

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

S.J., Appellant

and

**DEPARTMENT OF LABOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Dallas, TX, Employer**

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**Docket No. 08-1975
Issued: December 8, 2008**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 10, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated March 17, 2008. 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 the Office properly denied modification of a February 5, 2007 wage-earning capacity determination.

FACTUAL HISTORY

The case has been before the Board on prior appeals. The Board reversed an October 21, 2003 Office decision terminating appellant's compensation on the grounds that she refused an offer of suitable work.¹ By decision dated January 17, 2007, the Board found the Office had not

¹ Docket No. 04-341 (issued November 12, 2004).

properly calculated appellant's compensation for the periods August 31, 2004 to April 1, 2005, and commencing July 12, 2005.² The Board noted that, pursuant to the Office's regulations, it must determine the current pay rate for the date-of-injury job, and the Office had failed to make adequate findings in this regard. In response the Office issued a February 2, 2007 decision that found the date of injury was July 31, 1997, and the current pay rate for the date-of-injury position was \$861.48 per week.

By decision dated October 11, 2007, the Board affirmed the Office's February 2, 2007 decision. In addition, the Board affirmed a November 17, 2006 Office decision, denying modification of a June 7, 2006 wage-earning capacity determination based on her actual earnings since April 3, 2006. The history of the case is contained in the Board's prior decisions and is incorporated herein by reference.

On February 5, 2007 the Office modified its June 7, 2006 wage-earning capacity determination to reflect pay rate calculations in accord with the February 2, 2007 decision. As in the June 7, 2006 decision, it found appellant had actual earnings of \$733.15 commencing April 3, 2006. With respect to computation of compensation, the Office pay rate for compensation purposes was \$980.54, based on a recurrence of disability on December 12, 2000.³ The current pay rate for the date-of-injury job was \$861.48, resulting in a loss of wage-earning capacity of 15 percent of the weekly pay rate.

On October 29, 2007 appellant filed a recurrence of disability claim. She stopped working on October 5, 2007 and returned to work on October 15, 2007. Appellant submitted an October 19, 2007 report from Dr. Craig Callewart, an orthopedic surgeon, who stated that appellant reported continuing pain. The diagnoses included C4-5 disc degeneration, and lumbar sciatica and radiculopathy. Dr. Callewart stated that appellant was working two hours daily and had reduced her hours due to employment-related C4-5 disruption. He stated that appellant reported that repetitive employment factors continued to exacerbate her condition and this would support her claim for a recurrence of disability.

By letter dated November 5, 2007, appellant requested reconsideration of the February 5, 2007 decision. She argued the pay rate calculations were incorrect as the Office should use a pay rate in a May 23, 2005 job offer. Appellant stated that she returned to work at three hours per day on July 13, 2005 pursuant to the job offer.

In a report dated November 12, 2007, Dr. Olayinka Ogunro, an orthopedic surgeon, reported that appellant complained of pain and numbness in both hands. He diagnosed de Quervains tenosynovitis of the left wrist, medial epicondylitis right elbow, lateral epicondylitis left elbow and bilateral carpal tunnel syndrome. Appellant was advised to reduce typing, keyboarding and writing at work.

² Docket No. 06-129 (issued January 17, 2007).

³ The June 7, 2006 decision had used a pay rate for compensation purposes of \$1,404.29 per week as of April 3, 2006.

By decision dated January 14, 2008, the Office denied modification of the wage-earning capacity determination. The Office also found that appellant had not established a recurrence of disability.

On January 29, 2008 appellant again requested reconsideration. She argued the pay rate calculations were incorrect.

In a decision dated March 17, 2008, the Office denied modification of the February 5, 2007 decision.

LEGAL PRECEDENT

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 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

The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,⁶ has been codified at 20 C.F.R. § 10.403. The Office first calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the "current" pay rate for the job held at the time of injury. The employee's wage-earning capacity in terms of dollars is computed by multiplying the pay rate for compensation purposes by the percentage of wage-earning capacity.

ANALYSIS

The Office issued a wage-earning capacity determination on February 5, 2007 based on appellant's actual earnings. Appellant filed a Form CA-2a indicating she stopped work on October 5, 2007. Since a wage-earning capacity determination had been issued, the initial issue is whether the determination should be modified.⁷ To modify this determination, appellant must meet one of the above requirements for establishing modification. With respect to a material change in the nature and extent of the employment-related condition, appellant did not submit probative medical evidence. The accepted conditions in this case are bilateral carpal tunnel syndrome and a C5-6 herniated disc. Dr. Callewart indicated that he treated appellant on October 19, 2007 with a diagnosis of a C4-5 disc disruption. This is not an accepted condition and Dr. Callewart did not provide any medical rationale to support his statement that it was

⁴ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

⁵ *Id.*

⁶ 5 ECAB 376 (1953).

⁷ *See Katherine T. Kreger*, 55 ECAB 633 (2004).

employment related.⁸ He also appeared to opine that the light-duty job had aggravated appellant's condition. A claim based on new employment factors would be considered a new claim for compensation.⁹

Dr. Ogunro included a diagnosis of bilateral carpal tunnel syndrome but he did not discuss a material change in the nature and extent of the condition. The record does not contain rationalized medical evidence showing a material change in an employment-related condition after February 5, 2007.

It is noted that the Office may accept a short period of disability even if the evidence does not establish a modification of the wage-earning capacity determination is warranted.¹⁰ To establish a recurrence of disability, appellant must, however, submit evidence showing a change in the nature and extent of an employment-related condition resulting in disability.¹¹ For the reasons noted above, the medical evidence is not sufficient to establish a recurrence of disability on or about October 5, 2007. None of the physicians of record provide a rationalized medical opinion on the issue.

With respect to error in the original determination, appellant argues that the *Shadrick* calculation used to determine her wage-earning capacity in terms of dollars was incorrect. Specifically, appellant argued the pay rate for compensation purposes was incorrect. The Office used a date of recurrence of disability of December 12, 2000 and a pay rate of \$980.54. This is consistent with its finding in the February 2, 2007 Office decision, which the Board had previously reviewed and affirmed. Appellant contends that the Office should use a pay rate from July 2005, when she returned to work. Under 5 U.S.C. § 8101(2), “‘monthly pay’ means the monthly pay at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater....” The Office used the date compensable disability recurred. The return to work in July 2005 did not represent a date of injury, a date disability began or a recurrence of disability. It does not provide a basis for establishing the pay rate for compensation purposes under the Act.

The Board accordingly finds that the evidence does not support a modification of the February 5, 2007 wage-earning capacity determination. Appellant did not establish a material

⁸ Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on the issue of whether there is a causal relationship between a diagnosed condition and the employment factors. The opinion of the physician must be based on a complete factual and medical background, must be of reasonable medical certainty and supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant. *Jennifer Atkerson*, 55 ECAB 317, 319 (2004).

⁹ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(b)(2) (May 1997).

¹⁰ *Katherine T. Kreger*, *supra* note 7.

¹¹ *Terry R. Hedman*, 38 ECAB 222 (1986).

change in the nature and extent of an employment-related condition or error in the original determination.

CONCLUSION

The evidence does not establish that a modification of the February 5, 2007 wage-earning capacity determination is warranted.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 17 and January 14, 2008 are affirmed.

Issued: December 8, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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