

of modified distribution clerk fairly and reasonably represented appellant's wage-earning capacity.

On June 26, 2001 appellant, then a 42-year-old modified clerk, filed an occupational disease claim alleging that she developed bilateral carpal tunnel syndrome due to typing, writing, filing and using a computer in the course of her federal employment. The Office accepted appellant's claim for bilateral carpal tunnel syndrome and trigger thumb of both hands on October 23, 2003. Appellant underwent a right carpal tunnel release and right trigger thumb release on November 11, 2003. The Office entered appellant on the periodic rolls on January 26, 2004. Appellant underwent a left carpal tunnel release and excision of dorsal ganglion cyst of the left wrist on May 19, 2004. The Office expanded appellant's claim to include this condition.

Appellant returned to light-duty work for four hours on October 18, 2004. She filed a new claim on October 27, 2004 alleging that she injured her low back. The Office accepted this claim for lumbar strain and right buttock strain. Appellant accepted a light-duty position on November 5, 2004. She accepted a new light-duty work assignment on January 25, 2005. By letter dated February 14, 2005, the Office reduced appellant's compensation benefits to reflect her earnings as a modified mail processing clerk.

Dr. Robert F. Brennan, a Board-certified orthopedic surgeon, performed a left wrist arthroscopy, debridement and synovectomy including an excision of a ganglion cyst and left de Quervain's release on May 10, 2005. The Office entered appellant on the periodic rolls on June 3, 2005. Dr. Brennan completed a form report on June 27, 2005 and indicated he anticipated that appellant could work eight hours a day on July 27, 2005.

The Office referred appellant for a second opinion evaluation with Dr. Christopher E. Cenac, a Board-certified orthopedic surgeon. In a report dated December 13, 2005, Dr. Cenac reviewed the statement of accepted facts and found that appellant was hostile on examination. He stated that symptom magnification and illness behavior was documented. Dr. Cenac found that appellant had no objective residual causally related to her cervical strain, radio-styloid tenosynovitis, bilateral carpal tunnel syndrome, bilateral trigger thumbs and ganglion cyst. He concluded that appellant had reached maximum medical improvement and could return to modified work. Dr. Cenac stated, "She has subjective complaints not substantiated by objective physical findings relative to the above[-]stated conditions." He found that appellant's lumbar and right buttock strains were a temporary aggravation of preexisting conditions of advanced degenerative disease and vacuum disc phenomenon at L5-S1. Dr. Cenac reviewed a functional capacity evaluation and stated that appellant could return to her prior occupation as a modified clerk. He stated that she had no need of further orthopedic evaluation or treatment. Dr. Cenac completed a work capacity evaluation on February 8, 2008 and found appellant could work eight hours a day with limitations on pushing, pulling, lifting, squatting, kneeling and climbing.

In a note dated January 11, 2006, Dr. Brennan found that appellant had tenderness in the right wrist and diagnosed bilateral wrist strain. The Office requested that Dr. Brennan respond to Dr. Cenac's report on February 24, 2006.

Dr. Jorge E. Isaza, a Board-certified orthopedic surgeon, completed notes on October 5, 2005, December 6 and 20, 2005 and diagnosed facet arthropathy and L4-5 and L5-S1 and disc herniation at L5-S1 along with left meniscal tear due to her October 27, 2004 employment injury. On physical examination, Dr. Isaza found decreased reflexes in the lower extremities and appropriate Waddell test. He recommended injections. Dr. Isaza stated that some of appellant's findings were preexisting, but that appellant reported no pain prior to her injury and that therefore her symptoms were due to her employment injury.

On May 2, 2006 Dr. Brennan stated that appellant had tenderness over her wrist and range of motion pain. He stated, "The patient does not want to work." Dr. Brennan supported appellant's need for additional range of motion and strengthening exercises on June 20, 2006.

The Office referred appellant for an impartial medical evaluation with Dr. Gordon P. Nutik, a Board-certified orthopedic surgeon.² In a report dated July 21, 2006, Dr. Nutik reviewed appellant's history of her injuries and performed a physical examination. He noted that appellant had increased range of motion in the neck after testing was complete. Dr. Nutik found decreased sensation in her fingers, weakness on muscle testing, but no atrophy of the upper extremities. He found no spasm of the back muscles and variation in appellant's abilities when she was tested. Dr. Nutik stated that it was difficult to assess appellant's upper extremity and neck function and opined that she should be restricted to sedentary activity in these areas. He opined that appellant's October 27, 2004 injury was consistent with a low back sprain. Dr. Nutik noted that Dr. Isaza diagnosed disc herniation, but requested to review the magnetic resonance imaging scan before rendering an opinion. He again noted that appellant exhibited inconsistencies in her abilities which raised questions about the validity of appellant's subjective complaints. Dr. Nutik recommended that appellant perform sedentary work six hours a day with no repetitive activities or sitting or standing for prolonged periods of time.

Dr. Nutik completed a work restriction evaluation on August 24, 2006. He opined that appellant could work six hours a day standing for one hour, sitting for six hours, reaching for one hour and reaching above the shoulder for two hours. Dr. Nutik indicated that appellant should not twist, bend, stoop or operate a motor vehicle. Appellant could push, pull and lift up to 10 pounds with no squatting, kneeling or climbing. She could perform repetitive movements of the wrists or elbow one hour each with a weight of no more than 10 pounds.

Dr. Brennan completed a note on August 21, 2006 and indicated that appellant should continue her exercises due to chronic left hand pain.

On April 24, 2007 the employing establishment offered appellant a limited-duty position as a modified mail processing clerk. In a letter dated April 26, 2007, the Office informed appellant that the offered position was suitable and allowed her 30 days to accept the position or offer her reasons for refusal. Appellant responded on May 5, 2007 and stated that she had not been released by her physicians and could not yet accept the offered position. In a letter dated June 13, 2007, the Office informed appellant that her reasons for refusing the offered position were not valid. It allowed appellant 15 days to accept the position. By decision dated June 28, 2007, the Office terminated appellant's compensation benefits on the grounds that she refused an

² The statement of accepted facts indicates that appellant's claim files were doubled at this time.

offer of suitable work. It concluded that the weight of the medical evidence rested with the impartial medical examiner, Dr. Nutik, who determined that appellant could work with restrictions six hours a day. The Office found that the position offered by the employing establishment was within these restrictions and that appellant failed to offer a valid reason for refusing the position of modified mail processing clerk.³

LEGAL PRECEDENT

Once the wage-earning capacity of an injured employee is properly determined, it remains undisturbed regardless of actual earnings or lack of earnings.⁴ A modification of such a 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. The burden is on the Office to establish that there has been a change so as to affect the employee's capacity to earn wages in the job determined to represent her earning capacity. Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn and not on actual wages lost.⁵

In addition, Chapter 2.814.11 of the Office 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. Office 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 the Office 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.⁶

ANALYSIS

In the present case, the Office terminated appellant's compensation benefits effective June 28, 2007 in a decision of that date, on the grounds that she refused an offer of suitable work. Section 8106(c) of the Act provides in pertinent part, "A partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation."⁷ Prior to terminating appellant's compensation on June 28, 2007, the Office issued a formal loss of wage-earning capacity decision on February 14, 2005, in which it reduced appellant's

³ Following appellant's July 26, 2007 appeal to the Board, the Branch of Hearings and Review issued a decision dated January 22, 2008 regarding the termination of appellant's compensation benefits. As this decision was issued after appellant filed her appeal with the Board on July 26, 2007, it is null and void. *See Douglas E. Billings*, 41 ECAB 880 (1990); *Oren E. Beck*, 33 ECAB 1551 (1982).

⁴ *Sharon C. Clement*, 55 ECAB 552, 555 (2004).

⁵ *Id.*

⁶ *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11 (July 1997).

⁷ 5 U.S.C. § 8106(c).

compensation benefits to reflect her earnings as a modified mail processor which it found fairly and reasonably represented appellant's wage-earning capacity. However, it did not follow the applicable case law and procedures regarding appellant's wage-earning capacity prior to terminating her compensation. The Office did not address its prior formal loss of wage-earning capacity decision or otherwise formally modify this loss of wage-earning capacity decision which was in place at the time that it made its suitable work determination on June 28, 2007. Board precedent establishes that a formal loss of wage-earning capacity decision remains undisturbed unless appropriately modified. As the Office has not appropriately modified appellant's formal loss of wage-earning capacity decision, the suitable work termination is not appropriate.⁸

CONCLUSION

The Board finds that the Office improperly terminated appellant's wage-loss compensation on the grounds that she refused suitable work.

ORDER

IT IS HEREBY ORDERED THAT June 28, 2007 decision of the Office of Workers' Compensation Programs is reversed.

Issued: April 14, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

⁸ *Sharon C. Clement, supra* note 4.