United States Department of Labor
Employees' Compensation Appeals Board

L.G., Appellant	)	
and	)	**Docket No. 06-1542**
	)	**Issued: March 23, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Houston, TX, Employer	)	

Appearances:
Edmond O'Suji, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 23, 2006 appellant, through her attorney, filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated March 22, 2006, which denied modification of her 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 the December 28, 2004 loss of wage-earning capacity determination should be modified.

FACTUAL HISTORY

On March 23, 2000 appellant, then a 40-year-old supervisor, filed a traumatic injury claim alleging that an employee struck her in her right shoulder while she was performing her federal job duties. The Office initially accepted appellant's claim for right shoulder strain. Appellant filed an additional claim for occupational disease on October 9, 2000 alleging that she developed stress, depression and anxiety as a result of the March 23, 2000 employment injury

and the actions of the employing establishment following her injury. The Office expanded appellant's claim to include adjustment reaction.

In a report dated February 22, 2002, Dr. Jackson T. Achilles, a Board-certified psychiatrist, examined appellant as a second opinion physician and diagnosed post-traumatic stress disorder. He indicated that appellant could not return to work at the employing establishment.

Appellant underwent surgery to her right shoulder on January 7, 2002. The Office entered appellant on the periodic rolls on March 8, 2002. The Office referred appellant for vocational rehabilitation counseling on September 11, 2002.

Appellant's attending physician, Dr. Ronald L. Fraser, a Board-certified orthopedic surgeon, opined that appellant developed lateral epicondylitis as a result of her accepted shoulder injury. The Office referred appellant to Dr. Bernard Z. Albina, who found that the lateral epicondylitis and recommended surgical release were not due to appellant's accepted employment injury. By decision dated September 8, 2003, the Office denied appellant's request for surgery. Dr. Fraser continued to support a causal relationship between appellant's lateral epicondylitis and her right shoulder injury. The Office referred appellant to Dr. John J. Debender, a Board-certified orthopedic surgeon, for an impartial examination. Dr. Debender found that appellant's elbow condition was not related to her accepted shoulder injury.

The Office referred appellant for a second opinion examination with Dr. Jorge A. Raichman, a Board-certified psychiatrist, to evaluate her ability to work due to her accepted emotional condition. In a report dated January 4, 2004, Dr. Raichman diagnosed mood disorder due to orthopedic injuries with mixed features. He noted that appellant was willing to return to work in a nonsupervisory capacity. Dr. Raichman stated: "My recommendation is that she is able to return to work and that her psychiatric condition is neutralized with the psychotropic medications she is taking." He completed a work restriction evaluation and indicated that she could work eight hours a day. Dr. Raichman stated that appellant should not supervise postal coworkers and that she could perform all the duties of her former position except supervising coworkers. He indicated that appellant would have difficulty dealing with abusive, loud, profane or large peers at work.

Appellant requested an oral hearing regarding the denial of her request for surgery.

The Office closed appellant's rehabilitation file on February 24, 2004. The vocational rehabilitation counselor found that appellant was capable of working as a office supervisor. This position required appellant to coordinate activities of clerical personnel, prepare employee ratings as well as hire, train and supervise clerical staff.

By decision dated November 5, 2004, the hearing representative affirmed the Office's September 8, 2003 decision denying authorization for surgery due to the diagnosed condition of lateral epicondylitis.

In a letter dated November 23, 2004, the Office proposed to reduce appellant's compensation benefits based on her capacity to earn the wages of an office manager. Appellant disagreed with this proposal. By decision dated December 28, 2004, the Office finalized its preliminary determination reducing appellant's compensation benefits effective January 22, 2005.

Appellant requested reconsideration of the Office's December 28, 2004 decision on December 22, 2005 and submitted a statement detailing the reasons she disagreed with the wage-earning capacity determination. By decision dated March 22, 2006, the Office denied modification of its December 28, 2004 wage-earning capacity decision.[1]

LEGAL PRECEDENT

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless the original rating was in error, there is a material change in the nature and extent of the injury-related condition or that the employee has been retrained or otherwise vocationally rehabilitated. The burden of proof is on the party attempting to show a modification of the wage-earning capacity.[2]

Under section 8115(a) of the Federal Employees' Compensation Act,[3] in determining compensation for partial disability, the wage-earning capacity of an employee is determined by actual earnings if actual earnings fairly and reasonable represent the wage-earning capacity. Generally, wages actually earned are the best measure of a wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity must be accepted as such measure.[4] If the actual earnings do not fairly and reasonably represent his or her wage-earning capacity or if the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his or her usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect wage-earning capacity in his or her disabled condition.[5]

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open market, that fits the employee's capabilities with regard to his or her physical limitations, education, age and prior experience. Once this selection is made, a

[1] Following the Office's March 22, 2006 decision, appellant submitted additional new evidence. As the Office did not consider this evidence in reaching a final decision, the Board may not review the evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

[2] *Elise L. Price*, 54 ECAB 734 (2003).

[3] 5 U.S.C. §§ 8101-8193, § 8115(a).

[4] *Selden H. Swartz*, 55 ECAB 272 (2004).

[5] *Ralph A. Nettles*, 54 ECAB 463 (2003).

determination of wage rate and availability in the labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in *Albert C. Shadrick*[6] and codified section 10.403(d) of the Office's regulation[7] will result in the percentage of employee's loss of wage-earning capacity.

ANALYSIS

The evidence establishes that the Office's original determination of appellant's wage-earning capacity determination was erroneous. The evidence does not establish that the selected position of office supervisor or manager was within appellant's work restrictions. The Office previously accepted that appellant's March 2000 employment injury resulted in an adjustment reaction, as well as in her physical injury. The medical evidence in the record does not establish that appellant has the emotional capacity to supervise employees as required by the constructed position. The psychiatric evidence from Dr. Achilles and Dr. Raichman, noted that appellant was not to return to a supervisory position at the employing establishment. Dr. Achilles' 2002 report found that appellant could not return to her date-of-injury position. Dr. Raichman's January 4, 2004 report addressed the issue of whether appellant could return to work in other settings. He noted that appellant was willing to return to work in a nonsupervisory capacity and recommended that she return to within restrictions, including that she not supervise coworkers. Dr. Raichman stated that appellant could perform all the duties of her former position except supervising coworkers. He indicated that appellant would also have difficulty dealing with abusive, loud, profane or large peers at work. The medical evidence does not establish that appellant is capable of acting as a supervisor due to her accepted emotional condition. Appellant has established that modification of the original wage-earning capacity is warranted as erroneous.

CONCLUSION

The Board finds that appellant has met her burden to modify the wage-earning capacity determination as the evidence establishes that the original determination was in error.

[6] 5 ECAB 376 (1953).

[7] 20 C.F.R. § 10.403(d).

ORDER

IT IS HEREBY ORDERED THAT the March 22, 2006 decision of the Office of Workers' Compensation Programs is reversed.

Issued: March 23, 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