United States Department of Labor
Employees' Compensation Appeals Board

J.S., Appellant	)	
and	)	**Docket No. 07-688**
	)	**Issued: July 20, 2007**
DEPARTMENT OF THE ARMY, MEDDAC, Fort Carson, CO, Employer	)	

Appearances:
Appellant, pro se
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 January 16, 2007 appellant filed a timely appeal from a June 22, 2006 merit decision of the Office of Workers' Compensation Programs modifying her March 6, 1994 loss of wage-earning capacity and a November 1, 2006 decision denying her request for modification of the June 22, 2006 decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office met its burden of proof to modify appellant's March 6, 1994 wage-earning capacity determination; and (2) whether the Office properly denied modification of the June 22, 2006 loss of wage-earning capacity determination.

FACTUAL HISTORY

On August 8, 1990 appellant, then a 32-year-old clinical nurse, sustained injury to her back when she slipped and fell. The Office accepted her claim for lumbar strain, herniated nucleus pulposus at L3-4 and L4-5 and authorized partial hemilaminectomy and discectomy

surgery, which was performed on November 20, 1991. Appellant stopped work on October 6, 1991 and returned to work part time on December 28, 1992, in a reassigned position as a medical clerk.[1]

By decision dated March 6, 1994, the Office found that appellant's actual earnings as a part-time medical clerk effective December 28, 1992 fairly and reasonably represented her wage-earning capacity. The Office noted that appellant continued in this position until July 30, 1993 when she relocated to Yakima, Washington due to her husband's transfer. In 1996 appellant moved to Algona, Iowa, to Fort Leavenworth, Kansas in 1998 and to Laurens, Iowa in 2000.

In a May 31, 2003 functional capacity evaluation (FCE) report, Janelle G. Kampf, physical therapist, indicated that appellant was capable of performing sedentary work for four hours per day. Ms. Kampf recommended a rehabilitation program based upon appellant's "poor level of musculoskeletal fitness." After reviewing the May 31, 2003 FCE, Dr. Alexander Pruitt, appellant's attending Board-certified orthopedic surgeon, stated on a November 9, 2004 work capacity evaluation (Form OWCP-5c) that appellant was capable of working eight hours per day with restrictions.

On October 19, 2004 the Office referred appellant for vocational rehabilitation training and paid for additional training.

On January 12, 2006 appellant obtained a part-time medical clerk position with Spenser Hospital.

In a May 10, 2006 status report, Leslie Nelson, a rehabilitation specialist, noted that appellant was happy working part time and decided not to pursue full-time work in her area. The rehabilitation specialist noted a labor market search found no full-time work available in her local commuting area. As appellant relocated from Colorado a labor market search for full-time work as a medical clerk was completed for her date-of-injury job in Colorado.

On May 15, 2006 the Office issued a notice of proposed reduction in compensation. It found that the March 6, 1994 wage-earning capacity determination could be modified as the evidence established that appellant was capable of working eight hours as a medical clerk. The Office also determined that appellant had a 61 percent wage-earning capacity, which was computed by comparing the pay rate at the time of her clinical nurse position with the pay rate for her position of medical clerk.

In June 14, 2006 CA-110 notes, the Office noted that appellant had informed her vocational rehabilitation counselor that she had sustained an injury at work while reaching for an item on a bottom shelf.

In a decision dated June 22, 2006, the Office modified appellant's wage-earning capacity effective July 9, 2006 to reflect her ability to work eight hours per day as a medical clerk. The Office determined that her wage-earning capacity was 61 percent of the current pay rate for her date-of-injury position and her compensation was reduced to reflect her wage-earning capacity.

[1] Appellant initially relocated to Yakima, Washington in September 1993 and later moved to Iowa.

On July 31, 2006 appellant requested reconsideration and submitted additional evidence in support of her request, including treatment notes for the period April 18 to July 6, 2006 from Dr. Bruce A Feldman, a treating Board-certified family medicine practitioner; a June 21, 2006 lumbar spine x-ray interpretation; a June 29, 2006 lumbar spine magnetic resonance imaging scan; a July 12, 2006 report by Dr. Jason Hough, an osteopath; and an August 3, 2006 report by Dr. Stephen J. Frushour. Appellant also resubmitted treatment notes by Dr. Pruitt for the period October 10, 2001 to June 11, 2003.

Dr. Feldman noted on June 12, 2006 that appellant had a worsening of her condition following her "moving and shifting medical records and charts" at work on Friday. He attributed appellant's condition to "a work-related aggravation of preexisting back pain." In progress notes dated June 27, 2006, Dr. Feldman opined that appellant was capable of working light-duty work restrictions. He recommended appellant work four-hour shifts at a time.

On July 12, 2006 Dr. Hough noted that appellant related that she sustained an injury at work on June 12, 2006. She sustained the injury while bending and turning. He diagnosed a L4-5 herniated nucleus pulposus. A physical examination revealed "some tenderness at L4[-]5 level along the paraspinal musculature with radiation into the sciatic notch."

On August 3, 2006 Dr. Frushour diagnosed L4-5 spine instability. Appellant indicated that she "did fairly well with intermittent mild problems until 2005" when she had increased problems. She related that she was unable to "remember one single incident that caused increased problems but it may have been moving medical files or bending and twisting."

By decision dated November 1, 2006, the Office denied appellant's request for modification of the June 22, 2006 wage-earning capacity decision. The Office found the record devoid of any medical evidence showing that she was medically unable to work eight hours per day or perform the sedentary duties of the medical clerk position.

LEGAL PRECEDENT -- ISSUES 1&2

Once a loss of wage-earning capacity is established, 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.[2] The burden of proof is on the party attempting to show modification of the award.[3]

Chapter 2.814.11 of the Office's procedure manual contains provisions regarding the modification of a formal loss of wage-earning capacity. The relevant part provides that a formal loss of wage-earning capacity will be modified when: (1) the original rating was in error; (2) the claimant's medical condition has changed; or (3) the claimant has been vocationally rehabilitated. Office procedures further provide that the party seeking modification of a formal loss of wage-earning capacity decision has the burden to prove that one of these criteria has been

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

[3] *See also Marie A. Gonzales*, 55 ECAB 395 (2004).

met. If the Office is seeking modification, it must establish that the original rating was in error, that the injury-related condition has improved or that the claimant has been vocationally rehabilitated.[4]

ANALYSIS -- ISSUES 1&2

On March 4, 1994 the Office determined that appellant's earnings as a part-time medical clerk fairly and reasonably represented her wage-earning capacity. The burden of proof is on the Office to justify modification of this determination.

The Office's procedure manual provides that a modification of a loss of wage-earning capacity decision is warranted if the evidence establishes a change in the employment-related condition. On June 22, 2006 the Office found modification of the March 4, 1994 wage-earning determination was warranted. It found that appellant's injury-related condition had improved based upon the May 31, 2003 Functional Capacity Evaluation report and November 9, 2004 work capacity evaluation by Dr. Pruitt, who found that appellant was capable of working a sedentary position eight hours per day. At the time of the March 4, 1994 wage-earning determination, the medical evidence showed that she was only able to work four hours per day. Dr. Pruitt, appellant's attending Board-certified orthopedic surgeon, opined that appellant was capable of working a full-time sedentary position. The Board finds that the medical evidence of record established that appellant's condition had improved such that she was able to work eight hours per day in a sedentary position. The Office properly established a change in appellant's condition for the better and properly modified her March 4, 1994 wage-earning capacity determination.

Subsequent to the June 22, 2006 modification appellant requested reconsideration. The medical evidence submitted by her shows that she sustained an injury on or about June 12, 2006 while working for a private employer. On July 12, 2006 Dr. Hough noted that appellant sustained an injury at work on June 12, 2006 and diagnosed a L4-5 herniated nucleus pulposus. Dr. Frushour diagnosed L4-5 spine instability and related that appellant was doing well until 2005 when her problems increased. However, neither Dr. Hough nor Dr. Frushour addressed appellant's ability to perform the duties of medical clerk for eight hours. Therefore, the opinions of Drs. Hough and Frushour, are of diminished probative value and insufficient to support that the Office erred in modifying her March 6, 1994 wage-earning capacity on June 22, 2006.[5]

Dr. Feldman attributed appellant's worsening of her condition to "a work-related aggravation of preexisting back pain." In progress notes dated June 27, 2006, he opined that appellant was capable of working light-duty work with restrictions and recommended she work four-hour shifts at a time. Dr. Feldman's report does not address whether appellant could perform the duties of a medical clerk for eight hours. He noted that she was capable of working light duty and recommended four-hour shifts. However, Dr. Feldman provided no rationale for

[4] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11 (June 1996).

[5] *See generally Roma A. Mortenson-Kindschi*, 57 ECAB ___ (Docket No. 05-977, issued February 10, 2006); *Ellen L. Noble*, 55 ECAB 530 (2004).

this conclusion nor does he provide an opinion as to the cause of the disability. The Board has held that medical opinions not fortified by rationale are of diminished probative value.[6] Thus, Dr. Feldman's opinion is insufficient to establish that the Office did not meet its burden of proof to modify her March 6, 1994 wage-earning capacity decision.

CONCLUSION

The Board finds that the Office met its burden of proof to modify appellant's March 6, 1994 wage-earning capacity determination.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 1 and June 22, 2006 are affirmed.

Issued: July 20, 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

[6] *Cecelia M. Corley*, 56 ECAB ___ (Docket No. 05-324, issued August 16, 2005).