

)	
S.B., Appellant)	
)	
and)	Docket No. 12-1255
)	Issued: May 7, 2013
PEACE CORPS, PEACE CORPS VOLUNTEER)	
SERVICE, Washington, DC, Employer)	
)	

Case Submitted on the Record

DECISION AND ORDER

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

On May 18, 2012 appellant, through her attorney, filed an appeal from a November 22, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

The issue is whether appellant met her burden of proof to establish that a January 6, 2009 wage-earning capacity decision should be modified.

On appeal, appellant's attorney asserted that the burden of proof rested with OWCP. Counsel asserted that appellant's condition had materially changed and that the January 6, 2009 wage-earning capacity decision was in error because the selected position of coordinator, volunteer services, was based on stale medical evidence and that her age and the position's reasonable availability were not properly considered.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

OWCP accepted that appellant, who was born on May 22, 1950 and a Peace Corps volunteer from February 1989 through December 1990, sustained permanent aggravation of her preexisting spondylolisthesis, malaria and a broken tooth while performing volunteer service in the Solomon Islands. She has not worked since April 1991 and was placed on the periodic compensation rolls. On April 13, 1992 appellant underwent a posterior fusion at L5-S1 and had surgical removal of hardware and scar revision on October 6, 1993. She accompanied her husband to jobs in the South Pacific and, after her return to the United States, was referred for vocational rehabilitation in Rochester, New York, in September 1996. In July 1997, appellant accepted a position in Belize. She submitted medical reports and remained on the periodic compensation rolls. Appellant was referred for vocational rehabilitation in March 2006, in New York state. She relocated to Asheville, North Carolina, in May 2006.

In a July 5, 2006 report, Dr. Harold J. Pikus, a Board-certified neurosurgeon, noted the history of injury and appellant's complaint of worsening back and buttock pain. He provided examination findings and recommended a magnetic resonance imaging (MRI) scan of the lumbar spine. A July 12, 2006 lumbar MRI scan demonstrated status post L5-S1 fusion with mild narrowing at L5 and mild spinal canal stenosis at L3-4 and L4-5. In a July 24, 2006 report, Dr. Margaret O. Burke, a Board-certified physiatrist, reviewed the history of injury, the MRI scan study and provided physical examination findings. She diagnosed low back and right more than left sacroiliac pain, status post L5-S1 fusion. Dr. Burke provided a lift for appellant's left shoe to help with her discomfort. She recommended physical and aquatic therapy. On a work capacity evaluation, dated August 24, 2006, Dr. Burke advised that appellant could not work, stating that she had not worked in 16 years, had pain and was in treatment. She indicated that appellant could possibly return to work within four to six months as her rehabilitation progressed and provided a follow-up report on October 3, 2006.

In October 2006, OWCP referred appellant to Dr. Michael J. Goebel, a Board-certified orthopedic surgeon, for a second-opinion evaluation. In a November 7, 2006 report, Dr. Goebel noted the history of injury and his review of the medical record, including a statement of accepted facts and set of questions and the July 2006 MRI scan study. He provided physical examination findings and diagnosed status post L5-S1 fusion, solid; an L3-4, L4-5 degenerative disc disease, mild and advised that the employment injury aggravated underlying spondylolisthesis that still caused pain. Dr. Goebel recommended a shoe lift on the left and advised that appellant could perform light-duty work for eight hours a day, with a lifting restriction of 10 pounds, with occasional bending, stooping and twisting, pushing, pulling and lifting and 10- to 15-minute breaks every two to four hours. On December 21, 2006 OWCP forwarded Dr. Goebel's report to Dr. Burke for comment.

In reports dated May 15, 2007, Dr. Burke noted additional complaints of left knee and gastrointestinal problems and that appellant's back would go in and out. She diagnosed multiple arthralgias and sacroiliac pain and recommended physical therapy. Dr. Burke advised that appellant was capable of performing light duty, lifting 10 pounds occasionally and limiting bending and stopping, with 10-minute breaks every two to four hours. In a July 16, 2007 follow-up report, she noted complaints of increasing pain.

On December 12, 2007 Georgiana A. Farmer, an OWCP rehabilitation specialist, referred appellant to Tamara Hite, a rehabilitation counselor, for vocational rehabilitation services. On February 13, 2008 Ms. Hite signed an individual rehabilitation placement plan. In a February 25, 2008 report, Dr. Burke noted appellant's complaint of worsening back pain. She provided examination findings and diagnosed chronic myofascial and joint pain. Dr. Burke denied appellant's request to release her from jury duty and stated, "I think [appellant] needs to make a good faith effort to return to light to sedentary employment. I do n[o]t think this would be harmful to her in any way."

Ms. Farmer and Ms. Hite each noted appellant's education and training, including a Bachelor of Science in social work. Ms. Hite identified the positions of information clerk and coordinator of volunteer services, finding that they were within the sedentary strength category, within appellant's work restrictions and educational qualifications and reasonably available in the local labor market. In a March 3, 2008 report, she advised that she had made contact with Anthony Ward, an employment counselor with the State of North Carolina, who advised that the positions of a caseworker, eligibility specialist and volunteer coordinator were reasonably available in the local labor market, at a salary range between \$18,000.00 and \$20,000.00 a year.

In a June 9, 2008 report, Dr. Burke indicated that appellant felt she could not work. She provided physical examination findings and referred appellant for electrodiagnostic testing. Appellant reported that she would be traveling outside the country in August 2008.

A conference was held on July 8, 2008 with an OWCP claims examiner, Ms. Hite and appellant participating. An overview of appellant's rehabilitation process was discussed. An August 19, 2008 electrodiagnostic study was interpreted by Dr. Michael H. Young, a Board-certified neurologist, as essentially normal except for minimally prolonged right peroneal and posterior tibial distal latencies which could indicate very early peripheral neuropathy. He found no evidence of significant nerve damage.

Ms. Hite reported that she contacted Mr. Ward again in September 2008 and that he reported that jobs in human services and tourism, such as case aide, customer service representative and information clerk, were still reasonably available but that openings had decreased and that most jobs were very competitive. She noted that appellant had several employment barriers including that she had been out of the job market for 18 years; she lacked recent work skills and needed to alternate sitting and standing. Vocational rehabilitation services for appellant were closed on October 6, 2008.

OWCP secured updated pay rate information from the employing establishment. By letter dated November 7, 2008, it proposed to reduce appellant's compensation benefits based on her

capacity to earn wages as a coordinator, volunteer services.² OWCP advised appellant that, if she disagreed with the proposed reduction, she should submit additional evidence or argument within 30 days. On November 29, 2008 appellant disagreed with the proposed reduction in compensation, asserting that the medical evidence did not support that she could return to full-time work and that job market information of record did not indicate reasonable availability of the selected position.

In a January 6, 2009 decision, OWCP reduced appellant's wage-loss benefits, based on her capacity to earn wages as coordinator of volunteer services. It applied the principles identified in the *Shadrick* decision,³ finding a new wage-earning capacity of 55 percent and reduced appellant's compensation, accordingly, effective January 18, 2009. OWCP found that the physical requirements did not exceed the limitations recommended by Dr. Burke, an attending physician.

On February 2, 2009 appellant requested a hearing and submitted a list of jobs researched during April to September 2008. In a January 21, 2009 report, Dr. Burke advised that it was reasonable for appellant to do sedentary work with no heavy lifting and the ability to move from sit to stand on an ad-lib basis. She indicated that appellant "would have a better chance of obtaining employment" if she were to start on a part-time basis, gradually increasing her work hours over a four-week period. In a February 20, 2009 report, Dr. Burke indicated that she had not seen appellant since June 2008. She advised that the electrodiagnostic studies showed no significant evidence of neuropathy and noted that appellant requested that the physician limit her to part-time work. Dr. Burke noted that appellant had recently sprained her ankle. She provided physical examination findings and diagnosed chronic back pain and stated that she told appellant that she could not document an objective reason why she could not work full time.

At the June 5, 2009 hearing appellant testified that jobs were not available in her area and that her physician advised her to begin work on a part-time basis with restrictions. She stated that she had not worked for about 20 years and did not have the experience or skills required for the position. Appellant stated that she had applied for many jobs and that physically she had days when she could not function and could only work part time. Her husband testified that the selected position was not available locally and that she was not physically or vocationally able to do the job.

By decision dated August 17, 2009, an OWCP hearing representative affirmed the January 6, 2009 decision.

² The *Dictionary of Occupational Titles* job description for coordinator, volunteer services is as follows: Coordinates student and community volunteer services program in organizations engaged in public, social and welfare activities: Consults administrators and staff to determine organization needs for various volunteer services and plans for volunteer recruitment. Interviews, screens and refers applicants to appropriate units. Orients and trains volunteers prior to assignment in specific units. Arranges for on-the-job and other required training and supervision and evaluation of volunteers. Resolves personnel problems. Serves as liaison between administration, staff and volunteers. Prepares and maintains procedural and training manuals. Speaks to community groups, explaining organization activities and role of volunteer program. Publishes agency newsletter and prepares news items for other news media. Maintains personnel records. Prepares statistical reports on extent, nature and value of volunteer service. Strength: sedentary. *Dictionary Of Occupational Titles* (4th ed. revised, 1991).

³ *Albert C. Shadrick*, 5 ECAB 376 (1953); 20 C.F.R. § 10.403(d).

On June 15, 2010 appellant, through her attorney, requested reconsideration. He asserted that the January 6, 2009 wage-earning capacity determination was in error. In reports dated November 5, 2009, Dr. Burke noted appellant's complaints of pain and stiffness. She provided physical examination findings, diagnosed chronic, recurrent, right sacroiliac pain and advised that appellant could perform sedentary work four hours a day on a permanent basis. On May 25, 2010 Dr. Burke additionally diagnosed depression and reiterated that appellant had chronic back pain and could perform sedentary work on a part-time basis.

In a decision dated September 7, 2010, OWCP denied appellant's reconsideration request. Appellant filed an appeal with the Board. By order dated September 28, 2011, the Board found that OWCP should have adjudicated her reconsideration request as a request for modification of the wage-earning capacity decision. The Board remanded the case to OWCP for proper adjudication, to be followed by an appropriate merit decision to preserve appellant's appeal rights.⁴

By decision dated November 22, 2011, OWCP found that appellant did not establish that the January 6, 2009 wage-earning capacity determination should be modified.⁵

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. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.⁶ OWCP's procedure manual provides that, "[i]f a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In this instance the [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity."⁷ 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.⁸ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁹

In addition, Chapter 2.814.11 of OWCP's procedure manual contains provisions regarding the modification of a formal loss of wage-earning capacity. The relevant part provides that a

⁴ Docket No. 11-460 (issued September 28, 2011).

⁵ Appellant submitted no other evidence subsequent to the June 15, 2010 reconsideration request.

⁶ *Katherine T. Kreger*, 55 ECAB 633 (2004).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

⁸ *Stanley B. Plotkin*, 51 ECAB 700 (2000).

⁹ *Id.*

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. OWCP's 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 OWCP 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.¹⁰ It is not precluded from adjudicating a limited period of employment-related disability when a formal wage-earning capacity determination has been issued.¹¹

ANALYSIS

The burden for modifying a wage-earning capacity is on the party attempting to show modification of the wage-earning capacity determination.¹² This includes the production of evidence in support of modification.¹³

The Board finds that appellant has not met her burden to modify the January 6, 2009 wage-earning capacity determination. In determining an employee's wage-earning capacity based on a position deemed suitable but not actually held, OWCP must determine whether the position is vocationally suitable, taking into account the employee's education, age and prior experience.¹⁴ Because a rehabilitation specialist is an expert in the field of vocational rehabilitation, OWCP may rely on his or her opinion as to whether a job was reasonably available.¹⁵ In the case at hand, both Ms. Farmer and Ms. Hite referenced appellant's age and qualifications. While Ms. Hite found that appellant's time out of the job market would be a challenge, she indicated that she planned to utilize assisted reemployment. The labor market analysis supported that the position of coordinator, volunteer services, was reasonably available. Ms. Hite contacted Mr. Ward, an employment counselor with the State of North Carolina, in March 2008. They discussed several positions, including coordinator, volunteer services. Mr. Ward advised Ms. Hite that positions in social services organizations were reasonably available at an annual salary of \$18,000.00 to \$20,000.00. Ms. Hite again contacted Mr. Ward in September 2008 to reverify that the jobs were still reasonably available, which he confirmed. The record therefore supports that appellant's age and the positions' reasonable availability were properly considered.

With regard to appellant's medical condition, the report of an OWCP referral physician, Dr. Goebel, was more than two years old at the time of the January 6, 2009 decision. Appellant's attending physiatrist, Dr. Burke, advised on May 15, 2007 that appellant could perform light-duty work. On February 25, 2008 she advised that appellant needed to make a good faith effort to return to light to sedentary employment. Dr. Burke also indicated on January 21, 2009 that it was

¹⁰ See Federal (FECA) Procedure Manual, *supra* note 7 at Chapter 2.814.11 (October 2009).

¹¹ *Sandra D. Pruitt*, 57 ECAB 126 (2005).

¹² *Stanley B. Plotkin*, *supra* note 8.

¹³ *Id.*

¹⁴ 20 C.F.R. § 10.403.

¹⁵ See Federal (FECA) Procedure Manual, *supra* note 7 at Chapter 2.814.8.b(2) (October 2009).

reasonable for appellant to do sedentary work. On February 20, 2009 she reported that appellant could not document any objective reason she could not work full time. In reports dated November 5, 2009 and May 25, 2010, Dr. Burke noted that appellant could only perform sedentary duties on a part-time basis but did not adequately explain how her condition had worsened such that full-time work was no longer acceptable. Appellant therefore did not meet her burden to modify the January 6, 2009 wage-earning capacity determination on the grounds that her injury-related condition had materially changed.¹⁶

Appellant may request modification of the wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to modify the January 6, 2009 wage-earning capacity decision.

ORDER

IT IS HEREBY ORDERED THAT the November 22, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 7, 2013
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

¹⁶ *Supra* note 10.