

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

M.M., Appellant)
and) Docket No. 11-681
DEPARTMENT OF VETERANS AFFAIRS,) Issued: October 4, 2011
VETERANS ADMINISTRATION MEDICAL)
CENTER, Alexandria, LA, Employer)

)

Appearances:

Daniel E. Broussard, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 14, 2011 appellant filed a timely appeal from a July 19, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) denying modification of a January 20, 2010 wage-earning capacity determination. Pursuant to the Federal Employees' Compensation Act (FECA)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 OWCP properly denied modification of the January 20, 2010 wage-earning capacity determination.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. In an August 26, 2008 decision, the Board reversed OWCP's May 21, 2007 decision terminating appellant's compensation on the grounds that she refused an offer of suitable work.² The facts and law contained in that decision are incorporated herein by reference.

On September 4, 2003 appellant, a 50-year-old licensed practical nurse, filed a traumatic claim alleging that she injured her neck while lifting a patient. OWCP accepted her claim for cervical and lumbar strain, aggravation of degenerative disc disease of the cervical and lumbar spine and lumbar radiculopathy. Appellant stopped working on August 21, 2003 and was placed on the periodic rolls.

In a decision dated June 29, 2005, OWCP terminated appellant's wage-loss (monetary) and schedule award benefits, effective that date, on the grounds that she had refused an offer of suitable work. By decision dated May 21, 2007, an OWCP hearing representative affirmed the June 29, 2005 decision. On August 26, 2008 the Board reversed the May 21, 2007 decision on the grounds that OWCP had failed to consider all of the medical evidence of record. OWCP reinstated appellant's compensation benefits effective June 29, 2005.

In an August 10, 2009 second opinion report, Dr. Robert Holladay, a Board-certified orthopedic surgeon, provided examination findings. He found mild decreased range of motion of the left shoulder. Dr. Holladay indicated that appellant had mild soft-tissue residual from her extensive surgery of the cervical spine anteriorly and posteriorly, which would likely prevent her from performing activities of reaching, working overhead and heavy lifting. He diagnosed degenerative disc disease of the cervical spine; postoperative anterior cervical disc infusion, C4-7; postoperative laminectomy and fusion of the cervical spine and degenerative disc disease, lumbar spine. Dr. Holladay opined that appellant could return to full duty with restrictions. Appellant was precluded from stooping, twisting, bending, squatting, kneeling or climbing. She was also restricted from lifting, pulling or pushing more than 10 pounds.

On September 29, 2009 the employing establishment offered appellant a limited-duty position as a program support assistant based on Dr. Holladay's August 10, 2009 report. The position was defined as basically sedentary, but required a lot of walking. On October 29, 2009 appellant accepted the limited-duty position as a program support assistant.

By decision dated January 20, 2010, OWCP reduced appellant's compensation benefits effective November 22, 2009 based upon her actual earnings as a program support assistant. It found that the position fairly and reasonably represented her wage-earning capacity. As appellant had demonstrated the ability to perform the duties of this job for two months or more, the position was considered suitable to her partially disabled condition.

On April 20, 2010 appellant submitted a notice of recurrence alleging that she was totally disabled as of April 9, 2010. She stated that, since her return to work following her accepted injury, her pain had increased and her function and motion had decreased. Appellant contended

² Docket No. 07-2103 (issued August 26, 2008).

that her condition was not a recurrence but a continuation of pain from her original injury that had increased since she returned to work.

Appellant submitted an April 19, 2010 report from Dr. John M. Burdine, a Board-certified physiatrist. Examination of the cervical spine revealed pain with extension, cervical paraspinous tenderness and spasms palpable. Examination of the lumbar spine revealed pain with extension, lumbar paraspinous tenderness. Dr. Burdine diagnosed cervical syndrome; cervico-brachial neuralgia; facet arthropathy of the spine; lumbar spondylosis and lumbosacral radiculitis. He recommended that appellant undergo a functional capacity examination. Temporary work restrictions included lifting, no lifting or bending, no prolonged activities, no overhead activities and frequent breaks. Dr. Burdine stated that, without surgery, appellant's prognosis was poor for recovery.

Appellant submitted an April 9, 2010 letter from Dr. DeVinder Verma, a treating physician, who opined that, due to her job-related injury and increase pain, she was unable to work commencing April 7, 2010.

In a letter dated June 1, 2010, OWCP advised appellant that the evidence submitted was insufficient and informed her as to the information necessary to support her recurrence claim.

Appellant submitted an April 5, 2010 performance review signed by her supervisor, Fay C. Thrasher, Ph.D, who stated that appellant had both physical and cognitive difficulties which interfered with her ability to successfully perform the functions of her position. Ms. Thrasher noted that appellant had a hard time typing and focusing due to the numerous medications she was required to take for pain.

The record contains a June 9, 2010 report from Dr. Paul J. Waguespack, a Board-certified neurological surgeon, who stated that appellant had pain in her neck and was tender to palpation without much radiation. Appellant also had some tenderness in her shoulder with impingement sign, which worsened on elevation of the arm and generated burning and tingling down her left posterior arm. She also had pain in her back in the low midline with tenderness and radiation in the left sciatic notch region down toward her knee and occasionally toward her foot. Dr. Waguespack recommended a magnetic resonance imaging (MRI) scan of the left shoulder and myelograms of the cervical and lumbar spine to definitively illustrate whether further would be of benefit. He determined to treat her with an injection of her left shoulder and Lidoderm Patch over the sore area at her posterior left neck.

OWCP referred the case file to the district medical adviser (DMA) for a determination as to whether appellant's left shoulder condition should be accepted as a consequence of her original 2003 injury. The DMA reviewed the medical record and noted that she had ongoing problems following her 2003 work injury, including stiffness and pain in the neck and intermittent left shoulder pain, which required injections. He opined that the left shoulder condition should be considered consequential to the original injury of August 21, 2003.

On July 9, 2010 OWCP accepted "other affections of the shoulder region" and authorized treatment of the left shoulder as consequential to the original August 21, 2003 injury.

By decision dated July 19, 2010, OWCP denied modification of the January 20, 2010 wage-earning capacity decision. Adjudicating appellant's recurrence claim as a request to modify the LWEC determination, OWCP stated that the evidence failed to establish a change in the nature and extent of her injury-related condition, that she had been retrained or vocationally rehabilitated or that the original determination was erroneous.

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.³ OWCP'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. 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.⁴ 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.⁵ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁶

Chapter 2.814.11 of OWCP's 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 OWCP is not precluded from adjudicating a limited period of employment-related disability when a formal wage-earning capacity determination has been issued.⁸

³ *Katherine T. Kreger*, 55 ECAB 633 (2004).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

⁵ *Stanley B. Plotkin*, 51 ECAB 700 (2000).

⁶ *Id.*

⁷ See Federal (FECA) Procedure Manual, *supra* note 4 at Chapter 2.814.11 (June 1996).

⁸ *Sandra D. Pruitt*, 57 ECAB 126 (2005).

ANALYSIS

OWCP appropriately treated appellant's notice of recurrence as a request for modification of the January 20, 2010 wage-earning capacity decision. Appellant does not contend that the original wage-earning capacity determination was erroneous, nor does the evidence establish that she has been retrained or otherwise vocationally rehabilitated. The issue is whether there has been a material change in the nature and extent of her injury-related conditions. The Board finds that this case is not in posture for a decision.

The medical evidence generally supports appellant's claim that her condition worsened following her return to work in the modified program support assistant position. On April 9, 2010 Dr. Verma opined that, due to her job-related injury and increased pain, she was unable to work as of April 7, 2010. On April 19, 2010 Dr. Burdine modified appellant's work restrictions and stated that, without surgery, her prognosis was poor for recovery. In a June 9, 2010 report, Dr. Waguespack observed that she had neck pain and some tenderness in her shoulder with impingement sign, which worsened on elevation of the arm and generated burning and tingling down her left posterior arm. Appellant also had pain in her back in the low midline with tenderness and radiation in the left sciatic notch region down toward her knee and occasionally toward her foot. Dr. Waguespack recommended an MRI scan of the left shoulder and myelograms of the cervical and lumbar spine to definitively illustrate whether further surgery would be of benefit. He determined to treat her with an injection of her left shoulder and Lidoderm Patch over the sore area at her posterior left neck.

OWCP sought an opinion from the DMA as to whether appellant's newly diagnosed shoulder condition should be considered consequential to her accepted injury. After reviewing the medical record, the DMA opined that the left shoulder condition should be considered consequential to the original injury of August 21, 2003. Based upon the DMA's report, OWCP accepted "other affections of the shoulder region" and authorized treatment of the left shoulder as consequential to the original injury. It did not, however, consider whether appellant's left shoulder condition constituted a worsening of her accepted injury warranting modification of her wage-earning capacity.

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.⁹ Once OWCP undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.¹⁰ In this case, appellant alleged and submitted medical evidence in support of her claim that her condition worsened following the issuance of a wage-earning capacity determination. OWCP began to develop the evidence by seeking an opinion from the DMA as to whether her shoulder condition was consequential to the accepted injury. It failed, however, to seek clarification as to whether appellant's condition had

⁹ *William J. Cantrell*, 34 ECAB 1223 (1983).

¹⁰ *Richard F. Williams*, 55 ECAB 343, 346 (2004).

materially worsened due to the shoulder or other conditions. Without such information, an informed decision cannot be reached on the relevant issue.¹¹

As this case is not in posture for a decision, it will be remanded to OWCP for further development. After OWCP has developed the case record to the extent it deems necessary, a *de novo* decision shall be issued.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the July 19, 2010 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision.

Issued: October 4, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹¹ The Board notes that the development of an accepted consequential shoulder condition strongly suggests that appellant's condition has worsened.