

FACTUAL HISTORY

This case was previously before the Board.¹ In a June 5, 2007 decision, the Board found that the Office properly denied modification of a December 23, 1997 wage-earning capacity determination. The Board also affirmed a schedule award granted for impairment to her right upper extremity. The case was remanded, however, for development of the medical evidence as to whether appellant had more than 10 percent impairment of her larynx. The facts of the case, as set forth in the Board's prior decision, are incorporated herein by reference.

In a June 21, 2007 report, Dr. Harry A. Doyle, a Board-certified psychiatrist, performed a mental status examination and review of the medical records. He reiterated the diagnoses of major depression and panic disorder which he attributed to her employment. Dr. Doyle opined that appellant was totally disabled from any type of work as a result of both her pain disorder and her major depression. He stated that appellant "is experiencing serious symptoms and impairment in social and occupational function" due to these conditions.

In a July 10, 2007 letter, counsel for appellant requested modification of the December 23, 1997 wage-earning capacity decision. In a June 26, 2007 report, Dr. Doyle advised that appellant's accepted work injuries of depression and chronic pain and associated impairments made the office automation clerk position unsuitable. He found that her work injuries worsened as a result of pain due to work-related activities and, based on increasing depression, she was unable to adequately perform her job duties. Dr. Doyle described her depression and chronic pain, noting that appellant had been totally disabled since April 1998. He reviewed the duties and physical requirements of the limited-duty position of office automation clerk. Dr. Doyle found the position was not suitable as it did not take into consideration her depression and chronic pain conditions. He noted that appellant started missing time at work and eventually stopped work in April 1998 and sought treatment for her depression. Dr. Doyle opined that the accepted employment conditions of pain disorder and major depression rendered appellant totally disabled and unable to perform the duties of office automation clerk. In an August 14, 2007 letter responding to the Office's request about her office automation clerk position, appellant noted the duties of the position and that there was no order or schedule for when she performed these duties. She related that she became "more and more worn-out (tired) as the day went by" so that she had difficulty remaining alert at work. In addition, appellant sometimes forgot to do things she was supposed to and had no recollection of her supervisor instructing her to perform some duties.

On August 20, 2007 the Office referred appellant for a second opinion evaluation with Dr. David R. Rogerson, a Board-certified otolaryngologist, to determine the degree of any impairment of the larynx.

¹ Docket No. 06-750 (issued June 5, 2007). Appellant's claim was accepted by the Office for a herniated disc at C5-6 with radiculopathy and a left shoulder soft trauma injury after items fell on her from a metal cabinet. She underwent a C5-6 nerve root decompression surgery and anterior cervical interbody fusion. Appellant resigned from her position effective July 15, 1994, but returned to work as an office automation clerk on September 15, 1997. The Office determined on December 23, 1997 that her actual wages as an office automation clerk fairly and reasonably represented her wage-earning capacity. On February 2, 2006 it accepted major depressive disorder and pain disorder.

On October 18, 2007 Dr. Rogerson set forth finding on physical examination and reviewed the statement of accepted facts and medical record. He advised that appellant had a 10 percent whole person impairment of the larynx pursuant to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*). On physical examination, Dr. Rogerson noted “right vocal cord paralysis just to the right of the midline position with good vocal cord approximation by the left true vocal cord.”

On October 20, 2007 an Office medical adviser reviewed the report of Dr. Rogerson and agreed with his opinion that appellant had 10 percent impairment of the larynx. Using Table 11-8, page 265, the Office medical adviser found that appellant fit category 1 which represented a 10 percent whole person impairment or 10 percent larynx impairment.

By decision dated October 23, 2007 and reissued October 31, 2007, the Office denied appellant’s request for an increased schedule award for her larynx.

By decision dated December 20, 2007, the Office denied modification of appellant’s wage-earning capacity determination as she did not establish any of the criteria for modification.

LEGAL PRECEDENT -- ISSUE 1

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, or the employee has been retrained or otherwise vocationally rehabilitated.² The burden of proof is on the party attempting to show the award should be modified.³

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings in a constructed position, represents a claimant’s ability to earn wages. Compensation payments are based on the wage-earning capacity determination, and it remains undisturbed until properly modified.⁴ The Office’s procedure manual provides that, after 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 greater disability. In this instance “the [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity.”⁵

ANALYSIS -- ISSUE 1

The Board finds that, as of April 25, 2005, appellant established a change in the nature and extent of her injury-related condition such that the 1997 wage-earning capacity should be modified.

² See *D.M.*, 59 ECAB ___ (Docket No. 07-1230, issued November 13, 2007); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

³ *Id.*; *Jack E. Rohrabough*, 38 ECAB 186, 190 (1986).

⁴ *Katherine T. Kreger*, 55 ECAB 633, 635 (2004); see *Robert H. Merritt*, 11 ECAB 64 (1959).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

On December 23, 1997 the Office found that appellant's actual wages as an automation clerk fairly and reasonably represented her wage-earning capacity. On June 1, 2005 appellant claimed that she was totally disabled for work as of April 10, 1998. In the prior appeal, the Board found that the medical evidence was not sufficient to establish that appellant became disabled in 1998 due to her depression or chronic pain condition or that her accepted conditions precluded her from continuing in such employment.

As noted, Dr. Doyle first examined appellant on April 25, 2005 and diagnosed major depressive disorder and pain disorder related to her federal employment. As of February 2, 2006, the Office accepted that appellant sustained these consequential conditions due to her federal employment. The weight of the medical evidence, as represented by the reports of Dr. Doyle, establishes that appellant's accepted condition had changed such that the 1997 wage-earning capacity warranted modification. Dr. Doyle has supported that appellant was totally disabled on and after April 25, 2005 due to residuals of her accepted condition.

In a June 21, 2007 report, Dr. Doyle essentially reiterated the findings and diagnoses provided in his May 3, 2005 report. He addressed his April 25, 2005 examination of appellant and noted that, since that time, appellant remained unemployed and was treated for complaints of headaches and cervical pain, upper extremity paresthesias and interscapular pain, all aggravated with physical activity. Dr. Doyle listed his findings on mental status examination, noting that her intelligence was estimated to be in the average range and that she was able to provide a coherent and detailed history. Appellant was reported as alert and oriented to person, place and time, with recent and remote memory intact and reasoning and judgment not impaired. Dr. Doyle reiterated that appellant's psychiatric diagnoses were directly related to the factors of employment listed in the statement of accepted facts. He found that appellant could not perform the duties of automation clerk due to symptoms of anxiety and depression with poor attention, sleep disturbance and fatigue. From an occupation perspective, Dr. Doyle found appellant to be totally disabled from gainful employment and recommended ongoing medical treatment.

In the June 26, 2007 report, Dr. Doyle again addressed his evaluation of appellant noting the findings set forth in his May 3, 2005 report. He repeated the psychiatric diagnoses made in this case and then reviewed records pertaining to the Office's statement of accepted facts, decisions of the Social Security Administration and decisions of the Office and the Board. Dr. Doyle reviewed the duties of an automation clerk and took issue with the December 23, 1997 correspondence of an Office claims examiner who had advised that the duties of the position was within appellant's work tolerance. He stated that the medical records documented that appellant was experiencing symptoms of depression related to chronic pain; however, he acknowledged that no psychiatric evaluation was conducted prior to assessing her work tolerance for the selected position of automation clerk. The Board notes that appellant returned to work in the position of automation clerk on July 7, 1997 and worked full time as of September 15, 1997. In determining her wage-earning capacity in December 1997, the Office properly considered those physical impairments which preexisted her accepted conditions.⁶ As noted by Dr. Doyle, there was no contemporaneous examination in 1977 or evaluation by a physician who found that she was disabled from performing the duties of automation clerk based on depression or chronic pain. It was not until receipt of Dr. Doyle's May 3, 2005 report that the Office accepted that appellant sustained consequential injuries of major depressive disorder and pain disorder from

⁶ See *Mark H. Dever*, 53 ECAB 710 (2002).

which he advised that she was totally disabled. While the reports of Dr. Doyle are relevant to the issue of appellant's disability as of April 25, 2005 when he first examined her and her capacity to continue working as an automation clerk; his opinion on her psychiatric disability in 1997 until he examined her in 2005 is conjecture. In addressing her disability in 1997, Dr. Doyle noted that both Dr. Blough and Dr. Rashti had diagnosed depression.

Appellant underwent examination by Dr. Leland S. Blough on August 15, 1996. Dr. Doyle merely noted that Dr. Blough had diagnosed depression and recommended psychiatric treatment. The Board notes that Dr. Blough provided an extensive orthopedic evaluation of appellant, advising that she underwent surgery and bone graft at C5-6 with internal fixation. Dr. Blough found no definite C6 motor or reflex deficiency in the upper extremities and characterized her work capacity as full light-duty work. He explained the absence of any upper extremity atrophy, restriction of motion or pain and weakness other than a mild sensory reduction in the right index finger and thumb. Dr. Blough could not explain appellant's complaints of intermittent dysesthesias and paresthesias on the basis of anatomical structural changes. He stated: "There is indication in this lady of some degree of chronic pain syndrome/learned pain behavior attributes." Dr. Blough did not find that she was disabled for work; rather, he noted that she should return to work in a sedentary or light-duty capacity.

On October 22, 1997 Dr. Robert A. Rashti, a Board-certified neurosurgeon, conducted an evaluation of pain in the trapezius area extending to the lateral aspect of appellant's neck. He noted some volitional weakness on upper extremity muscle testing and noted that she had good muscle tone. With encouragement, appellant demonstrated normal strength bilaterally. Dr. Rashti reviewed diagnostic studies which showed a good bone fusion at the C5-6 level. He advised that appellant presented with an atypical picture of right trapezius and shoulder pain which did not appear consistent with ongoing radiculopathy. Dr. Rashti recommended additional diagnostic studies and that appellant continue in her light-duty work. He stated: "I strongly suspect that there is some associated underlying depression contributing to her overall symptom complex." Dr. Rashti did not find appellant unable to perform the duties of a limited-duty automation clerk due to depression or chronic pain.

As of the date of the 1997 wage-earning capacity determination, appellant had not submitted medical opinion to establish disability for work due to depression or chronic pain. Dr. Doyle critiqued this aspect of the claim, stating "despite repeated documentation that [appellant] was suffering from a related depressive disorder, she was not referred for psychiatric evaluation and her disability determination and work tolerance was based solely on her physical condition." However, the Office is not required to consider medical conditions that arise subsequent to the work-related injury in determining whether a position constitutes an employee's wage-earning capacity.⁷ It was appellant's burden to submit medical evidence to establish that her depression and/or chronic pain caused her to be totally disabled from performing the duties of a limited-duty automation clerk. This she failed to do until 2005 and the presentation of medical opinion from Dr. Doyle. Therefore, appellant did not establish error in the original wage-earning capacity determination decision or of a material change in her accepted condition until 2005.

⁷ See *Dorothy Jett*, 52 ECAB 246.

LEGAL PRECEDENT -- ISSUE 2

The schedule award provision of the Act⁸ and its implementing regulations⁹ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.¹⁰ Effective February 1, 2001, the fifth edition of the A.M.A., *Guides* is used to calculate schedule awards.¹¹

The larynx is a scheduled member of the body for which an award is payable for 160 weeks for a total impairment.¹² Under the A.M.A. *Guides*, impairment to the larynx is determined by impairment of a claimant's ability to speak.¹³ Speech impairment is evaluated as to audibility (ability to speak at a level sufficient to be heard), intelligibility (ability to articulate and to link the phonetic units of speech with sufficient accuracy to be understood), and functional efficiency (ability to produce a serviceably fast rate of speech output and to sustain this output over a useful period of time). The degree of impairment is equivalent to the greatest percentage of impairment recorded in any one of these components of speech function.

Section 8123(a) of the Act provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician, to resolve the conflict.¹⁴

ANALYSIS -- ISSUE 2

In the prior Board decision, the Board found an unresolved conflict of medical opinion between Dr. Platto and an Office medical adviser with regard to the extent of permanent impairment to appellant's larynx. However, on remand the Office did not refer appellant for an impartial medical examination. Rather, it referred her for a second opinion evaluation with Dr. Rogerson on August 20 and September 4, 2007. The Office procedure manual provides that, once it has been determined that an impartial medical examination is necessary in order to resolve a conflict, the Office is to select the physician to resolve the conflict and notify employee

⁸ 5 U.S.C. §§ 8101-8193.

⁹ *Id.* at § 8107.

¹⁰ 20 C.F.R. § 10.404.

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.7b.(4) (August 2002); see *Jesse Mendoza*, 54 ECAB 802 (2003).

¹² 20 C.F.R. § 10.404(a); 5 U.S.C. § 8107(c)(22).

¹³ A.M.A., *Guides*, 180-83 (5th ed. 2001). See also *A. George Lamp*, 45 ECAB 441 (1994); *Martin J. Epp*, 38 ECAB 858-59 (1987).

¹⁴ 5 U.S.C. § 8123(a); see *Bryan O. Crane*, 56 ECAB 713 (2005); *Charles S. Hamilton*, 52 ECAB 110 (2000); *Robert D. Reynolds*, 49 ECAB 561 (1998).

claimant as to who the impartial medical specialist will be.¹⁵ There is no evidence that Dr. Rogerson was selected according to the criteria pertaining to impartial medical specialists. Therefore, the case will be remand to the Office for appropriate further medical development of this issue.

CONCLUSION

The Board finds that appellant established a material change in her accepted condition as of April 25, 2005 such that modification of the December 23, 1997 wage-earning capacity is warranted. The Board also finds that the case is not in posture for decision on the issue of permanent impairment to her larynx due to an unresolved conflict in the medical evidence.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 20, 2007 be set aside. The decisions dated October 23 and 31, 2007 are set aside and the case remanded for further proceedings consistent with this decision of the Board.

Issued: April 6, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁵ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(d) (October 1995).