

The Office accepted that on February 19, 2000 appellant, then a 41-year-old rural letter carrier, sustained a strain, traumatic tendinitis and impingement syndrome of her right shoulder

due to a motor vehicle accident.<sup>1</sup> On April 27, 2001 she underwent an acromioplasty of her right shoulder, which was authorized by the Office.<sup>2</sup> On July 8, 2000 appellant was involved in a nonwork-related motor vehicle accident that reinjured her right shoulder. On August 14, 2002 she sustained a work-related right shoulder strain when her right arm was pulled down by a falling portion of a mailbox.<sup>3</sup> On May 30, 2003 appellant underwent an open arthrotomy of her right shoulder which was authorized by the Office.

On August 4, 2004 Dr. Henry L. King, an attending Board-certified orthopedic surgeon, advised that appellant could return to work with restrictions including no lifting more than 30 pounds. Appellant returned to full-time work for the employing establishment on August 9, 2004 as a modified rural letter carrier. The job restricted her from lifting more than 30 pounds. On January 18, 2005 Dr. Manhal A. Ghanma, a Board-certified orthopedic surgeon, who served as an Office referral physician, stated that appellant was capable of performing her modified rural letter carrier position with restrictions of no lifting more than 30 pounds above shoulder level.

In a September 2, 2005 decision, the Office reduced appellant's wage-loss compensation to zero effective August 9, 2005 finding that her actual wages as a modified rural letter carrier effective August 9, 2004 fairly and reasonably represented her wage-earning capacity. It noted that appellant had worked more than 60 days as a modified rural letter carrier.

On January 25, 2007 Dr. Nicholas V. Varrati, an attending Board-certified physical medicine and rehabilitation physician, noted that appellant reported that she experienced chronic right shoulder pain and had noticed increased pain with activity at work. Palpation of the right shoulder region showed tenderness over the right acromioclavicular (AC) joint and the tuberosity of the humerus and allodynia over the anterior inner aspect of the axilla. Range of motion testing of the right shoulder showed flexion of 80 degrees, extension of 40 degrees, abduction of 70 degrees and adduction of 40 degrees. Dr. Varrati diagnosed chronic right shoulder pain with neuropathic and nociceptive components, regional pain syndrome, history of dermatomyositis and status post arthrotomy of the right shoulder. On February 15, 2007 she stated that, on palpation, appellant had tenderness over the right AC joint and subacromial bursa and allodynia over the right anterior lateral shoulder. Range of shoulder motion testing revealed flexion of 90 degrees, extension of 40 degrees, abduction of 80 degrees and adduction 40 degrees.

Appellant stopped work on March 30, 2007 and submitted claims for compensation (Forms CA-7) alleging total disability for the period March 30 to April 9, 2007. She returned to work at the employing establishment effective April 10, 2007. In an April 16, 2007 letter, the Office requested that appellant submit additional evidence in support of her claim within 30 days of the letter. It noted that, if appellant stopped work due to a worsening of her work-related

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<sup>1</sup> The claim was given file number xxxxxx547. Appellant's job at the time of her injury required her to lift up to 70 pounds and case mail for up to three hours per day.

<sup>2</sup> Medical records from the period indicate that appellant was diagnosed with right carpal tunnel syndrome. The Office has not accepted that appellant sustained employment-related right carpal tunnel syndrome.

<sup>3</sup> The claim was given file number xxxxxx630. The Office combined appellant's two claims with file number xxxxxx547 as the master file.

condition, she should submit medical evidence supporting such a worsening. If she stopped work because her light-duty restrictions changed, she should submit evidence supporting such a change. In an undated statement, appellant noted that on March 29, 2007 Dr. Varrati placed her off work. She asserted that she had not performed light-duty work for two or three years but rather had been performing her regular duties for 34 hours per week.

Appellant submitted a March 29, 2007 report from Dr. Varrati, who noted that she was seen in a follow-up examination for reevaluation of her chronic shoulder pain. She reported that she had chronic pain in her right shoulder since her first work injury with significant worsening of her pain over the prior week. Appellant denied any inciting incident other than work which required her to “reach with the mail.” She characterized her pain as 10 on a scale of 10. Examination revealed that appellant had tenderness in the subacromial bursal and AC joint regions of her right shoulder. Dr. Varrati indicated that she had decreased range of right shoulder motion in that testing showed flexion of 50 degrees, extension of 20 degrees, abduction of 40 degrees and adduction of 30 degrees. He injected appellant’s right subacromial bursa and diagnosed chronic right shoulder pain with neuropathic and nociceptive components, regional pain syndrome, history of dermatomyositis and status post arthrotomy of the right shoulder. Dr. Varrati stated that he would place appellant off work until April 9, 2007 to rest the shoulder. In a March 29, 2007 note, he indicated that appellant was off work until April 9, 2007 due to “continued right shoulder pain.”

On April 4, 2007 Dr. Leon Rosenberg, an attending Board-certified neurologist, described appellant’s medical history and described her current complaints and finding on examination. Appellant reported decreased sensation over the palmar surface of her right hand (including the fingers) and remarkable hypersensitivity of the right medial upper arm. Dr. Rosenberg diagnosed “neuropathic pain, status post shoulder injury, most likely lower plexus involvement.” He thought that appellant had “unrelated right carpal tunnel syndrome” which caused the numbness she reported having when driving.

On April 12, 2007 Dr. Varrati stated that appellant reported a significant improvement of her right shoulder pain following both the time off work and the injection. He noted that appellant returned to work four days prior and she reported a pain level of six but was “very happy with her pain relief.” Dr. Varrati noted that examination showed only mild tenderness over appellant’s right subacromial bursa and right shoulder range of motion testing showed flexion of 100 degrees, extension of 40 degrees, abduction of 90 degrees and adduction of 50 degrees. He again diagnosed chronic right shoulder pain with neuropathic and nociceptive components, regional pain syndrome, history of dermatomyositis and status post arthrotomy of the right shoulder. On May 10, 2007 and January 3, 2008 Dr. Varrati detailed findings of his examination of appellant that were similar to those of April 12, 2007.

In a May 22, 2006 decision, the Office denied appellant’s claim for compensation for the period March 30 to April 9, 2007.<sup>4</sup> It found that she did not submit sufficient medical evidence to establish that she was totally disabled due to her accepted employment injuries. The Office

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<sup>4</sup> The Office inadvertently indicated that appellant’s claim was denied for the period March 31 to April 9, 2007 but she actually claimed compensation for the period March 30 to April 9, 2007.

noted that the medical evidence did not provide an explanation of how or why appellant's right shoulder condition had worsened.

Appellant requested a hearing before an Office hearing representative. At the October 30, 2007 hearing, the Office hearing representative advised that the actual issue in the case was whether the Office's September 2, 2005 wage-earning capacity decision should be modified. Appellant claimed that, prior to March 29, 2007, she was performing the same job she had done since she started with the employing establishment. She asserted that her job duties required her to lift 70 pounds even though she had a work restriction of 30 pounds.<sup>5</sup> Appellant alleged that she had not been offered modified or light-duty work until recently. Prior to March 29, 2007, she had to lift many department store catalogues and that she experienced pain after lifting them.

Appellant submitted a May 29, 2007 insurance form in which Dr. Varrati found that she was totally disabled from March 29 to April 8, 2007. He stated, "Put off work due to type of job increase pain" and circled a portion of the form that indicated that the condition starting March 28, 2007 was "an aggravation of an already existing condition that worsen[ed] over time." On August 30, 2007 Dr. Varrati provided appellant's current symptoms and examination findings and repeated the diagnoses he previously provided. In an October 30, 2007 note, he stated that appellant was currently being seen for pain management secondary to a rotator cuff tear and subsequent surgery. Dr. Varrati noted that she was at maximum medical improvement and recommended that she not lift more than 30 pounds. On October 30, 2007 he stated:

"On March 29, 2007 [appellant] had noted significant worsening of her pain which she said was a 10 over 10. She works as a rural carrier and has to constantly stretch with this arm. At that time, [appellant] was noted to have significant decreased motion to the arm with increased pain with any flexion or abduction. Because of the severity of her shoulder symptoms, I had injected the shoulder and had scheduled her off work for one week. She was off until April 9, 2007. The reason for [appellant] being off work: The shoulder required significant rest and no further aggravation. [She] did well and was returned to work on the above date."

In a January 18, 2008 decision, the Office hearing representative affirmed the May 22, 2007 decision. She stated that appellant's claim could best be characterized as a request for modification of the Office's wage-earning capacity determination and found that she did not meet her burden of proof to modify that determination. The Office hearing representative found that the September 2, 2005 wage-earning capacity determination was proper and that the reports of Dr. Varrati did not establish a material worsening of appellant's employment-related condition on or after March 30, 2007. She also found that appellant did not meet her burden of proof to

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<sup>5</sup> Appellant stated that she was offered help for putting anything over 35 pounds into her vehicle but not for taking such items out of her vehicle.

establish that she sustained employment-related total disability for the period March 30 to April 9, 2007.<sup>6</sup>

### **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 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 actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity."<sup>9</sup> The Board has stated, "Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure."<sup>10</sup> However, wage-earning capacity may not be based on an odd-lot or make-shift position designed for an employee's particular needs or a position that is seasonal in an area where year-round employment is available.<sup>11</sup> Wage-earning capacity may only be based on a temporary or part-time position if the position held by the employee at the time of injury was a temporary or part-time position.<sup>12</sup>

Office procedures direct that a wage-earning capacity determination based on actual wages be made following 60 days of employment.<sup>13</sup> The procedures provide for a retroactive determination where an employee has worked for at least 60 days, the employment fairly and

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<sup>6</sup> The Office hearing representative indicated that the type of evidence the Office requested from appellant would be appropriate for evaluation of a request for modification of a wage-earning determination. Therefore, the Office's mischaracterization of the issue in the earlier decision was harmless.

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

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

<sup>9</sup> 5 U.S.C. § 8115(a).

<sup>10</sup> *Floyd A. Gervais*, 40 ECAB 1045, 1048 (1989); *Clyde Price*, 32 ECAB 1932, 1934 (1981). Disability is defined in the implementing federal regulations as "the incapacity, because of an employment injury, to earn the wages the employee was receiving *at the time of injury*." (Emphasis added.) 20 C.F.R. § 10.5(f). Once it is determined that the actual wages of a given position represent a employee's wage-earning capacity, the Office applies the principles enunciated in *Albert C. Shadrick*, 5 ECAB 376 (1953), in order to calculate the adjustment in the employee's compensation.

<sup>11</sup> See *James D. Champlain*, 44 ECAB 438, 440-41 (1993); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.814.7a(1), (2) (July 1997).

<sup>12</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.814.7a(3) (July 1997).

<sup>13</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7c (December 1993).

reasonably represents the claimant's wage-earning capacity and work stoppage did not occur due to any change in the claimant's injury-related condition.<sup>14</sup>

### **ANALYSIS -- ISSUE 1**

The Office accepted that on February 19, 2000 appellant sustained a strain, traumatic tendinitis and impingement syndrome of her right shoulder due to a vehicular accident. On April 27, 2001 she underwent an acromioplasty of her right shoulder which was authorized by the Office. On August 14, 2002 appellant sustained a work-related right shoulder strain when her right arm was pulled down by a falling portion of a mailbox. On May 30, 2003 she underwent an open arthrotomy of her right shoulder which was authorized by the Office. Appellant returned to work in August 2004 as a modified rural letter carrier with work restrictions including no lifting more than 30 pounds.

Appellant stopped work on March 30, 2007 and submitted claims for compensation alleging total disability for the period March 30 to April 9, 2007. In a May 22, 2006 decision, the Office denied appellant's claim for compensation for the period March 30 to April 9, 2007 finding that she did not submit sufficient evidence to show that she was totally disabled due to her accepted employment injuries. In a January 18, 2008 decision, an Office hearing representative affirmed the Office's May 22, 2007 decision. She indicated that appellant's claim would best be characterized as a request for modification of the Office's wage-earning capacity determination and found that she did not meet her burden of proof to modify that determination. The Office hearing representative also found that appellant did not meet her burden of proof to establish that she sustained employment-related total disability for the period March 30 to April 9, 2007.

As to whether appellant met her burden of proof to modify the Office's wage-earning capacity determination, the Board finds that she did not submit any evidence to show that the Office's wage-earning capacity determination was erroneous. The Office reduced appellant's compensation to zero effective August 9, 1994 as her actual earnings as a rural letter carrier beginning August 9, 2004 represented her wage-earning capacity. This determination was consistent with section 8115(a) of the Act which provides that the wage-earning capacity of an employee is determined by her actual earnings if her actual earnings fairly and reasonably represent his wage-earning capacity.<sup>15</sup> The Office properly noted that appellant had received actual earnings as a rural letter carrier for more than 60 days in that she had been working in the position since August 9, 2004 when the Office issued its September 2, 2005 decision and there is no evidence that appellant's earnings in this position did not fairly and reasonably represent her wage-earning capacity. The rural letter carrier position was not an odd-lot or make-shift position designed for appellant's particular needs and it was not seasonal in nature. Moreover, the position was not a temporary or part-time position.<sup>16</sup> The evidence does not show that

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<sup>14</sup> *Id.* at Chapter 2.814.7e (December 1993).

<sup>15</sup> *See supra* note 10 and accompanying text.

<sup>16</sup> *See supra* note 11 and 12 and accompanying text.

appellant's actual earnings as a rural carrier did not fairly and reasonably represent her wage-earning capacity.

Appellant contends that there was a material change in the nature and extent of her employment-related condition. However, the evidence of record does establish a material change in the nature and extent of her employment-related condition or otherwise establish that the Office improperly denied modification of its wage-earning capacity determination.<sup>17</sup>

In a March 29, 2007 report, Dr. Varrati, an attending Board-certified physical medicine and rehabilitation physician, stated that appellant reported significant worsening of her pain over the prior week but denied any inciting incident other than work, which required her to "reach with the mail." Examination revealed that appellant had tenderness in the subacromial bursal and AC joint regions of her right shoulder. Dr. Varrati indicated that she had decreased range of right shoulder motion in that testing showed flexion of 50 degrees, extension of 20 degrees, abduction of 40 degrees and adduction of 30 degrees. He diagnosed chronic right shoulder pain with neuropathic and nociceptive components, regional pain syndrome, history of dermatomyositis and status post arthroscopy of the right shoulder and stated that he would give appellant off work until April 9, 2007 to rest the shoulder.<sup>18</sup>

The Board notes that this evidence does not show that appellant sustained a material worsening of her employment-related conditions on or after March 30, 2007. Dr. Varrati's reports are of limited probative value on this matter because he did not provide any explanation of how appellant's accepted conditions (a strain, traumatic tendinitis and impingement syndrome of the right shoulder) had materially worsened.<sup>19</sup> He noted tenderness in the subacromial bursal and AC joint regions of her right shoulder and reported range of motion findings for appellant's right shoulder which he characterized as showing decreased range of right shoulder motion. The Board notes, however, that these findings are not substantially different from the findings Dr. Varrati reported prior to March 30, 2007. Dr. Varrati did not present sufficient objective findings to show that appellant sustained a material worsening of her employment-related condition.

In subsequent reports, Dr. Varrati emphasized appellant's report of increased pain. It appears that her complaints of increased pain served as the basis for him to place appellant off work starting March 30, 2007. Another circumstance militating against a finding that appellant sustained a material worsening of her employment-related condition on or after March 30, 2007 is the fact that she returned to work on April 9, 2007 and continued to perform her work duties for an extended period. There is also evidence in the record that her problems in early

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<sup>17</sup> See *Norman F. Bligh*, 41 ECAB 230, 237-38 (1989).

<sup>18</sup> In a March 29, 2007 note, Dr. Varrati indicated that appellant was off work until April 9, 2007 due to "continued right shoulder pain."

<sup>19</sup> See *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (finding that a medical opinion not fortified by medical rationale is of little probative value).

April 2007 might have been due to a nonwork-related condition.<sup>20</sup> For these reasons, appellant did not meet her burden of proof to modify the Office's wage-earning capacity determination.

### **LEGAL PRECEDENT -- ISSUE 2**

When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative, and substantial evidence a recurrence of total disability and show that she cannot perform such light duty. As part of this burden the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.<sup>21</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that the reports of Dr. Varrati do not show that appellant sustained a recurrence of total disability for the period March 30 to April 9, 2007. Dr. Varrati did not provide a rationalized medical opinion explaining how appellant's accepted conditions (a strain, traumatic tendinitis and impingement syndrome of the right shoulder) spontaneously worsened such that she could no longer perform her light-duty work. In fact, he did not provide any description of appellant's light-duty work or explain why her employment-related condition was so severe that she could no longer perform it for the period March 30 to April 9, 2007. As noted, it would appear that appellant's reports of increased pain were the reason Dr. Varrati placed her off work starting March 30, 2007.<sup>22</sup> She has not shown a change in the nature and extent of her injury-related condition between March 30 and April 9, 2007. Appellant alleged a change in the nature and extent of her light-duty job requirements. She claimed that she was forced to work beyond her work restrictions prior to March 30, 2007. However, appellant did not submit evidence establishing this assertion. For these reasons, she did not show that she sustained a recurrence of total disability for the period March 30 to April 9, 2007.

### **CONCLUSION**

The Board finds that appellant did not meet her burden of proof to modify the Office's wage-earning capacity determination. The Office further finds that appellant did not meet her burden of proof to establish that she sustained a recurrence of total disability for the period March 30 to April 9, 2007.

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<sup>20</sup> On April 4, 2007 Dr. Rosenberg, an attending Board-certified neurologist, indicated that appellant's nonwork-related right carpal tunnel syndrome might be responsible for the reported numbness in her right arm. In addition, appellant has not been retrained or otherwise vocationally rehabilitated such that her work as a modified rural letter carrier would not be representative of her wage-earning capacity.

<sup>21</sup> *Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

<sup>22</sup> Appellant did not submit reports from physicians other than Dr. Varrati that addressed the question of whether she sustained an employment-related recurrence of total disability between March 30 and April 9, 2007.



**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' January 18, 2008 and May 22, 2007 decisions are affirmed.

Issued: November 21, 2008  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

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