

outlet syndrome, a cervical strain and right brachial plexus lesions due to factors of her federal employment.

In a June 9, 2006 decision, the Board found that appellant's actual earnings as a modified automation clerk fairly and reasonably represented her wage-earning capacity. However, the Board found that the Office improperly denied appellant's May 30, 2005 request for reconsideration under the clear evidence of error standard as her request was timely filed. The Board remanded the case for the Office to review appellant's request for reconsideration under the proper standard.

On remand, appellant contended that she was never reemployed at a lower paying job with the employing establishment or another organization. She noted that she had worked six hours per day instead of eight and was entitled to two hours of wage loss per day from September 2003 to February 2004 when she returned to full duty.

The Office referred appellant to Dr. Katharine J. Leppard, a Board-certified physiatrist, for a second opinion. On April 26, 2006 Dr. Leppard noted chronic bilateral upper extremity pain and paresthasias. She recommended further diagnostic studies, including an electromyogram (EMG) and a magnetic resonance imaging (MRI) scan. In a June 1, 2006 report, Dr. Leppard reviewed the results of testing. Appellant's EMG showed evidence of chronic C7 radiculopathy on the right and, on the left upper extremity, a radial neuropathy at the lateral elbow. Appellant also had chronic cervical myofascial pain with underlying degenerative changes with disc protrusions at C5-6 and C6-7. Dr. Leppard noted that appellant has persistent pain and symptoms. She listed restrictions of no lifting over 20 pounds and limiting repetitive hand use to 30 minutes at a time.

In a report dated July 19, 2006, Dr. Jack L. Rook, an attending Board-certified physiatrist, diagnosed right brachial plexus lesion, sprain/strain of the neck and bilateral tenosynovitis hand/wrist.

By decision dated July 31, 2006, the Office denied modification of appellant's October 30, 2003 wage-earning capacity determination.

In a report dated December 8, 2006, Dr. Rook noted that Dr. Leppard's restrictions were very similar to those he recommended. However, he would add no work past midnight, no sweeping and no shoulder work. Dr. Rook also restricted appellant to working 30 minutes on followed by 30 minutes off, for a total of 4 hours a day.

On February 14, 2007 appellant requested reconsideration of the July 31, 2006 decision. She contended, "I was improperly placed on [loss of wage-earning capacity] LWEC. I did not meet the requirements to be placed on an LWEC."

By letter dated April 30, 2007, the Office referred appellant for an impartial medical examination with Dr. Barry Ogin, a Board-certified physiatrist, for the purpose of resolving the conflict in work restrictions between Dr. Leppard and Dr. Rook.

By decision dated May 7, 2007, the Office denied modification of the October 30, 2003 wage-earning capacity decision. It found that appellant did not show a material change in the nature and extent of her injury-related condition, evidence that she had been rehabilitated or that the original determination was made in error.

LEGAL PRECEDENT

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.² The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.³

Section 8123(a) provides in pertinent part: If there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.⁴ In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.⁵

ANALYSIS

The Board notes that a conflict in medical opinion arose with regard to appellant's work restrictions between Dr. Leppard, the second opinion physician, and Dr. Rook, appellant's treating physician. Dr. Leppard opined that appellant had restrictions of no lifting over 20 pounds and limited repetitive hand use to 30 minutes at a time. Dr. Rook indicated that in addition to these restrictions appellant could not work past midnight and was limited to working 30 minutes on followed by 30 minutes off for a total of 4 hours work a day. The Office properly referred appellant to Dr. Ogin for an impartial medical examination. However, it did not wait for a medical opinion from the impartial medical specialist before issuing its decision. A modification in wage-earning capacity can be demonstrated by showing a material change in appellant's accepted conditions.⁶ The opinion of Dr. Ogin is necessary for resolution of the conflict in medical evidence and to properly determine appellant's capacity for work. Accordingly, the case will be remanded for the Office to consider the opinion of the impartial medical specialist and for such further development of the medical evidence as the Office finds necessary.

² *D.M.*, 59 ECAB ___ (Docket No. 07-1230, issued November 13, 2007); *Tamra McCauley*, 51 ECAB 375 (2000).

³ *P.C.*, 58 ECAB ___ (Docket No. 06-1954, issued March 6, 2007); *Harley Sims, Jr.*, 56 ECAB 320 (2005).

⁴ 5 U.S.C. § 8123(a).

⁵ See *Roger Dingess*, 47 ECAB 123 (1995); *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

⁶ *Elsie L. Price*, 54 ECAB 734 (2003).

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 7, 2007 and July 31, 2006 are vacated and the case remanded for further consideration consistent with this opinion.

Issued: November 25, 2008
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