

physician. She cited to Board cases *I.J.*, 59 ECAB 408 (2008) and *S.H.*, Docket No. 11-180 (issued September 9, 2011) in support of her contention.

FACTUAL HISTORY

This case has previously been before the Board. In a May 2, 2011 decision, the Board affirmed an OWCP decision that found appellant did not meet her burden of proof to modify a January 21, 2009 decision in which OWCP reduced her monetary compensation based on her capacity to earn wages as an information clerk.² The law and the facts of the previous Board decision are incorporated herein by reference.³

On June 1, 2011 appellant, through her attorney, requested modification of the January 21, 2009 wage-earning capacity determination. She submitted a May 18, 2011 report from Dr. Jacob E. Tauber, an attending Board-certified orthopedic surgeon, who noted that on physical examination appellant had markedly positive Tinel's and Phalen's signs, some decreased sensation to pinprick in her median nerve distribution and decreased grip strength bilaterally. Dr. Tauber diagnosed carpal tunnel syndrome and noted that he had previously indicated that she could lift up to 10 pounds occasionally but that the proposed job of information clerk would require her to do repetitive motions in the form of computer entry. He added that, if the position did not require computer entry, it could be suitable, but no job that required repetitive motion duties such as repetitive typing would be suitable. Dr. Tauber further opined that a conflict in medical evidence existed between him and Dr. Ha'Eri, an OWCP referral physician.

In a merit decision dated September 2, 2011, OWCP denied modification of the January 21, 2009 wage-earning capacity determination.

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.⁴ OWCP's procedure manual provides that, "[i]f 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

² Docket No. 10-1596 (issued May 2, 2011).

³ On March 19, 1991 OWCP accepted that appellant, a court reporter, sustained work-related bilateral carpal tunnel syndrome. Appellant was placed on the periodic compensation rolls. In 2008 OWCP referred her to Dr. G.B. Ha'Eri, a Board-certified orthopedic surgeon, who provided a March 24, 2008 report. OWCP thereafter referred appellant for vocational rehabilitation for assistance in returning her to work and the vocational rehabilitation counselor identified the position of information clerk as within her restrictions, qualifications and available in the local labor market. Appellant underwent training to update her skills and completed the training on October 24, 2008. She did not seek employment and on January 21, 2009, OWCP reduced her monetary compensation, based on her capacity to earn wages in the constructed position of an information clerk.

⁴ *Katherine T. Kreger*, 55 ECAB 633 (2004).

[claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity.”⁵ 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.⁶ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁷

In 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 OWCP 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.⁸ It is not precluded from adjudicating a limited period of employment-related disability when a formal wage-earning capacity determination has been issued.⁹

ANALYSIS

Appellant asserts that the January 21, 2009 wage-earning capacity was erroneous because she was medically incapable of performing the duties of the selected position. The Board finds that appellant did not submit sufficient evidence to establish error in OWCP’s January 21, 2009 wage-earning capacity determination. In the prior appeal, the Board reviewed the medical evidence submitted by appellant prior to the January 29, 2010 OWCP decision, including reports dated April 14 and August 10, 2009 from Dr. Tauber, an attending orthopedic surgeon. With her June 1, 2011 request for modification, appellant submitted a May 18, 2011 report from Dr. Tauber, who provided findings on physical examination or markedly positive Tinel’s and Phalen’s signs, some decreased sensation to pinprick in her median nerve distribution and decreased grip strength bilaterally. Dr. Tauber diagnosed carpal tunnel syndrome. He noted his prior recommendation that appellant lift up to 10 pounds occasionally but opined that the proposed job of information clerk would require her to do repetitive motions in the form of computer entry. Dr. Tauber noted that, if the position did not require computer entry, it could be suitable, but no job that required repetitive motion duties such as repetitive typing would be suitable. He stated that a conflict in medical evidence existed between him and Dr. Ha’Eri, an OWCP referral physician.

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

⁶ *Stanley B. Plotkin*, 51 ECAB 700 (2000).

⁷ *Id.*

⁸ *See* Federal (FECA) Procedure Manual, *supra* note 5 at Chapter 2.814.11 (June 1996).

⁹ *Sandra D. Pruitt*, 57 ECAB 126 (2005).

The selected position of information clerk was classified as sedentary. It required no fingering and only occasional reaching and handling of no more than 10 pounds.¹⁰ Thus, Dr. Tauber's May 18, 2011 report does not provide support for appellant's contention that the information clerk position was outside her physical restrictions. He allowed that there was a conflict in medical opinion with that of Dr. Ha'Eri, an OWCP referral orthopedic surgeon. In a March 24, 2008 report, Dr. Ha'Eri provided permanent restrictions of no repetitive use of both wrists, no lifting over 10 pounds, and no pulling/pushing over 20 pounds, with each activity performed no more than one hour per day, restrictions within the requirements of the information clerk position.

The cases referenced by appellant can be distinguished from the facts in the instant case. Appellant cited *I.J.* to support that a conflict in medical opinion had been created.¹¹ As noted, while the restrictions provided by Dr. Ha'Eri and Dr. Tauber vary somewhat, the merit issue in this case is whether the January 21, 2009 wage-earning capacity decision should be modified. The restrictions provided by both physicians were within the physical requirements of the selected position of information clerk. In *S.H.*,¹² the duties of the selected position did not conform with the restrictions provided by an OWCP referral physician. This is factually distinguishable from the medical evidence from Dr. Ha'Eri on this case.

There is no evidence of record that appellant was retrained or otherwise vocationally rehabilitated. Dr. Tauber's May 18, 2011 report is insufficient to show that there was a material change in the nature and extent of the injury-related condition such that the January 21, 2009 decision should be modified and he reiterated physical restrictions he had reported previously in his August 17, 2009 report.

As the medical evidence is insufficient to establish that the January 21, 2009 wage-earning capacity decision should be modified,¹³ OWCP properly denied modification of the January 21, 2009 wage-earning capacity determination.¹⁴

Appellant may request modification of the wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

¹⁰ The *Dictionary of Occupational Titles* job description for information clerk was as follows: Answers inquiries from persons entering establishment. Provides information regarding activities conducted at establishment, location of departments offices and employees within organization. Informs customer of location of store merchandise in retail establishment. Provides information concerning services, such as laundry and valet services in hotel. Receives and answers requests for information from company officials and employees. May call employees or officials to information desk to answer inquiries. May keep record of questions asked. The strength level was listed as sedentary, with no climbing, balancing, stooping, kneeling, crouching, crawling or fingering and occasional reaching and handling of no more than 10 pounds.

¹¹ *I.J.*, 59 ECAB 408 (2008).

¹² *S.H.*, Docket No. 11-180 (issued September 9, 2011).

¹³ See *Darletha Coleman*, 55 ECAB 143 (2003).

¹⁴ *T.M.*, Docket No. 08-975 (issued February 6, 2009).

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that a January 21, 2009 wage-earning capacity decision that reduced her compensation should be modified.

ORDER

IT IS HEREBY ORDERED THAT the September 2, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 11, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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