United States Department of Labor
Employees' Compensation Appeals Board

A.R., Appellant	)	
and	)	**Docket No. 10-1544**
	)	**Issued: May 2, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Gillette, Wyoming, Employer	)	

Appearances:
Gordon Reiselt, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 19, 2010 appellant, through her representative, filed a timely appeal of an April 26, 2010 merit decision of the Office of Workers' Compensation Programs denying modification of its July 29, 2008 wage-earning capacity determination. Pursuant to the Federal Employees' Compensation Act[1] 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 Office's July 29, 2008 wage-earning capacity for the position of customer representative should be modified.

On appeal, appellant contends that the decision is contrary to fact and law.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 5, 1981 appellant, then a 26-year-old distribution clerk, filed a traumatic injury claim alleging that on that date she injured her back while lifting a heavy bag. The Office accepted her claim for musculoligamentous injury of the scapulothoracic muscle. Appellant returned to work in a series of non-Government jobs and later a position with the employing establishment. On June 1, 2002 the Office accepted that she sustained a recurrence of disability on January 1, 2001. Appellant worked part-time modified duty as a flexible duty clerk for the employer from January 10, 2001 to June 5, 2006.

In an October 26, 2005 duty status report, Dr. William A. Coch, a treating physician since May 1996, advised that appellant could lift 10 pounds, 30 minutes a day, and could sit, walk and perform simple grasping and manipulation intermittently for 6 hours a day and could stand and walk intermittently for 30 minutes a day. In a progress note of the same date, he found that appellant was tolerating 20 hours of work per week.

On June 6, 2006 the employing establishment withdrew the limited-duty work assignment and appellant received compensation for wage loss.

In a June 22, 2006 report, Dr. Coch noted that appellant had chronic symptoms of a localized syndrome in the right upper extremity. Although appellant was not working, he advised that her work restrictions continued to be the same. In a July 13, 2006 note, Dr. Coch noted that her clinical course was compatible with moderate myofascial syndrome in the neck and trapezius area which was caused by the employment injury. The prognosis for change in the future was poor, as he did not anticipate any improvement or any worsening of her condition. Dr. Coch opined that appellant was permanent partially disabled. In an accompanying duty status report, he stated that she could not perform any reaching or repetitive movements of the wrist or elbow. Dr. Coch restricted appellant to pushing, pulling, lifting and squatting limited to 10 pounds for one to two hours a day or less. He restricted her to operating a motor vehicle for a half hour, standing for two hours and sitting and walking for six hours per day. On May 2, 2007 and January 21, 2008 Dr. Coch noted that, since he last saw appellant, he had returned to work for 20 hours a week. Appellant believed that her pain was aggravated by her employment. In a February 4, 2008 note, Dr. Coch indicated that appellant had an increase in her symptoms doing 20 hours of work and recommended a magnetic resonance imaging (MRI) scan.

Appellant had an MRI scan on February 18, 2008 which was interpreted by Dr. Ross A. Horsley, a Board-certified radiologist, as showing a large broad-based protrusion C5-6 disc with associated impingement on the cord and bilateral foraminal encroachment. Dr. Horsley also noted a large paracentral protrusion C6-7 disc with associated impingement on the cord and right foraminal encroachment as well as protrusion T3-4 disc noted on sagittial sequence.

On July 19, 2006 the Office referred appellant for vocational rehabilitation. Effective November 23, 2007, it approved the plan developed by her vocational counselor to return to work as a receptionist. Pursuant to a closure vocational report dated May 8, 2008, the vocational counselor advised that appellant worked in an on-the-job training program beginning on November 11, 2008, which was to be followed with a year of assisted reemployment benefits. The vocational counselor stated that appellant stopped work shortly after the training period,

noting that appellant stated that her physician took her off work, even though she had completed the three months of on-the-job training.

On April 10, 2008 the vocational rehabilitation counselor identified positions suitable for appellant, including that of customer service representative, a sedentary position. With regard to specific vocational preparation, he noted that appellant's work at the employing establishment gave her the necessary skills for this position and that testing supported this conclusion. Appellant worked successfully with customers at a local Ford dealership from November 12, 2007 through February 12, 2008. The vocational rehabilitation counselor noted that available positions were discussed with the Office employment specialist. There were a limited number of part-time customer service positions in appellant's locale. In a labor market survey dated April 11, 2008, the vocational rehabilitation counselor noted that barriers to appellant's return to work included that she had a ½ hour driving restriction and was not able to work more than 20 hours a week. Based on his review of the job goal research, the want-ad sections of local newspapers and ongoing contacts with prospective employers, the position of customer representative was reasonably available. The vocational rehabilitation counselor noted that the site director of the New York State Department of Labor Statistics at Hornel indicated that the occupational outlook for the jobs was good and that a reasonable amount of open positions were available.

On June 11, 2008 the Office issued a notice of proposed reduction of compensation, wherein it proposed reducing appellant's compensation to reflect her ability to earn wages as a customer service representative earning a weekly rate of $186.54.

By decision dated July 24, 2008, the Office reduced appellant's compensation benefits effective August 2, 2008, finding that she was capable of performing the duties of a customer service representative.

On August 17, 2008 appellant requested an oral hearing before an Office hearing representative.

In a medical report dated August 4, 2008, Dr. Coch indicated that he last examined appellant in July 2008 for difficulties relating back to an on-the-job injury of November 5, 1981, at which time she suffered neck and shoulder pain which was eventually diagnosed as chronic scapulothoracic myofascial syndrome. He noted that this condition was chronic and had never remitted. Appellant had been working part time for a number of years, but her condition recently worsened so that part-time employment was impossible. She experienced an increase in pain to the neck and shoulder area with numbness and stiffness. An MRI scan and neurosurgical consultation showed that appellant had underlying cervical spondylosis with disc herniations and a neurosurgeon advised that there was no indication for surgery. Dr. Coch concluded, "At this point, I believe that [appellant] is no longer able to perform any gainful employment based on her condition resulting from the injury in 1981." He did not believe that any further attempts at rehabilitation would be successful.

At the January 7, 2009 hearing, appellant acknowledged that she could have continued work at the employing establishment in her part-time position but that the employer withdrew the position as it had no more light-duty work available. She was referred to vocational

rehabilitation and accepted a position of part-time receptionist/clerical assistant with an automobile dealership on February 13, 2008. Appellant stopped work on February 18, 2008 alleging increased disability. Within one week of returning to work, her right arm would go numb from repetitive movement. Appellant noted that she continued only because her counselor informed her to do so. She contended that the job involved certain activities that were beyond her work restrictions.

In a January 14, 2009 report, Dr. Coch noted that appellant had recovered incompletely from an injury in 1981, which developed into a secondary fibromyalgia or cervical thoraco-scapular myofascial syndrome. Appellant had cervical disc disease with significant protrusions not requiring surgery. Dr. Coch noted that this led to chronic pain especially with any repetitive tasks and difficulty with sustained activity. He found that appellant was not employable and unlikely to ever be employable. Dr. Coch stated that the work required for an office service representative involved repetitive tasks which aggravated her symptoms.

By letter dated January 28, 2009, the employing establishment argued that the Office's decision should be affirmed.

By decision dated March 26, 2009, the hearing representative found that at the time of the Office's July 29, 2008 wage-earning capacity decision, appellant was capable of performing the position of customer service representative. The hearing representative remanded the case to the Office for referral to a second opinion physician to determine whether she had disabling residuals of the accepted employment injury such that she was unable to perform the selected position of customer service representative on a part-time basis. After any further development, the Office was to issue a decision on whether appellant was entitled to reinstatement of wage-loss benefits as of August 2, 2008.

On April 24, 2009 the Office referred appellant to Dr. Ibrahim Y. Al-Sinjari, a Board-certified orthopedic surgeon, for a second opinion. In a report dated May 13, 2009, Dr. Al-Sinjari diagnosed degenerative arthritis to appellant's cervical spine which did not require surgery. According to the records, appellant's injury was on November 5, 1981 at which time, she had a severe sprain of her cervical spine. Dr. Al-Sinjari noted that the sprain resolved but gradually developed to arthritis. He found that appellant could work 20 hours a week but not lift over 20 pounds, no heavy pushing and no pulling. Appellant could do limited repetitive work but avoid frequent bending of her neck. In a September 16, 2009 addendum, Dr. Al-Sinjari responded to questions from the Office. He noted that appellant had range of motion within normal limits and mild spasms and tenderness in the cervical spine, medial and lateral sides. Dr. Al-Sinjari believed her work-related sprain attributed to her current arthritic condition. When appellant worked she was going to move her neck which could irritate the root of the nerve to the upper arms. Dr. Al-Sinjari noted that anyone with advanced arthritis would experience pain.

By decision dated September 24, 2009, the Office denied appellant's request for modification of the wage-earning capacity decision.

Appellant requested an oral hearing, which was held on February 17, 2010. She testified that she worked in the private sector from November 12, 2007 to February 12, 2008. After

training was over, appellant started the assistant reemployment program on February 13, 2008 and last worked on February 20, 2008. She left work on February 20, 2008 due to pain in her shoulder, stiffness in her neck and numbness in her arm and hand. Dr. Coch advised that appellant should not work any further. At the hearing, counsel contended that the position of customer service representative was not suitable and that Dr. Al-Sinjari's report did not constitute the weight of medical evidence.

By decision dated April 26, 2010, an Office hearing representative affirmed the September 24, 2009 decision.

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.[2] Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.[3]

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 wage-earning capacity determination.[5]

When a formal loss of wage-earning capacity determination is in place and light duty is withdrawn, the proper standard of review is not whether appellant sustained a recurrence of disability, but whether the Office should modify its decision according to the established criteria for modifying a formal loss of wage-earning determination.[6] Office procedures provide that when the employing establishment has withdrawn a light-duty assignment, which accommodated the claimant's work restrictions and a formal wage-earning capacity decision has been issued, the decision will remain in place, unless one of the three accepted reasons for modification applies.[7]

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.[8] In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an

[2] *See* 5 U.S.C. § 8115 (determination of wage-earning capacity).

[3] *Sharon C. Clement*, 55 ECAB 552 (2004).

[4] *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Tamra McCauley*, 51 ECAB 375, 377 (2000).

[5] *Id.*

[6] *K.R.*, Docket No. 09-415 (issued February 24, 2010).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.150.7(a)(5) (October 2005).

[8] 5 U.S.C. § 8123(a); *see E.H.*, Docket No. 08-1270 (issued July 8, 2009).

impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background must be given special weight.[9]

ANALYSIS

The Office accepted that on November 5, 1981 appellant sustained a musculoligamentous injury of the scapulothoracic muscle. It paid wage-loss compensation and medical benefits. Appellant returned to work as a part-time modified flexible duty clerk, a position she held from January 10, 2001 through June 5, 2006. On June 6, 2006 the employer withdrew this position, and appellant filed a claim for disability, which the Office accepted. Appellant was referred to vocational rehabilitation and worked as a receptionist from November 11, 2008 to February 18, 2009, at which point she stopped work alleging an increase in her symptoms. The vocational counselor determined that appellant could obtain suitable work as a customer service representative and, by decision dated July 24, 2008, the Office reduced appellant's wage-loss compensation effective August 2, 2008 on her ability to earn wages as a customer service representative. Once a wage-earning capacity decision is made, it remains in effect until it is properly modified.[10]

A wage-earning capacity determination can be modified if the party attempting to show a modification establishes that there has been a material change in the nature and extent of the injury-related condition, that the employee has been retrained or otherwise vocationally rehabilitated or if the original determination was erroneous.[11] Appellant contends there was a material change in the nature and extent of her injury-related condition.

Dr. Coch, appellant's treating physician, opined that appellant could not perform the work of a customer service representative. He treated her since May 1996. Although appellant was able to work in part-time employment with restrictions; in a February 4, 2008 note, Dr. Coch addressed her return to work and increased symptoms. As of January 14, 2009, he found that she was not employable. On August 4, 2008 he explained that appellant's difficulties related back to the injury of November 5, 1981. Appellant worked part time for a number of years, but that her condition worsened such that part-time employment was impossible for her. Dr. Coch reviewed an MRI scan and neurological consultation and found that appellant was no longer able to perform any gainful employment based on her condition resulting from the 1981 employment injury.

Dr. Al-Sinjari, the second opinion physician, did not find that appellant was totally disabled. On April 24, 2009 he found appellant was capable of working 20 hours a week with restrictions of not lifting over 20 pounds or doing any heavy pushing or pulling and that she should only do limited repetitive work and should avoid bending her neck. Dr. Al-Sinjari noted

[9] *V.G.*, 59 ECAB 635 (2008).

[10] *See Katherine T. Kreger*, 55 ECAB 633 (2004).

[11] *Harley Sims, Jr., supra* note 4.

on September 16, 2009 that appellant's work-related condition contributed to her current arthritic condition.

The Board finds a conflict in medical opinion between appellant's treating physician and the second opinion physician with regard to appellant's capacity for work and whether there was a material change in her accepted condition. The Board finds that these opinions are of virtually equal weight. Accordingly, the case will be remanded to the Office for referral to an impartial medical examiner. After such further development of the case record as the Office deems necessary, a *de novo* decision shall be issued.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the April 26, 2010 decision of the Office of Workers' Compensation Programs is set aside, and the case remanded for further consideration consistent with this decision.

Issued: May 2, 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