

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

**K.G. (Administrator for the Estate of T.B.),
Appellant**

and

**U.S. POSTAL SERVICE, POST OFFICE,
Stratford, NJ, Employer**

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**Docket No. 08-1327
Issued: September 30, 2009**

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 2, 2008 appellant, through counsel, filed a timely appeal of the November 13, 2007 merit decision of the Office of Workers' Compensation Programs denying modification of a wage-earning capacity determination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant established that her November 16, 1999 wage-earning capacity determination should be modified.

FACTUAL HISTORY

This case has previously been before the Board. In a May 23, 2003 decision, the Board set aside the Office's February 12 and December 18, 2002 decisions denying the employee's February 15, 2000 recurrence of disability claim.¹ The Board remanded the case to the Office for further development of the medical evidence to determine whether the employee sustained a

¹ Docket No. 03-701 (issued May 23, 2003).

recurrence of disability commencing February 15, 2000. In a July 10, 2007 order, the Board set aside an Office hearing representative's March 1, 2006 decision, which denied the employee's February 15, 2000 recurrence of disability claim.² The Board found that the hearing representative applied the wrong standard of review as the claim raised the issue of whether modification of the Office's November 16, 1999 wage-earning capacity determination was warranted. A review of the facts pertaining to this appeal is set forth below.

On July 29, 1998 the employee, then a 41-year-old letter carrier, injured her neck and shoulders while pulling flats from the top shelf of a carrier case. The Office accepted her claim for cervical radiculopathy, rotor cuff impingement of the right shoulder and supraspinatus tendinosis of both shoulders, and authorized cervical and right shoulder surgeries.³ On June 1, 1999 the employee returned to work in a modified carrier position. By decision dated November 16, 1999, the Office reduced the employee's compensation effective October 23, 1999. It determined that her actual wages as a part-time modified carrier fairly and reasonably represented her wage-earning capacity. The employee worked in the modified position until February 15, 2000 when she filed a claim alleging that she sustained a recurrence of disability. Following her return to work in the modified position, the employee alleged that she continued to experience pain. She was unable to grasp due to severe pain emanating from her neck down to her hand.

In a November 19, 2003 decision, the Office denied the employee's recurrence of disability claim. It found the medical evidence insufficient to establish that she sustained a recurrence of disability commencing February 15, 2000 causally related to her accepted employment-related injuries. By decision dated October 18, 2004, an Office hearing representative set aside the Office's November 19, 2003 decision. She found a conflict⁴ between Dr. Alex M. Cueto⁵ and Dr. Bruce W. Wulfsberg, a Board-certified orthopedic surgeon,⁶ attending physicians, and Dr. Henry J. Magliato,⁷ an Office medical adviser, whether the

² Docket No. 06-1965 (issued July 10, 2007).

³ The only authorized surgery that appellant did not undergo was the anterior cervical discectomy and fusion with allograft.

⁴ The Office hearing representative also reviewed the January 20, 2004 report, Dr. Joan F. O'Shea, appellant's attending physician, who opined that the employee's right C6-7 herniated disc, moderate left C5-6 herniated disc and moderate right C4-5 herniated disc were causally related to a 1998 work-related motor vehicle accident. The hearing representative found that Dr. O'Shea's was of diminished probative value due to an inaccurate history of injury; thus, it did not assist in creating the conflict.

⁵ In a February 16, 2000 medical report, Dr. Cueto stated that the employee sustained a recurrence of injury. He diagnosed cervical herniation at C6-7. Dr. Cueto stated that the employee was unable to return to work.

⁶ In a March 28, 2000 report, Dr. Wulfsberg stated that the employee had herniated discs in the cervical spine with radiculopathy and an impingement syndrome and a partial thickness tear of her rotator cuff. He opined that she was unable to work in her modified position.

⁷ In a September 29, 2003 report, Dr. Magliato found that the medical evidence did not establish a worsening of the employee's accepted employment-related conditions. He explained that the attending physician did not provide objective findings, such as testing and physical findings, to establish a worsening of her accepted conditions. Dr. Magliato noted that a March 29, 2000 work capacity evaluation indicated that the employee could perform limited-duty work four hours per day which she was performing at the time of the claimed recurrence of disability on February 15, 2000.

employee became totally disabled on February 15, 2000 due to a worsening of her accepted employment-related injuries. The hearing representative remanded the case to the Office for referral of appellant to an impartial medical specialist.

By letter dated March 23, 2005, the Office referred the employee, together with the case record and a statement of accepted facts, to Dr. George P. Glenn, Jr., a Board-certified orthopedic surgeon, for an impartial medical examination. In an April 7, 2005 report, Dr. Glenn reviewed the history of the employee's July 29, 1998 employment injuries and medical treatment. He noted her complaints of constant headaches that never resolved. She complained of pain in the right and left shoulders, which radiated down to her left arm and hand and in the neck that caused her prior problem to worsen. The employee experienced tenderness from the neck to the base of the skull and shoulder area. Dr. Glenn reported essentially normal findings on physical examination with neck pain experienced on squatting and decreased range of motion of the cervical spine, arms and shoulders. The employee demonstrated full range of motion when her attention was directed towards a surgical scar on her right shoulder and when she completely turned her head to the left in a prone position with her arms above her head. Dr. Glenn reported essentially normal findings on neurological examination with paresthesias in the fifth digit of the right hand and decreased flexion on bending at the waist. He stated that there were inconsistent responses to testing of the left hand. The employee's performance on Jamar testing of the right hand was significantly less than expected in light of her normal muscle strength. The kilogram force on the left was greater but did not equate to a bell shaped curve, which was indicative of poor effort on the right and left. Regarding limited range of motion of the back, Dr. Glenn noted that the employee was able to bend forward touching the area above her ankles while sitting on an examination table. This indicated a range of motion, which was significantly greater than she would allow on a voluntary basis and was painless.

Dr. Glenn opined that there was no incident indicating that the employee's symptoms worsened as of February 15, 2000. The employee was doing fairly well regarding her shoulder, arm, neck and low back. Dr. Glenn noted a new diagnosis of ulnar nerve neuropraxia (compression neuropathy of the ulnar nerve) in the cubital groove on the right. He related that this condition generally occurred as a result of direct trauma in patients who had a significant cubitus valgus deformity occurring over a period of time. Dr. Glenn could not find such a history in the record and stated that the condition was not work related. He found that the range of motion of the employee's cervical and lumbar spines and shoulder was far in excess of what she allowed on a voluntary basis. The employee's reported tenderness was so diffuse as to defy explanation on an organic injury basis. Dr. Glenn stated that the employee showed no signs of weakness (with alternate testing) or any neurologic deficits. Jamar testing demonstrated poor effort. Dr. Glenn related that the employee's reported limitations of motion were an effort to impress him with her residual problems. He noted that Dr. Laura E. Ross, an attending Board-certified orthopedic surgeon, addressed the employee acquiring full range of motion in the shoulder. Dr. Glenn stated that the employee currently showed no neurologic deficit. The employee's subjective complaints were minimal and not supported by objective findings. Dr. Glenn stated that cervical surgery was not necessary based on a recent magnetic resonance imaging (MRI) scan and his physical examination findings. He indicated that the employee's preexisting degenerative changes in the neck progressed but these were a physiologic manifestation rather than an indication of a subsequent traumatic event. Dr. Glenn related that her employment-related disc herniations had resolved. She still had radiculopathy. He opined that no incident occurring around or near February 15, 2000 caused any worsening of the

employee's current preexisting problem which would prevent her from performing her modified work duties. Dr. Glenn found that she was not totally disabled from February 15 to May 20, 2000. He further found that the employee could return to her modified position four hours per day.

In a May 26, 2005 decision, the Office found that the employee did not sustain a recurrence of disability commencing February 15, 2000 based on Dr. Glenn's April 7, 2005 impartial medical opinion.

In a June 20, 2006 report, Dr. Ross noted the employee's complaint of worsening discomfort in her cervical spine, and her previous diagnosis of cervical disc pathology and cervical radiculopathy. She reported findings on physical examination and diagnosed cervical sprain/strain with underlying cervical degenerative disc disease and cervical disc pathology. She recommended an MRI scan of the cervical spine to determine the nature of the employee's continued symptoms since they had worsened. In a February 19, 2007 report, Dr. Ross noted the employee's symptoms, which included spasms, tensing on both sides and pain radiating to the right and left arms. She diagnosed multilevel cervical disc herniations with right upper extremity radiculitis and impingement syndrome of the right shoulder. Dr. Ross stated that the employee could not work for an indefinite period.

In a decision dated November 13, 2007, the Office denied modification of the November 16, 1999 wage-earning capacity decision. It accorded special weight to Dr. Glenn's April 7, 2005 impartial medical opinion.

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.⁸

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.⁹ 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.¹⁰

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

⁸ See *Katherine T. Kreger*, 55 ECAB 633 (2004).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

¹⁰ *Id.*

rehabilitated or the original determination was, in fact, erroneous.¹¹ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.¹²

Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part: If there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.¹³ In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.¹⁴

ANALYSIS

The Office accepted that the employee sustained cervical radiculopathy, rotator cuff impingement of the right shoulder and supraspinatus tendinosis of both shoulders while in the performance of duty on July 29, 1998. On November 16, 1999 the Office determined that the employee's actual earnings as a modified carrier fairly and reasonably represented her wage-earning capacity. The employee filed a claim for total disability commencing February 15, 2000 due to her accepted employment-related conditions. The Board finds that appellant has not shown that there was a material change in the nature and extent of the employee's employment-related conditions such that the Office's November 16, 1999 wage-earning capacity determination should be modified.

A conflict in the medical opinion arose between Dr. Cueto and Dr. Wulfsberg, attending physicians, and Dr. Magliato, an Office medical adviser, regarding the issue of whether the employee's July 29, 1998 employment-related conditions had worsened causing total disability commencing February 15, 2000. Dr. Cueto and Dr. Wulfsberg opined that the employee continued to have residuals and total disability due to the accepted employment-related conditions. Dr. Magliato opined that the employee's work-related conditions had not worsened and she was able to perform her modified work duties.

The Office properly referred appellant to Dr. Glenn as the impartial medical specialist. He reviewed the entire record and statement of accepted facts, and performed a thorough examination of appellant. In an April 7, 2005 report, Dr. Glenn opined that the employee was not totally disabled as of February 15, 2000 due to a worsening of her accepted employment-related conditions. He further opined that she could return to her part-time modified position. Dr. Glenn stated that there were no objective findings to support her subjective complaints of pain. His physical examination revealed essentially normal findings. Dr. Glenn found that she demonstrated full range of motion when he directed her attention towards a surgical scar on her

¹¹ *M.A.*, 59 ECAB ____ (Docket No. 07-349, issued July 10, 2008); *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

¹² *D.M.*, 59 ECAB ____ (Docket No. 07-1230, issued November 13, 2007); *Sherman Preston*, 56 ECAB 607 (2005).

¹³ 5 U.S.C. § 8123(a); *see Y.A.*, 59 ECAB ____ (Docket No. 08-254, issued September 9, 2008).

¹⁴ *See V.G.*, 59 ECAB ____ (Docket No. 07-2179, issued July 14, 2008); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

right shoulder and when she completely turned her head to the left in a prone position with her arms above her head. He also provided essentially normal findings on neurological examination. Dr. Glenn noted that her new diagnosis of ulnar nerve neuropraxia in the cubital groove on the right was not work related. He related that while this condition generally occurred as a result of direct trauma in patients who had a significant cubitus valgus deformity occurring over a period of time, the employee did not experience such trauma. Dr. Glenn found that the range of motion of her cervical and lumbar spine and shoulder was far in excess of what she allowed on a voluntary basis. The employee's reported tenderness was so diffuse as to defy explanation on an organic injury basis. Dr. Glenn stated that she showed no signs of weakness (with alternate testing) or any neurologic deficits. He related that she did not currently show any neurologic deficit. Dr. Glenn related that the employee's preexisting degenerative changes in the neck progressed but these were a physiologic manifestation rather than an indication of a subsequent traumatic event. He found that she still had radiculopathy but did not state that it had worsened causing her total disability as of February 15, 2000. Dr. Glenn further found that the employee's disc herniations had resolved.

The Board notes that Dr. Glenn's opinion is based on a proper factual and medical background and is entitled to special weight afforded an impartial medical specialist. Based on Dr. Glenn's review of the case record, essentially normal findings on physical and neurological examination, he found that the employee was not disabled commencing February 15, 2000 due to a worsening of her accepted employment-related cervical radiculopathy, rotor cuff impingement of the right shoulder and supraspinatus tendinosis of both shoulders and that the employee was able to return to her modified carrier position. The Board finds that the Office properly denied modification of the November 16, 1999 wage-earning capacity determination as the medical evidence failed to establish a material change in the nature and extent of the employee's employment-related conditions.

Appellant did not submit any rationalized medical evidence to overcome the weight of Dr. Glenn's opinion or to create a new conflict. Dr. Ross' June 20, 2006 report found that the employee sustained cervical sprain/strain with underlying cervical degenerative disc disease and cervical disc pathology. She recommended further diagnostic testing to determine the nature of her continued worsening symptoms. However, the Office has not accepted the employee's claim for cervical sprain/strain.¹⁵ Moreover, as Dr. Ross did not provide an opinion stating that the employee was totally disabled as of February 15, 2000 due to a worsening of her accepted July 29, 1998 employment-related conditions, the Board finds that her report is of limited probative value.¹⁶

Similarly, Dr. Ross' February 19, 2007 report is of limited probative value. She found that the employee sustained multilevel cervical disc herniations with right upper extremity radiculitis and impingement syndrome of the right shoulder. Dr. Ross opined that she was totally disabled for work indefinitely. The Office has not accepted the employee's claim for cervical disc herniations with right upper extremity radiculitis.¹⁷ Further, Dr. Ross did not provide an

¹⁵ For conditions not accepted by the Office as being employment related, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relation, not the Office's burden to disprove such relationship. *Alice J. Tysinger*, 51 ECAB 638 (2000).

¹⁶ *Michael E. Smith*, 50 ECAB 313 (1999).

¹⁷ See *Alice J. Tysinger*, *supra* note 15.

opinion stating that the employee was totally disabled commencing February 15, 2000 due to a worsening of her accepted July 29, 1998 employment-related conditions.¹⁸

Appellant has not claimed or otherwise shown that the Office's original November 16, 1999 wage-earning capacity determination was erroneous. The Office based the employee's wage-earning capacity determination that her actual earnings as a modified carrier beginning on June 1, 1999 represented her wage-earning capacity.¹⁹ There is no evidence that the employee's actual earnings as a modified carrier did not fairly and reasonably represent her wage-earning capacity and the Office properly adjusted her compensation based on this wage-earning capacity determination.²⁰ The position was not an odd-lot or makeshift position designed for the employee's particular needs; nor was it seasonal in nature.²¹ For these reasons, appellant has not shown that the Office's original determination with regard to the employee's wage-earning capacity was erroneous. He also has not alleged or otherwise shown that the employee was retrained or otherwise vocationally rehabilitated.

On appeal, appellant contends that Dr. Glenn's medical opinion is not entitled to special weight accorded an impartial medical specialist, as he did not understand the nature of a recurrence of disability. Counsel stated that Dr. Glenn consistently referred to an alleged incident occurring on February 15, 2000 while the record established that the employee's total disability was caused by the worsening of her accepted employment conditions. He noted that the record showed that no incident occurred on February 15, 2000. As noted in the Board's July 10, 2007 order, the recurrence of disability standard of review is not applicable to the facts in this case. The Office issued the November 16, 1999 decision on the employee's wage-earning capacity at the time of the claimed recurrence of total disability. The case was properly adjudicated as a request for modification of the wage-earning capacity determination, not as a claim of recurrence.²² Dr. Glenn found that the employee's disability commencing February 15, 2000 was not due to a material change of her accepted employment-related conditions. His opinion is entitled to special weight as an impartial medical specialist because it is well rationalized and based on an accurate factual and medical background.

Appellant further contended that Dr. O'Shea's February 25, 2004 report established that the employee suffered a worsening of her employment-related conditions commencing February 15, 2000. Dr. O'Shea reviewed a history that the employee sustained a right rotator cuff injury and cervical herniated discs as a result of a July 29, 1998 work-related motor vehicle accident. She stated that the work-related motor vehicle accident initially caused the herniated discs, but as the body attempted to respond to these changes, it laid down bone and ligaments

¹⁸ *Michael E. Smith, supra* note 16.

¹⁹ Disability is defined in the implementing federal regulations as the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. 20 C.F.R. § 10.5(f). The Office applied the principles enunciated in *Albert C. Shadrick*, 5 ECAB 376 (1953), in order to calculate the adjustment in appellant's compensation.

²⁰ *See Clarence D. Ross*, 42 ECAB 556, 561-62 (1991).

²¹ *See James D. Champlain*, 44 ECAB 438, 440-41 (1993); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (July 1997).

²² *Katherine T. Kreger, supra* note 8.

which made the condition and pain worsen. Dr. O'Shea further stated that the employee's untreated pain continued to make her condition worsen. She advised that the condition would not improve without adequate decompression. Dr. O'Shea opined that the employee's condition worsened from February 15 to December 30, 2000. However, Dr. O'Shea's report is not based on an accurate factual background. She stated that the employee sustained injuries resulting from a July 29, 1998 work-related car accident rather than from pulling flats from the top shelf of a carrier which was the incident accepted by the Office. It is well established that medical reports must be based on a complete and accurate factual and medical background, and medical opinions based on an incomplete or inaccurate history are of little probative value.²³ The Board finds, therefore, that Dr. O'Shea's report is of limited probative value and insufficient to outweigh the special weight accorded to Dr. Glenn's impartial medical opinion that the employee's total disability as of February 15, 2000 was not caused by a worsening of her July 29, 1998 employment-related conditions.

CONCLUSION

The Board finds that the Office properly denied modification of the November 16, 1999 wage-earning capacity determination.

ORDER

IT IS HEREBY ORDERED THAT the November 13, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 30, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

²³ *Douglas M. McQuaid*, 52 ECAB 382 (2001).