

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MARJORIE L. JELINEK and DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL CENTER, St. Paul, MN

*Docket No. 02-385; Submitted on the Record;  
Issued July 25, 2002*

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DECISION and ORDER

Before ALEC J. KOROMILAS, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issues are: (1) whether appellant has established that her May 3, 1988 loss of wage-earning capacity determination should be modified; and (2) whether the Office of Workers' Compensation Programs met its burden in terminating appellant's authorization for medical treatment.

This is the fifth appeal in this case.<sup>1</sup> By decision dated August 9, 1985, the Board remanded the case for further development on the issue of appellant's wage-earning capacity.

On February 20, 1975 appellant, then a 25-year-old keypunch operator, filed a claim for an injury to her right arm and hand due to her keypunching duties. She resigned from her job on February 21, 1975. On April 26, 1976 the Office accepted the condition of cervicothoracic sprain<sup>2</sup> and began paying compensation for temporary total disability effective February 21, 1975. She was placed in a vocational rehabilitation program on January 28, 1976.

By decision dated May 3, 1988, the Office determined that appellant had the capacity to earn wages as a collection clerk and, because the weekly salary for this position exceeded her weekly pay for her date-of-injury position, she had no loss of wage-earning capacity.

By decision dated March 22, 1989, the Office denied modification of its May 3, 1988 decision.

By decision dated November 13, 2001, the Office denied appellant's claim on the grounds that the medical evidence of record failed to establish that her work-related condition had worsened to the point that she did not have the capacity to earn wages as a collection clerk. The Office also terminated appellant's authorization for medical treatment for her accepted condition.

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<sup>1</sup> See Docket No. 85-230 (issued August 9, 1985).

<sup>2</sup> Although the nonfatal summary indicates that right carpal tunnel syndrome is an accepted condition, the Office indicated on September 1, 2000 that carpal tunnel syndrome is not an accepted condition.

The Board finds that appellant has not established that her May 3, 1988 loss of wage-earning capacity determination should be modified

Once a loss of wage-earning capacity is determined, 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.<sup>3</sup> The burden of proof is on the party attempting to show modification.<sup>4</sup> In this case, appellant sought modification of the Office's May 3, 1988 wage-earning capacity determination.

Appellant submitted medical evidence in support of her contention that there had been a material change in the nature and extent of her injury-related condition.

In a report dated October 7, 1999, Dr. Thomas V. Rieser, an orthopedic surgeon, related appellant's statement that she had been treated continuously for neck, upper back and right shoulder and arm pain since February 20, 1975. He stated that appellant had tried to work on several occasions but was unable to tolerate her pain. Dr. Rieser provided findings on examination, a history of her medical treatment and diagnosed degenerative disc disease at C5-6 with mild instability and chronic neck pain. However, this report does not contain a rationalized medical opinion explaining why appellant was unable to perform the position of collection clerk due to her employment-related cervicothoracic sprain or otherwise establish that the Office improperly determined appellant's wage-earning capacity.<sup>5</sup> Therefore, this report does not establish that appellant's wage-earning capacity determination should be modified.

In a report dated August 29, 2000, Dr. Rieser stated:

"It is my understanding that [appellant] had a work injury in 1975 and had continuing pain since then. She apparently has tried to work on different occasions, but was unable to because of her persistent neck pain. I have indicated in the past that this was a temporary aggravation. After rereview of her file, it is my opinion she has degenerative disc disease with chronic neck pain caused by her 1975 work injury. When I saw her in October 1999, I recommended two to three weeks of physical therapy as well as anti-inflammatory medication. She may need intermittent physical therapy with or without anti-inflammatory medication for exacerbations of pain. I have not seen her in the office since that time."

However, Dr. Rieser provided insufficient medical rationale explaining how appellant's degenerative disc disease was causally related to her 1975 employment injury, a cervicothoracic sprain or that she could not perform the position of collection clerk due to a change in the nature or extent of her employment-related condition. Therefore, this report does not discharge appellant's burden of proof.

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<sup>3</sup> *Stanley B. Plotkin*, 51 ECAB \_\_\_ Docket No. 99-1838 (issued September 28, 2000); *Derrick Higgin*, 50 ECAB 213 (1998).

<sup>4</sup> *See James D. Champlain*, 44 ECAB 438, 440 (1993).

<sup>5</sup> *See Norman F. Bligh*, 41 ECAB 230, 237-38 (1989).

In a report dated January 15, 2001, Dr. Rieser stated that appellant had degenerative disc disease at C5-6. He stated that she had a work injury in 1975 and had experienced continuing pain since then. However, Dr. Rieser did not provide an opinion, supported by medical rationale, explaining that appellant was unable to perform the position of collection clerk due to a change in the nature or extent of her 1975 employment injury. Therefore, this report does not establish that appellant's May 3, 1988 wage-earning capacity determination should be modified.

In a report dated July 18, 2001, Dr. E. Harvey O'Phelan, an orthopedic surgeon and an Office referral physician, provided a history of appellant's condition and findings on examination. He stated:

“[Appellant] walks with a normal gait. She does not have the demeanor of a patient who is in pain. She moves freely in and around the examining room. She is able to get on and off the examining table without difficulty.

“[Appellant] stands erect. She is obviously overweight and generally deconditioned. She describes her soreness as being on the right side of the neck in the lower portion of the neck region towards the right shoulder. The reflexes of the upper extremity including the triceps, biceps and brachioradialis reflexes were normal. The radial pulses were normal bilaterally. [Appellant] has normal capillary return. There is normal function in her elbows, wrists and smaller articulation of the hand. She has good grasp, good pinch, good hook function....”

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“The diagnosis, therefore, established would be considered a cervical/thoracic sprain of a chronic nature superimposed on degenerative intervertebral disc changes.... The relationship, therefore, is associated as a direct cause, not as a single event, but as a number of minor repetitive separate incidents of trauma. It appears that the discomfort is an aggravation of a status in the cervical spine that has been persistent, but it is quite reasonable to expect [appellant] to be able to function as a collection clerk or in a position where she could be able to control her time relative to standing, sitting, walking, and so forth. I do not, therefore, find her permanently and totally disabled, but rather one with a minor disability in the lower cervical, right shoulder and the right upper extremity. Although she is considered disabled, she is able to perform many types of work ... as long as the activities required of her are of a light or sedentary nature. As indicated, no further treatment for [appellant] is indicated until she loses approximately 40 pounds of body weight and will go a long way towards relieving the present discomfort.”

In a work capacity evaluation, Dr. O'Phelan indicated that appellant could work for four hours a day with restrictions, increasing to eight hours at an undetermined time. As Dr. O'Phelan indicated that appellant was able to perform the position of collection clerk, his report does not establish that appellant's May 3, 1988 wage-earning capacity determination should be modified.

As appellant has failed to provide rationalized medical evidence establishing a change in the nature or extent of her employment injury such that she cannot perform the position of

collection clerk, she has failed to establish that her May 3, 1988 wage-earning capacity should be modified.

The Board further finds that the Office improperly terminated appellant's authorization for medical treatment.

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.<sup>6</sup> To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which required further medical treatment.<sup>7</sup> In his report dated August 29, 2000, Dr. Rieser stated that appellant might need physical therapy and medication for chronic neck pain related to her 1975 employment injury. In his July 18, 2001 report, Dr. O'Phelan did not state that appellant no longer needed medical treatment for her employment injury. Rather, he stated that no further medical treatment was indicated until appellant first lost approximately 40 pounds of weight. As both Drs. Rieser and O'Phelan indicated that appellant had residuals requiring medical treatment for her employment injury, the Office did not meet its burden in terminating her authorization for medical treatment.

The decision of the Office of Workers' Compensation Programs dated November 13, 2001 is affirmed as to the wage-earning capacity issue but reversed on the issue of termination of medical benefits.

Dated, Washington, DC  
July 25, 2002

Alec J. Koromilas  
Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>6</sup> See *Furman G. Peake*, 41 ECAB 361, 364 (1990).

<sup>7</sup> *Id.*