointment clerk position was reasonably available in appellant's commuting area.

In early December 1984, appellant began to participate in an Office-sponsored vocational rehabilitation program. On December 20, 1984 Dr. Kleinman indicated that appellant should be encouraged to pursue "full gainful employment." He stated his recommendation that appellant not repetitively lift more than 10 pounds based on her subjective pain complaints. On April 30, 1990 Dr. Michael S. Turner, an attending Board-certified neurosurgeon, stated that appellant continued to have right lateral epicondylitis but did not have any right radial nerve dysfunction. He indicated that appellant could not perform tasks that involved "much extension at the wrist on a repetitive basis only against gravity."

On January 25, 1996 Dr. Andrew J. Vicar, an attending Board-certified neurologist, stated that on examination appellant had full flexion and extension of her right elbow and fingers. He noted that she had no atrophy of her arm, no swelling or redness anywhere, and no neurovascular, neurological or motor deficits. Dr. Vicar indicated that appellant subjectively complained that her right arm hurt but that she had no objective findings. He stated that she could perform sedentary clerical work which included such duties as answering the telephone, filing documents and using the computer.<sup>2</sup>

On March 14, 2006 the Office requested that appellant submit an updated medical report regarding her right elbow condition within 60 days. After appellant did not submit the requested report within the allotted time period, the Office referred her to Dr. James B. Rickert, a Board-

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<sup>1</sup> On August 5, 1977 the Office granted appellant a schedule award for a 15 percent permanent impairment of her right arm.

<sup>2</sup> Dr. Vicar indicated that appellant's medical condition was the same as that observed when he last examined her in November 1990.

certified orthopedic surgeon, for an examination and opinion regarding whether she had residuals or disability due to her accepted right elbow conditions.<sup>3</sup>

On November 13, 2006 Dr. Rickert concluded that appellant did not have any residuals of her accepted right elbow conditions. He provided a description of appellant's medical history including her surgeries in 1974 and 1980 and indicated that she reported that her right elbow was nontender but that she had pain and swelling in the knuckles of her right hand. Dr. Rickert stated that appellant had some arthritic changes involving the interphalangeal joints of her right hand. On examination appellant's right upper extremity was neurolovascularly intact, her right wrist and elbow exhibited a full range of motion, she had well-healed surgical scars on the right elbow with no point tenderness, and she had no varus or valgus instability. Dr. Rickert stated that appellant's active diagnosis was degenerative changes of the right hand. He stated:

"There are no objective findings involving any of the accepted conditions in the statement of accepted facts. I do not believe there is any residual. Therefore, I do not believe there is any residual that is active or disabling. Any current disability she does have is related to the arthritic change, which is in her hand. This is not due to work injury, nor to preexisting factors, rather, it is simply routine degenerative changes that one is likely to see in any 76-year-old woman.

"At this time, I do believe that the patient is capable of performing her position stated in the statement of accepted facts. I base this on the fact that in the statement of accepted facts, it states that she could do this work with no lifting over 10 pounds and no repetitive activity of the right arm. Please note that I believe she can do repetitive activities of the right arm, certainly the right lateral epicondylitis would not be limiting this. The patient does not have any quantifiable functional deficits at this time, other than the degenerative changes noted in the hand already discussed."<sup>4</sup>

The Office requested Dr. Rickert to clarify whether appellant could perform her preinjury position and whether the recommended 10-pound lifting restriction was based solely on nonwork related degenerative changes/arthritis of her right hand. On December 7, 2006 Dr. Rickert stated:

"At this time, the patient is able to do her unrestricted work if one considers only her work-related condition. The degenerative changes and arthritis are the reason I recommended restricted work. However, there are no ongoing residuals from her work injury. Therefore, as far as her work injury alone is concerned, she needs no restriction."

On February 27, 2007 the Office advised appellant of its proposal to modify its determination of her loss of wage-earning capacity, thereby reducing her compensation to zero. The Office found that the opinion of Dr. Rickert established a material change in the nature and

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<sup>3</sup> The Office provided a detailed statement of accepted facts.

<sup>4</sup> In a November 14, 2006 form report, Dr. Rickert stated that appellant could not lift more than 10 pounds.

extent of her injury-related condition, *i.e.*, she no longer had any residuals of her accepted employment injuries. Appellant submitted a March 21, 2006 letter in which she argued that Dr. Rickert did not perform an adequate examination.

In an April 8, 2007 decision, the Office finalized the proposed modification of its determination of appellant's loss of wage-earning capacity, thereby reducing her compensation to zero.

### **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 injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was in fact erroneous.<sup>5</sup> The burden of proof is on the party attempting to show the award should be modified.<sup>6</sup> If the Office wishes to modify a claimant's compensation, such as modifying a loss of wage-earning capacity determination by showing a material change in the nature and extent of the injury-related condition, its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>7</sup>

### **ANALYSIS**

The Office accepted that appellant sustained lateral humeral epicondylitis of the right elbow and entrapment of the right radial nerve by the right supinator muscle causing right lateral epicondylitis. Appellant last worked for any employer on February 8, 1974 and the Office paid appropriate disability compensation. In a November 5, 1981 decision, the Office modified appellant's compensation based on its determination that the selected position of appointment clerk represented her wage-earning capacity. The position was sedentary and did not require lifting more than 10 pounds.

In November 2006 the Office referred appellant to Dr. Rickert, a Board-certified orthopedic surgeon, for an examination and opinion regarding whether she had residuals or disability due to her accepted right elbow conditions.<sup>8</sup> Based on the opinion of Dr. Rickert, the Office modified its determination of appellant's loss of wage-earning capacity, thereby reducing her compensation to zero.

The Board finds that the Office properly modified its determination of appellant's loss of wage-earning capacity based on the opinion of Dr. Rickert. In well-rationalized reports dated November 13 and December 7, 2006, Dr. Rickert concluded that appellant did not have any

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<sup>5</sup> *George W. Coleman*, 38 ECAB 782, 788 (1987); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

<sup>6</sup> *Jack E. Rohrabach*, 38 ECAB 186, 190 (1986).

<sup>7</sup> *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>8</sup> Prior to this time, the last medical evidence of record was dated January 25, 1996 and appellant did not respond to a request for an updated medical report.

residuals of her accepted right elbow conditions. He indicated that on examination appellant's right upper extremity was neurovascularly intact, that her right wrist and elbow had full range of motion, that she had well-healed surgical scars on the right elbow with no point tenderness, and that she had no varus or valgus instability.

The Board has carefully reviewed the opinion of Dr. Rickert and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Rickert's opinion is based on a proper factual and medical history in that he had the benefit of an accurate and up-to-date statement of accepted facts, provided a thorough factual and medical history and accurately summarized the relevant medical evidence.<sup>9</sup> Dr. Rickert provided medical rationale for his opinion by explaining that appellant did not exhibit any objective evidence of her accepted right elbow conditions. He explained appellant's continuing problems, which necessitated a 10-pound lifting restrictions, by indicating that they were due to a nonwork-related degenerative process of the right hand. Dr. Rickert stated that appellant would only be prevented from performing her preinjury job by her nonwork-related hand condition.

Given that the Office has shown that appellant ceased to have residuals from her employment-related right elbow conditions, it has shown a material change in the nature and extent of the injury-related condition. Therefore, it had an adequate basis to modify its determination of appellant's loss of wage-earning capacity.<sup>10</sup> It was appropriate for the Office to reduce appellant's compensation to zero as the medical evidence showed that no employment-related condition contributed to any level of disability.

### **CONCLUSION**

The Board finds that the Office met its burden of proof to modify its determination of appellant's loss of wage-earning capacity, thereby reducing her compensation to zero.

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<sup>9</sup> See *Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

<sup>10</sup> See *supra* notes 5 through 7 and accompanying text.

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' April 8, 2007 decision is affirmed.

Issued: October 15, 2007  
Washington, DC

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

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

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