

FACTUAL HISTORY

The Office accepted that on August 13, 2002 appellant, then a 34-year-old physical security specialist, sustained cervical and lumbosacral strains with radiculopathy and a concussion as a result of a motor vehicle accident. She stopped work on the date of injury. On October 25, 2002 Dr. Michael E. Batipps, an attending Board-certified neurologist, released appellant to return to work four hours per day with restrictions.

In a June 12, 2003 medical report, Dr. Robert F. Draper, Jr., a Board-certified orthopedic surgeon and Office referral physician, listed normal findings on physical examination. He advised that appellant had cervical, thoracic and lumbosacral strains based on her complaints of discomfort in these body parts. Dr. Draper concluded that she could perform her regular work duties as a security specialist, eight hours per day with no restrictions.

In a September 15, 2003 report, Dr. Batipps reviewed Dr. Draper's June 12, 2003 findings. He stated that in addition to Dr. Draper's diagnoses, appellant had lumbosacral and cervical radiculopathy causally related to her August 13, 2002 employment injuries. Dr. Batipps disagreed with Dr. Draper's finding that appellant could work eight hours per day with no restrictions. He advised that she could work six hours per day with restrictions.

On September 22, 2003 appellant returned to limited-duty work as a physical security specialist, six hours per day. Her return to work was effective September 29, 2003.

In a May 19, 2005 decision, the Office reduced appellant's compensation effective September 29, 2003 based on its determination that her actual wages as a modified physical security specialist working 30 hours a week fairly and reasonably represented her wage-earning capacity.

On December 17, 2008 appellant filed a claim for wage-loss compensation (Form CA-7) for the period commencing February 8, 2008. On the claim form, the employing establishment advised that she resigned on July 11, 2006.

In reports dated February 8 through December 17, 2008, Dr. Batipps reported his findings on neurological examination which included tenderness and spasm in the cervical and lumbosacral spines and tenderness in the right shoulder. Appellant had decreased pinprick sensation and a limping gait. Dr. Batipps reviewed the results of magnetic resonance imaging (MRI) scans and an electromyogram/nerve conduction velocity (EMG/NCV) study which were normal. He diagnosed chronic post-traumatic cervical and lumbosacral pain and chronic pain in the upper and lower extremities. Dr. Batipps advised that the diagnosed conditions were causally related to appellant's August 13, 2002 employment injuries. He concluded that she was indefinitely totally disabled.

In a February 10, 2009 letter, the employing establishment controverted appellant's claim on the grounds that the medical evidence of record failed to establish that she sustained a recurrence of disability due to her August 13, 2002 employment-related injuries.

By letter dated March 24, 2009, the Office requested that appellant file a recurrence claim (Form CA-2a) for her disability commencing February 8, 2008. It also requested that she submit additional factual and medical evidence.

In an April 29, 2009 report, Dr. Batipps again found tenderness in the cervical and lumbosacral spines and shoulders, diminished pinprick sensation in the right upper extremity and a limping gait due to pain. There was also tenderness in the lower extremities. Appellant had decreased range of motion of the lumbosacral spine and motor strength. Dr. Batipps diagnosed chronic cervical and lumbosacral radiculopathy and post-traumatic headaches and dizziness due to her August 13, 2002 employment injuries. Appellant was status postconcussion due to the accepted injuries. Dr. Batipps advised that the diagnosed conditions interfered with her ability to use her right upper extremity and perform sedentary work. He concluded that appellant was indefinitely totally disabled due to her employment-related conditions.

By letter dated June 11, 2009, the Office again requested that appellant file a Form CA-2a. It also advised her that the evidence submitted was insufficient to establish her claimed total disability.

On July 9, 2009 appellant filed a Form CA-2a contending that she never recovered from her accepted employment-related conditions. In a September 10, 2009 report, Dr. Batipps advised that, although EMG/NCV studies performed on July 23 and August 14, 2009 were normal, appellant had cervical and lumbosacral radiculopathy symptoms. He stated that it may have been difficult for the tests to identify her lumbosacral radiculopathy due to poor muscle relaxation.

In a September 30, 2009 decision, the Office denied appellant's recurrence of disability claim. Appellant failed to submit any rationalized medical evidence establishing that she was totally disabled for work commencing February 8, 2008 due to her August 13, 2002 employment injuries.²

On October 24, 2009 appellant, through her attorney, requested a telephonic hearing with an Office hearing representative. In a January 15, 2010 report, Dr. Batipps noted that there had been no fundamental change in his neurological examination over the past two to three years. He reiterated his findings of tenderness and decreased range of motion and sensation related to appellant's cervical and lumbosacral spines and right upper extremity. Dr. Batipps also reiterated his diagnoses of chronic cervical and lumbosacral radiculopathy, post-traumatic headaches and dizziness and status postconcussion due to appellant's August 13, 2002 employment injuries. He advised that she had reached maximum medical improvement. Dr. Batipps concluded that appellant's prognosis for returning to work was poor. Appellant would continue to experience long-term disability.

² In the September 30, 2009 decision, the Office indicated that on October 2, 2005 appellant's wage-loss compensation was terminated because she had returned to full-time work with no loss of wages. The employing establishment advised the Office that appellant was released to perform full-duty work effective June 6, 2005. The Board notes that the record does not contain any evidence establishing that the Office made a formal loss of wage-earning capacity determination in October 2005 regarding appellant's return to full-time employment.

In an April 5, 2010 decision, an Office hearing representative affirmed the September 30, 2009 decision with a modification. He determined that appellant's claim for a recurrence of disability commencing February 8, 2008 should be treated as a request for modification of the Office's May 19, 2005 loss of wage-earning capacity decision. The hearing representative found that the evidence did not establish a material change in appellant's medical condition, that she had been retrained or vocationally rehabilitated or that the original loss of wage-earning capacity decision was erroneously issued. Accordingly, he found that the evidence was insufficient to establish that the May 19, 2005 loss of wage-earning capacity decision should be modified.

LEGAL PRECEDENT

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages.³ Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn and not on actual wages lost.⁴ Compensation payments are based on the wage-earning capacity determination, which remains undisturbed until properly modified.⁵

Modification of a standing wage-earning capacity 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 erroneous.⁶ 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. 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.⁷ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁸

ANALYSIS

The Board finds that appellant failed to meet her burden of proof to establish that the May 19, 2005 wage-earning capacity decision should be modified.

³ 5 U.S.C. § 8115(a); *Lee R. Sires*, 23 ECAB 12, 14 (1971) (the Board held that actual wages earned must be accepted as the measure of a wage-earning capacity in the absence of evidence showing they do not fairly and reasonably represent the employee's wage-earning capacity). *K.R.*, Docket No. 09-415 (issued February 24, 2010).

⁴ *Roy Matthew Lyon*, 27 ECAB 186, 190 (1975), *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984); *K.R.*, *supra* note 3.

⁵ *See Sharon C. Clement*, 55 ECAB 552, 557 (2004).

⁶ *Sue A. Sedgwick*, 45 ECAB 211, 215-16 (1993); *Elmer Strong*, 17 ECAB 226, 228 (1965).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995). *See also* FECA Transmittal 10-01 (issued October 5, 2009).

⁸ *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

The Office accepted that appellant sustained cervical and lumbosacral strains with radiculopathy and a concussion as a result of a motor vehicle accident that occurred in the performance of duty on August 13, 2002. On May 19, 2005 it determined that her actual earnings as a modified physical security specialist fairly and reasonably represented her wage-earning capacity. Appellant claimed a recurrence of disability commencing February 8, 2008. In a decision dated September 30, 2009, the Office found that the medical evidence was insufficient to establish an employment-related recurrence of disability. On April 5, 2010 an Office hearing representative affirmed and modified the September 30, 2009 decision to reflect that the evidence was insufficient to establish that the May 19, 2005 loss of wage-earning capacity determination should be modified. Because a formal decision of appellant's loss of wage-earning capacity was in place when she filed the recurrence of disability claim, the Office properly adjudicated the case as a request for modification of an established loss of wage-earning capacity.⁹

Appellant did not allege that the original loss of wage-earning capacity determination was erroneous. There is also no evidence that her modified physical security specialist position was part time, seasonal or temporary or that the wages received were not equal to or greater than her wages on the date of injury. The issue, therefore, is whether appellant has established a material change in the nature and extent of her employment-related conditions warranting modification of the May 19, 2005 wage-earning capacity determination.

Appellant has submitted insufficient probative medical opinion on this point. Dr. Batipps found that her cervical and lumbosacral radiculopathy, post-traumatic headaches and dizziness were causally related to the August 13, 2002 employment injuries. He noted that appellant was totally disabled for work commencing February 8, 2008 due to the accepted employment injuries. Dr. Batipps stated that the diagnosed conditions prevented her from using her right upper extremity and performing sedentary work. Although he offered an opinion that appellant's cervical, lumbosacral and headache conditions worsened and rendered her totally disabled commencing February 8, 2008, he offered little medical rationale to support his stated conclusion. Dr. Batipps did not adequately explain how the normal MRI scans or EMG/NCV studies supported his clinical finding of a material worsening of appellant's employment-related condition or total disability. He explained that it "may" have been difficult for the normal EMG/NCV studies to identify appellant's lumbosacral radiculopathy due to poor muscle relaxation is speculative in nature and of diminished probative value.¹⁰ Dr. Batipps did not provide any other medical rationale to support his clinical findings of a material worsening of her employment-related conditions and resultant total disability.

The Board finds that appellant has not established that the 2005 wage-earning capacity determination was erroneous. Appellant has not established that she sustained a material change in her accepted conditions that caused total disability as of February 8, 2008, the date she stopped work.

⁹ *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sharon C. Clement*, 55 ECAB 552 (2004); Federal (FECA) Procedure Manual, *supra* note 7.

¹⁰ *L.R. (E.R.)*, 58 ECAB 369 (2007); *Kathy A. Kelley*, 55 ECAB 206 (2004).

CONCLUSION

The Board finds that appellant has failed to establish that modification of the Office's May 19, 2005 wage-earning capacity determination is warranted.

ORDER

IT IS HEREBY ORDERED THAT the April 5, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 5, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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