

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

M.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Austin, TX, Employer**

)
)
)
)
)
)
)
)

**Docket No. 11-272
Issued: January 25, 2012**

Appearances:

*Tim Egbuchunam, 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 November 16, 2010 appellant's representative timely appealed the October 7, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied modification of a wage-earning capacity determination. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUE

The issue is whether appellant established a basis for modifying OWCP's March 28, 2000 wage-earning capacity determination.

¹ 5 U.S.C. §§ 8101-8193.

² The record forwarded to the Board includes evidence received after OWCP issued its October 7, 2010 decision. The Board's appellate review is limited to evidence that was in the case record at the time OWCP issued its final decision. 20 C.F.R. § 501.2(c). Accordingly, the evidence received after October 7, 2010 may not be considered on appeal.

FACTUAL HISTORY

This case has previously been before the Board.³ Appellant, a 58-year-old rotating former letter carrier, has an accepted claim for exacerbation of os odontoideum (spina bifida) with instability at C1-2.⁴ OWCP authorized several surgical procedures, the latest being March 3, 1998 cervical fusion.⁵ Appellant subsequently returned to work in a part-time, limited-duty capacity. On March 28, 2000 OWCP issued a formal loss of wage-earning capacity, (LWEC) determination. It found that appellant's actual earnings as a part-time, modified clerk effective October 23, 1998, fairly and reasonably represented her wage-earning capacity. As such, OWCP adjusted her wage-loss compensation to reflect her part-time weekly wages of \$373.20. For several years thereafter, appellant continued to work in a part-time, limited-duty capacity while receiving wage-loss compensation based on OWCP's March 28, 2000 LWEC determination. She stopped working on June 9, 2003 and requested wage-loss compensation for total disability. OWCP continued to pay appellant for partial disability in accordance with the March 28, 2000 LWEC determination.

When the case was last on appeal, the Board affirmed OWCP's March 27, 2006 decision denying modification of the March 28, 2000 LWEC determination.⁶ The Board found that appellant had not demonstrated that her accepted condition had materially changed such that it precluded her from performing the part-time, modified clerk position she held at the time of her June 9, 2003 work stoppage. At the time, appellant did not allege that she was retrained or otherwise vocationally rehabilitated or that the original March 28, 2000 LWEC determination was erroneous. The Board further found that she had not demonstrated that her carpal tunnel syndrome and post-traumatic stress disorder (PTSD) were related to her accepted cervical condition.⁷ The Board's October 2, 2007 decision is incorporated herein by reference.

Appellant sought modification on at least five occasions. In each instance, OWCP denied modification of the March 28, 2000 LWEC determination.⁸ It issued its latest decision in response to appellant's June 9, 2010 request. Appellant submitted the appeal request form that accompanied OWCP's November 18, 2009 decision denying modification.

³ Docket Nos. 05-591 (issued August 8, 2005) and 06-1158 (issued October 2, 2007).

⁴ Appellant's accepted condition arose on or about July 10, 1990.

⁵ OWCP also authorized treatment for a major depressive episode following appellant's March 3, 1998 surgery, but to date OWCP has not accepted a psychiatric/psychological condition as being causally related to either the July 10, 1990 employment injury or any OWCP-authorized medical procedure.

⁶ Docket No. 06-1158 (issued October 2, 2007).

⁷ The Board noted that appellant's then-current psychiatric condition and her bilateral carpal tunnel syndrome (CTS) appeared to be the subject of a separate occupational disease. Appellant had in fact filed a separate claim for bilateral CTS (xxxxxx790), which OWCP denied as untimely.

⁸ Subsequent to the Board's October 2, 2007 decision, OWCP denied modification by decisions dated March 13, August 20, 2008, June 12 and November 18, 2009 and October 7, 2010.

On July 15, 2010 appellant's representative submitted a request for review of the November 18, 2009 decision. He commented that no new evidence had been submitted and, therefore, "a merit review [was] not an option." According to appellant's representative, the petition was "based on a Prima Facie guideline."

OWCP had received additional medical evidence since issuing its November 18, 2009 decision denying modification. The new evidence included recent treatment notes from Dr. Rebecca J. McKown, a family practitioner.⁹ The diagnoses reflected in Dr. McKown's various treatment notes included C-2 neck fracture and sequelae, upper extremity paresthesia and neuralgia, carpal tunnel syndrome, PTSD and right hip arthritis.¹⁰

OWCP also received a September 19, 2010 narrative report from Dr. McKown, who noted that appellant was totally disabled and could not work for any amount of time at her part-time, modified job. Dr. McKown explained that allowing appellant to work at any job for any amount of time would accelerate, exacerbate and aggravate her original accepted injury. She further stated that she did not anticipate appellant ever returning to work. Dr. McKown also referenced a February 19, 2003 cervical magnetic resonance imaging (MRI) scan that showed a cyst at C-2. She noted that the cyst might represent degenerative or post-traumatic, postsurgical changes. Dr. McKown characterized the cyst formation as a "material worsening."

In its October 7, 2010 decision, OWCP found that Dr. McKown's recent report did not explain how appellant's current condition or disability was due to her original injury. It further noted that she did not explain why appellant was no longer able to perform her previous part-time, limited-duty assignment. OWCP determined that appellant failed to establish a basis for modifying the prior LWEC determination.

LEGAL PRECEDENT

A wage-earning capacity determination is a finding that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages.¹¹ Actual wages earned is generally the best measure of wage-earning capacity.¹² In the absence of evidence showing that actual earnings do not fairly and reasonably represent the injured employee's wage-earning capacity, such earnings must be accepted as representative of the individual's wage-earning capacity.¹³ A determination regarding whether actual earnings

⁹ Dr. McKown has been appellant's treating physician since September 2003. Her latest treatment notes covered the period of November 8, 2009 through September 19, 2010.

¹⁰ The right hip arthritis was reportedly at the site of a previous bone graft associated with appellant's cervical surgery.

¹¹ 5 U.S.C. § 8115(a); see *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

¹² *Hayden C. Ross*, 55 ECAB 455, 460 (2004).

¹³ *Id.*

fairly and reasonably represent wage-earning capacity should be made only after an employee has worked in a given position for more than 60 days.¹⁴

Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.¹⁵ 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 erroneous.¹⁶ The burden of proof is on the party seeking modification of the wage-earning capacity determination.¹⁷

ANALYSIS

Appellant requested modification, therefore, she bears the burden of proof.¹⁸ Neither she nor her representative clearly identified the grounds for the latest LWEC modification request. Appellant did not specifically allege that she was retrained or otherwise vocationally rehabilitated or that the original March 28, 2000 LWEC determination was erroneous. The appeal request form she submitted on June 9, 2010 merely indicated that she was seeking reconsideration. Because new evidence had been submitted since the November 18, 2009 decision, OWCP properly reviewed this evidence to determine if appellant demonstrated a material change in the nature and extent of her injury-related condition.

OWCP accepted exacerbation of os odontoideum (spina bifida) with instability at C1-2 and appellant's three related surgeries. Dr. McKown's treatment notes covering the period of November 8, 2009 through September 19, 2010 included numerous diagnoses that have not been accepted by OWCP.¹⁹ Moreover, these treatment notes are of limited probative value because she did not specifically address appellant's ability to work either in general terms or in relation to the part-time, modified clerk position she held when she last worked in June 2003.

Dr. McKown's September 19, 2010 narrative report indicated that a cervical cyst seen on a February 19, 2003 MRI scan represented a "material worsening" of appellant's condition. While it is evident from this latest report that Dr. McKown believed appellant could not and should not work in any capacity, she failed to explain the clinical significance of the identified cyst at C-2. Moreover, Dr. McKown's characterization of the cyst formation as indicative of a

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (October 2009).

¹⁵ *Katherine T. Kreger*, 55 ECAB 633, 635 (2004).

¹⁶ *Tamra McCauley*, 51 ECAB 375, 377 (2000).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Where appellant claims that a condition not accepted or approved by OWCP was due to her employment injury, she bears the burden of proof to establish that the condition is causally related to the employment injury. *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

“material worsening” is undermined by the fact that appellant continued to work for more than three months after the cyst was identified in February 2003. Other than noting its presence, she has not identified any specific functional limitations ostensibly associated with appellant’s C-2 cyst.

Dr. McKown also noted that appellant recently developed arthritis in her right hip at the site of a prior bone graft. The evidence is unclear as to whether this recent development is causally related to appellant’s OWCP-approved surgery, furthermore, Dr. McKown failed to explain how appellant’s right hip arthritis precluded her from performing her previously assigned duties as a part-time, modified clerk. Accordingly, the Board finds that Dr. McKown’s latest treatment notes and her September 19, 2010 report are insufficient to demonstrate a material change in the nature and extent of appellant’s injury-related condition.

Appellant and her representative have not specifically alleged that she was retrained or otherwise vocationally rehabilitated or that the original March 28, 2000 LWEC determination was erroneous. Furthermore, the evidence OWCP received since its November 18, 2009 decision failed to demonstrate a material change in the nature and extent of appellant’s injury-related condition. Consequently, appellant has failed to satisfy her burden of proof with respect to modification.

CONCLUSION

Appellant has not established a basis for modifying the March 28, 2000 wage-earning capacity determination.

ORDER

IT IS HEREBY ORDERED THAT the October 7, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 25, 2012
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