United States Department of Labor
Employees' Compensation Appeals Board

F.C., Appellant	)	
and	)	**Docket No. 10-1596**
	)	**Issued: May 2, 2011**
FEDERAL JUDICIARY, U.S. COURTS, U.S. DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, Los Angeles, CA, Employer	)	

Appearances:
Max Gest, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 28, 2010 appellant, through her attorney, filed an appeal from a January 29, 2010 decision of the Office of Workers' Compensation Programs. Pursuant to the Federal Employees' Compensation Act[1] and 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 appellant met her burden of proof to establish that a January 21, 2009 wage-earning capacity decision should be modified.

On appeal, appellant's attorney asserts that the January 21, 2009 decision was in error because she was medically incapable of performing the selected position.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On April 20, 1990 appellant, then a 48-year-old court reporter, filed an occupational disease claim alleging that her federal job duties caused bilateral carpal tunnel syndrome. She stopped work on April 23, 1990. A February 12, 1991 electromyogram (EMG) demonstrated bilateral carpal tunnel syndrome. On March 19, 1991 the Office accepted bilateral carpal tunnel syndrome and she was placed on the periodic compensation rolls.

In a September 28, 2007 work capacity evaluation, Dr. Swamy R. Venuturupalli, an attending physician Board-certified in internal medicine and rheumatology, diagnosed severe carpal tunnel syndrome. He advised that appellant could not return to her former job as court reporter or perform repetitive movements of the wrists. Pushing, pulling, lifting, squatting, kneeling and climbing were also generally restricted.

The Office referred appellant to Dr. G.B. Ha'Eri, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a March 24, 2008 report, Dr. Ha'Eri noted his review of the record, including the statement of accepted facts, and appellant's complaint of occasional pain and paresthesia of both hands. He noted that appellant was not wearing any braces on her wrists or hands and was not interested in having surgical decompression. Visual inspection of both wrists and hands revealed no deformity or swelling and she had evidence of mild degenerative arthritis in the finger joints in both hands. Bilateral wrist and hand palpation demonstrated no tenderness. Tinel's sign was bilaterally positive over the carpal tunnels and range of motion of bilateral wrists and hands was within normal limits. Dr. Ha'Eri diagnosed bilateral carpal tunnel syndrome, based on the positive EMG findings in 1991 and the positive Tinel's sign. He advised that appellant was at maximum medical improvement but could not return to her previous employment as court reporter. Dr. Ha'Eri provided permanent restrictions of no repetitive use of both wrists, no lifting over 10 pounds and no pulling/pushing over 20 pounds, with each activity performed no more than one hour a day.

On April 3, 2008 the Office referred appellant to Frank Corso, a vocational rehabilitation counselor, for assistance in returning her to work. Appellant underwent a transferable skills analysis and vocational evaluation. On June 5, 2008 Mr. Corso identified the positions of information clerk and appointment clerk, finding that they were within the sedentary strength category, within her work restrictions and qualifications, and reasonably available in the local labor market. He recommended training program to update appellant's skills and in July 2008 she began approved training. Mr. Corso advised that she reported that she had difficulty with the typing required to learn new software and the training program was then modified to her needs. On August 18, 2008 appellant submitted a form electing civil service retirement. On September 8, 2008 she asked to discontinue training and withdraw from vocational rehabilitation. Appellant completed the training program on October 24, 2008. In correspondence dated October 24, 2008, she stated that she no longer wised to participate in the rehabilitation program.

By letter dated December 9, 2008, the Office proposed to reduce appellant's compensation benefits based on her capacity to earn wages as an information clerk.[2] It advised her that, if she disagreed with the proposed reduction, she should submit additional evidence or argument within 30 days.[3] On December 12, 2008 Mr. Corso updated the job survey information for the information clerk and appointment clerk positions.

In a January 21, 2009 decision, the Office reduced appellant's compensation benefits, based on her capacity to earn wages as an information clerk. It found that the physical requirements did not exceed the limitations recommended by Dr. Ha'Eri.

On January 30, 2009 appellant requested a hearing. At the April 21, 2009 hearing, she described her court reporter job duties and the vocational rehabilitation training, which she said required repetitive typing that aggravated her carpal tunnel syndrome and caused pain. Appellant occasionally used a computer at home and occasionally drove. Counsel contended that the training was inappropriate because appellant had to type eight hours a day while in training and the selected position required handwriting which also required repetitive motion.

In an April 14, 2009 report, Dr. Jacob E. Tauber, an attending Board-certified orthopedic surgeon, noted appellant's complaint of occasional bilateral wrist pain, associated with numbness and tingling and swelling of the hands and fingers that increased with repetitive flexion, grasping, pushing and pulling and when opening jars and bottles. He provided findings on physical examination, noting markedly positive Tinel's and Phalen's signs of both wrists. Dr. Tauber advised that appellant could not lift or perform repetitive motion duties, and that any type of reaching or handling, such as taking multiple messages or doing any type of work with her hands, would be inappropriate.[4]

By decision dated July 23, 2009, an Office hearing representative affirmed the January 21, 2009 decision.[5]

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[2] The Department of Labor's *Dictionary of Occupational Titles* (DOT) job description for information clerk was as follows: Answers inquiries from persons entering establishment; provides information regarding activities conducted at establishment, and location of departments, offices and employees within organization; informs customer of location of store merchandise in retail establishment; provides information concerning services, such as laundry and valet services, in hotel; receives and answers requests for information from company officials and employees; may call employees or officials to information desk to answer inquiries; and may keep record of questions asked. The strength level was listed as sedentary, with no climbing, balancing, stooping, kneeling, crouching, crawling or fingering and occasional reaching and handling of no more than 10 pounds.

[3] By letter dated October 29, 2008, the Office proposed to suspend appellant's monetary compensation on the grounds that she failed to cooperate in rehabilitation efforts and on December 4, 2008 adjusted her compensation on the grounds that she failed to cooperate with vocational rehabilitation efforts. Appellant's compensation was reduced to reflect her wage-earning capacity as an information clerk. This decision was vacated on December 9, 2008.

[4] Dr. Tauber also provided an impairment evaluation.

[5] On February 3, 2009 appellant was granted schedule awards for a 10 percent impairment of the right arm and a 10 percent impairment of the left. By decision dated September 23, 2009, she was granted additional upper extremity impairments of 14 percent on the right and 14 percent on the left or a total 24 percent impairment to each upper extremity.

On September 29, 2009 appellant, through counsel, requested reconsideration, asserting that the information clerk position was inappropriate because it was outside her physical restrictions. In an August 17, 2009 report, Dr. Tauber advised that she could lift 10 pounds occasionally but certainly not repetitively. He also stated that appellant's training in computer data entry was inappropriate and that the position chosen by the vocational rehabilitation counselor was inappropriate as it required repetitive computer entry.

In a January 29, 2010 decision, the Office denied modification of the January 21, 2009 wage-earning capacity determination.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[6] An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.[7] Section 8115 of the Act and Office regulations provide that 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 wage-earning capacity or the employee has no actual earnings, his or her wage-earning capacity is determined with due regards to the nature of the injury, the degree of physical impairment, usual employment, age, qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect his or her wage-earning capacity in the disabled condition.[8]

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office for selection of a position listed in the Department of Labor's DOT or otherwise available in the open market, that fits that employee's capabilities with regards 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 open labor market should be made through contact with the state employment service or other applicable service.[9] Finally, application of the principles set forth in *Albert C. Shadrick*[10] will result in the percentage of the employee's loss of wage-earning capacity.[11]

The Office must initially determine a claimant's medical condition and work restrictions before selecting an appropriate position that reflects his or her wage-earning capacity. The

[6] *James M. Frasher*, 53 ECAB 794 (2002).

[7] 20 C.F.R. §§ 10.402, 10.403; *John D. Jackson*, 55 ECAB 465 (2004).

[8] 5 U.S.C. § 8115; *id*. at § 10.520; *John D. Jackson, id.*

[9] *James M. Frasher, supra* note 6.

[10] 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.403.

[11] *James M. Frasher, supra* note 6.

medical evidence upon which the Office relies must provide a detailed description of the condition.[12] Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.[13]

Office procedures provide 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. In that instance the Office will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity.[14] Office procedures regarding the modification of a formal loss of wage-earning capacity provide that it will be modified when: (1) the original rating was in error; (2) the claimant's medical condition has changed; or (3) the claimant has been vocationally rehabilitated and that the party seeking modification of a formal loss of wage-earning capacity decision has the burden to prove that one of these criteria has been met.[15]

ANALYSIS

Once a formal wage-earning capacity decision is in place, 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.[16] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[17]

The Board finds that appellant did not submit sufficient evidence to establish that the Office's January 21, 2009 wage-earning capacity determination was erroneous.[18] On appeal, appellant asserts that she was medically incapable of performing the duties of the selected position. The evidence submitted by her prior to the January 21, 2009 decision included a September 28, 2007 work capacity evaluation by Dr. Venuturupalli, an attending physician Board-certified in internal medicine and rheumatology, who advised that she could not return to her previous job as court reporter or perform repetitive movements of the wrists. He also generally restricted pushing, pulling, lifting, squatting, kneeling or climbing. In a March 24, 2008 report, Dr. Ha'Eri, an Office referral orthopedic surgeon, agreed that appellant could not return to the court reporter position. He provided permanent work restrictions, stating that she could not perform repetitive use of both wrists. Lifting was limited to 10 pounds and pushing

[12] *William H. Woods*, 51 ECAB 619 (2000).

[13] *John D. Jackson, supra* note 7.

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

[15] *Id.* at Chapter 2.814.11 (June 1996); *see Stanley B. Plotkin*, 51 ECAB 700 (2000).

[16] *Stanley B. Plotkin, id*.

[17] *Id.*

[18] *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sharon C. Clement*, 55 ECAB 552 (2004); Federal (FECA) Procedure Manual, *supra* note 14.

and pulling to 20 pounds and these were restricted to no more than one hour a day. In a April 14, 2009 report, Dr. Tauber advised that appellant could not lift or perform repetitive motion duties and that any type of reaching or handling would be inappropriate such as taking multiple messages or doing any type of work with her hands.

Each physician advised that appellant could not perform repetitive duties with her hands. However, the selected position of information clerk, which is classified as sedentary, requires no fingering.[19] Dr. Tauber advised on April 14, 2009 that appellant could not lift and that any type of reaching or handling would be inappropriate. Again, the position classification does not establish that lifting was required taking multiple messages or doing specific work with the hands. It stated that the employee "may" keep a record of questions asked.[20] At the hearing, appellant testified that she occasionally used a computer at home. Based on this evidence the Office properly determined that the selected position of information clerk was within her physical capabilities and represented her wage-earning capacity as of January 21, 2009.

There is no evidence of record that appellant was retrained or otherwise vocationally rehabilitated, and the medical evidence submitted subsequently is insufficient to show that there was a material change in the nature and extent of the injury-related condition such that the January 21, 2009 decision should be modified. In an August 17, 2009 report, Dr. Tauber advised that she could lift 10 pounds occasionally but certainly not repetitively. He also stated that appellant's training in computer data entry was inappropriate and that the position chosen by the vocational rehabilitation counselor was inappropriate as it required repetitive computer entry. The training program, which appellant completed, was modified to meet her restrictions, and the selected position of information clerk does not require repetitive computer entry. Dr. Tauber did not indicate that there had been a material change in the nature and extent of the injury-related condition. In fact, while he previously advised that appellant could not lift, in his August 17, 2009 report, he stated that she could lift 10 pounds occasionally, when he had previously restricted her to no lifting.

The Board finds that, as this report did not establish a worsening of appellant's injury-related condition, the medical evidence is insufficient to establish that the January 21, 2009 wage-earning capacity decision should be modified.[21] The Office, therefore, properly denied modification of the January 21, 2009 wage-earning capacity determination.[22]

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that a January 21, 2009 wage-earning capacity decision that reduced her compensation should be modified.

[19] *Supra* note 2.

[20] *Id*.

[21] *See Darletha Coleman*, 55 ECAB 143 (2003).

[22] *T.M.*, Docket No. 08-975 (issued February 6, 2009).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs finalized on January 29, 2010 is affirmed.

Issued: May 2, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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