



On April 10, 2006 Dr. David J. Clymer, a treating physician released appellant to return to work full time with restrictions, including lifting a maximum of 40 pounds, reaching a maximum of four hours and lifting above the shoulder a maximum of two hours. Appellant returned to work on June 12, 2006 based Dr. Clymer's restrictions.

By decision dated September 14, 2006, OWCP determined that the modified packer/warehouseman position fairly and reasonably represented appellant's wage-earning capacity with no wage loss.

On September 14, 2010 appellant filed a notice of recurrence of disability as a result of material worsening of the accepted medical conditions. In support of her claim, she submitted September 14 and October 23, 2010 duty status reports from her treating physician, Dr. Sushmita Veloor, a Board-certified physiatrist, who recommended modifying appellant's restrictions to include lifting, pulling and pushing a maximum of 10 pounds a day and reaching above the shoulder a maximum of one hour a day. Dr. Veloor also indicated that appellant should take a 10-minute break every hour to lie down.

In a letter dated October 29, 2010, OWCP informed appellant that it would consider her recurrence claim a request to modify the September 14, 2006 LWEC decision and advise her of the acceptable reasons for requesting modification of a LWEC decision, namely that the original LWEC decision was erroneous, she had been retrained or otherwise vocationally rehabilitated or she had sustained a material change in the nature and extent of the injury-related accepted medical condition.

In a letter dated August 3, 2010, appellant's representative asked Dr. Veloor if he believed that his diagnosis of cervicothoracic myofascial pain syndrome was a component of the direct treatment for appellant's accepted condition of aggravation of sprain/strain of the neck and thoracic regions. On August 4, 2010 Dr. Veloor indicated his agreement by placing a checkmark next to the statement.

By decision dated December 7, 2010, OWCP denied modification of the September 14, 2006 LWEC decision, finding that none of the criteria for modification had been met.

In a December 17, 2010 duty status report, Dr. Veloor reiterated his revised restrictions. The record contains reports of follow-up examinations from him. On February 9, 2011 Dr. Veloor reiterated his diagnosis of cervicothoracic myofascial pain syndrome and noted that appellant had a lot of trigger points along the upper trapezius muscles, semispinalis capitis and intrascapular region.

On July 14, 2011 OWCP referred appellant, together with a statement of accepted facts and the medical record, to Dr. Joseph Huston, a Board-certified orthopedic surgeon, for a second-opinion examination. It asked Dr. Huston to address specific questions, including whether appellant required ongoing medical treatment for a diagnosis caused or aggravated by work-related activities. Dr. Huston was asked whether appellant had residuals resulting from the accepted 2003 injury and, if so, to describe those residuals and provide rationale for his opinion. Finally, he was asked for a rationalized opinion as to whether the accepted aggravation of her cervical and thoracic spinal condition was temporary or permanent. OWCP authorized

Dr. Huston to perform any testing he deemed to be necessary in order to render a rationalized opinion.

In a report dated August 2, 2011, Dr. Huston provided a history of injury and examination findings. He noted that appellant limited the overhead reaching of her shoulders with complaint of stiffness and soreness in the upper back areas. Examination of appellant's neck produced complaints of tenderness in all areas, including over the spine and over right and left paravertebral muscles. She complained of tenderness in both shoulders, in the trapezius areas and in the interscapular regions bilaterally. Cervical flexion was 35 degrees (normal 50 degrees); extension was 50 degrees (normal 60 degrees); lateral tilts bilaterally were 40 degrees (normal 5 degrees); and bilateral rotations were 65 degrees (normal 80 degrees). Dr. Huston stated that appellant had chronic and generalized complaints of soreness and stiffness in her neck, upper back and scapular regions. He diagnosed chronic myofascial pain syndrome in the cervical and thoracic regions. Dr. Huston opined that the diagnosed condition preexisted appellant's employment injury, but was "no doubt aggravated by the repetitive lifting activities that she did at work." He stated that her history of complaints suggest that there was some permanent aggravation. Dr. Huston noted, however, that "there was no concrete evidence to be sure of that including testing with MRI [scans] and nerve testing."

On December 2, 2011 appellant, through counsel, requested reconsideration.

In a February 28, 2011 report, Dr. Veloor stated that appellant had developed chronic neck and thoracic pain as a result of repetitious overhead lifting in her job as a packer and warehouseman. He opined that she was unable to work more than four hours a day and that she could lift no more than five pounds. Additional restrictions included pushing and pulling a maximum of 10 pounds and no reaching above shoulder level. Appellant was also required to take a 10-minute break every hour to lie down.

In a narrative statement dated October 28, 2011, Dr. Veloor indicated that appellant continued to have problems with chronic neck and upper back pain secondary to accepted cervical and thoracic strain. He opined that her work limitations were in relation to her accepted injury.

By decision dated January 26, 2012, OWCP denied modification of the prior decision, as the evidence failed to establish that appellant sustained a material worsening of her accepted work-related condition.

### **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.<sup>2</sup> Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.<sup>3</sup>

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<sup>2</sup> See 5 U.S.C. § 8115 (determination of wage-earning capacity).

<sup>3</sup> *Sharon C. Clement*, 55 ECAB 552 (2004).

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.<sup>4</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>5</sup>

The Board has held that OWCP may accept a limited period of disability without modifying a standing wage-earning capacity determination. This occurs when there is a demonstrated temporary worsening of a medical condition of insufficient duration and severity to warrant modification of a wage-earning capacity determination. This narrow exception is only applicable for brief periods of medical disability.<sup>6</sup>

### ANALYSIS

The Board finds that this case is not in posture for a decision as to whether appellant has established that OWCP's September 14, 2006 loss of wage-earning capacity (LWEC) determination should be modified.

OWCP accepted that appellant sustained an aggravation of cervical and thoracic sprains/strains bilaterally. On September 14, 2006 it found that her actual wages as a modified packer/warehouseman fairly and reasonably represented her wage-earning capacity. On September 14, 2010 appellant filed a notice of recurrence of disability, alleging that her accepted condition had worsened to the degree that she could no longer perform the duties of her current job. OWCP properly interpreted her notice as a request to modify the original September 14, 2006 LWEC determination. Appellant did not contend, and the evidence does not reflect, that the original wage-earning capacity determination was in error or that she was retrained or otherwise vocationally rehabilitated. The relevant issue, consequently, is whether the medical evidence establishes a material change in the nature and extent of the injury-related condition.

Reports from appellant's treating physician support appellant's claim of a material worsening in her accepted condition. On August 4, 2010 Dr. Veloor diagnosed cervicothoracic myofascial pain syndrome and indicated that the condition was a component of the direct treatment for appellant's accepted condition of aggravation of sprain/strain of the neck and thoracic regions. In his September 14 and October 23, 2010 duty status reports, he recommended modifying her restrictions to include lifting, pulling and pushing a maximum of 10 pounds a day and reaching above the shoulder a maximum of one hour a day. Dr. Veloor also indicated that appellant should take a 10-minute break every hour to lie down. Appellant argues that these increased restrictions precluded her from performing the duties of her packer/warehouseman position. On February 28, 2011 Dr. Veloor increased her restrictions. He opined that appellant was unable to work more than four hours a day, that she could lift no more than 5 pounds, push and pull no more than 10 pounds and not reach at all above shoulder level. Appellant was also required to take a 10-minute break every hour to lie down. On October 28, 2011 Dr. Veloor opined that her work limitations resulting from chronic neck and upper back

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<sup>4</sup> *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Tamra McCauley*, 51 ECAB 375, 377 (2000).

<sup>5</sup> *Id.*

<sup>6</sup> *K.R.*, Docket No. 09-415 (issued February 24, 2010).

pain were secondary to her accepted injury. Although none of his reports is completely rationalized, they are consistent in supporting his claim of a material worsening in appellant's accepted condition, rendering her unable to perform the position on which the original LWEC determination was based.

OWCP referred appellant to Dr. Huston to address whether she had residuals resulting from the accepted 2003 injury and, if so, to describe those residuals and provide rationale for his opinion. Dr. Huston was also asked for a rationalized opinion as to whether the accepted aggravation of appellant's cervical and thoracic spinal conditions was temporary or permanent. He, however, failed to offer clear answers to OWCP's questions within the framework of the statement of accepted facts. Dr. Huston diagnosed chronic myofascial pain syndrome in the cervical and thoracic regions, stating that the diagnosed condition preexisted appellant's employment injury, but was "no doubt aggravated by the repetitive lifting activities that she did at work." He did not explain, however, how the accepted aggravation of cervical and thoracic strain was causally related to the condition he diagnosed, namely, chronic myofascial pain syndrome and whether her current condition represented a worsening of the accepted condition. Without such an explanation, Dr. Huston's opinion is of limited probative value. Regarding OWCP's query as to whether the accepted aggravation was temporary or permanent, he suggested that there might be some permanent aggravation. Dr. Huston's opinion is vague and speculative and therefore is of diminished probative value. He indicated that he was unable to render a definitive opinion because there was no concrete evidence of record, such as magnetic resonance imaging (MRI) scan and nerve testing of record. The Board notes that Dr. Huston was authorized to perform any testing he deemed to be necessary in order to render a rationalized opinion. Dr. Huston's failure to do so diminishes the probative value of his report.

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter.<sup>7</sup> While appellant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done.<sup>8</sup> Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.<sup>9</sup> As it undertook development of the medical

evidence by referring appellant to Dr. Huston, it had an obligation to secure an opinion adequately addressing the relevant issues.<sup>10</sup> For this reason, the Board finds that the case is not in posture for decision as to whether OWCP's September 14, 2006 LWEC decision should be modified as a supplemental opinion is required from Dr. Huston. The case will be remanded to OWCP for a supplemental report from the second opinion physician. If Dr. Huston is unwilling

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<sup>7</sup> *Vanessa Young*, 55 ECAB 575 (2004).

<sup>8</sup> *Richard E. Simpson*, 55 ECAB 490 (2004).

<sup>9</sup> *Melvin James*, 55 ECAB 406 (2004).

<sup>10</sup> *Peter C. Belkind*, 56 ECAB 580 (2005). *See also Id.* (Once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner). *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.9(j) (September 2010) (OWCP has a duty to seek clarification from a second opinion physician where the second opinion physician does not address the specified medical issues). *See also Mae Z. Hackett*, 34 ECAB 1421 (1983) wherein the Board has held that, once OWCP begins to develop the medical evidence, it has the responsibility to obtain an evaluation which will resolve the issue involved in the case.

or unable to clarify or elaborate on his opinion, the case should be referred to another appropriate specialist. After such further development as OWCP deems necessary, an appropriate decision should be issued regarding this matter.

**CONCLUSION**

The Board finds that the case is not in posture for decision as to whether OWCP's September 14, 2006 LWEC decision should be modified as further development is needed.

**ORDER**

**IT IS HEREBY ORDERED THAT** the Office of Workers' Compensation Programs' decision dated January 26, 2012 is set aside and remanded for action consistent with this decision.

Issued: February 20, 2013  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

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