

FACTUAL HISTORY

On March 15, 2004 appellant, then a 45-year-old forest biologist, filed a traumatic injury claim (Form CA-1) alleging that on March 9, 2004 she twisted her leg and fell while attempting to cross a river. She injured her left knee. On May 11, 2004 the Office accepted the claim for left meniscus tear, bilateral shoulder sprain and left chondromalacia patellae. The Office authorized a right knee arthroscopy on May 27, 2004 and surgical repair of a torn left shoulder rotator cuff on July 8, 2004. It paid appropriate medical and compensation benefits.

On September 1, 2004 Dr. Steven Dickhaut, a Board-certified orthopedic surgeon, released appellant to work with restrictions.

On December 1, 2004 the employing establishment offered appellant a position as a wildlife biologist. The position was a temporary position from December 13, 2004, not to exceed one year, at 40 hours per week. The employing establishment noted that the temporary appointment was the same type of appointment appellant held on the date of injury. Appellant accepted the position and began work on December 13, 2004.

By decision dated March 3, 2005, the Office determined that appellant's actual wages as a wildlife biologist fairly and reasonably represented her wage-earning capacity. The Office determined that her actual wages met or exceeded her date-of-injury wages. Therefore, she did not have a loss of wage-earning capacity.²

On March 14, 2005 appellant requested a schedule award. By decision dated July 28, 2005, the Office granted her a schedule award for a 10 percent left lower extremity impairment. The award ran for the period March 24 to October 28, 2005.³

Effective March 18, 2005, appellant's position as a wildlife biologist was terminated due to lack of work and funding.

On January 4, 2006 she underwent another left shoulder arthroscopy, which the Office approved. On January 28, 2006 she filed a Form CA-7 for temporary total disability commencing January 4, 2006. Progress reports from Dr. Norman Kane, a Board-certified orthopedic surgeon, dated January 12 and 23, 2006, indicated that appellant was temporary totally disabled as a result of the right shoulder arthroscopic debridement and decompression.

By decision dated March 8, 2006, the Office denied appellant's claim for compensation for the period commencing January 4, 2006. It noted that her temporary appointment ended effective March 18, 2005 and its March 3, 2005 letter indicated that appellant had demonstrated the ability to perform the duties as a wildlife biologist for several months. The medical evidence was not reviewed.

² The Office found that the current pay rate for date-of-injury position and the new position was \$971.94 per week, based on a full-time position at \$50,541.00 per annum. The Office indicated that appellant was in a temporary appointment on her date of injury and she was brought back to the same type of appointment.

³ As previously noted, appellant has not appealed this decision.

In a letter dated March 23, 2006, appellant requested reconsideration. She advised that she had filed an Equal Employment Opportunity (EEO) complaint against the employing establishment as it had available jobs. Appellant submitted treatment records of psychological counseling due to her March 9, 2004 injury. This included copies of appellant's individual therapy sessions and medical documentation from Dr. Robert Helston, an emergency physician, who diagnosed major depression. In an initial diagnostic screening report, Sandra Lynam a licensed marriage and family therapist, and Erica Rivers, a licensed professional counselor, diagnosed pain disorder, depressive disorder and anxiety disorder as being related to the injury. In an unsigned March 31, 2006 letter of medical necessity, Dr. Edward Wolski, a family practitioner, and Jack Currin, Ph.D., licensed clinical psychologist, diagnosed pain disorder, depressive disorder and anxiety disorder associated with appellant's work-related injury. Appellant was found totally disabled.

In an October 7, 2005 report, Dr. Randall Browning, Board-certified in emergency medicine, advised that appellant was involved in a motor vehicle accident in a parking lot where she had stopped and another vehicle backed out and struck her from behind. Examination revealed no evidence of head, chest or abdominal injury or any neurologic involvement. Some tenderness was noted in the neck and back areas. An impression of cervical and lumbar strains was provided and appellant was discharged from care. In an October 8, 2005 report, Dr. Steven M. Gabriel, Board-certified in emergency medicine, noted a history of the October 7, 2005 motor vehicle accident. He provided an impression of hypertension and musculoskeletal pain in the back, neck and shoulder.

By decision dated June 9, 2006, the Office denied modification of its March 3, 2005 wage-earning determination. It found that insufficient evidence had been presented to modify the loss of wage-earning determination.

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.⁴ 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.⁵

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

⁴ 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).

⁵ 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.⁶ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁷

ANALYSIS

The Board notes that there is no indication in the record that the original March 3, 2005 wage-earning capacity determination was erroneous. The record clearly establishes that appellant's wildlife biologist position was a temporary appointment similar to the type of appointment held on the date of injury. As the wildlife biologist position was also a temporary appointment, the Office may use actual wages from such position in determining wage-earning capacity.⁸ Appellant worked in the position more than 60 days,⁹ and the temporary position was available for approximately one year. Appellant worked in this position for approximately 90 days before being terminated by the employing establishment for lack of work and funding.¹⁰ Furthermore, there is no evidence in the record that appellant was retrained or otherwise vocationally rehabilitated.

The evidence appellant submitted also fails to establish that there was a material change in the nature and extent of appellant's injury-related condition. The evidence either pertained to unrelated medical conditions or did not specifically address the relevant issue of whether there was a material change in the nature and extent of the injury-related condition. The March 30, 2006 functional capacity evaluation and the medical reports from Dr. Gabriel and Dr. Browning, which concern a nonwork-related motor vehicle accident on October 7, 2005, fail to address the accepted work injuries of March 9, 2004. Appellant's psychological counseling records fail to include a medical report which contains any explanation as to how or why appellant's accepted physical conditions changed for the worse. Dr. Helston's reports fail to address the accepted work injuries of March 9, 2004. The March 31, 2006 report from Drs. Wolski and Currin fail to provide any rationale to support the causal relationship of the psychological conditions to appellant's work-related injuries and fail to provide any explanation as to how or why appellant's physical conditions changed for the worse. The report from Sandra Lynam, a licensed marriage and family therapist, and Erica Rivers, a licensed professional counselor, is insufficient to establish the claim as they were not signed by a physician and thus are not competent medical

⁶ *Stanley B. Plotkin*, 51 ECAB 700 (2000); *Tamra McCauley*, 51 ECAB 375 (2000).

⁷ *Harley Sims, Jr.*, *supra* note 5; *Stanley B. Plotkin*, *supra* note 6.

⁸ If the claimant is not in a temporary position at the time of injury, a temporary job is not appropriate for a wage-earning capacity determination. See *Pamela J. Darling*, 49 ECAB 286 (1998).

⁹ The procedure manual states that, after the claimant has been working for 60 days, the Office will determine whether actual earnings fairly and reasonably represent wage-earning capacity. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993).

¹⁰ *A.P.*, 58 ECAB ____ (Docket No. 06-1428, issued November 29, 2006) (where the Board held that wages earned from reemploying a temporary worker in another temporary position may be considered if the new position lasts at least 90 days).

evidence.¹¹ As such, the Board finds that the evidence and the medical reports submitted are insufficient to meet appellant's burden of proof to show a material change in the nature and extent of the injury-related condition.

Appellant also submitted reports from Dr. Kane to support her claim of total disability. The medical evidence from Dr. Kane support appellant was temporarily totally disabled for a period of time on and after January 4, 2006 due to her second left shoulder arthroscopy, a procedure which the Office authorized. These reports are relevant to whether appellant had a limited period of work-related disability following the accepted surgery. The Board notes that consideration of the modification of wage-earning capacity issue does not preclude the Office from the acceptance of a limited period of employment-related disability, without a formal modification of the wage-earning capacity determination.¹² In this case, the Office authorized the January 4, 2006 left shoulder arthroscopy. The Office's procedure manual provides that wages lost for compensable medical examination or treatment may be reimbursed.¹³ The case will be remanded to the Office for further development of the record as it deems necessary and the issuance of a *de novo* decision on the issue of the nature and extent of any compensable disability arising from appellant's January 4, 2006 authorized surgery.

CONCLUSION

The Board finds that appellant has not established a basis for modification of her wage-earning capacity decision. The case is remanded for the issuance of a *de novo* decision on the issue of the nature and extent of any disability arising from appellant's January 4, 2006 authorized surgery.

¹¹ See 5 U.S.C. § 8101(2) (this subsection defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law. See also *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board has held that a medical opinion, in general, can only be given by a qualified physician).

¹² *Katherine T. Kreger*, 55 ECAB 633 (2004). See *Sharon C. Clement*, 55 ECAB 552 (2004).

¹³ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computing Compensation*, Chapter 2.901.16 (December 1995).

ORDER

IT IS HEREBY ORDERED THAT the June 9, 2006 decision of the Office of Workers' Compensation Programs is affirmed in part and the case remanded for further action consistent with this opinion.

Issued: February 1, 2007
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