

July 8, 2002 the Office accepted appellant's claim for mild bilateral carpal tunnel syndrome. Appellant stopped work on March 28, 2007.¹

By letter dated October 16, 2007, the Office accepted appellant's claim for left C5-6 radiculopathy.

On December 15, 2007 appellant returned to work as a limited-duty mail processing clerk at the employing establishment at her regular salary. By decision dated February 22, 2008, the Office reduced her wage loss to zero pursuant to 5 U.S.C. §§ 8106 and 8115. It determined that appellant's actual wages as a mail processing clerk fairly and reasonably represented her wage-earning capacity. Appellant had demonstrated her ability to perform the duties of the position satisfactorily and her actual earnings were equal to the current pay of her date-of-injury position.

By letter dated June 8, 2008, the Office accepted appellant's claim for left shoulder impingement.

In a report dated June 25, 2008, Dr. Mark A.P. Filippone, an attending Board-certified physiatrist, advised that appellant sustained cervical radiculopathy and carpal tunnel syndrome. He indicated with an affirmative mark that the diagnosed conditions were caused by her accepted employment-related injuries. Dr. Filippone opined that appellant was totally disabled commencing June 25, 2008.

On June 27, 2008 appellant filed a Form CA-2a claim alleging that she sustained a recurrence of total disability on June 25, 2008. She experienced massive spasms on the left side of her neck and sharp pains on the left side of her head. Appellant also experienced involuntary movements of her upper and lower left arm due to nerve damage on the left side of her neck. She sustained left side cervical radiculopathy, a pinched nerve in the left shoulder and bilateral carpal tunnel syndrome.

By letter dated July 11, 2008, the Office advised appellant of the criteria necessary to modify a formal loss of wage-earning capacity decision. It requested that she submit such evidence within 30 days. The Office stated that the evidence of record was insufficient to establish a material worsening of her accepted employment-related conditions.

In reports dated June 25 to August 20, 2008, Dr. Filippone reiterated his diagnoses of cervical radiculopathy and carpal tunnel syndrome. He advised that appellant required cervical epidural steroid injections which were directly and solely a result of her accepted employment-related injuries.

By decision dated August 28, 2008, the Office denied modification of the February 22, 2008 loss of wage-earning capacity decision. It found that appellant failed to submit sufficient rationalized medical evidence to establish a material worsening of her accepted employment-related conditions.

¹ By decision dated July 5, 2007, the Office accepted that appellant sustained a recurrence of total disability on March 28, 2007 causally related to her accepted employment-related injuries.

In a September 3, 2008 letter, appellant, through her attorney, requested an oral hearing before an Office hearing representative.

In medical records dated August 20, 2008 to January 13, 2009, Dr. Filippone noted appellant's continuing bilateral hand symptoms. He advised that her left shoulder rotator cuff impingement, disc herniation at C4-5 and bulging disc at C5-6 were causally related to her accepted employment-related injuries. Dr. Filippone stated that appellant was only 41 years old and any abnormalities would not be part of any aging process. He recommended cervical surgery. Dr. Filippone found that appellant remained totally disabled.

By decision dated February 24, 2009, an Office hearing representative affirmed the August 28, 2008 decision. He found that appellant had not submitted sufficient evidence to establish that there was a material change in the nature and extent of her employment-related conditions, that she had been vocationally rehabilitated or that the original loss of wage-earning capacity determination was erroneous.²

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.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 vocationally

² By letter dated February 4, 2009, the Office accepted that appellant sustained a recurrence of total disability on October 31, 2008 causally related to her accepted employment-related injuries. It authorized left shoulder surgery. Also, on February 4, 2009 the Office issued a decision modifying its February 22, 2008 loss of wage-earning capacity determination. It found the evidence sufficient to establish that appellant's employment-related conditions had worsened as of October 31, 2008 and warranted surgery.

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.*

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

The Office accepted that appellant sustained mild bilateral carpal tunnel syndrome, left C5-6 radiculopathy and left shoulder impingement while in the performance of duty. On February 22, 2008 it determined that her actual earnings as a mail processing clerk fairly and reasonably represented her wage-earning capacity. Appellant filed a claim for total disability commencing June 25, 2008 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 her employment-related conditions such that the Office's February 22, 2008 wage-earning capacity determination should be modified.

Dr. Filippone opined that appellant sustained cervical radiculopathy, bilateral carpal tunnel syndrome, left shoulder rotator cuff impingement, disc herniation at C4-5 and a bulging disc at C5-6 due to her accepted employment-related conditions. He found that she was totally disabled commencing June 25, 2008. However, the Office has not accepted appellant's claim for disc herniation at C4-5 or a bulging disc at C5-6.⁸ Dr. Filippone did not provide adequate medical rationale explaining how or why appellant became totally disabled commencing June 25, 2008 due to the worsening of her accepted employment-related conditions. The Board notes that his conclusions are of limited probative value. The record reflects that appellant return to modified duty on December 15, 2007 and worked until June 25, 2008. Dr. Filippone did not explain how appellant's condition had changed such that she was unable to continue at modified duty. The Board finds that the medical evidence is insufficient to establish that she sustained a material change in the nature and extent of the accepted conditions commencing June 25, 2008 that would warrant modification of the February 22, 2008 wage-earning capacity determination.

Appellant has not claimed or otherwise shown that the February 22, 2008 wage-earning capacity determination was erroneous. The Office based her wage-earning capacity determination that her actual earnings as a limited-duty mail processing clerk beginning on December 15, 2007 represented her wage-earning capacity.⁹ There is no evidence that her actual earnings as a limited-duty mail processing clerk did not fairly and reasonably represent her wage-earning capacity and the Office properly adjusted her compensation based on this wage-

⁶ *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).

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

⁸ 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).

⁹ 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.

earning capacity determination.¹⁰ The position was not an odd-lot or makeshift position designed for appellant's particular needs; nor was it seasonal in nature.¹¹ For these reasons, appellant has not shown that the Office's original wage-earning capacity determination was erroneous. She also has not alleged or otherwise shown that she was retrained or otherwise vocationally rehabilitated.

On appeal, appellant contended that the May 2, 2008 x-ray and magnetic resonance imaging scan reports of Dr. Stephen J. Conte, a Board-certified radiologist, establish that she sustained a material change in the nature and extent of her employment-related cervical condition. Although Dr. Conte noted that she had several cervical conditions including a disc herniation at C4-5 and a bulging disc at C5-6, these conditions have not been accepted by the Office.¹² Further, his reports predate the alleged period of total disability. Dr. Conte did not provide an opinion stating that she was totally disabled as of June 25, 2008 due to a worsening of her accepted employment-related conditions.¹³ The Board finds, therefore, that his reports are insufficient to establish that appellant's total disability as of June 25, 2008 was caused by a worsening of her employment-related conditions.

CONCLUSION

The Board finds that appellant failed to meet her burden of proof to establish that her wage-earning capacity determination should be modified.

¹⁰ See *Clarence D. Ross*, 42 ECAB 556, 561-62 (1991).

¹¹ See *James D. Champlain*, 44 ECAB 438, 440-41 (1993); Federal (FECA) Procedure Manual, *supra* note 4, Chapter 2.814.7 (July 1997).

¹² *Alice J. Tysinger*, *supra* note 8.

¹³ *Michael E. Smith*, 50 ECAB 313 (1999).

ORDER

IT IS HEREBY ORDERED THAT the February 24, 2009 and August 28, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 22, 2010
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