

FACTUAL HISTORY

On May 10, 2004 appellant, then a 53-year-old mail processor, filed an occupational disease claim, alleging that her dusty work environment at the processing and distribution center (P&DC) affected her breathing. She stopped work on October 23, 2003.² On March 17, 2005 OWCP accepted temporary aggravation of asthma. Appellant received compensation. She returned to a full-time mail processing position at an airport postal facility on July 12, 2005 where she operated an abdominal aortic aneurysm scan for 1.5 hours and input data for troighos (THS) operation for 4 to 6 hours.

By decision dated January 13, 2006, OWCP found that appellant's actual earnings as a mail processing clerk fairly and reasonably represented her wage-earning capacity, with zero loss.

Appellant worked in this position until the airport facility closed. On December 13, 2006 she was offered a modified assignment at the P&DC as an automation clerk. Appellant was to input data for THS operation for 4 to 6 hours and use a handheld device for 1.5 hours daily. On January 25, 2007 she filed a claim for compensation for the period commencing January 2, 2007. Appellant asserted that, when she reported to the P&DC, she was sent home to get medical clearance. The employing establishment stated that dust sampling had been performed within the building and very little dust was found.

In reports dated January 11 and February 6, 2007, Dr. Francine Yep, Board-certified in family medicine, diagnosed asthma caused by dust at work. She advised that appellant was partially disabled from September 23, 2004 to the present and had a permanent restriction of no exposure to mold, dust or temperature extremes. On February 16, 2007 the employing establishment offered appellant a mail processing clerk position in priority mail at the P&DC where she would scan for one to two hours and input data for the operation for four to six hours. In a March 5, 2007 report, Dr. Yep reiterated that appellant could not be exposed to heat, extreme cold or dust due to asthma and that she should work in temperatures ranging from 60 to 70 degrees with no extreme humidity, no fumes and no irritants.

OWCP referred appellant to Dr. Hsien-Wen Hsu, Board-certified in internal medicine and pulmonary disease, for a second opinion evaluation. In a July 10, 2007 report, Dr. Hsu reviewed appellant's medical and employment history. He provided findings on physical examination and reviewed pulmonary function tests (PFT). Dr. Hsu diagnosed asthma, based on PFT findings and history of asthma since childhood. He opined that the dusty work environment was an aggravating factor for appellant's disease. Dr. Hsu reported that appellant's prior employment as a mail processor required prolonged standing and loading mail into large machines for seven to eight hours a day. He concluded that she should work in an environment free of dust, flowers and cold temperatures. In an attached work capacity evaluation, Dr. Hsu advised that appellant could work eight hours a day without restrictions and advised that she should be on medication to be symptom-free. In a November 19, 2007 report, he advised that the

² The employing establishment submitted results of environmental sampling and air monitoring, done on February 25, September 21 and 24, 2004.

aggravation of appellant's underlying condition lasted between October 3, 2003 until December 30, 2006 and that she did not suffer any residuals from the condition.

On March 17, 2008 OWCP proposed to terminate appellant's compensation benefits on the grounds that the temporary aggravation of the preexisting asthma had ceased.

On March 20, 2008 Dr. Yep advised that appellant had reviewed Dr. Hsu's July 10 and November 19, 2007 reports and was in agreement with his assessment.

By decision dated April 17, 2008, OWCP finalized the termination of benefits. Appellant requested a review of the written record and by decision dated December 16, 2008, OWCP's hearing representative affirmed the April 17, 2008 decision.

On December 25, 2008 appellant, through her representative, requested reconsideration of the December 16, 2008 decision and in a nonmerit decision dated April 21, 2009, OWCP denied the December 29, 2009 request.³

In a June 22, 2009 report, Dr. Yep advised that appellant could not return to work at the P&DC because she had numerous asthma exacerbations while working there and her asthma had been well controlled since she transferred to another facility.

On September 3, 2009 appellant filed a claim for compensation for the period January 2 to December 8, 2007. She resubmitted Dr. Yep's January 11, 2007 report.

On time analysis forms completed for the dates January 2 to December 7, 2007, appellant stated that she was sent home by a supervisor. The employing establishment appended a note that she was not sent home but left the assignment and never returned. By letter dated September 24, 2009, OWCP noted the discrepancy between appellant's statement that she was sent home by a supervisor and the employing establishment's statement that she left work and did not return. It asked that she substantiate her allegation.

In an October 2, 2009 response, appellant's representative argued that the responses from the employing establishment were inconsistent regarding whether appellant was sent home and that withdrawal of her alternative position entitled her to compensation. He noted that appellant was granted unemployment benefits by the state and submitted additional evidence including memoranda of telephone calls between her and OWCP, portions of a November 16, 2005 vocational rehabilitation report, a January 11, 2006 telephone memorandum between the employing establishment and OWCP regarding appellant's alternative position, a January 25, 2007 telephone memorandum between the employing establishment and OWCP noting that appellant had been reassigned and had filed a claim for compensation, February 13, 2007 correspondence from the employing establishment to appellant requesting a medical update, the February 16, 2007 job offer, February 22, 2007 correspondence from the employing establishment to OWCP requesting a suitability determination regarding the job offer, a State of California February 21, 2007 decision finding that appellant was not entitled to state unemployment benefits and an April 4, 2007 state appellate decision finding that appellant was

³ Appellant did not file an appeal of the April 21, 2009 decision with the Board.

entitled to state unemployment benefits because, after her reassignment, she was not provided work in a healthy location.

By decision dated April 29, 2010, OWCP denied modification of the January 13, 2006 wage-earning capacity determination.

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.⁴ OWCP procedures provide that OWCP can make a retroactive wage-earning capacity determination if the claimant worked in the position for at least 60 days, the position fairly and reasonably represented his or her wage-earning capacity and the work stoppage did not occur because of any change in his injury-related condition affecting the ability to work.⁵

The procedures further provide 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

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. OWCP 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. If it is seeking modification, it must establish that the original rating was in error, that the injury-related condition has improved or that the claimant has been vocationally rehabilitated.⁷

ANALYSIS

The Board finds that appellant has not met any of the requirements for modification of OWCP's January 13, 2006 wage-earning capacity determination. Appellant seeks wage-loss compensation from January 2 to December 8, 2007, while the wage-earning determination was in effect and before OWCP terminated all benefits on April 17, 2008. Applicable case law and OWCP procedures require that once a formal wage-earning capacity decision is in place, a

⁴ *Katherine T. Kreger*, 55 ECAB 633 (2004).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (July 1997); *Selden H. Swartz*, 55 ECAB 272 (2004).

⁶ Federal (FECA) Procedure Manual, *id.* at Chapter 2.814.9(a) (December 1995).

⁷ *Id.* at Chapter 2.814.11 (June 1996).

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.⁸ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁹

OWCP accepted that appellant, then working at the P&DC, sustained temporary aggravation of asthma. She returned to a modified position on July 12, 2005 at an airport postal facility and by decision dated January 13, 2006, OWCP found that her modified position fairly and reasonably represented her wage-earning capacity. The modified position at the P&DC consisted of essentially the same modified duties that she had been performing at the airport facility and were not the duties of her date-of-injury position running a mail processing machine.

Appellant filed claims for wage loss beginning January 2, 2007. She did not submit any evidence to show that OWCP's original wage-earning capacity decision was erroneous. OWCP based its January 13, 2006 wage-earning capacity determination on her actual earnings as a modified mail processor beginning on June 12, 2005, finding that the earnings fairly and reasonably represented her wage-earning capacity. This determination was consistent with section 8115(a) of FECA which provides that the wage-earning capacity of an employee is determined by the employee's actual earnings if the actual earnings fairly and reasonably represent wage-earning capacity.¹⁰ OWCP properly noted that appellant had received actual earnings as a modified mail processor for more than 60 days at the time of its wage-earning capacity determination and there is no evidence that the position was make shift, temporary, seasonal or otherwise inappropriate for a wage-earning capacity determination.¹¹

Appellant now asserts that she sustained a recurrence of disability because the position to which she was assigned in January 2007 violated her medical restrictions. As a formal wage-earning capacity was in effect at the time of the claimed recurrence, she must show a basis for modification of that decision to be entitled to wage-loss compensation on or after January 2, 2007.¹² Appellant did not allege that she was retrained or otherwise vocationally rehabilitated and, as discussed, there is no evidence that the original wage-earning capacity determination was erroneous. Furthermore, the evidence does not establish a material change in her employment-related condition.

The medical evidence includes reports dated January 11 to March 5, 2007 in which Dr. Yep, an attending family practitioner, advised that appellant should work in an environment free of dust, pollen and extreme temperatures. Dr. Hsu, a pulmonologist, provided a second opinion evaluation for OWCP, also advised that appellant should work in an environment free of

⁸ *Stanley B. Plotkin*, 51 ECAB 700 (2000).

⁹ *Id.*

¹⁰ 5 U.S.C. § 8115(a); *A.P.*, 58 ECAB 198 (2006).

¹¹ *D.S.*, 58 ECAB 392 (2007).

¹² *Id.*

dust, flowers and cold temperature and that she should be on medication to be symptom-free. On March 20, 2008 Dr. Yep advised that she agreed with Dr. Hsu's assessment. She also advised on June 22, 2009 that appellant could not return to work at the P&DC because she had numerous asthma exacerbations while working there. These reports, however, do not establish a worsening of appellant's injury-related condition but merely provide preventive measures and are therefore insufficient to establish that the January 13, 2006 wage-earning capacity decision should be modified.¹³ Moreover, fear of future injury is not compensable.¹⁴

Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn and not on actual wages lost.¹⁵ Absent a showing that the wage-earning capacity should be modified, appellant has no disability under FECA and is not entitled to compensation for wage loss based on her transfer to the P&DC. Accordingly, OWCP properly denied her claim for wage loss as she did not establish modification of the established wage-earning capacity determination and properly denied modification of its January 13, 2006 wage-earning capacity decision.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that a January 13, 2006 wage-earning capacity decision that reduced her compensation to zero should be modified.

¹³ See *Darletha Coleman*, 55 ECAB 143 (2003).

¹⁴ *I.J.*, 59 ECAB 408 (2008).

¹⁵ *Marie A. Gonzales*, 55 ECAB 395 (2004).

ORDER

IT IS HEREBY ORDERED THAT the April 29, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 26, 2011
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