

were causally related to the repetitive motion involved in casing mail and processing mail on machines. On August 20, 2002 appellant underwent an anterior cervical decompression and fusion, C4-5, C5-6 and C6-7 with iliac crest bone bank fusion and microdissection. On September 27, 2002 the Office accepted her claim for chronic back pain and cervical disc herniation. It later accepted appellant's claim for bilateral carpal tunnel syndrome. On February 12, 2003 she underwent a right carpal tunnel release. Appellant underwent a left carpal tunnel release on August 27, 2003. The Office paid appropriate compensation and medical benefits.

On January 3, 2004 the employing establishment made a job offer to appellant as a mail processor clerk. This position involved distributing mail manually into a monitored case for seven hours a day and sweeping letter mail from modified letter case one hour a day. By letter dated January 7, 2004, the Office informed appellant that it had reviewed the physical requirements of the offered position and found them to be suitable and in accordance with her medical restrictions as set forth in Dr. Helen Schilling, appellant's Board-certified physiatrist's report of December 31, 2003.¹ Appellant returned to work on January 17, 2004. On April 1, 2004 the Office reduced appellant's compensation based on her wages in her new position. By decision dated August 15, 2004, the Office found that appellant had been reemployed as a modified clerk with wages of \$913.52 per week effective January 17, 2004.² It reduced appellant's monetary compensation effective January 17, 2004 based on her actual earnings.

In a note regarding an Office visit on August 28, 2007, Dr. Schilling noted that appellant stopped working on August 2, 2007 due to stress, possibly related to altercations with her supervisors at work. She noted that appellant had thoracic and lumbar pain. Dr. Schilling opined that, if appellant is going to pursue medical retirement from the employing establishment, it needed to be psychiatric because her spine did not justify medical retirement.

In a November 19, 2007 report, Dr. Ajay K. Bindal, appellant's Board-certified neurosurgeon, noted that appellant is suffering from continued degenerative disease affecting her spine status post cervical fusion five years ago. He noted that this is further compounded by stress-related anxiety. Dr. Bindal noted that appellant was unable to carry out her work responsibilities as a result and that he fully supported her decision to pursue disability. In an April 3, 2008 report, he indicated that appellant was symptomatic from degenerative disease of her cervical and lumbar spine.

An April 14, 2008 magnetic resonance imaging scan was interpreted by Dr. Josefina Timm as: evincing solid-appearing interbody fusion at C4-5 and C5-6; intervertebral disc degeneration with mild bulging and moderate unconvertrebral joint hypertrophy; mild posterior left paracentral profusion at C3-C4; and moderate degenerative facet hypertrophy on the right at C7-T1.

¹ In a work capacity evaluation dated December 31, 2003, Dr. Schilling indicated that appellant was able to sit, reach, twist, bend, stoop, operate a motor vehicle, squat and kneel eight hours a day. She limited appellant to walking and standing four hours a day and no repetitive motion in her wrist of her left hand and pushing/pulling in her left hand limited to 20 pounds.

² On September 23, 2004 the Office issued a schedule award for a 10 percent impairment of the right upper extremity and a 10 percent impairment of the left upper extremity.

In an April 17, 2008 report, Dr. Bindal noted that appellant's new imaging studies demonstrate no significant disc herniation or neurologic compression that would require additional surgical intervention. He advised appellant that she will need to pursue conservative treatment.

Appellant began treatment with Dr. David Dent, a physician who is Board-certified in occupational medicine and pain medicine, on April 28, 2008. At that time he diagnosed appellant with cervical radiculitis; chronic pain syndrome with associated depression, anxiety and insomnia; lumbar derangement; and carpal tunnel syndrome status post bilateral release. Dr. Dent opined that these injuries were the direct result of appellant's work-related injury of April 22, 2002. Appellant continued treatment with Dr. Dent. In a report dated May 20, 2008, Dr. Dent indicated that appellant reports severe pain in the cervical and shoulder region. He noted that appellant has been rehabilitated with surgery, medication and physical therapy with minimal results. Dr. Dent stated that appellant indicated increased pain with exertion. He also noted that appellant had psychosocial stressors including severe pain, inability to work, increased fatigue, health and illness concerns, stress and relaxation problems and problems related to decreased physical functionality which have affected her interpersonal relationships. Dr. Dent noted that, due to appellant's elevated scores, high pain levels, decreased functionality and sleep disturbance, appellant should be considered as a candidate for treatment in an interdisciplinary pain management program.

On June 18, 2008 appellant filed a claim for compensation commencing August 7, 2007. In support thereof, she submitted a June 18, 2008 report wherein Dr. Bindal noted that appellant has had increased stress at work which has caused her tremendously increased physical complaints including increased pain in her neck as well as anxiety and related incontinence. Dr. Bindal opined that appellant is suffering from continued disease affecting her spine status post cervical fusion five years ago. He noted that this is further compounded by stress-related anxiety. Dr. Bindal opined that appellant was not able to carry out her work responsibilities as a result and is seeking disability. In an August 29, 2008 report, he opined that appellant was totally disabled from her work responsibilities and that he did not see her pursuing gainful employment in the future and would support a decision to proceed with disability.

By decision dated October 17, 2008, the Office denied modification of appellant's loss of wage-earning capacity decision issued on August 16, 2004.

Dr. W.C. VanNess, III, a Board-certified physiatrist, interpreted a January 28, 2009 report on electromyography and nerve conduction velocity studies of the upper extremity as showing chronic bilateral C6 and C7 radiculopathy and mild to moderate bilateral median nerve irritation at the wrist.

On March 9, 2009 appellant requested reconsideration of the October 17, 2008 decision. In support of her claim, she submitted a February 2, 2009 report by Dr. Dent wherein he noted the April 22, 2002 employment injury and discussed appellant's course of treatment. Dr. Dent noted that in addition to her bilateral carpal tunnel syndrome, appellant has a cervical spine segment that has not fused properly after surgery and requires fusion. He noted that this was a dangerous situation called pseudoarthrosis, and noted that without an interbody fusion at that level to elevate and stabilize the C6-7 segment, appellant was at risk of cervical nerve root

compromise. Dr. Dent opined that appellant's condition makes it very risky to continue working, and that he agreed with Dr. Bindal's recommendation that appellant cannot work.

By decision dated March 31, 2009, the Office denied modification of the prior decision.

LEGAL PRECEDENT

A wage-earning capacity decision is a determination that specific amounts 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.³ 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.⁴ 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.⁵

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 vocational rehabilitated or the original determination was, in fact, erroneous.⁶ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁷

ANALYSIS

In the instant case, the Office accepted appellant's claim for chronic back pain, cervical disc herniation and bilateral carpal tunnel syndrome. Appellant returned to work in a modified position as a mail processor clerk for the employing establishment and the Office found in its decision dated August 15, 2004 that these wages represented her wage-earning capacity. She now seeks a determination to modify her wage-earning capacity.

Appellant has not submitted medical evidence that establishes that there has been a change in her condition that would render her unable to perform the duties of a modified clerk.⁸ The Board notes that Dr. Schilling indicated in her August 28, 2007 report that appellant stopped

³ See *Katherine T. Kreger*, 55 ECAB 633 (2004).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

⁵ *Id.*

⁶ *M.A.*, 59 ECAB ____ (Docket No. 07-349, issued July 10, 2008); *Harley Simsz, Jr.*, 56 ECAB 320 (2004); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

⁷ *D.M.*, 59 ECAB ____ (Docket No. 07-1230, issued November 13, 2007); *Sherman Preston*, 56 ECAB 607 (2005).

⁸ See *Phillip S. Deering*, 47 ECAB 692 (1996).

working on August 2, 2007 due to stress. Dr. Schilling further noted that if appellant was going to pursue retirement it needed to be psychiatric because her spine did not justify retirement. The Board notes that this case was not accepted for an emotional condition. Also, stress at work is not sufficient to justify total disability without more. Accordingly, Dr. Schilling did not determine that appellant's condition had worsened to the point where she was unable to do her work due to her accepted employment injury.

Dr. Bindal indicated that appellant was totally disabled from her work due to her spine condition compounded by anxiety. The stress alone is not a condition and Dr. Bindal did not explain why appellant could not perform her limited-duty job due to her accepted conditions of chronic back pain, cervical disc herniation or bilateral carpal tunnel syndrome. Dr. Dent also opined that appellant is now totally disabled due to her accepted work injuries. Appellant's claim was accepted for cervical disc herniation which was surgically repaired. Dr. Dent did discuss his treatment of appellant and evaluated that the fusion was not successful and explained his reasons for finding that it was risky for appellant to continue working. He did not indicate, however, that he was aware that appellant was in a limited-duty position and did not provide a well-reasoned explanation as to why appellant could not perform her modified-duty position. A fear of future injury is not sufficient to prove a change in appellant's medical condition warranting return to total disability.⁹

Consequently, appellant has not met her burden of proof to establish a basis for modification of her wage-earning capacity determination as she has not established a material change in the nature and extent of the injury-related condition, has not shown that she was vocational rehabilitated and has not established that the original determination was erroneous.

CONCLUSION

The Board finds that appellant has not established that her August 15, 2004 wage-earning capacity determination should be modified.

⁹ See *Mary Geary*, 43 ECAB 300, 309 (1991); *Pat Lazzara*, 31 ECAB 1169, 1174 (1980) (finding that appellant's fear of recurrence of disability upon return to work is not a basis for compensation).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 31, 2009 is affirmed.

Issued: April 1, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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