United States Department of Labor
Employees' Compensation Appeals Board

M.S., Appellant	)	
and	)	**Docket No. 07-2309**
	)	**Issued: June 4, 2008**
U.S. POSTAL SERVICE, GRAND CENTRAL STATION POST OFFICE, New York, NY, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 10, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decisions dated March 26 and July 12, 2007, denying 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 appeal.

ISSUE

The issue is whether appellant has met her burden of proof in establishing that her August 9, 2004 wage-earning capacity should be modified.

FACTUAL HISTORY

On December 12, 1999 appellant, then a 54-year-old modified carrier technician, filed a claim (Form CA-2a) alleging that she sustained a recurrence of disability on November 29, 1999

causally related to her March 13, 1993 and April 29, 1997 employment-related injuries.[1] She stated that her accepted employment injuries were aggravated by continuously carrying mail. By letter dated April 13, 2000, the Office advised appellant that her recurrence of disability claim would be treated as a claim for a new injury as she cited intervening work factors. On October 20, 2000 the Office accepted the claim for right lateral epicondylitis, radial tunnel syndrome and right shoulder derangement and authorized arthroscopic right shoulder surgery which was performed on November 21, 2000. The Office later authorized right elbow surgery which was performed on October 14, 2002.

On April 23, 2003 the employing establishment offered appellant a modified carrier technician position effective that date based on the February 20, 2003 restrictions set forth by Dr. Jonathan C. Gordon, an attending orthopedic surgeon.[2] By letter dated April 22, 2003, the Office advised appellant that the offered position was suitable work within her medical restrictions and the employing establishment confirmed that the position remained available to her.

On April 28, 2003 appellant accepted the employing establishment's job offer. She returned to work on May 27, 2003.

By decision dated August 9, 2004, the Office found that appellant's actual wages as a modified carrier technician fairly and reasonably represented her wage-earning capacity, finding that she had no loss of wage-earning capacity with weekly wages of $871.73.

On August 16, 2006 the Office received appellant's August 8, 2006 CA-2a form alleging a recurrence of disability beginning July 17, 2006 causally related to her March 13, 1993 employment injury. She stopped work on July 31, 2006. By letter dated September 12, 2006, the Office addressed the factual and medical evidence appellant needed to support her claim.[3]

Appellant submitted Dr. Gordon's August 16, 2006 report which stated that she sustained a right rotator cuff injury. Dr. Gordon believed that repetitive motion in the shoulder caused the recurrence of disability. He opined that appellant could no longer case mail.

In an October 12, 2006 report, Dr. Gordon opined that appellant sustained a recurrence of the March 13, 1993 employment injury on July 17, 2006. He stated that she sustained a right shoulder injury. Dr. Gordon opined that appellant was totally disabled from October 12 through November 9, 2006.

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[1] The record reveals that the Office accepted appellant's claim for a March 13, 1993 injury for a right shoulder condition. The claim for her April 29, 1996 employment injury was accepted for a contusion of the right elbow.

[2] In his February 20, 2003 report, Dr. Gordon stated that appellant had reached maximum medical improvement. He opined that she could return to work with restrictions. Appellant was restricted from performing any type of work that put extra strain on her right elbow. She could not lift more than 10 pounds, tie or bundle boxes or engage in any pronation or supination activity with her elbow that required excessive force. Dr. Gordon recommended that appellant be retrained for a job that involved light sorting or desk work. In an April 1, 2003 work capacity evaluation, Dr. Gordon indicated that she could not push or pull more than 10 pounds. Appellant could squat, kneel and climb four hours per day.

[3] The Office stated that the date of injury was November 29, 1999.

By decision dated October 17, 2006, the Office found that appellant did not sustain a recurrence of disability beginning July 17, 2006 causally related to her November 29, 1999 employment injuries. The evidence of record did not establish a change in the nature and extent of her employment-related conditions or in her limited-duty job requirements.

In an October 30, 2006 letter, appellant requested a review of the written record by an Office hearing representative. She submitted form reports dated October 14, 2000 of Dr. Stephen F. Scarange, a Board-certified orthopedic surgeon, which diagnosed acromioclavicular (AC) arthritis and subcromial bursitis, muscle strain, right elbow epicondylitis and right wrist contusion. Dr. Scarange indicated with an affirmative mark that the diagnosed conditions were caused or aggravated by appellant's March 19, 1993, April 29, 1996, August 18, 1997 and January 12, 1998 employment-related injuries.[4] He stated that she was totally disabled from May 19, 1999 through April 29, 2004.

In a January 10, 2003 form report, Dr. Gordon indicated with an affirmative mark that appellant's tennis elbow was caused or aggravated by an employment activity. He stated that she was totally disabled from October 2002 through March 9, 2003. In reports dated November 4 and December 2 and 23, 2005, Dr. Gordon listed appellant's restrictions.

On January 25, 2007 Dr. Gordon prescribed physical therapy. Also on January 25, 2007 he stated in a report that appellant had rotator cuff tear and that she was totally disabled from January 25 through March 8, 2007.

By decision dated March 26, 2007, an Office hearing representative affirmed the October 17, 2006 decision as modified. She found that the proper issue in the case was whether the August 9, 2004 loss of wage-earning capacity determination should be modified. The hearing representative found that appellant's recurrence of disability claim was based on a worsening of her accepted employment-related conditions. She determined that appellant failed to establish a material change in the nature and extent of her November 29, 1999 employment-related conditions.

Appellant submitted reports covering intermittent dates from February 16 to June 4, 2007 from Brenda Beckmann and Aimee Sesaldo, physical therapists, which addressed the treatment of her right shoulder condition.

In an April 5, 2007 report, Dr. Gordon reiterated that appellant had right shoulder rotator cuff tear. He opined that she was totally disabled from April 5 through May 10, 2007. Also on April 5, 2007 Dr. Gordon prescribed physical therapy.

In a May 29, 2007 letter, appellant requested reconsideration of the March 26, 2007 decision. She submitted Dr. Gordon's May 31, 2007 form report which stated that she was totally disabled from May 31 to June 4, 2007. Dr. Gordon indicated that appellant could resume limited-duty work with restrictions from June 5 through July 25, 2007. Also on May 31, 2007 he stated in a narrative report that appellant was being treated for a right shoulder injury that was a

[4] Appellant's claim for the August 18, 1997 and January 12, 1998 employment injuries were accepted for right shoulder sprain. Her claim for the May 19, 1999 employment injury was accepted for a contusion of the right wrist.

recurrence of her November 29, 1999 employment injuries. Dr. Gordon noted that she reinjured her shoulder on July 17, 2006 while performing modified work. He opined that the recurrence of disability was directly related to the accepted employment injuries. Dr. Gordon released appellant to return to work on June 5, 2007. In a March 8, 2007 report, he stated that appellant would be totally disabled from that date through April 5, 2007.[5] Ms. Beckmann, Ms. Sesaldo and Thomas Delviscio, a physical therapist, treated appellant on June 7 and 25, 2007.

By decision dated July 12, 2007, the Office denied modification of the March 26, 2007 decision. It found that appellant failed to establish a material change in the nature and extent of her November 29, 1999 employment-related injuries and limited-duty job requirements.[6]

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.[7]

Once the loss of wage-earning capacity 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.[8] The burden of proof is on the party attempting to show modification of the award.[9]

ANALYSIS

After her November 29, 1999 employment injuries, which the Office accepted for right lateral epicondylitis, radial tunnel syndrome and right shoulder derangement, appellant returned to work as a modified carrier technician at the employing establishment. On August 9, 2004 the Office found that her actual earnings from this employment over a period of time demonstrated her wage-earning capacity.

On July 31, 2006 appellant stopped work and claimed compensation for total disability beginning on July 17, 2006. Because a formal decision of appellant's loss of wage-earning capacity was in place, the Office properly adjudicated the case as a request for modification of

[5] It appears that Dr. Gordon inadvertently stated that appellant was totally disabled beginning March 8, 2002 rather than March 8, 2007.

[6] Following the Office's July 12, 2007 decision, appellant submitted additional evidence. The Board may not consider evidence for the first time on appeal which was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). Appellant can submit this evidence to the Office and request reconsideration. 5 U.S.C. § 8128; 20 C.F.R. § 10.606.

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

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

[9] *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Stanley B. Plotkin, supra* note 8.

her loss of wage-earning capacity.[10] She has the burden of proof to submit evidence sufficient to establish a material change in the nature and extent of her injury-related conditions.[11] Appellant has not met her burden of proof.

None of the medical evidence submitted by appellant establishes that her right lateral epicondylitis, radial tunnel syndrome and right shoulder derangement had materially worsened on July 17, 2006 to the point that she could no longer earn wages after July 31, 2006.

Dr. Gordon's August 16 and October 12, 2006 reports stated that appellant sustained a recurrence of disability beginning July 17, 2006 causally related to her March 13, 1993 and November 29, 1999 employment-related right shoulder condition. He stated that repetitive motion in the shoulder caused the alleged recurrence of disability. On October 12, 2006 Dr. Gordon opined that appellant could no longer case mail. In neither report did Dr. Gordon provide any rationale explaining how or why appellant's right shoulder condition worsened or caused disability for work as of July 17, 2006. His statement on causal relationship was conclusory in nature.

Dr. Gordon's May 31, 2007 report stated that appellant sustained a recurrence of disability beginning July 17, 2006 causally related to her November 29, 1999 employment-related injuries. This evidence does not address how appellant's accepted November 29, 1999 employment injuries worsened or caused disability for work as of July 17, 2006. Similarly, Dr. Gordon's January 25 and April 5, 2007 prescriptions for physical therapy failed to address how appellant's accepted November 29, 1999 employment injuries worsened or caused disability for work as of July 17, 2006.

Dr. Gordon's January 25, March 8, April 5 and May 31, 2007 reports stated that appellant had a rotator cuff tear. He further stated that she was totally disabled from January 25 through March 8, April 5 through May 10 and May 31 through June 4, 2007, respectively. Dr. Gordon did not provide an adequate discussion of how appellant's condition worsened during intermittent periods from January 25 through June 4, 2007 such as to cause her disability for work.

Dr. Scarange's October 14, 2000 form report stated that appellant sustained AC arthritis and subcromial bursitis, muscle strain, right elbow epicondylitis and right wrist contusion. He indicated with an affirmative mark that the diagnosed conditions were caused or aggravated by her April 29, 1996, August 18, 1997, January 12, 1998 and May 19, 1999 employment-related injuries. Dr. Scarange stated that appellant was totally disabled from May 19, 1999 through April 29, 2004. Similarly, in a January 10, 2003 form report, Dr. Gordon indicated with an affirmative mark that appellant's tennis elbow was caused or aggravated by an employment activity. He stated that she was totally disabled from October 2002 through March 9, 2003. In

[10] *Katherine T. Kreger, supra* note 7; *Sharon C. Clement*, 55 ECAB 552 (2004); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

[11] The Board notes that appellant is not claiming that she has been retrained or vocationally rehabilitated, and she does not seek reconsideration of the August 9, 2004 determination of wage-earning capacity on the grounds that it was in error.

reports dated November 4 and December 2 and 23, 2005, Dr. Gordon listed appellant's restrictions. The reports of Dr. Scarange and Dr. Gordon are not relevant to the issue in this case of whether the August 9, 2004 wage-earning capacity determination should be modified as they predate July 17, 2006, the date of the alleged worsening of appellant's employment-related conditions.

The reports from appellant's physical therapists do not constitute probative medical evidence inasmuch as a physical therapist is not a "physician" as defined under the Federal Employees' Compensation Act.[12]

Appellant has not submitted sufficiently rationalized medical evidence establishing a material change in the nature and extent of her employment-related conditions.[13]

CONCLUSION

The Board finds that appellant has not met her burden of proof in establishing that modification of the August 9, 2004 wage-earning capacity determination is warranted.

ORDER

IT IS HEREBY ORDERED THAT the July 12 and March 26, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 4, 2008
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

[12] 5 U.S.C. § 8101(2); *Vickey C. Randall*, 51 ECAB 357, 360 (2000) (a physical therapist is not a physician under the Act).

[13] *Stanley B. Plotkin, supra* note 8.