

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

L.B., Appellant

and

**SOCIAL SECURITY ADMINISTRATION,
Baltimore, MD, Employer**

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**Docket No. 07-1810
Issued: January 26, 2009**

Appearances:
Joe E. Segall, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 28, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' June 1, 2007 decision that denied modification of a loss of wage-earning capacity determination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether the Office properly denied modification of appellant's loss of wage-earning capacity determination.

FACTUAL HISTORY

On October 21, 1991 appellant, then a 38-year-old computer operator/voucher examiner, filed an occupational disease claim alleging that she developed sinusitis and bronchitis from breathing airborne dust at work. The Office accepted appellant's claim for aggravation of chronic bronchitis. Appellant missed work intermittently and received appropriate compensation

benefits.¹ Appellant retired on February 1, 1995 but elected benefits under the Federal Employees' Compensation Act.

Appellant was initially treated for a variety of ear, nose and throat symptoms. A computerized tomography scan and a magnetic resonance imaging (MRI) scan of her sinuses revealed no paranasal sinus disease. Her symptoms were noted to improve when she was removed from the work environment. In an April 19, 2000 report, Dr. Melissa McDiarmid, Board-certified in occupational medicine and an attending physician, advised that appellant was permanently unable to return to work at the employing establishment but could be retrained for work in an irritant-free and mold-free environment such as home-based work.

On January 8, 2003 appellant was referred for vocational rehabilitation. In a March 10, 2003 rehabilitation plan, the rehabilitation counselor recommended a 90-day job placement plan and noted that Dr. McDiarmid had restricted appellant to working from home. The counselor advised that the employing establishment was unable to accommodate appellant's restrictions. Based on Dr. McDiarmid's restrictions, the following positions would be suitable: transcriber/typist with an annual salary \$19,760.00 and a telephone solicitor with an annual salary of \$18,720.00 per year.

In a June 3, 2003 closure report, the rehabilitation counselor advised that an updated labor market survey revealed the market was favorable for a transcriber/typist and that positions were readily available in sufficient numbers both full and part time in appellant's commuting area and could be performed at home. The counselor provided a job description for the position of a transcriber/typist and a job classification. The average weekly wage of a transcriber/typist, Department of Labor, *Dictionary of Occupational Titles* No. 203.582.058, was \$380.00. The rehabilitation counselor reported that the position of transcriber/typist matched appellant's qualifications and medical restrictions provided by Dr. McDiarmid and could be performed at home.

In a June 10, 2003 report, Dr. McDiarmid diagnosed chronic rhinosinusitis with a lower respiratory component. In a work capacity evaluation form, she noted that appellant was permanently unable to return to work at the employing establishment but could work full time in a clean, irritant and mold-free environment such as home-based employment where she was typing or transcribing.

On March 4, 2004 the Office issued a notice of proposed reduction of compensation on the grounds that the evidence established that appellant was partially disabled and had the capacity to earn wages as a transcriber/typist at the rate of \$380.00 per week. It found that this position was in compliance with Dr. McDiarmid's restrictions and that the rehabilitation counselor determined that the position was reasonably available within appellant's commuting area.

¹ On February 28, 2005 appellant requested that a subpoena be issued for Dr. McDiarmid to attend the hearing. On August 10, 2005 the Office denied the request finding that appellant had not sufficiently explained why a subpoena was necessary to obtain evidence from Dr. McDiarmid.

In a letter dated April 1, 2004, appellant contended that she was only able to work in an irritant and mold-free environment but could find no such work. She indicated that she could not perform transcription work.

By decision dated April 15, 2004, the Office adjusted appellant's compensation benefits, effective April 18, 2004, to reflect her wage-earning capacity as a transcriber/typist.

On May 11, 2004 appellant requested an oral hearing which was held on September 28, 2005.² In reports dated June 5, 1998 to June 10, 2003, Dr. McDiarmid recommended that appellant attempt a trial of performing transcription work for the employing establishment in a home setting; however, the Office never pursued this option. She noted that the vocational rehabilitation program failed to find an office setting where appellant could remain healthy and work. On June 9, 2004 Dr. McDiarmid diagnosed chronic rhinosinusitis and noted that appellant's condition had not resolved. She advised that appellant was permanently unable to work at the employing establishment but reiterated that she could work in a home-based position. On September 27, 2005 Dr. McDiarmid noted that appellant's status was unchanged and diagnosed rhinosinusitis with a history of chronic bronchitis developed as a result of working at the employing establishment. On December 6, 2005 she diagnosed chronic rhinosinusitis and reiterated that appellant could work as a typist at home.

The employing establishment submitted a January 1, 2006 report from Dr. Christopher S. Holland, Board-certified in occupational medicine and an employing establishment physician, who reviewed appellant's medical records and noted that the employing establishment investigated the work environment and found the air quality to be acceptable. He diagnosed nonallergic rhinitis with symptoms triggered by a host of environmental pollutants as well as strong odors, alcoholic beverages and the cold. Dr. Holland concluded that appellant could work and earn wages at home or outside the home.

On January 27, 2006 the hearing representative affirmed the April 15, 2004 decision.

On January 12, 2007 appellant requested reconsideration. She submitted a December 13, 1994 report from Dr. Rebecca Bascom, a Board-certified pulmonologist, who reviewed appellant's history and diagnosed upper respiratory mucous membrane irritation related rhinitis caused by the workplace and preexisting rhinitis exacerbated by the work environment. Dr. Bascom noted that appellant's symptoms were exacerbated when she worked at the employing establishment and her symptoms decreased when she was away from work. She advised that appellant could work at full capacity in an environment which was reasonably free of exposure to dust and irritants and recommended home-based work. Dr. Bascom noted that there was a moderate concentration of mold colonies at the employing establishment; however, she could not definitively link the mold to appellant's symptoms. On June 8, 2006 Dr. McDiarmid reiterated that appellant could not return to work at the employing establishment but could work at home. On January 4, 2007 she disputed the findings of the Office and noted that appellant could attempt to work as a transcriber in an irritant-free environment such as her

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home but there was no guarantee that even home-based work would work for her. Appellant submitted a job description for a voucher examiner and an excerpt from a book on allergies.

The employing establishment submitted a January 7, 2007 report from the vocational rehabilitation counselor who noted participating in job placement efforts for appellant. The rehabilitation counselor stated that employers were willing to consider appellant for home-based jobs but that, when she followed up with interested employers, she conveyed skepticism about her ability to work.³

In a June 1, 2007 decision, the Office denied modification of the January 27, 2006 decision.

LEGAL PRECEDENT

Once the loss of wage-earning capacity 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.⁴ The burden of proof is on the party attempting to show modification of the award.⁵

ANALYSIS

The Office found that appellant could perform the duties of a transcriber/typist. The issue is whether there had been any change in her condition that would render her unable to perform those duties.⁶ For a physician's opinion to be relevant on this issue, the physician must address the duties of the constructed position.⁷ However, the medical evidence submitted by appellant following the loss of wage-earning capacity determination does not sufficiently explain why the constructed position of transcriber/typist performing work at home does not conform to appellant's medical limitations.

The December 13, 1994 report from Dr. Bascom predates the reduction of her compensation on April 18, 2004. Dr. Bascom indicated that appellant could work full capacity in an environment which was reasonably free of exposure to dust and irritants such as home-based work. This report does not establish that appellant's condition changed or that she was precluded from performing work while at home.

On January 4, 2007 Dr. McDiarmid noted that potential positions would have to be home-based work and there was no guarantee even home-based work would be successful. However, she did not provide any medical rationale explaining how any of appellant's injury-

³ The employing establishment also submitted environmental reports from 1993 and 1994.

⁴ *George W. Coleman*, 38 ECAB 782, 788 (1987); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

⁵ *James D. Champlain*, 44 ECAB 438 (1986); *Jack E. Rohrabough*, 38 ECAB 186, 190 (1986).

⁶ *Phillip S. Deering*, 47 ECAB 692 (1996).

⁷ *Id.*

related conditions would disable appellant from a position of a home-based transcriber/typist.⁸ Dr. McDiarmid did not note any change in appellant's accepted conditions that would render her unable to perform the duties of a transcriber/typist or explain why such work in the constructed position did not conform with her restrictions of the employment being in a clean, irritant-free and mold-free environment based at home. The other reports of Dr. McDiarmid did not indicate that appellant was unable to perform the duties of the selected position. Therefore, these reports are insufficient to support a modification of appellant's wage-earning capacity.

The Board finds that the medical evidence does not establish a change in appellant's employment-related condition such that a modification of the Office's wage-earning capacity determination is warranted. Appellant did not establish a basis for modification by submitting evidence establishing that she had been retrained or otherwise vocationally rehabilitated or that the original determination was, in fact, erroneous. Consequently, she did not meet a basis for modification of the wage-earning capacity determination.

CONCLUSION

The Board finds that appellant did not establish a basis for modification of the Office's wage-earning capacity determination.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated June 1, 2007 is affirmed.

Issued: January 26, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

⁸ See *Franklin D. Haislah*, 52 ECAB 457 (2001); *Jimmie H. Duckett*, 52 ECAB 332 (2001); (medical reports not containing rationale on causal relationship are entitled to little probative value).