

OWCP accepted that she sustained closed rib fractures and contusions of her chest wall and left lower leg. Appellant stopped work and received OWCP compensation.

Appellant received treatment for her condition from Dr. Jorge R. Alvear, an attending Board-certified anesthesiologist, who diagnosed chest wall pain and found her to be totally disabled. In December 12, 2006 and January 18, 2007 reports, Dr. Harold H. Alexander, a Board-certified orthopedic surgeon serving as an OWCP referral physician, stated that appellant had only subjective pain in her left rib cage and posited that she could return to modified work on a full-time basis.

In an April 11, 2007 report, Dr. Todd Zeigler, a Board-certified anesthesiologist serving as an impartial medical specialist, indicated that appellant complained of swelling in her left rib area but noted that his examination did not reveal swelling in that area. He indicated that bone scan and x-ray testing of her ribs showed negative results. Dr. Zeigler diagnosed left rib contusion, persistent pain complaints out of proportion to any objective findings and prolonged disability and time away from work despite minimal objective findings. He concluded that appellant could perform full-time work with restrictions from lifting more than 40 pounds and lifting more than 25 pounds on a regular basis.

Beginning August 22, 2007 appellant began working for the employing establishment on a full-time basis as a modified security screener for \$644.56 per week. The position involved reminding airline passengers about the procedures for passing through security and did not require lifting more than 10 pounds.

In a November 15, 2007 decision, OWCP adjusted appellant's compensation based on its determination that her earnings as a modified security screener fairly and reasonably, effective August 22, 2007, represented her wage-earning capacity. It indicated that appellant worked more than 60 days in the modified position.

Appellant claimed that her work-related condition had worsened such that she could not work as a modified security screener. She submitted an April 11, 2008 report in which Dr. Alvear diagnosed chest wall pain and moderate thoracic radiculitis and indicated that she might have sustained a thoracic disc bulge or herniation at the time of her original accident.

In a May 15, 2008 decision, OWCP affirmed its November 15, 2007 decision finding that appellant had not established that modification of its wage-earning capacity decision was warranted. It found that the medical evidence did not show a material change in the nature and extent of appellant's injury-related condition.

Appellant claimed that she sustained reflex sympathetic dystrophy syndrome due to her July 7, 2005 condition, but OWCP denied her claim for this condition in a June 23, 2008 decision.²

In a February 10, 2008 report, Dr. Christopher Crooker, an attending Board-certified internist, indicated that appellant suffered from permanent left side pain due to her July 2005 fall at work and noted that she reported that standing and walking for long periods was painful. He

² Appellant stopped work and retired from the employing establishment effective October 7, 2008.

posited that appellant was totally disabled from work. In an April 29, 2008 report, Dr. William Bostock, an attending Board-certified family practitioner and osteopath, advised that appellant was suffering from reflex sympathy dystrophy syndrome and was totally disabled. On May 5, 2008 Dr. Crooker reported that appellant had made some improvement but continued to have a great deal of pain in her left lower chest on the axillary line.

Appellant also claimed that she sustained neuropathic pain disorder and major depression due to her July 7, 2005 work injury. In a June 23, 2008 decision, OWCP found that appellant had not shown these conditions were work related and affirmed its earlier determination that she did not have work-related reflex sympathetic dystrophy syndrome.

In a September 18, 2008 report, Dr. Alvear stated that appellant suffered a workplace injury resulting in ongoing pain within her left chest wall, noting that it was diagnosed as a possible intercostal neuralgia and was treated as such. He stated that the x-rays showed no pathology within the intercostal area and indicated, "I feel that due to the radiating nature of the pain along the underside of the rib towards the left thorax indicates a likely thoracic radiculitis...." In a November 5, 2008 report, Dr. Larry D. Empting, an attending Board-certified neurologist, provided a history of the injury as provided by appellant and reported the findings on examination, including pain complaints in various muscle groups.³ He stated that appellant's "ongoing myofascial features, the left shoulder, the left hip, the possible low back contributors and the left rib contusion features" were all related to the July 7, 2005 accident. Dr. Empting noted that appellant also likely suffered diabetes-induced peripheral neuropathy and mononeuritis multiplex-type changes responsible for her distal peripheral neuropathy and her ulnar and lateral femoral cutaneous nerve involvement.

In a January 22, 2009 decision, OWCP's hearing representative affirmed OWCP's May 15, 2008 decision, indicating that appellant had not established work-related disability on or after April 2, 2008.

Appellant continued to submit periodic reports from attending physicians showing that she complained of chronic left chest pain and leg weakness.

In a January 12, 2010 order, the Board set aside the January 22, 2009 decision of OWCP and remanded the case to OWCP for consideration of whether appellant met her burden to establish that modification of OWCP's wage-earning capacity decision was warranted. The Board found that OWCP had improperly characterized the issue as whether appellant had established a recurrence of disability on or after April 2, 2008.⁴

In a February 22, 2010 report, Dr. Crooker diagnosed unchanged abdominal pain of the left upper quadrant and indicated that appellant was to continue her regular regimen.

In a March 1, 2010 decision, OWCP found that appellant did not meet her burden to establish that modification of OWCP's wage-earning capacity decision was warranted. Appellant did not show that the original November 2007 wage-earning capacity determination

³ Dr. Empting noted that appellant's muscle tone and bulk were intact and that she could toe walk and heel walk.

⁴ Docket No. 09-1411 (issued January 12, 2010).

was improper or that she underwent a material change in the nature and extent of her injury-related condition.

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.⁵ OWCP's procedure manual provides that, "[i]f 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. In this instance the [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity."⁶

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.⁷ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁸ The Board has held that a new injury does not constitute a material change in the nature and extent of the original injury-related condition such that a wage-earning capacity determination should be modified.⁹

In addition, Chapter 2.814.11 of the procedure manual contains provisions regarding the modification of a formal loss of wage-earning capacity. The relevant part provides that a formal loss of wage-earning capacity will be modified when: (1) the original rating was in error; (2) the claimant's medical condition has changed; or (3) the claimant has been vocationally rehabilitated. Office procedures further provide that the party seeking modification of a formal loss of wage-earning capacity decision has the burden to prove that one of these criteria has been met.¹⁰

Section 8115(a) of FECA provides that the "wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity."¹¹ The Board has stated, "Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing that they do not

⁵ *Katherine T. Kreger*, 55 ECAB 633 (2004).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

⁷ *Stanley B. Plotkin*, 51 ECAB 700 (2000).

⁸ *Id.*

⁹ *M.E.*, Docket No. 07-2306 (issued March 24, 2008).

¹⁰ See Federal (FECA) Procedure Manual, *supra* note 4 at Chapter 2.814.11 (June 1996).

¹¹ 5 U.S.C. § 8115(a).

fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure."¹² However, wage-earning capacity may not be based on an odd-lot or make-shift position designed for an employee's particular needs or a position that is seasonal in an area where year-round employment is available.¹³ Wage-earning capacity may only be based on a temporary or part-time position if the position held by the employee at the time of injury was a temporary or part-time position.¹⁴ Office procedures direct that a wage-earning capacity determination based on actual wages be made following 60 days of employment.¹⁵

ANALYSIS

On July 7, 2005 appellant sustained work-related closed rib fractures and contusions of her chest wall and left lower leg. After a period off work, she began working on August 22, 2007 as a modified security screener on a full-time basis. The position did not require lifting more than 10 pounds. In a November 15, 2007 decision, OWCP adjusted appellant's compensation effective August 22, 2007 based on its determination that her earnings as a modified security screener fairly and reasonably represented her wage-earning capacity. Appellant later requested modification of this wage-earning determination.

Appellant has not shown that OWCP's original wage-earning determination was erroneous. The Board finds that OWCP's determination that appellant's actual earnings as a modified security screener beginning August 22, 2008 fairly and reasonably represented her wage-earning capacity was consistent with section 8115(a) of FECA which provides that the wage-earning capacity of an employee is determined by her actual earnings if her actual earnings fairly and reasonably represent her wage-earning capacity.¹⁶ OWCP properly noted that appellant had received actual earnings as a modified security screener for more than 60 days in that she had been working in the position since August 22, 2008 when OWCP issued its November 15, 2007 decision and there is no evidence that appellant's earnings in this position did not fairly and reasonably represent her wage-earning capacity. The modified security screener position was not an odd-lot or make-shift position designed for appellant's particular

¹² *Floyd A. Gervais*, 40 ECAB 1045, 1048 (1989); *Clyde Price*, 32 ECAB 1932, 1934 (1981). 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*." (Emphasis added.) 20 C.F.R. § 10.5(f). Once it is determined that the actual wages of a given position represent an employee's wage-earning capacity, OWCP applies the principles enunciated in *Albert C. Shadrick*, 5 ECAB 376 (1953), in order to calculate the adjustment in the employee's compensation.

¹³ See *James D. Champlain*, 44 ECAB 438, 440-41 (1993); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7a(1) (July 1997).

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7a(1), (3) (July 1997).

¹⁵ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7c (December 1993).

¹⁶ See *supra* note 12 and accompanying text.

needs and it was not seasonal in nature.¹⁷ Moreover, the position was not a temporary or part-time position.¹⁸

The evidence does not show that appellant's actual earnings as a modified security screener did not fairly and reasonably represent her wage-earning capacity and OWCP properly adjusted her compensation based on this wage-earning capacity determination.¹⁹ For these reasons, appellant has not shown that OWCP's original determination with regard to her wage-earning capacity was erroneous.

Appellant alleged that medical evidence showed that there was a material change in the nature and extent of her employment-related condition. However, this evidence does not contain a rationalized medical opinion explaining why an employment-related condition prevented appellant from performing the modified security screener position or otherwise establish that OWCP improperly determined her wage-earning capacity.²⁰

After late 2007, several attending physicians indicated that appellant had continuing symptoms due to her July 7, 2005 work accident, including chronic left chest pain, and posited that these symptoms prevented her from working. For example, Dr. Crooker, an attending Board-certified internist, indicated on February 10, 2008 that appellant suffered from permanent left side pain due to her July 2005 fall at work and posited that she was totally disabled from work. In an April 29, 2008 report, Dr. Bostock, an attending Board-certified family practitioner and osteopath, advised that appellant was suffering from reflex sympathy dystrophy syndrome and was totally disabled. On September 18, 2008 Dr. Alvear, an attending Board-certified anesthesiologist, stated that appellant suffered a workplace injury resulting in ongoing pain within her left chest wall, noting that it was diagnosed as a possible intercostal neuralgia and was treated as such. He stated that appellant likely had thoracic radiculitis. In a November 5, 2008 report, Dr. Empting, an attending Board-certified neurologist, noted that appellant's myofascial pain, including that in the left shoulder, hip and ribs, were all related to the July 7, 2005 accident.

The Board notes, however, that these reports do not contain a clear opinion that appellant's injury-related condition had materially worsened to the extent that she could not work as a modified security screener. The reports essentially show that appellant continued to have relatively stable symptoms due to her work injury, including left chest pain, over an extended period. On appeal, appellant alleged that she actually sustained a more serious condition due to her July 7, 2005 work injury, such as reflex sympathetic dystrophy syndrome or some type of neuropathic condition affecting her legs. However, the medical evidence of record does not show that appellant sustained any injury on June 7, 2005 other than closed rib fractures

¹⁷ See *supra* note 13 and accompanying text.

¹⁸ See *supra* note 14 and accompanying text. In addition, Dr. Zeigler, a Board-certified anesthesiologist serving as an impartial medical specialist, indicated on April 11, 2007 that appellant could perform full-time work with restrictions from lifting more than 40 pounds and lifting more than 25 pounds on a regular basis. The duties of the modified security screener position were within these restrictions.

¹⁹ OWCP properly applied the principles enunciated in *Albert C. Shadrack*, 5 ECAB 376 (1953), in order to calculate the adjustment in appellant's compensation.

²⁰ See *Norman F. Bligh*, 41 ECAB 230, 237-38 (1989).

and contusions of her chest wall and left lower leg.²¹ Therefore, the record lacks medical evidence showing that an injury-related condition prevented her from working as a modified security screener.

Moreover, appellant has not been retrained or otherwise vocationally rehabilitated such that her work as a modified security screener would not be representative of her wage-earning capacity. For these reasons, she did not meet her burden of proof to establish that modification of OWCP's wage-earning capacity decision was warranted.

Appellant may request modification of the wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that modification of OWCP's wage-earning capacity decision was warranted.

ORDER

IT IS HEREBY ORDERED THAT the March 1, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 19, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

²¹ At least one attending physician attributed some of appellant's neuropathic symptoms to her nonwork-related diabetes.