United States Department of Labor
Employees' Compensation Appeals Board

R.S., Appellant	)	
and	)	**Docket No. 08-1559**
	)	**Issued: September 24, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Springfield, IL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 7, 2008 appellant filed a timely appeal from the March 28, 2008 merit decision of the Office of Workers' Compensation Programs denying modification of her wage-earning capacity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether appellant sustained a recurrence of total disability on or about June 13, 2007 causally related to her accepted work-related injury.

On appeal, appellant notes that the Office issued a February15, 2008 decision accepting her recurrence claim as the employing establishment withdrew light duty. However, the Office subsequently set that determination aside and found that she did not establish a basis for modifying a prior loss of wage-earning capacity determination.

FACTUAL HISTORY

On March 28, 2002 appellant, then a 50-year-old letter carrier, filed an occupational disease claim alleging that she sustained tendinitis in her wrist as a result of casing mail in her

federal employment. By letter dated June 12, 2002, the Office accepted her claim for bilateral cubital tunnel syndrome and right wrist tenosynovitis. On August 27, 2002 appellant underwent surgery for excision of ganglion cyst and release of the first extensor compartment, radial tunnel release and cubital tunnel release. On February 18, 2003 she underwent additional surgery for release of the ulnar nerve at the elbow and medial epicondylectomy with release of the left posterior interosseous nerve of the left forearm. On July 24, 2003 appellant accepted a limited-duty position with the employing establishment. She stopped work on February 22, 2005 and underwent additional surgery for repair of the radial collateral ligament and centralization extensor tendon, right index finger metacarpophalangeal (MP) joint.

On April 4, 2005 appellant returned to limited-duty work as a modified letter carrier. Her duties consisted of answering the telephone and performing duties as assigned by her supervisor within her medical restrictions.

In an April 28, 2005 note, Dr. Mark Greatting, a Board-certified orthopedic surgeon specializing in hand surgery, noted her postsurgical status with a well-healed wound but a fair amount of swelling. He noted dramatic improvement in motion from therapy. On August 18, 2005 Dr. Greatting advised that appellant reached maximum medical improvement as to her right index finger MP joint and set forth physical restrictions. Repetitive movements with the wrists and elbows was limited to two hours a day (one hour in morning and one hour in afternoon), pushing and pulling of 100 pounds for two hours a day and lifting 10 pounds for two hours a day.

In an August 29, 2005 report, Dr. Janet R. Albers, a Board-certified family practitioner, listed impressions of bilateral wrist pain, status post bilateral cubital tunnel and cyst removal in the wrist, tendinitis and tendon repair. In a work capacity evaluation, she found that appellant could work eight hours a day, with a restriction of two hours reaching above shoulder, operating a motor vehicle (intermittently), lifting a maximum of 10 pounds, with a one-hour restriction on repetitive movements with her wrists and elbows or pushing and pulling. Dr. Albers indicated that the restrictions were permanent.

On October 10, 2005 appellant was offered a position as a modified letter carrier. Her duties involved casing mail for one hour within restrictions prescribed by her medical provider, running express mail and shuttle mail and other duties as assigned by the carrier supervisor within her restrictions. Appellant was limited to a 10-pound lifting restriction, two hours of reaching above shoulder and driving (intermittently) and no climbing. She accepted this position.

By decision dated January 5, 2006, the Office determined that appellant's actual earnings as a modified letter carrier fairly and reasonably represented her wage-earning capacity. As appellant's wages in this position met or exceeded those in the job she held when injured, it reduced her compensation benefits to zero.[1]

[1] On June 16, 2006 the Office issued a schedule award for an 11 percent impairment of the left upper extremity and a 26 percent impairment of the right upper extremity.

In an April 27, 2006 report, Dr. Greatting noted that appellant received care in his office from May 13, 2004 through August 18, 2005, when he released her to return to work with restrictions. He recommended a functional capacity evaluation.

In a September 29, 2006 duty status report, Dr. Albers indicated that appellant was able to intermittently lift 10 pounds, stand three hours a day and walk four hours a day. She noted that appellant could not climb, kneel, bend, stoop, twist, push, pull, perform fine manipulation or operate machinery. Appellant was limited to two hours a day each for intermittent simple grasping, reaching above the shoulder and driving a vehicle.

By letter dated March 15, 2007, the employing establishment referred appellant for a fitness-for-duty evaluation. In report dated April 19, 2007, Dr. David J. Fletcher, Board-certified in occupational medicine, determined that she was "currently performing at a sedentary physical demand level, which is noted to be significantly below the required demand level for performance of job duties listed by the written job description." He noted: "It is believed that [appellant] is employable at the current demonstrated functional levels (lifting 10 to 13 pounds for a lifting height range of 10 [inches] to 46 [feet], lifting overhead 7.5 pounds, carrying 10 pounds and pushing/pulling 100 pounds, all on occasional basis." Dr. Fletcher did not anticipate that appellant's functional levels would significantly improve in the short term. Appellant would benefit from job activities that would not be highly repetitive, highly awkward or forceful in terms of the upper extremities.

A May 7, 2007 physical capacity evaluation was performed at Dr. Fletcher's request. The exercise physiologist noted that appellant participated on that date in approximately 2.5 hours of activities which included numerous functional and strength tests. Dr. Fletcher concluded that appellant was demonstrating the ability to work within a light physical demand level (lifting up to a 20-pound maximum occasionally). He further noted that the majority of appellant's current restrictions were appropriate no pushing/pulling, no overhead work, intermittent fine motor finger manipulation and rest when needed. On May 21, 2007 Dr. Fletcher advised that appellant could not lift over 20 pounds.

On June 8, 2007 the employing establishment offered appellant a position as a modified carrier. It restricted lifting 20 pounds but provided no further restrictions, noting that she could perform regular duties as a city route carrier within that restriction. On June 13, 2007 appellant rejected the offer, contending that it exceeded her physical limitations.

On June 13, 2007 appellant filed a recurrence of disability claim, contending that she had nerve damage and arthritis as a result of her accepted injury and subsequent surgery. She addressed the fitness-for-duty evaluation, which resulted different work limitations than those recommended by her attending physician. The employing establishment contended that appellant's only restriction was a 20-pound weight restriction. Appellant filed claims for wage-loss compensation from June 13 to September 28, 2007.

By letter dated June 20, 2007, the Office gave appellant 30 days to submit evidence in support of her recurrence claim.

In a June 21, 2007 letter, a health and resource management specialist at the employing establishment advised that appellant underwent a fitness-for-duty examination on April 19, 2007. This led to the current modified job offer with the only restriction being on lifting over 20 pounds. Appellant had refused the job offer and was sent home. She contended that she could not drive, but the only limitation was that she could not carry 20 pounds.

On August 13, 2007 Dr. Greatting noted that he had not seen appellant since February 15, 2006. He reviewed appellant's treatment and functional capacity evaluations. Dr. Greatting advised that appellant's condition had not changed and that she could not perform her regular work activities. He noted that appellant should not carry mail on a mail route or work as a letter carrier. Appellant was limited to intermittent activities of lifting and carrying a maximum of 10 pounds and not drive trucks or cars with a manual transmission.

By decision dated August 30, 2007, the Office denied modification of the 2006 loss of wage-earning capacity determination.

On September 7, 2007 appellant contended that she never received a job offer after having been sent home. The station manager told her there was no work within her restrictions.

On September 28, 2007 appellant requested an oral hearing. She filed claims for wage loss through January 3, 2008.

On December 12, 2007 appellant stated that she was notified by the station manager to report back to work pursuant to her job offer of July 27, 2007. She returned to work for six hours on November 26, 2007, when the station manager informed her that there was no work for her and to go home. On December 17, 2007 the employer made another offer of modified assignment, using the restrictions of Dr. Albers.

At a hearing held on January 7, 2008, appellant testified that she began working for the employing establishment in August 1982 and was "supposed to go back to work tomorrow." She was unable to work for approximately six months but was paid from June 13 to July 29, 2007. Appellant noted that the jobs she was offered involved driving, which she could not perform due to permanent nerve damage. She contended that she could not operate a window and that the doors to vehicles at the employing establishment were heavier than 10 pounds, which she could not push or pull.

By decision dated February 15, 2008, the Office hearing representative reversed the August 30, 2007 decision, finding that appellant established a recurrence of disability as the employing establishment withdrew her light-duty job. However, by decision dated March 28, 2008, the Chief of the Branch of Hearings and Review reopened the claim. He determined that appellant had not met the criteria for establishing modification of the 2006 wage-earning capacity determination. The Chief affirmed the August 30, 2007 decision

LEGAL PRECEDENT

When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that she can perform the light-duty position, the employee has the burden to establish

by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that she cannot perform such light duty. As part of this burden the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.[2] Office procedure provides that a recurrence of disability can be caused by withdrawal of a light-duty assignment made specifically to accommodate an employee if the withdrawal is not due to misconduct or nonperformance of job duties.[3]

When a wage-earning capacity determination has been made and the employee submits evidence with respect to disability for work, the issue presented is generally whether modification of wage-earning capacity is warranted.[4] However, the Office is not precluded from adjudication a recurrence of disability for a limited period of disability without formal modification of the wage-earning capacity determination.[5]

ANALYSIS

Appellant claimed that she sustained a recurrence of total disability when her modified letter carrier position was withdrawn as of June 13, 2007. She retired as of May 23, 2008. Although the Office issued a loss of wage-earning capacity determination on January 5, 2006 and reduced appellant's benefits to zero, the Board has held that this does not preclude the finding of a recurrence for a limited period of time.[6] The period of disability claimed appears to be less than one year. The employing establishment acknowledged that it modified appellant's position on June 13, 2007, based on a recent fitness-for-duty evaluation that found her only limitation was lifting restricted to 20 pounds. It provided a new job offer which was rejected by appellant. The employer advised that it did not have work within appellant's former restrictions.

Dr. Fletcher examined appellant and referred her for a functional capacity evaluation. As noted, he advised that appellant's only work limitation was on lifting over 20 pounds. However, appellant's treating physicians, Drs. Greatting and Albers, advised that she has additional restrictions. On August 18, 2005 Dr. Greatting advised that appellant had permanent restrictions prohibiting repetitive movements with her wrists and elbows for greater than two hours a day (one hour in the morning and one hour in the afternoon). Appellant was restricted to lifting up to 10 pounds. Dr. Greatting reaffirmed these restrictions in his April 27, 2006 report. Dr. Albers indicated that appellant could intermittently lift 10 pounds, stand intermittently three hours a day and walk intermittently four hours a day. She noted that appellant could not climb, kneel, bend, stoop, twist, push, pull and perform fine manipulation or operate machinery. Dr. Albers also

[2] *Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

[3] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3b(1)(c) (January 1995).

[4] *Katherine T. Kreger*, 55 ECAB 633, 636 (2004); *see Sharon C. Clement*, 55 ECAB 552 (2004).

[5] *See Sharon C. Clement*, *supra* note 4; *see* also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

[6] *W.A.*, Docket No. 08-1233 (issued March 3, 2009).

limited appellant to two hours a day each for intermittent simple grasping, reaching above the shoulder and driving a vehicle.

Under the Office's procedures, a physician who performs a fitness-for-duty examination for the employer cannot create a conflict in medical opinion.[7] Such a physician is not considered a second opinion physician for the government. The Board notes that the Office should have further developed the medical evidence of record. The employing establishment relies on the report of Dr. Fletcher as an accurate depiction of appellant's work capacity while she has relied on the restrictions set by her attending physicians. The case will be remanded for further development on appellant's capacity for modified duty and an appropriate decision on her claim for wage loss.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 28, 2008 be set aside. The case is remanded for further development consistent with this decision.

Issued: September 24, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[7] *See Mary L. Barragy*, 47 ECAB 285 (1996).