

United States Department of Labor  
Employees' Compensation Appeals Board

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M.D., Appellant )  
 )  
and )  
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DEPARTMENT OF AGRICULTURE, FOOD )  
SAFETY INSPECTION SERVICE, )  
Moorefield, WV, Employer )  
\_\_\_\_\_) **Docket No. 11-698**  
 ) **Issued: September 30, 2011**

*Appearances:*

*Alan J. Shapiro, 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  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On January 26, 2011 appellant, through her attorney, filed a timely appeal of the November 22, 2010 merit decision of the Office of Workers' Compensation Programs modifying a wage-earning capacity determination and terminating compensation. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> 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 met its burden of proof to modify its determination of appellant's wage-earning capacity and terminate her wage-loss compensation and medical benefits effective November 25, 2007.

On appeal, counsel contends that OWCP's November 22, 2010 decision is contrary to fact and law.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>2</sup> In an August 4, 2009 decision, the Board affirmed OWCP decisions dated November 26, 2007 and April 18, 2008 which reduced appellant's compensation effective November 25, 2007 based on its determination that the constructed position of retail sales clerk represented her wage-earning capacity. The Board found that the medical opinion of Dr. Karl V. Metz, a Board-certified orthopedic surgeon and an OWCP referral physician, was sufficiently rationalized to establish that appellant was medically capable of working full time in the constructed position. The facts and the circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference.<sup>3</sup> The facts and the history relevant to the present appeal are hereafter set forth.

By letter dated January 20, 2010, OWCP informed appellant that there was no current medical evidence of record and requested a narrative medical report within 30 days.

In a March 23, 2010 report, Dr. Bernard Hirsch, an attending Board-certified orthopedic surgeon, provided a history of the employment-related injuries and appellant's medical treatment. On physical examination of the left shoulder, he reported no signs of any residuals of any major impingement problem. Appellant had 4+/5 weakness in her left shoulder with an open can maneuver, but otherwise she had full passive motion in the scapular plane to abduction and full internal and full external rotation. No instability pattern was noted. No grinds or pops were elicited. Dr. Hirsch noted that appellant's only complaint of occasional discomfort in her left shoulder was subjective in nature. He stated that otherwise, she was apparently in school pursuing a business management degree and was not having any significant problems with her left shoulder. Dr. Hirsch concluded that appellant's medical condition had not changed since his last evaluation in 2006 and no orthopedic intervention was planned at that time.

By letter dated April 1, 2010, OWCP requested that Dr. Hirsch clarify his opinion as to whether employment-related residuals precluded appellant from performing her date-of-injury job duties without limitations and if so, discuss what type of work she was capable of performing.

In an April 13, 2010 report, Dr. Hirsch reiterated that appellant did not demonstrate any signs of residuals of any major impingement in her left shoulder. He stated that she was capable of performing full-duty work without limitations.

On April 29, 2010 OWCP issued a notice of proposed termination of appellant's wage-loss compensation and medical benefits. It modified the November 26, 2007 decision to reflect that she was capable of performing her date-of-injury work duties without restrictions and she had no residuals of her accepted conditions based on Dr. Hirsch's March 23 and April 13, 2010 reports.

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<sup>2</sup> Docket No. 08-1543 (issued August 4, 2009).

<sup>3</sup> OWCP accepted that appellant, a poultry inspector, sustained left shoulder strain and impingement resulting from her inspection duties and authorized left shoulder arthroscopic acromioplasty which was performed on October 26, 2001 and January 27, 2003.

In a decision dated June 2, 2010, OWCP modified its November 26, 2007 wage-earning capacity determination and terminated appellant's wage-loss compensation and medical benefits. It found that the medical evidence established that she no longer had any residuals or required medical treatment of her employment-related left shoulder conditions and resultant surgeries.

By letter dated June 16, 2010, appellant, through her attorney, requested a telephone hearing.

In an August 21, 2010 report, Dr. William N. Grant, a Board-certified internist, found that appellant had 40 percent impairment of the left upper extremity based on the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6<sup>th</sup> ed. 2009).<sup>4</sup>

In a November 22, 2010 decision, an OWCP hearing representative affirmed the June 2, 2010 decision. She found that the medical evidence submitted by appellant was insufficient to overcome the weight accorded to Dr. Hirsch's medical reports.

### **LEGAL PRECEDENT**

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to her employment, OWCP may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.<sup>5</sup>

Once a loss of wage-earning capacity is determined, a modification of such a determination is not warranted unless there is a material change in the nature and extent of the work-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was in fact erroneous.<sup>6</sup> The burden of proof is on the party attempting to show the award should be modified.<sup>7</sup>

### **ANALYSIS**

OWCP accepted that appellant sustained left shoulder strain and impingement due to her inspection duties at work. In decisions dated November 26, 2007 and April 18, 2008, it determined that her wage-earning capacity was represented by the constructed position of retail sales clerk.

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<sup>4</sup> Appellant's attorney submitted Dr. Grant's August 21, 2010 report to OWCP along with an August 26, 2010 letter inquiring about the status of appellant's schedule award claim. The Board notes that, during the September 29, 2010 telephone hearing, an OWCP hearing representative indicated that appellant had not filed a schedule award claim. Counsel stated that she would address her impairment through the schedule award process.

<sup>5</sup> *Jason C. Armstrong*, 40 ECAB 907 (1989).

<sup>6</sup> *George W. Coleman*, 38 ECAB 782, 788 (1987); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

<sup>7</sup> *Jack E. Rohrbaugh*, 38 ECAB 186, 190 (1986).

The Board finds that the opinion of Dr. Hirsch, appellant's attending physician, establishes that she ceased to have residuals of her accepted conditions. In a March 23, 2010 report, Dr. Hirsch listed his normal findings on physical examination. He found that appellant did not demonstrate any signs of residuals of any major impingement problem in her left shoulder. Dr. Hirsch also found that, although she had 4+/5 weakness in her left shoulder with an open can maneuver, she otherwise had full passive motion in the scapular plane to abduction and full internal and full external rotation. He found no instability pattern. Dr. Hirsch stated that no grinds or pops were elicited. He concluded that appellant's only complaint of occasional discomfort in her left shoulder was subjective in nature. Dr. Hirsch noted her pursuit of a business degree and stated that she was not having any significant problems with her left shoulder. He further concluded that appellant's medical condition had not changed since his last evaluation in 2006 and no orthopedic treatment was necessary at that time. In an April 13, 2010 follow-up report, Dr. Hirsch opined that appellant was capable of performing full-duty work without limitations.

The Board, upon review of the opinion of Dr. Hirsch notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Hirsch's reports show that appellant ceased to have residuals of her accepted work injuries, and she did not require further medical treatment and could perform full-duty work without limitations. His opinion is based on a proper factual and medical history and he provided medical rationale for his opinion by explaining that appellant's current complaint of left shoulder discomfort was subjective as she did not show any signs of residuals of her employment-related left shoulder impingement condition on examination.

Dr. Grant's August 26, 2010 report found that appellant had 40 percent impairment of the left upper extremity based on the A.M.A., *Guides*. However, Dr. Grant did not address whether her impairment was due to the accepted conditions and prevented her from performing her date-of-injury work duties. The Board finds that his report is insufficient to establish that appellant's current impairment was caused by the accepted employment injuries.

OWCP properly modified its November 26, 2007 wage-capacity determination in which it had adjusted appellant's compensation effective November 25, 2007 based on its determination that her wage-earning capacity was represented by the constructed retail sales clerk position. Dr. Hirsch's reports show that there was a material change in the nature and extent of the employment-related conditions, *i.e.*, for the better, such that she no longer had wage loss because of her accepted injuries.<sup>8</sup> OWCP properly terminated appellant's compensation effective November 25, 2007.

### **CONCLUSION**

The Board finds that OWCP met its burden of proof to modify its determination of appellant's wage-earning capacity and to terminate her wage-loss compensation and medical benefits effective November 25, 2007.

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<sup>8</sup> See *supra* note 6.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 22, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 30, 2011  
Washington, DC

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

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

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