

On appeal, appellant contends that the employing establishment withdrew the modified position on which she was rated resulting in a recurrence of disability. She also contends that the report of the impartial medical specialist is not well rationalized.³

FACTUAL HISTORY

This case was previously before the Board.⁴ In a December 28, 2006 decision, the Board found a conflict in medical opinion between Dr. Richard A. Nolan, an attending orthopedic surgeon, and Dr. Philip Wirganowicz, a Board-certified orthopedic surgeon and Office referral physician, as to whether appellant had disability commencing May 30, 2003.⁵ Appellant contended that she was no longer able to perform the duties of her modified video technician position upon which the Office based an August 8, 2002 wage-earning capacity determination.⁶ The case was remanded for referral to an impartial medical specialist to determine whether there was a material change in the nature or extent of her accepted conditions such that modification of the wage-earning capacity determination was warranted.

At the time of the Board's prior decision, a separate issue was also under development by the Office based on appellant's claim of disability commencing May 20, 2005, when Dr. Nolan performed surgery for an authorized right carpal tunnel revision. In an October 25, 2005 decision, an Office hearing representative found that the reports of Dr. Nolan supported disability to June 1, 2005. In a June 15, 2006 decision, the Office accepted that the medical evidence from Dr. Arthur M. Auerbach, an Office referral orthopedic surgeon, supported appellant's disability for four months following surgery. It paid wage-loss compensation through September 20, 2005. On October 30, 2006 an Office hearing representative set aside the June 15, 2006 decision, noting deficiencies in the reports of both Dr. Nolan and Dr. Auerbach. She instructed the Office to obtain a supplemental opinion from Dr. Auerbach addressing appellant's period of disability following surgery to be followed by the opportunity for comment from Dr. Nolan.

The Office requested that Dr. Auerbach clarify his medical opinion as to the extent and duration of appellant's disability following surgery on May 20, 2005. In a December 12, 2006 report, Dr. Auerbach reiterated that appellant had returned to her presurgery status by September 20, 2005 and was not totally disabled after that date. He noted that appellant had been working at modified duty full time as a video coding technician since her return to work on

³ At appellant's request, the appeals were consolidated for purposes of this decision.

⁴ Docket No. 06-1809 (issued December 28, 2006).

⁵ Appellant's occupational disease claim was accepted for bilateral carpal tunnel syndrome and de Quervain's disease. She was treated by Dr. Andrew J. Stein, an orthopedic surgeon, and underwent surgery on July 23, 2001 for left carpal tunnel release and de Quervain's tenolysis with cyst excision. Appellant underwent surgery on her right side on October 19, 2001. She was released by Dr. Stein to return to modified duty as a video coding technician as of January 7, 2002. Dr. Stein reviewed the position description and approved the job as suitable based on physical limitations.

⁶ On August 8, 2002 the Office found that appellant's actual earnings as a video coding technician fairly and reasonably represented her wage-earning capacity.

January 7, 2002. Appellant stopped work on May 30, 2003. Thereafter, a repeat right carpal tunnel surgery was performed on May 20, 2005. Dr. Auerbach characterized the nature of the work appellant performed at modified duty as consisting of reading addresses into a headset microphone, seeing, speaking, sitting or standing with occasional use of her hands. Based on his examination, he found that she was capable of performing these activities following her surgery as of September 20, 2005. Appellant was still precluded from reaching above shoulder level and repetitive movements of the wrists and elbows, pushing, pulling or lifting secondary to her accepted conditions and other diagnosed conditions. Dr. Auerbach noted that appellant's diabetes had accelerated and aggravated her carpal tunnel syndrome and bilateral shoulder adhesive capsulitis, due to an overlap of diabetic polyneuropathy involving the upper extremities. However, this did not disable appellant from returning to modified-duty work.

In an April 2, 2007 decision, the Office denied appellant's claim of disability after September 20, 2005 following the May 20, 2005 surgery. It found that the opinion of Dr. Auerbach constituted the weight of medical evidence. The claims examiner noted that Dr. Nolan had based his opinion on disability after September 20, 2005 on conditions not accepted as employment related and that he had not responded to a March 17, 2007 letter requesting that he comment on the opinion of Dr. Auerbach. On April 16, 2007 appellant requested a hearing before an Office representative which took place on August 22, 2007. She contended that she was effectively removed from the video technician position on February 4, 2005 and not offered another position. Therefore, no job was made available for appellant's return such that she sustained a recurrence of disability. Appellant's representative contended that the Office should develop the issue of whether all the conditions noted by Dr. Auerbach were related to appellant's work activities.⁷ She noted that Dr. Nolan did not provide comment on Dr. Auerbach's opinion.

On remand from the Board concerning modification of appellant's wage-earning capacity, the Office referred appellant, together with the statement of accepted facts, to Dr. Kuleep Sidhu, a Board-certified orthopedic surgeon, for an impartial medical examination. In a September 27, 2007 report, Dr. Sidhu briefly listed appellant's history of medical treatment. He noted that she complained of pain and numbness in both ring and little fingers. On examination, Dr. Sidhu reported appellant's height and weight, noted her neck movements were normal, listed range of motion of her shoulders and advised that her elbows had no swelling, Tinel's sign was negative over the carpal tunnels and both hands had scars from prior surgery. There was no tenderness around the radial styloid. Dr. Sidhu noted that every time he touched the carpal tunnel area, appellant complained of too much pain so that Tinel's sign and Phalen's tests could not be obtained. He diagnosed bilateral carpal tunnel syndrome, status post surgical release; possible bilateral ulnar neuropathy; bilateral de Quervain's disease, status post release; and shoulder tendinitis. Dr. Sidhu stated that appellant's accepted conditions of carpal tunnel and de Quervain's disease were related to her employment; however, there were no objective signs of disability due to the conditions. He noted that appellant had subjective complaints of pain in both hands and her shoulders. Dr. Sidhu listed that appellant had nonemployment-related preexisting diabetes with neuropathy and that her current disability was due to this problem. He

⁷ Appellant was separated from the employing establishment on October 28, 2006 and subsequently received a disability retirement.

noted that there were no current nerve conduction studies suggestive of recurrent carpal tunnel or ulnar neuropathy and that no additional surgical treatment was indicated. Dr. Sidhu advised that appellant's surgery of May 20, 2005 should have resulted in disability of no more than two months following the procedure. He found that appellant was capable of working as a video recording technician and provided work restriction limitations.

In an October 18, 2007 decision, the Office denied modification of the 2002 wage-earning capacity determination. It found that the medical evidence from Dr. Sidhu did not support a material change in the nature of her accepted conditions commencing May 30, 2003. Appellant requested a review of the written record.

In a December 13, 2007 decision, an Office hearing representative found that appellant was not entitled to compensation after September 20, 2005. She noted that the addendum report of Dr. Auerbach established that appellant was capable of returning to work as a full-time video voice technician within her work limitations. Moreover, Dr. Nolan had not responded to the Office's request that he provide comment if he disagreed. The hearing representative also noted that Dr. Sidhu found that appellant had the capacity to return to work as a video technician at modified duty after two months of disability.⁸

In a January 10, 2008 decision, an Office hearing representative set aside the October 18, 2007 decision denying modification of the 2002 wage-earning capacity determination. He found that the report of Dr. Sidhu was not sufficient to resolve the conflict in medical opinion. Dr. Sidhu did not review testimony provided by Dr. Nolan at a May 12, 2005 hearing or adequately address the issue of whether there was a material change in her condition beginning May 20, 2003 which disabled her from continuing modified duty.

On April 10, 2008 the Office requested that Dr. Sidhu provide a supplemental report addressing whether Dr. Nolan's 2005 testimony altered his opinion. In an April 21, 2008 response, Dr. Sidhu noted that Dr. Nolan related that appellant's prior surgery was not successful because it was done through a smaller incision and tenosynovectomy of the flexor tendons and neurolysis of the nerve could not be performed. Dr. Sidhu stated that not every patient required tenosynovectomy and it was rarely needed in patients who did not have rheumatoid arthritis. Dr. Sidhu was not convinced by Dr. Nolan's description of appellant as being short in stature with chubby hands as an individual most likely to develop swelling of the hands. He stated that working at a sedentary job, especially video recording, would not have that problem. Dr. Sidhu stated that the additional record materials did not establish a change in the nature or extent of appellant's work-related disability. At the time of his evaluation, he found that she was able to work as a video recording technician and that her job did not change or aggravate her condition.

In a May 12, 2008 decision, the Office denied modification of the 2002 wage-earning capacity determination. The claims examiner found that the additional progress notes from Dr. Nolan reiterated the physician's opinion that appellant was permanently and totally disabled.

⁸ The hearing representative's decision referred to Dr. Sidhu as an impartial medical specialist. The Board notes, however, that Dr. Sidhu was not selected as an impartial medical specialist on the issue of appellant's disability following the May 20, 2005 surgery.

The reports of Dr. Sidhu, the impartial medical specialist, were found to constitute the weight of medical opinion.

On May 29, 2008 appellant requested a hearing before an Office hearing representative which was held on October 29, 2008. At the hearing, Dr. Nolan appeared and expressed disagreement with the reports of Dr. Sidhu. He noted that the medical reports from Dr. Sidhu were not thorough in presenting findings on examination of appellant. Moreover, the medical restrictions recommended by Dr. Sidhu were not clear, as he did not fill out that portion of the work restriction evaluation stating that appellant could work eight hours a day. The form otherwise listed four-hour work restrictions on reaching above the shoulder, repetitive movements of the wrists or elbows, and pushing, pulling and lifting up to 10 pounds. Dr. Nolan stated that appellant had experienced some relief of her right carpal tunnel condition following surgery on May 20, 2005; however, the condition had come back and that she remained unemployable. He stated that the manner in which she sat to perform her duties as a video voice technician had aggravated her shoulder condition.

In a February 10, 2009 decision, the Office hearing representative affirmed the denial of modification of the 2002 wage-earning capacity.

LEGAL PRECEDENT -- ISSUE 1

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 rehabilitated, or the original determination was erroneous. The burden of proof is on the party attempting to show that modification of the wage-earning capacity determination is warranted.⁹ Compensation that is based on a wage-earning capacity determination remains undisturbed until properly modified.¹⁰ 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.¹¹

Section 8123(a) of the Act provides that, if there is 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.¹² It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on proper factual and medical background must be given special weight.¹³ When an impartial specialist is unable to

⁹ See *Harley Sims, Jr.*, 56 ECAB 320 (2005); *David L. Scott*, 55 ECAB 330 (2004).

¹⁰ *D.S.*, 58 ECAB 392 (2007).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995). See *Mary E. Marshall*, 56 ECAB 420 (2005).

¹² 5 U.S.C. § 8123(a); see *E.H.*, 60 ECAB ____ (Docket No. 08-1862, issued July 8, 2009).

¹³ *L.S.*, 60 ECAB ____ (Docket No. 08-1270, issued July 2, 2009); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

clarify or elaborate on his original report or if the supplemental report is also lacking in rationale, the Office must submit the case to a second impartial medical specialist for the purpose of obtaining a rationalized medical opinion on the issue giving rise to the conflict.¹⁴

ANALYSIS -- ISSUE 1

In the prior appeal, the Board found a conflict in medical opinion between Dr. Nolan for appellant and Dr. Wirganowicz, an Office referral physician, as to whether there was a material change in appellant's accepted conditions as of May 30, 2003 that warranted modification of the 2002 wage-earning capacity determination. The case was remanded for referral to an impartial medical specialist. The Office referred appellant to Dr. Sidhu, a Board-certified orthopedic surgeon. The Board finds, however, that the reports of Dr. Sidhu are not sufficient to resolve the conflict in medical opinion.

The September 27, 2007 report of Dr. Sidhu provided only a cursory review of appellant's past medical history and findings from examination. With regard to the issue he was asked to address, Dr. Sidhu did not clearly speak to appellant's condition as of May 30, 2003, when she stopped work and submitted a claim for wage-loss compensation. Dr. Sidhu failed to address the medical evidence contemporaneous to this period, stating: "Period of total disability ended a long time ago. I feel that her last surgery on May 20, 2005 and disability should have ended no more than two months following the procedure." The question of appellant's disability due to surgery in 2005 was not the issue on which the Board remanded this case for referral to an impartial specialist. Dr. Sidhu provided only brief responses to other questions asked by the Office. On January 10, 2008 the Office hearing representative found other deficiencies in the report of Dr. Sidhu as the impartial specialist omitted any discussion of the opinions of Dr. Nolan or Dr. Wirganowicz on which the conflict in medical opinion was found. He noted the failure of Dr. Sidhu to address whether the medical evidence established a material change in appellant's condition in 2003.

In the April 21, 2008 supplemental report, Dr. Sidhu provided two paragraphs, briefly critiquing the opinion of Dr. Nolan and as reiteration of his opinion: "I do NOT feel that there is any change in the nature and extent of her work-related disability." Again, he provided only a minimal response to the question certified to him and failed to address the medical evidence contemporaneous to appellant's claim in 2003.¹⁵ The Board finds that Dr. Sidhu's reports are not sufficient to resolve the conflict in medical opinion on the issue of whether appellant established that her accepted conditions had materially changed in 2003 such that modification of the 2002 wage-earning capacity was warranted. Dr. Sidhu's use of all capitals in a one

¹⁴ See *Nancy Keenan*, 56 ECAB 687 (2005).

¹⁵ Although the file contains document captioned questions to the referee physician, the record does not contain a list of the specific questions asked of Dr. Sidhu. The referral materials from the Office also state: "We also have a conflict on the issue of the extend [sic] and duration of your disability status from the May 20, 2005 right carpal tunnel syndrome procedure...."

sentence response negating the question on which the conflict was found is not persuasive.¹⁶ The Office properly sought clarification from the impartial specialist; however, his supplemental report does not cure the deficiencies contained in the original report. The opinion of Dr. Sidhu is not entitled to the special weight of the medical evidence. The case will be remanded to the Office for referral to another impartial medical specialist.

LEGAL PRECEDENT -- ISSUE 2

Whether a particular injury causes disability for work and the duration of such disability are medical questions that must be resolved by the preponderance of the probative and reliable medical evidence of record. The Board will not require the Office to pay compensation for disability in the absence of medical opinion directly addressing the specific periods for which compensation is claimed.¹⁷ The Office may accept a limited period of employment-related disability without modifying an existing wage-earning capacity determination.¹⁸

ANALYSIS -- ISSUE 2

Appellant underwent surgery on May 20, 2005 and claimed that she was disabled after that date from returning to modified duty. The Office paid wage-loss compensation through September 20, 2005 based on the opinion of Dr. Auerbach, a second opinion referral physician, who found that appellant's disability related to the revision right carpal tunnel surgery would extend no more than four months. It sought clarification of the physician's opinion and, in a December 12, 2006 report, he reiterated that appellant had returned to her pre-surgical status by September 20, 2005 and was not totally disabled after that date. Dr. Auerbach noted that appellant worked at modified duty full-time as a video coding technician upon her return to work on January 7, 2002 and had stopped work by May 30, 2003. Thereafter, the repeat right carpal tunnel surgery was performed on May 20, 2005. The work appellant had performed at modified duty consisted of reading addresses into a headset microphone, seeing, speaking, sitting or standing with occasional use of her hands. Based on his examination, Dr. Sidhu found that she was capable of returning to such employment activities as of September 20, 2005. He noted that she was precluded from reaching above shoulder level and from repetitive movements of the wrists and elbows, pushing, pulling or lifting secondary to her accepted conditions and other diagnosed medical conditions. Dr. Sidhu found that appellant's diabetes had accelerated and aggravated her carpal tunnel syndrome and bilateral shoulder adhesive capsulitis, due to an overlap of diabetic polyneuropathy involving the upper extremities.

Dr. Nolan, appellant's attending physician, found that she was disabled from returning to modified duty due to residuals of her accepted conditions. He advised that she continued to be disabled, in part, due to residuals of her left carpal tunnel syndrome for which further surgery

¹⁶ The opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and medical rationale expressed in support of the physician's opinion are all factors that determine the weight to be given. *See John D. Jackson*, 55 ECAB 465 (2004).

¹⁷ *See Amelia S. Jefferson*, 57 ECAB 183 (2005).

¹⁸ *See Katherine T. Kreger*, 55 ECAB 633 (2004); *Sharon C. Clement*, 55 ECAB 552 (2004).

was necessary. Dr. Nolan disagreed that her shoulder conditions were due to her diabetes, stating that the posture of the work she performed at modified duty had contributed to her disability for work. He recorded a 16-year history of repetitive heavy lifting and other work activities prior to the video voice technician position work in 2001 that he also found had aggravated her shoulder condition and cervical complaints.¹⁹ Dr. Nolan's testimony at two hearings before the Office provided an explanation for his opinion that appellant would be unable to return to work as a video voice technician as it was incompatible with her physical condition.

The Board finds that there is a conflict in medical opinion between Dr. Nolan and Dr. Auerbach as to the extent of appellant's disability following the 2005 revision surgery. Dr. Auerbach stated that the period of disability was four months, following which time appellant had the capacity to return to video voice modified duty she had been performing. He noted that residuals of her accepted conditions did not preclude her return to work. Dr. Nolan advised that appellant remained disabled. He disagreed to the extent that her diabetes condition had caused or contributed to her shoulder tendinitis and impingement and opined that her work history and modified-duty position had further aggravated her accepted carpal tunnel syndrome resulting in her permanent disability for work. The case will be remanded to the Office to obtain an impartial medical opinion on this aspect of the case.

The Board notes that appellant's representative has contended that the Office must take all of appellant's physical conditions into consideration to establish that her modified duty was "suitable." This is not the standard, however, in consideration of wage-earning capacity. Those physical ailments that preexisted the accepted condition are to be taken into consideration. Physical conditions subsequent to and unrelated to the accepted conditions are excluded from consideration.²⁰ It is only when the Office attempts to terminate compensation under section 8106(c) that it must consider preexisting and subsequently acquired conditions in the evaluation of the suitability of an offered position.²¹ In this case, appellant is seeking modification of the 2002 wage-earning capacity determination. Only her conditions accepted by the Office or preexisting the 2002 determination are relevant. It is up to the medical examiners to determine the relevance of appellant's preexisting diabetic condition to her accepted conditions or whether it contributed to a material change such that she became totally disabled as of May 30, 2003.

It is also contended that the employing establishment withdrew appellant's modified duty in February 2005 such that she sustained total disability prior to her surgery of May 20, 2005. The evidence of record reflects that, following her surgeries in 2001, appellant was found by Dr. Stein as capable of performing the video voice technician position full time within prescribed work restrictions. The record reflects that she returned to work on January 7, 2002. Dr. Stein

¹⁹ The Board notes that the employing establishment disputed the history of employment activities described by Dr. Nolan. On August 11, 2003 the employing establishment noted that appellant was attempting to have her shoulder conditions accepted as part of her original claim. Records were submitted noting that appellant had not carried or delivered mail since November 1991 and was removed from delivery based on a high motor vehicle accident rate in 1992.

²⁰ See *Lee A. Dent*, 54 ECAB 704 (2003).

²¹ See *Richard P. Cortes*, 56 ECAB 200 (2004).

and Dr. Schmitz reported that, while appellant had complaints related to her diabetes and hereditary osteochondromas, she was capable of continuing in her modified employment. Dr. Nolan initially noted that her work as a video voice coding technician should consist of two hours on and two hours off. Appellant subsequently submitted her claim for wage-loss commencing May 30, 2003.

The record reflects that modified duty remained available for appellant after that date, when the issue of whether the 2002 wage-earning capacity determination should be modified first arose. As discussed, the conflict in medical opinion on this issue is unresolved. On November 10, 2004 the employing establishment advised appellant that in light of the extended period of time off work, her original pay location in Fremont would be responsible for processing all paperwork regarding her claim. On January 26, 2005 the employing establishment advised that the video coding room would be closed effective February 4, 2005 and that all limited-duty employees currently working in the room would be given new job offers based on current medical documentation. Other career employees would become unassigned clerks. Appellant's representative contends that this action gave rise to a compensable recurrence of disability as of that date. The Board does not agree.

As noted, once a wage-earning capacity has been determined, it remains in effect unless the party seeking modification establishes one of the three criteria for modifying the determination. In this case, appellant has contended that there was a material change in the nature and extent of her employment-related condition. Appellant's representative relies on the standard pertaining to establishing a recurrence of disability in situations in which there has been no wage-earning capacity determination.²² Under the Office's procedure manual, however, the withdrawal of light duty after a wage-earning capacity is in place does not constitute a recurrence of disability.²³

The evidence of record reflects that, upon the closing of the video coding room on February 4, 2005, the employing establishment advised that all limited-duty employees would be assigned modified work within their existing physical restrictions. An Office hearing representative previously noted that appellant never contacted the employing establishment to ascertain what her job offer or new work assignment would be. Indeed, she has contended that she remains totally disabled after surgery on May 20, 2005. Whether the employing establishment identified another specific position is not the question. The issue is appellant's ability to earn the wages determined under the 2002 wage-earning capacity decision. As noted in Robert A. Flint,²⁴ the word "disability" is used in several sections of the Act. With the exception of certain sections where the statutory context or the legislative history clearly shows that a different meaning was intended, the word as used in the Act means "[i]ncapacity because of injury in employment to earn wages which the employee was receiving,"²⁵ In this case at the

²² See *Jackie D. West*, 54 ECAB 158 (2002); *Terry R. Hedman*, 38 ECAB 222 (1986).

²³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.12 (May 1997). See 20 C.F.R. § 10.509(a).

²⁴ 57 ECAB 369 (2006).

²⁵ *Id.* at 374.

time of her claimed disability. The withdrawal of the modified video coding work on February 4, 2005 did not give rise to a recurrence of disability.²⁶

CONCLUSION

The Board finds that the issue of whether the 2002 wage-earning capacity should be modified is not in posture due to an unresolved conflict of medical opinion. Similarly, the medical evidence regarding the extent of disability related to appellant's surgery on May 20, 2005 is in conflict.

ORDER

IT IS HEREBY ORDERED THAT the February 10, 2009 and December 13, 2007 decisions of the Office of Workers' Compensation Programs be set aside. The case is remanded to the Office for further action in conformance with this decision.

Issued: March 11, 2010
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

²⁶ See *K.R.*, 60 ECAB ____ (Docket No. 09-28, issued September 16, 2009). See also *Hubert Jones, Jr.*, 57 ECAB 467 (2006).