

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THEALONIA PAYTEN and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Brecksville, OH

*Docket No. 99-286; Submitted on the Record;
Issued October 19, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly modified its determination of appellant's loss of wage-earning capacity.

On May 17, 1981 appellant, then a 41-year-old food service worker, filed a claim for a traumatic injury occurring on that date in the performance of duty. The Office accepted her claim for lumbar myofascitis, chronic pain syndrome and depression. Appellant sustained intermittent periods of total disability until March 1985, when she stopped work and did not return.

In a report dated October 5, 1992, Dr. Moses Leeb, a Board-certified orthopedic surgeon, to whom the Office referred appellant for an impartial medical examination, found that she could work for 4 hours per day with restrictions on lifting up to 20 pounds. Dr. Leeb further found that appellant could perform continuous sitting, intermittent walking, standing, lifting, bending and squatting and no climbing, kneeling or twisting.

In a decision dated January 24, 1994, the Office reduced appellant's compensation effective March 6, 1994 on the grounds that she had the capacity to perform the position of cashier for four hours per day.

In a report dated April 10, 1995, Dr. Sheldon Kaffen, a Board-certified orthopedic surgeon and Office referral physician, noted that medical records indicated an increase in appellant's low back symptoms following a May 1993 motor vehicle accident. Dr. Kaffen stated, "On the basis of the work related, low back injury alone, it is my opinion that [appellant] could work at least six hours daily." He further opined that appellant could work for eight hours per day as a cashier/checker.

In a report dated April 14, 1995, Dr. Jonathan E. Dunn, a Board-certified psychiatrist, found that appellant did not have major depression or a pain disorder with associated

psychological factors but “did meet criteria for a pain disorder associated with a general medical condition, in this case, low back pain.” Dr. Dunn further noted that appellant had cognitive difficulties of an unknown etiology. In an accompanying work restriction evaluation, he indicated that appellant’s difficulty concentrating might be due to medication which she took for her low back pain.

In a supplemental report dated August 11, 1995, Dr. Dunn found that appellant had no psychiatric diagnosis. He indicated that he could not comment on whether appellant had chronic pain syndrome as he was not familiar with the definition of the syndrome. Dr. Dunn stated:

“There is no question in my mind that [appellant] does continue to experience some pain and discomfort that is associated with her condition of lumbar myofascitis and, as such, she meets the criteria for pain disorder associated with a general medical condition.”

By decision dated March 22, 1996, the Office modified its loss of wage-earning capacity determination effective March 31, 1996 based on its finding that appellant had the capacity to perform the position of cashier II for eight hours per day.

By decision dated March 22, 1996, the Office terminated appellant’s medical benefits on the grounds that she had no further residuals of her employment-related emotional condition.

The Office subsequently noted that it had received a report dated March 16, 1996 from appellant’s attending physician, Dr. Lonnie Marsh, an internist, prior to rendering its March 22, 1996 decisions. Dr. Marsh diagnosed chronic depression and low back pain and found appellant unable to work as a cashier. In decisions dated March 27, 1996, the Office found that his opinion was insufficient to change either its modification of the prior wage-earning capacity determination or its termination of medical benefits for residuals of her emotional condition.

By letter dated April 8, 1996, appellant requested a hearing before an Office hearing representative.

In a decision dated October 24, 1996, the Office hearing representative affirmed the Office’s finding that appellant did not have any further depression causally related to her employment injury but reversed its finding that she did not have employment-related chronic pain syndrome. The hearing representative further found that the Office had not met its burden of proof to modify its determination of appellant’s wage-earning capacity as the medical evidence did not establish that her condition had materially changed. The hearing representative found that it was unclear whether, in rendering his opinion, Dr. Kaffen had considered appellant’s condition of chronic pain syndrome, the effects of the motor vehicle accident on her condition or her possibly preexisting degenerative disc disease and cervical spine problems. The hearing representative found that the Office should determine which of appellant’s conditions preexisted her employment injury and whether she actually had previous work experience as a cashier. The hearing representative further instructed the Office to evaluate the extent of appellant’s cognitive problems before determining a suitable work environment.

By letter dated December 10, 1996, the Office referred appellant, together with the case record and a statement of accepted facts, to Dr. David R. Webb, Jr., a Board-certified orthopedic surgeon, for a second opinion evaluation.

In a report dated December 30, 1996, Dr. Webb diagnosed chronic cervical pain with superimposed degenerative arthritis and degenerative disc disease, chronic lumbar syndrome with degenerative arthritis and degenerative disc disease, a history of grand mal seizures, and a history of chronic psychiatric depression. In response to the Office's question of whether appellant's degenerative disc disease was causally related to her employment injury, Dr. Webb stated:

“The amount of degenerative changes is about average for [appellant's] age and would appear to be due to the normal aging and maturing process. It could, obviously, [have] been aggravated by the injury but we have no way to quantify that. One would say that this is probably an aggravation of a preexisting problem.

“[Appellant's] level of disability is certainly modified by her chronic pain complaints and, the fact that she has had apparently a significant depression, also makes her ability to cope with this more challenging and thus we feel has a great deal to do with [her] reaction to even normal stresses.”

Dr. Webb further found that appellant's cervical condition arose after her 1981 employment injury and was caused or aggravated by her motor vehicle accident. He concluded that appellant could work as a cashier part time from four to six hours per day “if she could have a frequent change of position with no repetitive bending, stooping or no prolonged standing or sitting.” In an accompanying work restriction evaluation, Dr. Webb found that appellant should limit all activities, including lifting to 10 pounds.

In a report dated July 20, 1997, an Office rehabilitation specialist identified the position of surveillance system monitor, ticket seller and parking lot cashier as within appellant's restrictions and reasonably available within her commuting area.

By decision dated April 11, 1997, the Office modified its prior loss of wage-earning capacity determination effective April 27, 1997 based on its finding that appellant could perform the duties of a surveillance system monitor for six hours per day. In a decision dated August 27, 1998 and finalized August 28, 1998, a hearing representative affirmed the Office's April 11, 1997 decision.

The Board finds that the Office did not meet its burden of proof to modify its determination of appellant's loss of wage-earning capacity.

Once 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.¹ The burden of proof is on the party attempting to show the award should be modified.²

In the present case, the Office has not met its burden of proof to show that modification of its prior wage-earning capacity determination was warranted due to an improvement in appellant's injury-related condition. The Office based its initial finding that appellant could work as a part-time cashier on the October 5, 1992 report of Dr. Leeb, a Board-certified orthopedic surgeon and impartial medical examiner, who found that appellant could work 4 hours per day and lift up to 20 pounds. He further found that appellant could continuously sit and intermittently walk, stand, lift, bend and squat.

The Office modified its loss of wage-earning capacity based on the December 30, 1996 report of Dr. Webb, a Board-certified orthopedic surgeon who performed a second opinion evaluation. He found that appellant could work as a cashier for four to six hours per day with frequent position changes and "no prolonged standing or sitting." He further opined that appellant could not lift more than 10 pounds. Rather than establishing that appellant's condition has materially improved, Dr. Webb's report indicates that appellant now has increased restrictions on lifting and sitting. Thus, the Office has not established an improvement in appellant's injury-related condition.

Further, the Office did not, as instructed by the hearing representative, determine the nature and extent of appellant's cognitive difficulties prior to modifying its wage-earning capacity decision. Dr. Dunn indicated in his May 18, 1995 work restriction evaluation that the medication that appellant took for back pain might be affecting her concentration and ability to follow directions. He thus recommended that appellant's limited ability to concentrate be "further evaluated in order to match her in an appropriate way for a work environment."

The Office, therefore, has not met its burden of proof to establish a material change in appellant's condition which would warrant modification of the prior loss of wage-earning capacity determination.

¹ *James D. Champlain*, 44 ECAB 438 (1993).

² *Id.*

The decision of the Office of Workers' Compensation Programs dated August 27, 1998 and finalized August 28, 1998 is hereby reversed.

Dated, Washington, DC
October 19, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member