

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

J.F., Appellant

and

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

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**Docket No. 12-1410
Issued: November 28, 2012**

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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 18, 2012 appellant, through her attorney, filed a timely appeal from a May 7, 2012 Office of Workers' Compensation Programs' (OWCP) decision denying modification of her loss of wage-earning capacity. 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.

ISSUE

The issue is whether appellant met her burden of proof to modify the February 18, 2010 loss of wage-earning capacity determination.

FACTUAL HISTORY

This case has previously been before the Board.² In an October 19, 2011 decision, the Board affirmed a September 20, 2010 decision finding that OWCP properly determined appellant's actual earnings as a modified-duty clerk fairly and reasonably represented her wage-

¹ 5 U.S.C. § 8101 *et seq.*

² Docket No. 11-133 (issued October 19, 2011).

earning capacity. The facts and the history contained in the prior appeal are incorporated by reference.³

On August 4, 2011 appellant filed a claim alleging a recurrence of total disability on July 20, 2011. She returned to work after her original injury of July 15, 2008 and had restrictions of no heavy lifting, bending, stooping and no prolonged standing. However, appellant's back, hip, leg, ankle and foot still hurt.

An August 1, 2011 magnetic resonance imaging (MRI) scan of the right hand, read by Dr. Daniel Kirzeder, a Board-certified diagnostic radiologist, revealed no obvious abnormality of the dorsal aspect of the right hand underlying the cutaneous marker, the site of the patient's pain. There were no suspicious bone marrow signal abnormalities and no evidence of acute fracture or osteonecrosis.

In an August 8, 2011 report, Dr. Francisco J. Battle, a neurosurgeon, noted that appellant was involved in a work-related injury on July 15, 2008. Appellant related that her current duties included "bending over to remove files" with the "onset of a sharp pain in [her] back" with radiation mainly into the right leg with associated numbness and tingling in a nondermatomal distribution. Dr. Battle reviewed a March 31, 2010 MRI scan that revealed a central disc protrusion at L5-S1 approximately one to two millimeters without significant central or bilateral foraminal stenosis and a central annular tear. He diagnosed lumbar radiculitis, lumbar disc displacement, lumbago and lumbar myofascial injury.

By letter dated September 9, 2011, OWCP informed appellant of the evidence needed to support her claim and requested additional evidence within 30 days.

OWCP received duty status reports dated July 28, August 2 and September 7, 2011 from a provider whose signature is illegible. The physician indicated generally that appellant was unable to work. On September 22, 2011 Dr. Les Benson, an emergency medicine physician, prescribed chronic pain management.

By decision dated October 26, 2011, OWCP denied appellant's claim for a recurrence of disability on July 20, 2011.

On November 2, 2011 appellant, through her representative, requested a telephonic hearing, which was held on February 16, 2012. During the hearing, he argued that the recurrence was caused by a change in appellant's modified-duty position that exceeded her work limitations. Appellant returned to work in December 2009 to restricted duty with no lifting over 10 pounds, no bending and no stooping. She could only stand for two hours and sit for two hours and that she had to alternate standing and sitting. Appellant advised that there were always at least two people working until August 2010. She explained that her job duties and restrictions were the same, but there were certain times that she worked alone. Appellant explained that, when this occurred, it substantially increased the amount of her bending and lifting that she would have to do. In the summer of 2011, she developed a knot on her hand and back problems. Appellant filed a new claim that was denied. She lost about a week of work and retired effective September 30, 2011. OWCP received copies of previous medical reports.

³ Appellant retired effective September 30, 2011.

In a letter dated November 16, 2011, the employing establishment confirmed that appellant retired effective September 30, 2011.

In a January 24, 2012 report, Dr. Benson noted that appellant's objective findings included back spasm with pain on palpation, worse on the left; decreased back range of motion; a positive straight leg raise and decreased reflexes on the left. He diagnosed a back sprain with radiculopathy. Dr. Benson noted that the effects of appellant's injuries had not ceased and her prognosis was poor. Appellant was physically incapable of standing, sitting or walking for any appreciable time or distance, or lift or carry in a repetitive manner. Dr. Benson did not anticipate her return to work and noted that she was retired. In a February 1, 2012 report, he recommended additional physical therapy.

A February 6, 2012 MRI scan of the right shoulder read by Dr. David O. Risinger, a Board-certified diagnostic radiologist, revealed rotator cuff tendinosis, a partial tear and degenerative arthritis of the acromioclavicular joint and of the glenohumeral joint. Dr. Risinger also noted left knee MRI scan findings. In an April 11, 2012 MRI scan of the left foot, Dr. Greg Bathurst, a Board-certified diagnostic radiologist, diagnosed a stress reaction of the left metacarpal bone and found no definite fractures.

By decision dated May 7, 2012, an OWCP hearing representative affirmed the October 26, 2011 decision, finding that appellant did not provide sufficient medical evidence to modify the previous 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, 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.⁵ 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.⁶

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

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

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995). See also FECA Transmittal 10-01 (issued October 5, 2009).

⁶ *Id.*

rehabilitated or the original determination was, in fact, erroneous.⁷ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁸

ANALYSIS

On August 4, 2011 appellant alleged that she could no longer work and filed a notice of recurrence of total disability commencing July 20, 2011. Because a formal decision of her loss of wage-earning capacity was in place, OWCP properly adjudicated the case as a request for modification of an established loss of wage-earning capacity.⁹

Appellant alleged that there was a change in the modified-duty clerk position. During the hearing, she alleged a change in her modified-duty position that exceeded her work limitations. Appellant explained that there were at least two people working until August 2010. Her job duties and restrictions were still the same, but because there were certain times that she worked alone, it substantially increased the amount of bending and lifting that she would have to do. The Board notes that other than her hearing testimony, appellant did not submit evidence to establish a material change in the nature and extent of the injury-related condition.

The record also contains several reports from treating physicians. The reports do not clearly show a material worsening of appellant's injury-related condition that rendered her unable to work as a modified-duty clerk. In a January 24, 2012 report, Dr. Benson diagnosed a back sprain, with radiculopathy. He noted generally that the effects of appellant's injuries had not ceased and her prognosis was poor. Appellant was physically incapable of standing, sitting, walking for any appreciable time or distance and could not lift or carry in a repetitive manner. He opined that he did not anticipate her returning to work and noted that she was retired. The Board notes that Dr. Benson's report does not support that modification of the wage-earning capacity is warranted. While Dr. Benson did not anticipate appellant returning to work as she was retired, he did not adequately explain how there was a change in the nature and extent of her injury-related condition such that she became unable to perform the duties of a modified-duty clerk. He did not provide sufficient medical rationale to explain why she could not perform the selected position at the time OWCP found that the position represented her wage-earning capacity.

Other reports submitted by appellant did not offer any opinion as to whether she was disabled due to a material change in her injury-related condition. None of the physicians specifically explained whether her injury-related condition had worsened or whether she was capable of performing her modified position. Therefore, these reports are insufficient to meet appellant's burden of proof.¹⁰

⁷ *Tamra McCauley*, 51 ECAB 375, 377 (2000).

⁸ *Id.*

⁹ *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sharon C. Clement*, 55 ECAB 552 (2004); Federal (FECA) Procedure Manual, *supra* note 5.

¹⁰ Appellant also submitted medical evidence from a provider whose signature is illegible. The Board has held that a medical report may not be considered as probative medical evidence if there is no indication that the person completing the report qualifies as a physician as defined in 5 U.S.C. § 8101(2) and reports lacking proper identification do not constitute probative medical evidence. *C.B.*, Docket No. 09-2027 (issued May 12, 2010).

The burden of proof is on the party attempting to show a modification of the wage-earning capacity, in this case, appellant has not submitted any medical evidence establishing a material change in the nature and extent of her injury-related conditions. The aforementioned reports are insufficient to establish a worsening of her employment-related condition that would warrant total disability from the position of a modified-duty clerk. Appellant has not shown that she was retrained or otherwise vocationally rehabilitated or that the original wage-earning capacity was erroneous. She therefore did not meet her burden of proof to establish that modification of the wage-earning capacity determination was warranted.

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

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that modification of the February 18, 2010 wage-earning capacity determination was warranted.

ORDER

IT IS HEREBY ORDERED THAT the May 7, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 28, 2012
Washington, DC

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

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

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