

Appellant returned to part-time limited-duty work at the employing establishment until March 27, 1998. The Office placed her on the periodic rolls effective March 29, 1998.

In a January 5, 2001 decision, the Office found that the constructed position of office helper represented appellant's wage-earning capacity.¹ In a March 24, 1999 medical report, Dr. James Russo, Jr., an Office referral physician, opined that appellant could successfully complete the training program and perform the duties of a cashier II, telephone solicitor and office helper.² Appellant requested an oral hearing before an Office hearing representative.

By decision dated April 24, 2001, an Office hearing representative set aside the January 5, 2001 wage-earning capacity determination and remanded the case to the Office. He found that appellant did not receive a pretermination notice. On July 6, 2001 the Office issued a proposed notice of reduction of compensation benefits based on appellant's ability to perform the position of office helper.

In a decision dated August 13, 2001, the Office finalized its reduction of appellant's compensation effective August 12, 2001. The evidence of record was sufficient to establish that the position of office helper was medically and vocationally suitable and within appellant's commuting area. On August 14, 2001 appellant requested an oral hearing before an Office hearing representative.

Prior to the January 8, 2002 oral hearing, appellant submitted medical reports dated August 6 and October 8, 2001 from Dr. Earle who stated that appellant sustained impingement syndrome of the left shoulder and chronic left hip bursitis. Following the hearing, she submitted Dr. Earle's October 24, 2000 report in which he stated that appellant's left shoulder adhesive capsulitis and trochanteric bursitis of the left hip were doing well.

By decision dated March 11, 2002, an Office hearing representative affirmed the August 13, 2001 wage-earning capacity determination. Appellant appealed to the Board.

In a January 10, 2003 decision, the Board found that the Office properly reduced appellant's compensation benefits effective August 12, 2001 based on her ability to perform the constructed position of office helper.³ It found that Dr. Russo's March 24, 1999 report and Dr. Earle's April 20, 2000 OWCP-5c form constituted the weight of the medical opinion evidence.

¹ The physical requirements of the office helper position involved strength levels of 20 pounds occasionally and 10 pounds frequently. It did not involve climbing, balancing, kneeling, crouching, crawling, feeling, tasting/smelling, far acuity, depth perception, color vision and field vision. The position required occasional stooping and accommodation for frequent reaching, handling, fingering, talking, hearing and near acuity.

² In an April 20, 2000 work capacity evaluation (Form OWCP-5c), Dr. Guy H. Earle, an attending Board-certified family practitioner, stated that appellant could not work eight hours per day because she attended school. Appellant's physical limitations included sitting from four to six hours, walking two hours and standing three to four hours per day and no reaching over her shoulder. Further, appellant could twist, push and pull up to 8 pounds, lift up to 15 to 20 pounds and squat and kneel occasionally and climb, seldom to occasionally.

³ Docket No. 02-1311 (issued January 10, 2003).

By letter dated April 22, 2003, appellant, through counsel, requested reconsideration before the Office. Counsel contended that appellant was unable to lift 20 pounds based on Dr. Earle's April 10, 2003 report. Dr. Earle reiterated his diagnosis of left hip bursitis and left shoulder impingement syndrome. He stated that these conditions had been stable for some time. Based on a March 24, 2003 physical capacity evaluation (PCE), Dr. Earle opined that appellant was limited to sitting one-half to three-quarters of an hour, four to six hours per day, standing one quarter to one-half hour, three to four hours per eight-hour day and walking one-quarter hour or less at a time one to two hours per eight-hour day. Appellant could bend, reach with the left arm and operate foot controls occasionally and squat and kneel seldom. She could not crawl or climb. Finger manipulation was unrestricted. Based on a March 10, 2003 National Institute for Occupational Safety and Health (NIOSH) lifting test, Dr. Earle stated that appellant could push and pull 5 pounds frequently and 15 pounds occasionally, and lift and carry 4 pounds frequently and 8 pounds occasionally.

By letter dated May 20, 2003, the Office noted that Dr. Earle recommended work restrictions were more severe than those previously assigned. It requested that he explain the material worsening of appellant's work-related conditions to support the need for greater restrictions. Dr. Earle did not respond.

In a June 25, 2003 decision, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was irrelevant and, thus, was insufficient to warrant a merit review of her claim. By letter dated July 8, 2003, appellant, through counsel, requested reconsideration. In a May 27, 2003 report, Dr. Earle stated that appellant continued to have impingement syndrome in the left shoulder that significantly affected her ability to push, pull, lift and carry. The bursitis in her hip affected her gait and ability to stand, walk and sit but had improved somewhat with the addition of medication to her regimen. Dr. Earle stated that these restrictions were based on the March 10, 2003 PCE. He indicated that another PCE was performed on May 27, 2003 which found, among other things, that appellant could not lift more than 14 pounds.

By letter dated August 21, 2003, the Office requested that Dr. Earle explain what caused appellant's lifting ability to deteriorate since his April 20, 2000 report, which limited lifting to 15 to 20 pounds to his current restriction of lifting up to 14 pounds. The Office authorized a PCE. In an August 25, 2003 letter, Dr. Earle stated that appellant's physical capacities had been reevaluated using limited testing. He explained that the change from 15 to 20 pounds occasionally to 14 pounds occasionally did not represent a large deterioration of her physical capacity. In a report dated September 11, 2003, Dr. Earle reported the results of an August 29, 2003 PCE. He stated that overall appellant's capacities had not changed significantly compared to prior ones. Appellant certainly demonstrated capacities that would allow her to work as an office helper based on the physician's knowledge of the requirements of this job.

By decision dated October 1, 2003, the Office denied modification of the August 13, 2001 wage-earning capacity determination. Dr. Earle's opinion constituted the weight of the medical opinion evidence in finding that appellant was capable of performing the duties of an office helper.

In a letter dated November 7, 2003, appellant, through counsel, requested reconsideration. Counsel stated that Dr. Earle's October 13, 2003 report established that appellant was not physically capable of performing the office helper position.

In a decision issued on November 20, 2003, the Office denied appellant's request for reconsideration as it neither raised substantive legal questions nor included pertinent new and relevant evidence and, thus, it was insufficient to warrant a merit review of its prior decisions. By letter dated December 3, 2003, appellant, through counsel, requested reconsideration.

In a May 21, 2004 decision, the Office denied modification of the August 13, 2001 wage-earning capacity determination. The evidence of record failed to establish that appellant was unable to perform the duties of the office helper position based on Dr. Earle's October 13, 2003 report. The Office noted that Dr. Earle stated that he did not have an opportunity to review a description of the job analysis for the office helper position prior to writing his September 11, 2003 report. He indicated that some of the duties of the position were somewhat more demanding than similar job analyses in the state system. Dr. Earle opined that appellant should be able to perform the duties of the constructed position with limitations which included carrying 2 pounds frequently and 5 pounds occasionally at a sedentary level and lifting 5 pounds frequently and 11 pounds occasionally at shoulder and overhead levels.

On June 18, 2004 appellant appealed to the Board. By order dated January 7, 2005, the Board remanded the case to the Office for reconstruction of the case record.⁴

On May 5, 2005 the Office reissued its May 21, 2004 decision, denying modification of the August 13, 2001 wage-earning capacity determination. On May 25, 2005 appellant appealed to the Board. By order dated November 1, 2005, the Board again remanded the case to the Office for reconstruction of the case record.⁵

On January 6, 2006 the Office reissued its May 5, 2005 decision, denying modification of the August 13, 2001 wage-earning capacity determination. It found that the evidence of record failed to establish that appellant could not perform the duties of the constructed position of office helper.

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

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

⁴ Order Remanding Case, Docket No. 04-1762 (issued January 7, 2005).

⁵ Order Remanding Case, Docket No. 05-1304 (issued November 1, 2005).

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

the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was, in fact, erroneous.⁷ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁸

ANALYSIS

The Board finds that appellant did not meet her burden of proof to modify the August 13, 2001 wage-earning capacity. The evidence of record fails to establish that there was a material change in her accepted conditions, that she was vocationally rehabilitated or that the original determination was made in error.

Dr. Russo, an Office referral physician, reviewed a description of the office helper position and opined in a March 24, 1999 report that appellant could perform the duties of this position. In an April 20, 2000 OWCP-5c form, Dr. Earle, an attending physician, set forth physical limitations defining appellant's capacity for work. Based on this evidence, the Office determined appellant's wage-earning capacity as an office helper.

Appellant has not submitted sufficient medical evidence to establish a material change in the nature and extent of her accepted left shoulder and hip contusions, bursitis of the left hip, impingement syndrome of the left shoulder and hip strain.

In an April 10 2003 report, Dr. Earle stated that appellant could lift and carry four pounds frequently and eight pounds occasionally. On May 27, 2003 he indicated that appellant's employment-related conditions affected her ability to push, pull, lift, carry, stand, walk and sit based on a March 10, 2003 PCE. Dr. Earle advised that appellant could not lift more than 14 pounds. In an October 13, 2003 report, he reiterated that appellant could perform the office helper position with the restrictions of lifting no more than 5 pounds frequently and 11 pounds occasionally. Regarding appellant's lifting restrictions, Dr. Earle stated on August 25, 2003 that the change from 15 to 20 pounds to 14 pounds did not represent a significant deterioration of her physical capacity. On September 11, 2003 he stated that appellant could perform the office helper position as the August 29, 2003 PCE did not show a significant change in her capacities compared to prior evaluations. The Board finds that Dr. Earle did not support a material change in the nature or extent of appellant's accepted condition. He noted familiarity with the office helper position and explained that he did not observe a material change in appellant's capacity for employment. Dr. Earle characterized the change in lifting restrictions as not significant.

Appellant has not submitted evidence to show that the original August 13, 2001 determination regarding her wage-earning capacity was erroneous. On appeal, appellant contends that at the time of the Office's August 13, 2001 decision, Dr. Russo's March 24, 1999 report was too old to serve as a basis for the reduction of her compensation. It is well established that a wage-earning capacity determination must be based on a reasonably current medical evaluation.⁹ However, in this case, appellant's wage-earning capacity was based on Dr. Russo's

⁷ *Tamra McCauley*, 51 ECAB 375, 377 (2000).

⁸ *Id.*

⁹ *Carl C. Green, Jr.*, 47 ECAB 737 (1996).

March 24, 1999 report, as well as Dr. Earle's April 20, 2000 OWCP-5c form. Both physicians were consistent with the physical requirements of the constructed office helper position. Neither physician reported that appellant was totally disabled due to residuals of her accepted conditions.

Appellant further contends that the Office improperly reduced her compensation because it did not send Dr. Earle a description of the office helper position. Dr. Earle stated in his October 13, 2003 report that he did not have a chance to review the job analysis for the office helper position prior to writing his September 11, 2003 report. He noted that the tasks of the constructed position were more demanding than similar job analyses in the state system. However, Dr. Earle did not change his opinion that appellant could perform the office helper position. He merely modified restrictions for her while working in the constructed position which he stated did represent a material change in her capacity for work.

Appellant did not submit evidence showing a material change in the nature and extent of her accepted left shoulder and hip contusions, bursitis of the left hip, impingement syndrome of the left shoulder and hip strain. She did not demonstrate that the Office's original determination of her wage-earning capacity was erroneous or that she has been retrained or vocationally rehabilitated. Appellant has not met her burden of proof to establish that the Office's wage-earning capacity decision should be modified.

CONCLUSION

The Board finds that appellant has failed to establish a basis for modification of the August 13, 2001 wage-earning capacity rating as an office helper.

ORDER

IT IS HEREBY ORDERED THAT the January 6, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 22, 2007
Washington, DC

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

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

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