

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

P.D., Appellant

and

**U.S. POSTAL SERVICE, MUNGER STATION,
Wichita, KS, Employer**

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**Docket No. 08-928
Issued: June 11, 2008**

Appearances:
John S. Evangelisti, Esq., for the appellant
No appearance, for the Director

Oral Argument May 15, 2008

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 11, 2008 appellant, through counsel, filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated January 3, 2008, which denied her request for modification of a September 3, 1998 loss of wage-earning capacity decision. Pursuant to 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 the Office properly denied modification of appellant's September 3, 1998 wage-earning capacity determination.

FACTUAL HISTORY

The case is on appeal to the Board for the fourth time. On August 23, 1996 appellant, a 38-year-old distribution clerk, filed an occupational disease claim alleging that on August 1,

1996 she first realized her tendinitis in her shoulders and arms was employment related.¹ The Office accepted the claim for bilateral tendinitis of the shoulders and arms.² In the first appeal, the Board affirmed the Office's October 11, 2002 decision which found that the medical evidence was not sufficient to establish that she sustained a recurrence of disability on and after May 26, 2001 due to her accepted August 23, 1996 employment injury.³ The Board noted that new evidence was submitted both subsequent to the October 11, 2002 hearing representative's decision and with her appeal.⁴ In the second appeal, the Board found that the October 23, 2002 and November 14, 2004 reports of Dr. Niernberger constituted relevant and pertinent new medical evidence sufficient to reopen the case.⁵ Thus, the Board set aside the Office's December 29, 2004 nonmerit decision and remanded the case for a decision on the merits. On November 26, 2007 the Board issued an order remanding the case and cancelling oral argument.⁶ The Board concluded that the Office's December 20, 2005 decision failed to contain a statement of reasons and findings of fact as required by the regulations. The facts and history contained in the prior appeals are incorporated by reference.

The medical evidence relevant to the issue at hand includes the October 23, 2002 and November 14, 2004 reports by Dr. Niernberger, a treating Board-certified family practitioner. In an October 23, 2002 report, Dr. Niernberger informed the Office that he had limited appellant "to what she normally does. Apparently 'walling mail' is a primary duty in her job." He opined that appellant stated that he "would require her not to 'wall mail' since this is a repetitive motion that will just exacerbate her shoulder pain" and "[t]his type of work will further exacerbate her pain and should not be done."

¹ This was assigned claim number A11-0152314. The Office also accepted that appellant sustained a contusion of the left hand due to an injury sustained on March 3, 1997. This was assigned claim number A11-0155819. The Office accepted a cervical strain due to an injury sustained on May 31, 1997. This was assigned claim number A11-0157359.

² Appellant accepted a June 19, 1998 limited-duty position offer on June 25, 1998. The position was as a modified general clerk working eight hours a day with Sunday and Wednesday off. Restrictions included lifting up to 15 pounds for 8 hours, 6 hours of sitting, 8 hours of standing, 3 hours of intermittent walking, 4 hours of continuous stooping and bending, 8 hours, continuous twisting, 2 hours, fine manipulation, 2 hours of "reaching above the shoulder level intermittent with 5 pounds," overhead work was prohibited as was "no working more than 18 inches from body." Duties included distributing accountable mail, maintaining general delivery mail; answering dutch door and customer telephone inquiries, verifying CFS mail, liaisons "between CCFS and carrier," ordering station supplies, maintaining AVUS, checking in carriers, working on return mail, entering hold mails orders, walling box mail and "[o]ther duties may be assigned as necessary and appropriate." On September 3, 1998 issued a loss of wage-earning capacity decision which found appellant had no loss of wages. Appellant retired on disability from the employing establishment effective June 3, 2003.

³ Docket No. 03-1539 (issued November 19, 2003).

⁴ This evidence included an October 23, 2002 report by Dr. Jerry E. Niernberger, a Board-certified family practitioner, which restricted appellant from walling mail, and an October 14, 2003 treatment note by David R. Reinsch, a physician's assistant.

⁵ Docket No. 05-1323 (issued November 9, 2005).

⁶ Docket No. 07-533 (issued November 26, 2007).

In a November 14, 2004 report, Dr. Niernberger stated, with regards to a worsening of appellant's condition prior to April 23, 2001, the following:

“[Her work] has seemed to aggravate and actually exacerbated her preexisting condition due to repetitive use throughout the day of the arms and hands, which causes inflammation to tendons, ligaments, and muscles. Continued use of the arms and hands, shoulders causes more inflammation, pain. At the time, the patient will overcompensate certain muscle groups, which they in turn causes weakening of antagonistic muscle groups, tendons [and] ligaments. Overall, what this means is, just worsens her condition.”

By decision dated January 3, 2008, the Office denied appellant's request for modification of the September 3, 1998 loss of wage-earning capacity decision.

LEGAL PRECEDENT

The Office's procedure manual provides that, if a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss.⁷ The procedure manual further indicates that, under these circumstances, the claims examiner will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity decision.⁸

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.⁹ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.¹⁰

ANALYSIS

The medical evidence relevant to appellant's capacity to earn wages as a modified general clerk consists of Dr. Niernberger's October 23, 2002 and November 14, 2004 reports. Dr. Niernberger, in his October 23, 2002 report, indicated that appellant could not “wall mail” as this was repetitive work and would aggravate her shoulder condition and thus should not be performed. In his November 14, 2004 report, he opined that appellant's condition had worsened and that her limited-duty work both aggravated and caused an exacerbation of her preexisting condition as a result of the “repetitive use throughout the day of the arms and hands, which

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995). See *Mary E. Marshall*, 56 ECAB 420 (2005).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995). See *Harley Sims, Jr.*, 56 ECAB 320 (2005).

⁹ *D.M.*, 59 ECAB ____ (Docket No. 07-1230, issued November 13, 2007); *Tamra McCauley*, 51 ECAB 375 (2000).

¹⁰ *P.C.*, 58 ECAB ____ (Docket No. 06-1954, issued March 6, 2007); *Harley Sims, Jr.*, *supra* note 8.

causes inflammation to tendons, ligaments [and] muscles.” Dr. Niernberger further noted that appellant’s “[c]ontinued use of the arms and hands, shoulders causes more inflammation, pain” and that as a result appellant “will overcompensate certain muscle groups, which they in turn causes weakening of antagonistic muscle groups, tendons [and] ligaments. Overall, what this means is, just worsens her condition.” The Board finds that these reports are therefore supportive of appellant’s contention that her employment-related condition has worsened and she cannot work eight hours a day as a modified general clerk, as found by the Office in its September 3, 1998 loss of wage-earning capacity decision.

Proceedings under the Federal Employees’ Compensation Act are not adversarial in nature and while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.¹¹ In this case, although the reports of Dr. Niernberger do not contain rationale sufficient to discharge appellant’s burden of proof to establish that her employment-related condition has worsened or changed such that the September 3, 1998 wage-earning capacity decision should be modified, the reports constitute substantial, unrefuted evidence in support of her modification claim such that further development of the case by the Office is warranted.¹²

On remand, the Office should further develop the medical evidence as appropriate to obtain a rationalized opinion regarding whether appellant has established that the September 3, 1998 loss of wage-earning capacity decision should be modified. Following such further development of the case record as it deems necessary, the Office should issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for a decision as to whether modification of appellant’s wage-earning capacity determination is warranted.

¹¹ *Donald R. Gervasi*, 57 ECAB 281 (2005); *Betty J. Smith*, 54 ECAB 174 (2002).

¹² *Thaddeus J. Spevack*, 53 ECAB 474 (2002); *see John J. Carlone*, 41 ECAB 354 (1989).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 3, 2008 is set aside and the case remanded for further proceedings consistent with the above opinion.

Issued: June 11, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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