

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

L.C., Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,
Oakland, CA, Employer

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**Docket No. 06-1809
Issued: December 28, 2006**

Appearances:

Sylvia R. Johnson, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 3, 2006 appellant, through her representative, filed a timely appeal from an August 4, 2005 merit decision of a hearing representative of the Office of Workers' Compensation Programs who denied modification of an August 8, 2002 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 this case.

ISSUE

The issue is whether appellant has established that modification of her August 8, 2002 wage-earning capacity determination is warranted.

FACTUAL HISTORY

On March 22, 2001 appellant, a 41-year-old clerk, filed an occupational disease claim alleging that on March 8, 2001 she realized that her hand and arm condition was employment

related.¹ The Office accepted the claim for bilateral carpal tunnel syndrome and de Quervain's disease. By letter dated October 12, 2001, the Office placed appellant on the periodic rolls for temporary total disability. Appellant accepted a modified position as a video coding systems technician and returned to work on January 7, 2002.

By decision dated August 8, 2002, the Office found that appellant had no loss of wage-earning capacity based on her actual earnings in the modified position beginning January 7, 2002. On July 30, 2003 appellant filed a Form CA-2a claim that she sustained a recurrence of disability on May 30, 2003, stating that she was in a lot of pain on May 29, 2003 and her physician "declared her disabled." She also submitted a CA-7 claim for compensation for the period May 30 to July 17, 2003.

Appellant submitted a May 2, 2003 electromyograph test performed by Dr. Marina Bulatov, a Board-certified physiatrist, and a June 24, 2003 attending physician's report (Form CA-20) and a July 29, 2003 disability slip from Dr. Richard A. Nolan, an attending Board-certified orthopedic surgeon. Dr. Bulatov diagnosed bilateral wrist median nerve compression and a normal ulnar nerve conduction study. Dr. Nolan diagnosed recurrent bilateral carpal tunnel syndrome and concluded that appellant was totally disabled for the period May 30 to September 1, 2003. Physical findings included positive carpal tunnel syndrome and hand swelling. He concluded that the condition was employment related based upon appellant's 17½ years of repetitive use of both upper extremities.

By letter dated August 6, 2003, the Office informed appellant of the evidence needed to support her claim. By decision dated October 21, 2003, the Office denied appellant's claim that she sustained a recurrence of disability beginning May 30, 2003.

On October 22, 2003 the Office received an August 28, 2003 report from Dr. Nolan who detailed the history of appellant's condition and medical treatment. He diagnosed tendinitis of the elbow, forearm and shoulders and bilateral carpal tunnel syndrome due to the repetitive nature of her employment duties. Dr. Nolan noted that appellant worked in her light-duty position until May 30, 2003 when her "upper extremity symptoms reached a level that she could no longer work." Appellant was found totally disabled.

In a letter dated November 15, 2003, appellant's representative requested an oral hearing, which was held on May 12, 2005. Appellant was represented at the hearing at which Dr. Nolan testified. Dr. Nolan noted that the video coding position required appellant's arms to be "in the kind of position that they are not used intermittently throughout the day." He stated that this resulted in her "shoulders literally hanging from her scapula, which just aggravates the tendinitis." Dr. Nolan reported "a significant amount of swelling of the carpal tunnel." He testified that appellant had moderate symptoms and "was not capable of performing work activities." Dr. Nolan testified that appellant's first surgery was not successful which resulted in her becoming totally disabled after working in her light-duty position. He stated that, as the

¹ This was assigned file number 13-2025849. The record reflects that appellant filed an occupational disease claim alleging that her neck, bilateral shoulder condition and bilateral elbow condition was employment related. This claim was assigned file number 13-2059901 and was denied by the Office on November 18, 2002. Appellant appealed the denial of her claim and requested an oral hearing before an Office hearing representative.

surgery did not provide appellant with an “adequate release of her flexor tendons,” she sustained a recurrence of disability. In addition, Dr. Nolan related:

“The dependency of the upper extremity has resulted in swelling and results in complications of the already compromised carpal tunnel with increased pressure on the nerve.”

In a report dated November 17, 2003, Dr. Philip Wirganowicz, a second opinion Board-certified orthopedic surgeon, diagnosed bilateral carpal tunnel syndrome and bilateral de Quervain’s tenosynovitis. A physical examination revealed no swelling and subjective diminished sensation in the fingers of both hands. Dr. Wirganowicz concluded that appellant was capable of performing the duties of the position of video coding technician with no restrictions. In support of this conclusion, he noted that the position was primarily sedentary and required “very little use of the arms.” In an attached work capacity evaluation form dated November 15, 2003, Dr. Wirganowicz concluded that appellant was capable of working eight hours per day with restrictions on reaching, repetitive movement, pushing, lifting and pulling.

In a December 4, 2003 attending physician’s report, Dr. Nolan concluded that appellant was totally disabled for the period May 30, 2003 through March 1, 2004 due to her bilateral carpal tunnel syndrome and bilateral shoulder tendinitis.

Appellant submitted disability slips signed and dated March 9 and December 7, 2004, February 1 and March 1, 2005 indicating that she was totally disabled from work.

In a decision dated August 4, 2005, an Office hearing representative denied appellant’s request for modification of the August 8, 2002 loss of wage-earning capacity decision beginning May 30, 2003.

LEGAL PRECEDENT

The Office’s procedure manual provides that, if 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.² The procedure manual further indicates that, under these circumstances, the claims examiner will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity decision.³

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

² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995). See *Mary E. Marshall*, 56 ECAB ____ (Docket No. 04-1048, issued March 25, 2005).

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995). See *Harley Sims, Jr.*, 56 ECAB ____ (Docket No. 04-1916, issued February 8, 2005).

rehabilitated or the original determination was, in fact, erroneous.⁴ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁵

ANALYSIS

The Office accepted the conditions of bilateral carpal tunnel syndrome and de Quervain's disease. Appellant did not submit evidence showing that the Office's August 8, 2002 wage-earning capacity determination was erroneous. Rather, she requested a resumption of compensation for total wage loss beginning May 30, 2003 by filing a recurrence of disability claim on July 30, 2003, contending that she was unable to perform the duties of the light-duty position. Because a formal decision of appellant's loss of wage-earning capacity was in place when she filed the claim, the Office properly adjudicated the case as a request for modification of an established loss of wage-earning capacity.⁶ There is no evidence of record that appellant has been retrained or otherwise vocationally rehabilitated.

In support of her claim that she was unable to perform the duties of the light-duty position, appellant submitted disability slips and reports and testimony from Dr. Nolan. In August 28, 2003 report, Dr. Nolan noted that appellant worked in her light-duty position until May 30, 2003 when her "upper extremity symptoms reached a level that she could no longer work." As appellant was unable to perform the duties of her position, Dr. Nolan found her totally disabled. In a December 4, 2003 attending physician's report, Dr. Nolan concluded that appellant was totally disabled for the period May 30, 2003 through March 1, 2004 due to her bilateral carpal tunnel syndrome and bilateral shoulder tendinitis. At the hearing, Dr. Nolan testified that the video coding position required appellant's arms to be "in the kind of position that they are not used intermittently throughout the day." He stated that this resulted in her "shoulders literally hanging from her scapula, which just aggravates the tendinitis." Dr. Nolan opined that appellant had moderate symptoms which resulted in her inability to perform her work duties. In support of his conclusion, Dr. Nolan testified that appellant's first surgery was not successful and which resulted in her becoming totally disabled after working in her light-duty position.

The Office referred appellant to Dr. Wirganowicz, for a second opinion examination. He found no objective evidence that appellant's carpal tunnel surgery had not been successful and opined that appellant was able to perform sedentary duty. The Office hearing representative found in an August 4, 2005 decision that the August 8, 2008 wage-earning capacity determination should remain undisturbed as there was insufficient evidence that appellant's condition had changed or she was unable to perform the duties of the position

The Board finds a conflict of medical opinion between Dr. Nolan, for appellant, and Dr. Wirganowicz, for the government, regarding the nature of appellant's impairments and her

⁴ *Stanley B. Plotkin*, 51 ECAB 700 (2000); *Tamra McCauley*, 51 ECAB 375 (2000).

⁵ *Harley Sims, Jr.*, *supra* note 3; *Stanley B. Plotkin*, *supra* note 4.

⁶ *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sharon C. Clement*, 55 ECAB 552 (2004); Federal (FECA) Procedure Manual, *supra* note 2.

ability to work. Section 8123(a) of the Act provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.⁷ When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.⁸ Therefore, the case will be remanded to the Office for resolution of the conflict.

On remand of the case, the Office shall refer appellant, the case record and an updated statement of accepted facts, to an appropriate Board-certified specialist or specialists to determine if appellant's medical condition has substantially changed. Following this and any other development deemed necessary, it shall issue an appropriate decision on whether the August 2002 wage-earning capacity determination should be modified.

CONCLUSION

The Board finds that this case is not in posture for a decision as to whether modification of appellant's wage-earning capacity determination is warranted.

⁷ 5 U.S.C. § 8123(a); *Bryan O. Crane*, 56 ECAB ____ (Docket No. 05-232, issued September 2, 2005).

⁸ *Elaine Sneed*, 56 ECAB ____ (Docket No. 04-2039, issued March 7, 2005); *Delphia Y. Jackson*, 55 ECAB 373 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 4, 2005 is set aside and the case remanded for further proceedings consistent with the above opinion.

Issued: December 28, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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