United States Department of Labor
Employees' Compensation Appeals Board

W.W., Appellant	)	
and	)	**Docket Nos. 11-1248 & 11-1707**
	)	**Issued: April 17, 2012**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Charleston, SC, Employer	)	

Appearances:
Appellant, pro se
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 April 26, 2011 appellant filed a timely appeal from the Office of Workers' Compensation Programs' (OWCP) merit decision of March 1, 2011 which denied modification a wage-earning capacity determination. On July 18, 2011 she also timely appealed OWCP's June 10, 2011 schedule award decision. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

[1] 5 U.S.C. § 8101 *et seq.*

[2] The record contains a June 27, 2011 decision that affirmed the denial of compensation for intermittent periods. Appellant did not appeal this decision.

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish that modification of the wage-earning capacity determination was warranted; and (2) whether appellant has more than a one percent impairment of her right leg, for which she received a schedule award.

FACTUAL HISTORY

This case has previously been before the Board.[3] In a July 11, 2011 decision, the Board affirmed OWCP's March 10, 2010 decision which found that appellant did not meet her burden of proof to establish a recurrence of disability for the period beginning June 30, 2009 causally related to her July 12, 2007 employment injury. The facts and history contained in the prior appeal are incorporated by reference.

Appellant's claim was accepted for right hip and right thigh sprains and enthesopathy of the hip region. On October 23, 2009 OWCP issued a wage-earning capacity decision reducing her wage-loss compensation to zero. It found that appellant was employed as a transportation security officer with wages of $638.54 a week effective July 13, 2007. Appellant's wages were equal to or exceeded the current pay for the job held at the time of injury. OWCP found that her actual earnings fairly and reasonably represented her wage-earning capacity. It also found that appellant demonstrated the ability to perform the duties of this job for more than two months and it was suitable for appellant's partially disabled condition. OWCP also found that the position was not temporary.

An April 6, 2009 report from Dr. Douglas Hein, a Board-certified orthopedic surgeon and OWCP referral physician, diagnosed hip strain and resolved iliopsoas strain. He noted that appellant's current diagnosis was a small labral tear with intermittent hip pain. Appellant also had intermittent groin pain as a result of her work injury. Dr. Hein opined that she could perform limited duty with permanent restrictions for eight hours a day. Appellant could walk for no more than four hours a day, bend or stoop for no more than one hour a day and lift for no more than one hour a day and no more than 40 pounds.

In a June 5, 2009 report, Dr. Bright McConnell, a Board-certified orthopedic surgeon, diagnosed bursitis, tendinitis in the hip region and lumbar stenosis. He found that appellant was at maximum medical improvement with respect to her work-related condition of right hip and thigh sprain. Dr. McConnell noted that her previous restrictions included limits on prolonged standing, not to exceed four hours, avoidance of repetitive bending or stooping and lifting restrictions of 40 pounds. He explained that appellant had residuals of lumbosacral disc disease with intermittent S1 neuropathy, documented by appellant as a work-related injury. Dr. McConnell believed that this was aggravated by her work injury of July 12, 2007 but that it was not an accepted condition. He advised that no further treatment was warranted for the accepted condition of right hip and thigh sprain. On February 4, 2010 Dr. McConnell clarified his walking restriction and explained that appellant could walk "frequently" in 250 to 1,000

[3] Docket No. 10-1922 (issued July 11, 2011).

strides. On April 16, 2010 he provided a work capacity evaluation which noted that her restrictions were permanent. Dr. McConnell stated that appellant could walk for one to two hours, no bending or stooping, no lifting over 25 pounds for two to three hours and no kneeling, squatting or climbing.

Appellant requested a schedule award on June 4, 2010. She provided a February 17, 2009 report from Dr. James K. Aymond, a Board-certified orthopedic surgeon, who noted that appellant had evidence of neural foraminal stenosis at L5-S1 level pursuant to a magnetic resonance imaging (MRI) scan and the narrowing was aggravated by her twisting injury of July 12, 2007. Dr. Aymond opined that she reached maximum medical improvement and that she had a seven percent impairment of the whole person.

In a June 23, 2010 report, an OWCP medical adviser indicated that appellant was in a chronic pain management program. He stated that the evidence did not permit assessment of true impairment of the right leg. In a June 23, 2010 addendum, the medical adviser explained that he had overlooked Dr. Hein's April 6, 2009 report. He stated that Dr. Hein's report was clear and objective. Appellant had a normal gate and normal findings for the right hip and thigh. The medical adviser noted that x-rays were normal and concluded that there was no basis for a permanent impairment other than bursitis or other soft tissue lesion. He referred to Table 16-4 Hip Regional Grid of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) and noted that the bursitis or soft tissue condition affecting the hip region provided for a default value of class 1 and a C category. The medical adviser opined that appellant had a one percent permanent impairment of the right lower extremity.[4]

In a June 29, 2010 report, Dr. J. Edward Nolan, a Board-certified anesthesiologist and pain management specialist, noted treating appellant since October 26, 2009 for pelvic/hip pain, lumbar radiculopathy and muscle spasms. In an October 26, 2009 report, he saw her for pain in the neck, right shoulder, mid back, low back, right leg and buttocks. Deep tendon reflexes were intact and symmetrical in the bilateral upper and lower extremities. Sensory function was grossly intact in the bilateral upper and lower extremities and motor function was normal. Appellant walked with a limp. She had mild cervical pain in the right paraspinous musculature to the right trapezius muscle; mild to moderate right shoulder pain; radiculopathy and moderate lumbar radiculitis pain with range of motion in the right L1-L2, L4-L5 and L5-S1 distribution to the groin and knee. Appellant had moderate right groin pain. Dr. Nolan diagnosed pelvic/hip pain, disuse atrophy of the muscles, lumbar radiculopathy and muscle spasms. He opined that there was nothing structurally in the hip that caused appellant's pain. On November 3, 2009 Dr. Nolan advised that she could return to work on November 4, 2009 with a 40-pound lifting restriction, no bending, squatting or crawling, and no pushing or pulling of heavy objects. In a November 17, 2009 work excuse, he indicated that appellant called his office to report that she was unable to work due to increased pain. Dr. Nolan provided work excuses for her absence from work on November 28 and December 26, 2009 due to increased pain. In a January 25, 2010 report, he explained that appellant indicated that she was unable to walk long distances due to her hip, groin and leg pain and asked that Dr. McConnell explain why she had issues with prolonged walking. On January 26, 2010 Dr. Nolan requested that appellant be excused from

[4] A.M.A., *Guides* 512 (6th ed. 2008).

work on January 16 and 22, 2010 due to increased hip pain. He advised that she could not walk prolonged distances. Dr. Nolan submitted other notes and work excuses reporting appellant's status and her disability on intermittent dates due to pain.

On July 15, 2010 appellant requested reconsideration of OWCP's October 23, 2009 wage-earning capacity decision. She alleged that her condition continued until she was removed from the employing establishment.[5] Appellant advised OWCP that she had used all her sick leave, annual leave and compensatory time because of her work-related injury. In a letter dated August 13, 2010, she disagreed with the one percent impairment rating provided by the medical adviser. Appellant also requested compensation for wage loss.

In an August 20, 2010 treatment note, Dr. Antonio Hernandez, a Board-certified internist, noted treating appellant since January 8, 2010. He indicated that she did not experience an increase in her blood pressure until after her work injury on July 12, 2007.

In a letter dated August 25, 2010, Martha A. Stitt, a senior human resources specialist, noted that appellant's compensation was reduced to zero based upon the suitability of the job that was offered to her and which she accepted in 2007. She advised that appellant worked in the position for about three years until her separation on June 25, 2010 which was due to administrative matters unrelated to her injury. Ms. Stitt challenged appellant's allegation that her absences were due to her work injury or that she had a worsening of her work-related condition.

In an August 31, 2010 letter, appellant requested that OWCP allow her to work in her part-time position. She contended that she had never recovered from her work injury. Appellant repeated her concerns in letters dated September 3 and 23, 2010. The record contains several claims for recurrence of disability commencing from November 10, 2009.

In a September 7, 2010 letter, OWCP provided Dr. Aymond with a copy of the medical adviser's report for review and comment. No response was received. On October 18, 2010 OWCP requested that the medical adviser review the file.

In an October 18, 2010 addendum, OWCP's medical adviser advised that the date of maximum medical improvement should be February 17, 2009, the date of Dr. Aymond's report.

On October 21, 2010 OWCP denied modification of the October 23, 2009 wage-earning capacity decision.

On October 25, 2010 OWCP granted appellant a schedule award for one percent permanent impairment of the right leg. The award covered 2.88 weeks, from June 8 to 28, 2009.

On November 10, 2010 appellant requested a telephonic hearing from the October 25, 2010 schedule award decision. The hearing was held on March 21, 2011.

[5] The record indicates that the employing establishment removed appellant effective June 26, 2010 for failure to follow instructions and for being absent without leave.

On November 27, 2010 appellant requested reconsideration of the October 21, 2010 wage-earning capacity decision. She described the circumstances surrounding her injury until she was terminated and alleged that she continued to be in physical and mental pain. Appellant referred to a 2007 incident in a supermarket where she slipped. She argued that her medical condition had worsened with increased disability.

By decision dated March 1, 2011, OWCP denied modification of the October 23, 2009 loss of wage-earning capacity decision.

In a letter dated April 19, 2011, appellant repeated her disagreement with the schedule award decision. She indicated that she was unable to walk "distances" without pain. Appellant indicated that she believed that she needed a second opinion.

By decision dated June 10, 2011, OWCP's hearing representative affirmed the October 25, 2010 schedule award decision.

LEGAL PRECEDENT -- ISSUE 1

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.[6]

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.[7] The procedure manual further indicates that, under these circumstances, the claims examiner will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity decision.[8]

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.[9] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[10]

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

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

[8] *Id.*

[9] *Tamra McCauley*, 51 ECAB 375, 377 (2000).

[10] *Id.*

ANALYSIS -- ISSUE 1

OWCP determined that appellant was unable to return to her date-of-injury position. The employing establishment offered her a position as a transportation security officer on July 13, 2007.

OWCP reduced appellant's compensation benefits based on her actual earnings as a transportation security officer on October 23, 2009, more than 60 days after she returned to work. It found that she was employed as a transportation security officer for with wages of $638.54 per week effective July 13, 2007. OWCP found that the position fairly and reasonably represented appellant's wage-earning capacity. It also found that she had demonstrated the ability to perform the duties of this job for over two months, and the position was considered suitable for her partially disabled condition. OWCP also found that there was no evidence that the position was temporary and reduced appellant's wages to zero as the current pay rate was equal to or greater than the pay rate at the time of the injury.

Appellant continued to work in this position until her separation on June 25, 2010 due to administrative matters unrelated to her injury. She then requested a resumption of compensation for wage loss. Appellant alleged that her condition did not improve and she was removed from the employing establishment.

The Board finds that the original wage-earning capacity determination was not in error. OWCP's wage-earning capacity determination was consistent with section 8115(a) of FECA which provides that the wage-earning capacity of an employee is determined by appellant's actual earnings if her actual earnings fairly and reasonably represent her wage-earning capacity.[11] The position was not temporary or part time. Appellant worked in this position from July 12, 2007 until she was separated from her position on June 25, 2010 due to matters unrelated to her work injury.

Appellant also has not shown a material change in the nature and extent of the injury-related condition. Reports from Dr. Nolan noted her status, work restrictions and her complaints of pain. These are insufficient to establish a material change in appellant's injury-related condition. While Dr. Nolan provided excuses for work on dates in which she had pain and muscle spasms, he did not explain how this represented a material change in her accepted right hip and right thigh sprains and enthesopathy of the hip region. In his June 29, 2010 report, he advised that he had been treating appellant since October 26, 2009 for pelvic/hip pain, lumbar radiculopathy and muscle spasms but he did not address whether the nature and extent of the injury-related conditions had changed materially. Many of Dr. Nolan's reports noted treating her for pain and symptoms unrelated to the injury-related conditions involving the right hip and thigh. He did not offer any opinion to explain how appellant's accepted conditions had materially changed and would cause her to be disabled for her job as a transportation security officer. Therefore, these reports are of limited probative value and do not establish a basis for modification of OWCP's wage-earning capacity determination.

[11] *A.P.*, 58 ECAB 198 (2006).

Additionally, Dr. McConnell, in his June 5, 2009 report, indicated that appellant had residuals of lumbosacral disc disease with intermittent S1 neuropathy, which he believed was aggravated by appellant's July 12, 2007 work injury, but it was not an accepted condition.[12] He explained that no further treatment was warranted with regard to appellant's accepted hip conditions. In his February 4, 2010 report, Dr. McConnell clarified appellant's work restrictions. However, he did not offer any opinion to explain how her accepted conditions would cause her to be disabled for her job as a transportation security officer. Thus, Dr. McConnell's reports are of limited probative value. No other medical reports specifically address how there was a material worsening of appellant's accepted conditions that prevented her from performing her transportation security officer job.

The Board finds that the medical evidence does not establish a material change in the nature and extent of appellant's injury-related conditions and that the accepted conditions caused her to be disabled for her job as a transportation security officer. Furthermore, there is no evidence in the record that she was retrained or otherwise vocationally rehabilitated.

As noted, the burden of proof is on the party attempting to show a modification of the wage-earning capacity. In this case, appellant has not met any of the three criteria for modifying OWCP's October 23, 2009 wage-earning capacity determination.[13]

On appeal, appellant asserts a material change in her accepted conditions. However, as explained, the medical evidence does not establish that an injury-related condition caused increased disability. Appellant may request modification of the wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

LEGAL PRECEDENT -- ISSUE 2

The schedule award provision of FECA[14] and its implementing federal regulations,[15] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted

[12] For conditions not accepted by OWCP as being due to an employment injury, the claimant bears the burden of proof to establish that the condition is causally related to the work injury. *Jaja K. Asaramo*, 55 ECAB 200 (2004).

[13] After she filed her April 26, 2011 appeal of OWCP's denial of modification of its wage-earning capacity decision, OWCP issued a September 15, 2011 decision that denied modification of the wage-earning capacity determination. The September 15, 2011 OWCP decision is null and void as OWCP and the Board may not have concurrent jurisdiction over the same issue. *See Russell E. Lerman*, 43 ECAB 770 (1992); *Douglas E. Billings*, 41 ECAB 880 (1990).

[14] 5 U.S.C. § 8107.

[15] 20 C.F.R. § 10.404.

the A.M.A., *Guides* as the uniform standard applicable to all claimants.[16] For decisions issued after May 1, 2009, the sixth edition will be used.[17]

In addressing lower extremity impairments, the sixth edition requires identifying the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).[18] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).[19]

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides,* with the medical adviser providing rationale for the percentage of impairment specified.[20]

Although the A.M.A., *Guides* includes guidelines for estimating impairment due to disorders of the spine, a schedule award is not payable under FECA for injury to the spine.[21] In 1960, amendments to FECA modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. Therefore, as the schedule award provisions of FECA include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine.[22] A schedule award is not payable for an impairment of the whole body.[23]

ANALYSIS -- ISSUE 2

In support of her claim for a schedule award, appellant provided a February 17, 2009 report from Dr. Aymond who noted her history, examined her and rated permanent impairment. Dr. Aymond opined that she had a seven percent impairment of the whole person. However, as noted above, a schedule award is not payable for an impairment of the whole body.[24] Thus, this report is of limited probative value.

---

[16] *Id*. at § 10.404(a).

[17] FECA Bulletin No. 09-03 (issued March 15, 2009).

[18] A.M.A., *Guides* 494-531; *see J.B.*, Docket No. 09-2191 (issued May 14, 2010).

[19] A.M.A., *Guides* 521.

[20] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

[21] *Pamela J. Darling*, 49 ECAB 286 (1998).

[22] *Thomas J. Engelhart*, 50 ECAB 319 (1999).

[23] *N.M.*, 58 ECAB 273 (2007).

[24] *Id.*

Board precedent is well settled however that, when an attending physician's report gives an estimate of impairment, but does not indicate that the estimate is based upon the application of the A.M.A., *Guides* or improperly applies the A.M.A., *Guides*, OWCP is correct to follow the advice of its medical adviser or consultant where he or she has properly utilized the A.M.A., *Guides*.[25]

In a June 23, 2010 report, OWCP's medical adviser reviewed the medical record and determined that there were no abnormal physical findings regarding the accepted conditions in the right hip or thigh. Furthermore, he indicated that x-rays were normal and concluded that there was no basis for a permanent impairment other than bursitis or other soft tissue lesion. The medical adviser found that appellant had one percent leg impairment under Table 16-4 for a class 1 bursitis. He determined the default leg impairment was one percent and with the assigned grade modifier there was no adjustment under the net adjustment formula.[26] The Board finds that the medical adviser's June 23, 2010 report properly applies the medical findings of record to the A.M.A., *Guides* and establishes that appellant has no more than one percent impairment of her right lower extremity for which she received a schedule award.

Although appellant argues on appeal that she had greater impairment, this assertion is not supported in the medical record. There is no medical evidence of record in conformance with the sixth edition of the A.M.A., *Guides*, which supports any greater impairment of her right leg.

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that modification of the wage-earning capacity determination was warranted. The Board further finds that she has no more than a one percent impairment of her right lower extremity, for which she received a schedule award.

[25] *See Ronald J. Pavlik*, 33 ECAB 1596 (1982); *Robert R. Snow*, 33 ECAB 656 (1982); *Quincy E. Malone*, 31 ECAB 846 (1980).

[26] A.M.A., *Guides* 512.

ORDER

IT IS HEREBY ORDERED THAT the June 10 and March 1, 2011 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 17, 2012
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