

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

L.E., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Washington, DC, Employer**

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) **Docket No. 11-85**
) **Issued: August 5, 2011**
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Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 6, 2010 appellant filed a timely appeal from an June 1, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant established that the September 23, 2004 wage-earning capacity determination should be modified as of October 18, 2005.

FACTUAL HISTORY

The case was before the Board on a prior appeal. By order dated August 3, 2008, the Board remanded the case to OWCP for a proper decision on the issue presented.² The Board

¹ 5 U.S.C. § 8101 *et seq.*

² Docket No. 09-159 (issued August 3, 2008).

noted that OWCP had issued a September 23, 2004 wage-earning capacity determination, and appellant claimed compensation for wage loss as of October 18, 2005. The issue, therefore, was whether the wage-earning capacity determination should be modified.

In a letter dated September 9, 2009, OWCP requested that appellant submit medical evidence as to whether her work injury had changed or worsened on or after October 18, 2005. By decision dated November 9, 2009, it denied modification of the wage-earning capacity determination. OWCP concluded that appellant's claims for disability for work after October 1, 2009 should be denied.³

By letter dated December 2, 2009, appellant requested a hearing before OWCP's hearing representative. A hearing was held on March 11, 2010. By decision dated June 1, 2010, OWCP's hearing representative denied modification of the wage-earning capacity determination. The hearing representative stated, "The claimed period of disability was denied based on the weight of medical opinion, established by the referee report from Dr. [Robert] Collins."

LEGAL PRECEDENT

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, in fact, erroneous.⁴ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁵

ANALYSIS

Appellant filed claims for compensation commencing October 18, 2005. Since there was a September 23, 2004 wage-earning capacity in place, the issue is whether a modification of this determination was warranted. As noted, a modification may be established if there is a material change in the nature and extent of the injury-related condition. In this case, OWCP accepted that in a motor vehicle accident on February 6, 2002, appellant sustained cervical, dorsal and lumbar strains, right knee and chest wall contusions, L4-5 disc herniation and unspecified disorder of the bursae and tendons of the right shoulder.

On October 18, 2005 appellant was seen by Dr. Hampton Jackson, an orthopedic surgeon, who indicated that appellant was seen for conditions caused by the work injury of February 6, 2002. Dr. Jackson noted worsening back and shoulder symptoms, and indicated that arthroscopic surgery was recommended for the shoulder. He stated that appellant should remain off work until surgery and for treatment of sciatica. Dr. Jackson reiterated that these conditions were causally related to the February 6, 2002 work injury.

³ Appellant had submitted claims for compensation (Form CA-7) for intermittent hours. One of the CA-7 forms was dated November 2, 2009 and covered the period October 1 to 31, 2009.

⁴ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

⁵ *Id.*

OWCP determined that further development of the medical evidence was warranted, and appellant was referred to Dr. Robert Smith, an orthopedic surgeon. One of the questions posed by OWCP was whether appellant was disabled as of October 18, 2005 due to an employment injury. Dr. Smith, however, never addressed the issue in his December 22, 2005 report. He did not discuss the October 18, 2005 medical evidence or provide an opinion on disability commencing that date. When OWCP found a conflict in the medical evidence under 5 U.S.C. § 8123(a),⁶ there was no conflict on the specific issue of appellant's employment-related condition on October 18, 2005. Moreover, Dr. Collins, the physician selected as a referee, also provided no opinion on the issue in his May 18, 2006 report. He did not refer to appellant's work stoppage, medical condition on October 18, 2005 or provide any opinion on the specific medical issue that is presented in this case. Dr. Collins addressed only findings as of the date of examination. The hearing representative's finding that Dr. Collins represented the weight of the medical evidence on the "claimed period of disability" is not supported by the record.

The Board finds that the additional development of the medical evidence did not provide any probative evidence on the issue of whether there was a material change in the employment-related condition as of October 18, 2005. As OWCP undertook development of the evidence, it has the responsibility to obtain a report which resolves the issues presented in the case.⁷ The case will be remanded for additional development of the medical evidence. The second opinion examiner should be asked to provide a rationalized medical opinion on the issue of whether there was a material change in an employment-related condition as of October 18, 2005. After such further development as the Office deems necessary, it should issue an appropriate decision.

CONCLUSION

The Board finds the case must be remanded to OWCP for further development of the evidence on the issue presented.

⁶ 5 U.S.C. § 8123(a) provides that, if there is a disagreement between a physician making the examination for the United States and the employee's physician, a third physician is selected to make an examination.

⁷ See *Mae Z. Hackett*, 34 ECAB 1421 (1983); *Richard W. Kinder*, 32 ECAB 863 (1981).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 1, 2010 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: August 5, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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