

<sup>1</sup> For Office decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. An appeal of Office decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. *See* 20 C.F.R. §§ 501.2(c) and 501.3.

## **FACTUAL HISTORY**

On November 12, 1992 the Office accepted that appellant, then a 33-year-old distribution clerk, sustained cervical and left shoulder strains due to the repetitive duties of her job. It later accepted the condition of left shoulder impingement and authorized left shoulder surgeries in 1993, 1996 and 1999 which included decompression, lateral clavicle resection and rotator cuff repair procedures. Appellant worked in limited-duty positions and received Office compensation for periods of disability.

In a December 3, 2003 report, Dr. Richard Shaw, a Board-certified rheumatologist, who served as an Office referral physician, determined that appellant had fibromyalgia which was triggered by her work-related left shoulder injury. On April 21, 2004 the Office expanded appellant's accepted conditions to include fibromyalgia.

Appellant stopped work for various periods and in late 2006 she returned to full-time work as a modified distribution clerk for the employing establishment. On June 19, 2007 Dr. Thomas Vangsness, Jr., an attending Board-certified orthopedic surgeon, indicated that she could work for eight hours a day with restrictions, including no lifting, pulling or pushing over 10 pounds and no overhead work with the left arm. Appellant's work as a modified distribution clerk was within these restrictions.

In an August 30, 2007 decision, the Office adjusted appellant's compensation effective August 30, 2007 based on its determination that her actual wages as a modified distribution clerk fairly and reasonably represented her wage-earning capacity.

Appellant stopped work on February 13, 2009 and filed claim forms alleging total disability beginning February 13, 2009 due to her accepted employment injuries.<sup>2</sup> She also suggested that the Office's August 30, 2007 wage-earning capacity determination should be modified to reflect the worsening of her work-related condition.

In a February 13, 2009 report, Dr. Daniel Arkfeld, an attending Board-certified internist and rheumatologist, stated that appellant visited him on that date crying and in a very stressed state. He indicated that on physical examination she exhibited tender points in all four quadrants, tenderness of the left first carpometacarpal joint, tenderness over the latissimus dorsi and pectoralis muscles on the left side and signs of possible overuse phenomenon with osteoarthritis. Dr. Arkfeld diagnosed left arm osteoarthritis/trauma with myofascial pain and fibromyalgia, stress reaction and invasive osteoarthritis of the left thumb. He indicated that appellant should be kept off work for one month. In a February 13, 2009 note, Dr. Arkfeld stated that she was totally disabled from February 13 to March 13, 2009.

On March 3, 2009 the Office requested that appellant submit additional evidence in support of her claim. It advised her regarding the standards for showing how a wage-earning capacity determination may be modified.

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<sup>2</sup> Appellant later claimed that she had work-related disability through May 13, 2009.

In a March 10, 2009 report, Dr. Arkfeld stated when he saw appellant on February 13, 2009 he changed her status to being temporarily totally disabled due to the state of her left shoulder injury with chronic pain syndrome, myofascial pain and fibromyalgia, stress reaction with depression and gastrointestinal/abdominal pain. He indicated that her left shoulder injury and subsequent severe fibromyalgia led her to be 100 percent disabled and noted that these conditions had previously been accepted as 100 percent work related. During the follow-up examination on March 10, 2009 appellant remained in chronic and severe pain. Dr. Arkfeld indicated that she had fibromyalgia in her left shoulder, upper torso area and other parts of her body. He stated, “[Appellant] continues [to be] 100 percent disabled at this time with severe pain. I have treated many fibromyalgia patients over the years and she would qualify as very severe and currently 100 percent disabled.”<sup>3</sup>

In a March 12, 2009 report, Dr. Vangsness stated that appellant reported that her left shoulder symptoms were getting worse and that her pain could be up to 8 on a scale of 10. He noted that on physical examination of the left shoulder she had 110 degrees of forward elevation out of the normal value of 160 degrees and 30 degrees of external rotation out of the normal value of 40 degrees. Appellant exhibited anterior capsular pain, was tender about the old surgery incision site and had forward flexion and abduction impingement. Dr. Vangsness indicated that she also had compensatory pain in her right shoulder and stated, “Her recent increase in pain, and change in work status, is secondary to the repetitive motion and ongoing continuous trauma at work.... Appellant will continue to be temporary totally disabled at this time.”

In an April 6, 2009 decision, the Office denied appellant’s request for modification of the August 30, 2007 wage-earning capacity determination and her claim for total disability beginning February 13, 2009. It stated that the reports of her attending physicians lacked rationale in support of their findings on disability.

In an April 10, 2009 report, Dr. Arkfeld stated that on current examination appellant had 18 of 18 tender points with control points being negative. Appellant had a large surgical scar over the superior aspect of her left shoulder with significant pain, limited range of motion of the shoulders (with more limited motion on the left), significant abdominal discomfort and diffuse painful myofascial tender points. Dr. Arkfeld stated that her myofascial pain and tender points had increased and noted that she had weakness upon abduction and rotation of her left shoulder which related to her surgery and the injury of her anterior capsular area. He posited that appellant’s failure to get proper treatment for her fibromyalgia had caused this condition to worsen and stated, “At this point, I would hope that a multidisciplinary approach to her fibromyalgia, which I would classify as severe, and shoulder injury can be obtained. As such, I am hoping she can return to gainful employment. Thus, I have placed her on temporary total disability status at this time.”<sup>4</sup>

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<sup>3</sup> In another March 10, 2009 note, Dr. Arkfeld diagnosed fibromyalgia, left shoulder traumatic injury status post surgery, irritable bowel and stomach pain, current disability since February 13, 2009 and decreased functional status.

<sup>4</sup> On March 30, 2009 Dr. Steven Richeimer, an attending Board-certified anesthesiologist, stated that he was treating appellant for fibromyalgia pain.

In April 14 and 23, 2009 reports, Dr. Vangsness asserted that appellant's work-related fibromyalgia and left shoulder problems had worsened and indicated that he had taken her off work due to increased pain. He noted that the left shoulder problems included painful limited motion (particularly on forward motion), impingement, anterior capsular pain and acromioclavicular joint problems.<sup>5</sup> Dr. Vangsness provided an assessment of increasing pain in both shoulders, status post previous surgeries involving the clavicle and the subacromial space.<sup>6</sup> In a May 6, 2009 form report, Dr. Arkfeld stated that appellant had been totally disabled since February 13, 2009 due to work-related fibromyalgia and left shoulder instability.

In a May 7, 2009 report, Dr. Stuart L. Silverman, an attending Board-certified internist and rheumatologist, stated that appellant reported experiencing moderate-to-severe widespread pain, constant moderate-to-severe left shoulder pain radiating to the right wrist and fingers, numbness in the right hip and diaphoresis in the hands. He stated that on examination she had fibromyalgia with 18 of 18 tender points and exhibited positive dolorimetry consistent with persistent pain and impingement of the left shoulder and loss of motion in both shoulders. Dr. Silverman indicated that appellant would benefit from an interdisciplinary program to address her multiple pain problems. He stated, "The patient at this time should be considered totally disabled and is unable to return to work in the workforce."

Appellant requested a review of the written record by an Office hearing representative. In an August 17, 2009 decision, the Office hearing representative affirmed the Office's April 6, 2009 decision.

### **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.<sup>7</sup> The burden of proof is on the party attempting to show the award should be modified.<sup>8</sup> Section 8115(a) of the Federal Employees' Compensation Act provides that the "wage-earning capacity of an employee is determined by his or her actual earnings if his or her actual earnings fairly and reasonably represent his or her wage-earning capacity."<sup>9</sup>

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<sup>5</sup> On April 14, 2009 appellant had forward elevation of 110 degree out of the normal value of 160.

<sup>6</sup> In an April 14, 2009 note, Dr. Vangsness stated regarding appellant's left shoulder, "I have clearly documented several times her chronic problem in this shoulder. At this time, as documented by me, her pain has recently increased and this is why I have kept her off of work.... My physical exam[ination] has documented her ongoing impingement and weakness. She has numbness and tingling intermittently in her left upper extremity and now she is having ongoing problems in her right shoulder."

<sup>7</sup> *George W. Coleman*, 38 ECAB 782, 788 (1987); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

<sup>8</sup> *Jack E. Rohrabough*, 38 ECAB 186, 190 (1986).

<sup>9</sup> 5 U.S.C. § 8115(a).

An employee seeking benefits under the Act has the burden of establishing the essential elements of his or her claim including the fact that the individual is an “employee of the United States” within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.<sup>10</sup> However, it is well established that proceedings under the 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.<sup>11</sup>

### ANALYSIS

The Office accepted that appellant sustained cervical and left shoulder strains and left shoulder impingement and authorized left shoulder surgeries which were performed in 1993, 1996 and 1999. In an August 30, 2007 decision, it adjusted her compensation based on its determination that her actual wages as a modified distribution clerk fairly and reasonably represented her wage-earning capacity. Appellant stopped work on February 13, 2009 and filed claim forms alleging total disability between February 13 and May 13, 2009 due to her accepted employment injuries. She also suggested that the Office’s August 30, 2007 wage-earning capacity determination should be modified to reflect the worsening of her work-related condition. Citing the failure to submit probative medical evidence, the Office denied appellant’s request for modification of the August 30, 2007 wage-earning capacity determination and her claim for total disability for the period February 13 to May 13, 2009.

Appellant submitted numerous reports of attending physicians in support of her claim. In February 13, March 10, April 10 and May 6, 2009 reports, Dr. Arkfeld, an attending Board-certified internist and rheumatologist, stated that she began exhibiting increased symptoms on examination beginning in February 2009, particularly with respect to her work-related left shoulder condition and fibromyalgia. He indicated that appellant was totally disabled from February 13 through at least May 6, 2009. In his March 10, 2009 report, Dr. Arkfeld stated that she “continues 100 percent disabled at this time with severe pain. I have treated many fibromyalgia patients over the years and she would qualify as very severe and currently 100 percent disabled.”

In March 12, April 14 and 23, 2009 reports, Dr. Vangsness, an attending Board-orthopedic surgeon, indicated that appellant’s work-related fibromyalgia and left shoulder problems had worsened and stated that he had taken her off work due to increased pain. He noted that her left shoulder problems included painful limited motion (particularly on forward motion), impingement, anterior capsular pain and acromioclavicular joint problems. Dr. Vangsness found periods of total disability between mid March and late April 2009.

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<sup>10</sup> *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989). The medical evidence required to establish a causal relationship between a claimed period of disability and an employment injury is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician’s rationalized opinion on the issue of whether there is a causal relationship between the claimant’s diagnosed condition and the compensable employment factors. See *Donna Faye Cardwell*, 41 ECAB 730, 741-42 (1990).

<sup>11</sup> *Dorothy L. Sidwell*, 36 ECAB 699, 707 (1985); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

In a May 7, 2009 report, Dr. Silverman, an attending Board-certified internist and rheumatologist, stated that appellant reported experiencing increased symptoms, including moderate-to-severe widespread pain, constant moderate-to-severe left shoulder pain radiating to the right wrist and fingers, numbness in the right hip and diaphoresis in the hands. He stated that on examination she had work-related fibromyalgia with 18 of 18 tender points and noted that she exhibited positive dolorimetry consistent with persistent pain and impingement of the left shoulder and loss of motion in both shoulders. Dr. Silverman stated, “The patient at this time should be considered totally disabled and is unable to return to work in the workforce.”

The Board notes that, while none of the reports of appellant’s attending physicians are completely rationalized, they are consistent in indicating that her work-related conditions caused total disability during the period of claimed disability (February 13 to May 13, 2009), and are not contradicted by any substantial medical or factual evidence of record. Therefore, while the reports are not sufficient to meet appellant’s burden of proof to establish her claim, they provide support for her claim that she sustained a change in the nature and extent of her employment-related condition such that the August 30, 2007 wage-earning capacity determination should be modified. Therefore, the reports are sufficient to require the Office to further develop the medical evidence and the case record.<sup>12</sup>

Accordingly, the case will be remanded to the Office for further evidentiary development regarding appellant’s request for modification of the August 30, 2007 wage-earning determination and her claim for total disability for the period February 13 to May 13, 2009. The Office should prepare a statement of accepted facts and obtain a medical opinion on this matter. After such development it deems necessary, the Office shall issue an appropriate decision regarding these matters.

### **CONCLUSION**

The Board finds that the case is not in posture regarding whether the Office properly denied appellant’s request for modification of a wage-earning determination and her claim for total disability for the February 13 to May 13, 2009. The case is remanded to the Office for further development.

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<sup>12</sup> See Robert A. Redmond, 40 ECAB 796, 801 (1989).

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 17, 2009 decision of the Office of Workers' Compensation Programs is set aside. The case is remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: December 23, 2010  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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