

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

C.R., Appellant)

and)

DEPARTMENT OF THE ARMY, U.S. ARMY)
MATERIEL COMMAND, Richmond, KY,)
Employer)

**Docket No. 11-118
Issued: September 14, 2011**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 18, 2010 appellant filed a timely appeal from the October 7, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) denying modification of her wage-earning capacity determination. Pursuant to the Federal Employees' Compensation Act (FECA)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 modification of the October 22, 2002 wage-earning capacity determination was warranted.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On March 23, 1982 appellant, then a 30-year-old laborer, sustained a lumbar strain and displacement of her L5-S1 disc without myelopathy. She stopped work and received OWCP compensation for periods of disability.²

On November 12, 1998 Dr. Frank A. Burke, a Board-certified orthopedic surgeon serving as OWCP's referral physician, found that appellant could perform sedentary work which allowed her frequent changes of position to accommodate back pain. On May 1, 2001 Dr. Andrew W. Ryan, an attending Board-certified orthopedic surgeon, determined that she could return to work without restrictions.

On October 22, 2002 a formal loss of wage-earning capacity decision was issued based upon appellant's ability to work in the constructed position of companion effective November 3, 2002. The position required occasional lifting of up to 10 pounds and frequent reaching, handling and fingering.³ In mid 2002 appellant's vocational rehabilitation counselor determined that she was vocationally capable of performing the position and that it was reasonably available in her commuting area at a wage of \$5.50 an hour.

In a May 3, 2007 letter to OWCP, appellant asked for her case to be reopened. She asserted that her back injury had worsened and she was not able to perform any type of work. In a February 13, 2008 decision, OWCP denied appellant's claim on the grounds that she had not established an employment-related recurrence of disability. In a June 17, 2009 order remanding case,⁴ the Board set aside the February 13, 2008 decision and directed OWCP to consider appellant's May 3, 2007 letter as a request for modification of its October 22, 2002 wage-earning capacity determination.

On remand, OWCP considered appellant's request for modification of its October 22, 2002 wage-earning capacity determination, including the medical evidence she submitted in support of her request.

In an April 16, 2007 report, Dr. Noel S. Ashcraft, an attending osteopath, noted that appellant reported increased back symptoms since August 2006. He diagnosed mechanical low back pain and possible bilateral radiculitis and recommended further treatment, including lumbar facet injections. Appellant also submitted November 27, 2006 and February 5, 2007 reports from Dr. Robert D. Owen, an attending Board-certified neurosurgeon, who discussed the fact that she reported worsening symptoms since August 2006. Dr. Owen detailed the limited findings on examination and recommended physical therapy treatment.⁵

² Appellant was terminated from the employing establishment effective August 18, 1986.

³ The position allowed appellant frequent changing of position.

⁴ Docket No. 08-1579 (issued June 17, 2009).

⁵ The results of June 28, 2006 magnetic resonance imaging (MRI) scan testing of the left knee and October 16, 2007 MRI scan testing of the lumbar region showed degenerative changes in these areas.

In an August 19, 2009 decision, OWCP found that appellant failed to establish that modification of the October 22, 2002 wage-earning capacity determination was warranted. It noted that she had not shown that she underwent a material change in the nature and extent of the injury-related condition.⁶

Appellant submitted a March 15, 2010 report in which Dr. Owen discussed her MRI scan and myelogram testing and referred her to pain management services. Dr. Owen stated, “her examination is really unchanged from the last visit, where I noted that she had normal strength, symmetric reflexes, and a straight leg raise on the left which caused distal leg pain. No sensory deficit was noted.”⁷ In a May 17, 2010 initial consultation report, Dr. Beno M. Kuharich, an osteopath, detailed appellant’s medical history and reported findings on examination. Physical examination showed that she had facet loading signs and restricted motion in her low back. Appellant also submitted a group of medical records, dated between January 2009 and February 2010, from the Veterans Hospital in Lexington, KY. The reports provided a summary of her past back problems as well as the history of nonwork problems such as obesity, degenerative joint disease in the hands and hypertension.

In a June 30, 2010 decision, OWCP affirmed the August 19, 2009 decision noting that the newly submitted medical evidence did not establish a material change in the nature and extent of her injury-related condition.

Appellant submitted numerous medical reports from Eastern Kentucky Pain Management dated between July and September 2010 that detailed the periodic treatment of her low back condition. She also submitted medical reports which had previously been submitted to OWCP.

In an October 7, 2010 decision, OWCP affirmed its June 30, 2010 decision noting the insufficiency of the medical evidence submitted by appellant.

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. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.⁸ OWCP’s procedure manual provides that, “[i]f 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.”⁹

⁶ Appellant had not shown that the original wage-earning capacity determination was erroneous or that she had been retrained.

⁷ Dr. Owen had last seen appellant in November 2009.

⁸ *Katherine T. Kreger*, 55 ECAB 633 (2004).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

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.¹⁰ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.¹¹

In addition, Chapter 2.814.11 of OWCP's procedure manual contains provisions regarding the modification of a formal loss of wage-earning capacity. The relevant part provides that a formal loss of wage-earning capacity 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. OWCP procedures further provide 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. If OWCP is seeking modification, it must establish that the original rating was in error, that the injury-related condition has improved or that the claimant has been vocationally rehabilitated.¹²

Under section 8115(a) of FECA, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent her wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, her wage-earning capacity is determined with due regard to the nature of her injury, her degree of physical impairment, her usual employment, her age, her qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect her wage-earning capacity in her disabled condition.¹³ When OWCP 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 OWCP or to its wage-earning capacity specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits that employee's capabilities with regards to 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. Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.¹⁴

¹⁰ *Stanley B. Plotkin*, 51 ECAB 700 (2000).

¹¹ *Id.*

¹² See Federal (FECA) Procedure Manual, *supra* note 9, at Chapter 2.814.11 (June 1996).

¹³ See *Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C § 8115(a). Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions. The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives. *Albert L. Poe*, 37 ECAB 684, 690 (1986), *David Smith*, 34 ECAB 409, 411 (1982).

¹⁴ See *Dennis D. Owen*, 44 ECAB 475, 479-80 (1993); *Wilson L. Clow, Jr.*, 44 ECAB 157, 171-75 (1992); *Albert C. Shadrick*, 5 ECAB 376 (1953). See also Federal (FECA) Procedure Manual, *supra* note 9 at Chapter 2.814.8 (December 1993).

ANALYSIS

In the present case, OWCP based appellant's loss of wage-earning capacity on a determination that her wage-earning capacity was represented by wages she could earn in the constructed position of companion.¹⁵ The position required occasional lifting of up to 10 pounds and frequent reaching, handling and fingering, but allowed for frequent changing of position. The Board finds that appellant did not submit evidence showing that OWCP's original determination with regards to her wage-earning capacity was erroneous.

On May 1, 2001 Dr. Ryan, an attending Board-certified orthopedic surgeon, determined that appellant could return to work without restrictions.¹⁶ Appellant's vocational rehabilitation counselor then determined that appellant was able to perform the position of companion and that state employment services showed the position was available in sufficient numbers so as to make it reasonably available within her commuting area. OWCP properly relied on the opinion of the rehabilitation counselor that appellant was vocationally capable of performing the companion position and a review of the medical evidence reveals that she was physically capable of performing the position. Appellant did not submit any evidence or argument showing that she could not vocationally or physically perform the companion position around the time of OWCP's October 22, 2002 wage-earning capacity determination.

OWCP considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment, age and employment qualifications, in determining that the companion position represented her wage-earning capacity.¹⁷ The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the companion position and that such a position was reasonably available within the general labor market of her commuting area. Therefore, OWCP properly based her wage-earning capacity effective November 3, 2002 on the companion position. For these reasons, appellant has not shown that its original determination with regards to her wage-earning capacity was erroneous.

In a May 3, 2007 letter, appellant suggested that there was a material change in the nature and extent of her injury-related condition. She submitted numerous medical reports which she believed showed that she sustained such a material change.

The Board finds that the medical evidence submitted by appellant does not contain a rationalized medical opinion explaining why an employment-related condition prevented her

¹⁵ OWCP had accepted that appellant sustained a lumbar strain and displacement of her L5-S1 disc without myelopathy.

¹⁶ On November 12, 1998 Dr. Burke, a Board-certified orthopedic surgeon serving as OWCP's referral physician, indicated that appellant could perform sedentary work which allowed for frequent changes of position to accommodate back pain.

¹⁷ See *Clayton Varner*, 37 ECAB 248, 256 (1985). Further, OWCP properly based its calculation of wage-earning capacity on the opinion of appellant's rehabilitation counselor which indicated that the minimum wage of a companion in appellant's labor market was \$5.50 an hour.

from performing the companion position or otherwise establish that OWCP improperly determined her wage-earning capacity.¹⁸

In these reports, attending physicians mostly described the conservative treatment of appellant's low back pain. These reports do not support a finding that appellant sustained a material change in the nature and extent of her injury-related condition, because they do not provide any opinion that her accepted work injuries, a lumbar strain and displacement of her L5-S1 disc without myelopathy, contributed to a material worsening of her back condition.

In an April 16, 2007 report, Dr. Ashcraft, an attending osteopath, noted that appellant reported increased back symptoms since August 2006. He diagnosed mechanical low back pain and possible bilateral radiculitis and recommended further treatment, including lumbar facet injections. Dr. Ashcraft did not, however, indicate that these findings were due to the accepted back condition or that they represented a worsening of appellant's condition.

Although appellant reported a worsening of back symptoms due to her accepted conditions, the medical reports do not contain objective findings supporting such a worsening of her back condition. For example, she submitted November 27, 2006 and February 5, 2007 reports in which Dr. Owen, an attending Board-certified neurosurgeon, discussed the fact that she reported worsening symptoms since August 2006. However, Dr. Owen reported limited findings on examination and recommended conservative treatment such as physical therapy. He provided no indication that appellant's continuing back problems were due to the accepted work injuries. In a March 15, 2010 report, Dr. Owen stated that her examination was essentially unchanged from the last visit in November 2009 when he noted that she had normal strength, symmetric reflexes and a straight leg raise on the left which caused distal leg pain.

In a May 17, 2010 report, Dr. Kuharich, an attending osteopath, detailed appellant's medical history and reported findings on examination. He indicated that she had facet loading signs and restricted motion in her low back, but he did not indicate that these findings were related to the accepted back injuries. Appellant submitted numerous other medical treatment notes, dated in 2009 and 2010, but none of these reports show a material change in the nature and extent of her injury-related condition.

For these reasons, the Board finds that appellant did not show that modification of OWCP's wage-earning capacity decision was warranted and it properly denied her modification request. Appellant may request modification of the wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that modification of OWCP's October 22, 2002 wage-earning capacity determination was warranted.

¹⁸ See *Norman F. Bligh*, 41 ECAB 230, 237-38 (1989). Moreover, appellant has not been retrained or otherwise vocationally rehabilitated such that her work as a companion would not be representative of her wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the October 7, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 14, 2011
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