

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

R.E., Appellant

and

**DEPARTMENT OF THE ARMY, SCHOFIELD
BARRACKS COMMISSARY, Wahiawa, HI,
Employer**

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**Docket No. 13-115
Issued: April 16, 2013**

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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 19, 2012 appellant filed an appeal from a July 11, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 a January 4, 1989 wage-earning capacity decision for the period May 13 to November 29, 2011 and whether OWCP met its burden of proof to modify the wage-earning capacity decision on November 29, 2011.

On appeal, appellant generally asserts that she is entitled to continued monetary compensation and that she has other work-related back conditions.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On November 9, 1985 appellant, then a 31-year-old part-time store worker, injured her back lifting a heavy box. OWCP accepted the claim for low back strain. An April 29, 1986 computerized tomography scan of the lumbar spine demonstrated minimal midline bulging at L5-S1. On September 10, 1986 appellant sustained a second employment-related low back strain. She stopped work that day.² Appellant received appropriate wage-loss compensation. She returned to part-time work at the commissary as a cashier on July 17, 1988.

In late 1988, appellant relocated from Hawaii to Georgia and on December 5, 1988 began work, 24 hours a week, at the Fort Benning commissary. By decision dated January 4, 1989, OWCP reduced her compensation benefits, based on her actual earnings as a sales store checker.

On April 26, 2006 appellant accepted a permanent full-time position as a sales store checker at the Fort Benning commissary.³

In September 2008, appellant came under the care of Dr. Thomas N. Bernard, Jr., a Board-certified orthopedic surgeon, who provided physical examination findings, diagnosed cervical and lumbar spondylosis and advised that she could work light duty.⁴

On January 16, 2010 appellant accepted a full-time modified sales store checker position working self-checkout.

Dr. Bernard continued to submit reports in which he reiterated his findings and diagnoses and advised that appellant could continue light-duty work.

On May 4, 2011 the Fort Benning commissary offered appellant a full-time modified position as a sales store checker operating an electronic checkout terminal. On May 5, 2011 Dr. Bernard advised restrictions that appellant should be able to sit or stand at will, limit walking to 15 minutes, sitting to one hour and standing to 30 minutes. On May 21, 2011 appellant submitted a claim for compensation beginning May 13, 2011 due to her need for shoulder surgery.

In a treatment note dated June 1, 2011, Dr. Bernard provided physical examination findings and advised that he would see appellant on an as needed basis. In correspondence dated June 1, 2011, he indicated that she brought him paperwork regarding retirement. Dr. Bernard advised that he had been treating appellant since 2008 for degenerative disc disease of the lower back and indicated that she had also undergone treatment for additional orthopedic conditions

² The 1985 claim was adjudicated by OWCP under file number xxxxxx105 and the 1986 claim under file number xxxxxx322. OWCP doubled the claims.

³ A telephone conferences were held on June 14, 2006 with an OWCP claims examiner and a representative of the agency participating regarding whether appellant's wage-earning capacity should be modified because she now worked full time. In an October 11, 2006 memorandum, OWCP noted that a determination needed to be made regarding modifying the wage-earning capacity determination.

⁴ Appellant also submitted reports from Dr. Patrick J. Fernicola, Board-certified in orthopedic surgery, regarding a right shoulder condition.

including the right shoulder. He reiterated that she had permanent restrictions for her back regarding repetitive bending, stooping, squatting and lifting.

On June 20, 2011 the employing establishment advised OWCP that the May 4, 2011 job offer was predicated on medical documentation dated April 21, 2011 that indicated that appellant's restrictions were to be based on a functional capacity evaluation under file number xxxxxx196 on April 18, 2010. It noted that on May 5, 2011 he submitted additional documentation with additional restrictions which they could not honor and she was advised to submit a claim for compensation.

By letter dated June 28, 2011, OWCP informed appellant of the requirements needed to modify a wage-earning capacity determination. In an August 15, 2011 report, Dr. Bernard reported that an August 11, 2011 magnetic resonance imaging (MRI) scan study demonstrated degenerative changes without any significant nerve compression. He indicated that appellant complained of upper and lower back pain, provided physical examination findings and reiterated her restrictions and diagnosed lumbosacral spondylosis without myelopathy.⁵

On October 24, 2011 OWCP proposed to modify appellant's wage-earning capacity determination by reducing her compensation to zero. It noted that the evidence received failed to establish a material worsening of the accepted employment injury and instead established that the work injury had improved and did not prevent her from performing full-time work. OWCP further found that the medical evidence did not support that the claimed recurrence of total disability was due to the November 19, 1985 employment injury and thus appellant no longer had a loss of wage-earning capacity.

Appellant submitted an August 11, 2011 MRI scan study report, which was compared with a July 17, 2008 study and redemonstrated a disc bulge at L4-5, unchanged slight retrolisthesis of L4 on L5 and a minimal disc bulge at L3-4 with mild hypertrophy.⁶

By decision dated November 29, 2011, OWCP modified appellant's wage-earning capacity to reflect that she had no loss of wage-earning capacity. On December 21, 2011 appellant requested a hearing. She stated that the commissary released her from duty on May 12, 2011 and submitted medical evidence previously of record. A December 19, 1994 MRI scan of the lumbosacral spine demonstrated very mild generalized bulging at L4-5 and L5-S1 with degenerative changes. Appellant also submitted the partial transcript of deposition testimony of Ms. Thomas regarding the events of May 2011 when the employing establishment found that, based on appellant's restrictions, it had no job available and correspondence dated July 12, 1988 and February 17, 1989 regarding appellant's pay.

⁵ The record contains serial MRI scan studies. A March 6, 1996 MRI scan study of the lumbosacral spine was interpreted as normal. An April 27, 2006 lumbar MRI scan demonstrated a moderate left-sided disc bulge or herniation with displacement of the left L4 nerve root and moderate left foraminal stenosis. An April 9, 2007 lumbar MRI scan demonstrated L4-5 disc degeneration and left lateral disc protrusion with facet arthropathy causing moderate left neuroforaminal stenosis and mild central and right stenosis. A July 17, 2008 lumbar MRI scan was unchanged from an April 9, 2007 study. A December 16, 2009 electrodiagnostic study of the lower extremities was normal with no evidence of peripheral nerve or nerve root dysfunction.

⁶ *See id.*

In reports dated from December 8, 2011 to February 20, 2012, Dr. Bernard reiterated his diagnosis and advised that appellant was disabled from work. On January 23, 2012 he noted her report that she had some worsening of left-sided low back pain that she attributed to picking up her grandchildren. Dr. Bernard noted physical findings of diffuse tenderness at the lumbosacral junction, decreased lumbar range of motion and some nerve irritation.⁷

At the hearing, held on April 12, 2012, appellant testified that she was working part-time in Hawaii when she sustained two back injuries, in November 1985 and September 1986 and that following the 1986 injury she was off work for one year. She stated that she was hired at Fort Benning, Georgia in February 1989 for 24 hours a week and that she always had physical restrictions that were not honored by the employing establishment. Appellant indicated that she began working full time in April 2006 and continued until May 2010 when she had right shoulder surgery. She stated that she was sent home on May 12, 2011 because the Fort Benning commissary did not have a position within her restrictions and argued that the same restrictions had always been in place. Appellant further asserted that she was not paid properly at Fort Benning and that she had not returned to work because she was in constant pain and had weakness and numbness related to her back.

In reports dated April 19 to June 14, 2012, Dr. Bernard reiterated his findings and conclusions.

By decision dated July 11, 2012, an OWCP hearing representative affirmed the November 29, 2011 decision. The hearing representative further found that appellant had not met the criteria for modifying the January 4, 1989 wage-earning capacity determination to establish total disability beginning May 13, 2011.

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.⁸ 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 [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity."⁹ 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

⁷ In his reports dated June 1, June 27, August 15 and December 8, 2011 and February 20, 2012, Dr. Bernard described physical examination findings of decreased range of motion in flexion, extension and bending. He indicated that appellant was neurologically intact and sciatic stretch signs were negative.

⁸ *Katherine T. Kreger*, 55 ECAB 633 (2004).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (October 2009).

fact, erroneous.¹⁰ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.¹¹

In addition, 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's 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.¹² It is not precluded from adjudicating a limited period of employment-related disability when a formal wage-earning capacity determination has been issued.¹³

ANALYSIS

Applicable case law and OWCP's procedures require that once a formal wage-earning capacity decision is in place, 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.¹⁴ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.¹⁵

Regarding the period May 13 to November 29, 2011, the Board finds that appellant did not submit sufficient evidence to show that OWCP's January 4, 1989 wage-earning capacity should be modified. OWCP accepted that on November 9, 1985 and September 10, 1986 appellant sustained low back strains. Appellant has not asserted that the January 4, 1989 decision was erroneous or that she was retrained or otherwise rehabilitated.

When appellant was injured in 1985, she was a part-time worker. She began full-time work on April 26, 2006 and continued working full time until she stopped work on May 13, 2011 and filed a claim for total disability compensation. The Board finds that the medical evidence relevant to appellant's injury-related low back strains on or after May 13, 2011 does not establish that there was a material change such that she could not perform her work duties.

Appellant's attending orthopedic surgeon, Dr. Bernard, began treating appellant in 2008 and provided a number of reports. In June 2011, he provided permanent restrictions for her back

¹⁰ *Stanley B. Plotkin*, 51 ECAB 700 (2000).

¹¹ *Id.*

¹² See Federal (FECA) Procedure Manual, *supra* note 9 at Chapter 2.814.11 (October 2009).

¹³ *Sandra D. Pruitt*, 57 ECAB 126 (2005).

¹⁴ *Stanley B. Plotkin*, *supra* note 10.

¹⁵ *Id.*

regarding repetitive bending, stooping, squatting and lifting. Beginning in December 2011, Dr. Bernard advised that appellant was totally disabled. He, however, diagnosed cervical and lumbosacral spondylosis without myelopathy and the MRI scan studies demonstrated a disc herniation at L4-5 and degenerative disc disease. None of these are accepted conditions. Dr. Bernard did not indicate in any of his reports that the 1985 and 1986 lumbar strains caused appellant's current low back condition. Subsequently, acquired conditions are not considered in determining wage-earning capacity¹⁶ and the record does not indicate that appellant has filed claims for additional low back conditions. The Board therefore finds Dr. Bernard's opinion of little probative value on the issue of whether appellant's accepted 1985 and 1986 low back strains materially changed such that the wage-earning capacity determination should be modified.

As the medical evidence submitted by appellant does not adequately explain that she had a material worsening of her injury-related low back strains, it is insufficient to establish that she was unable to perform her work duties beginning May 13, 2011.¹⁷

The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.¹⁸ Thus, OWCP has the burden to establish that the January 4, 1989 wage-earning capacity determination should be modified beginning November 29, 2011. Appellant began full-time work without restrictions in April 2006 and demonstrated the ability to continue full-time work until May 13, 2011. As noted above, Dr. Bernard began treating her in 2008. He, however, did not indicate in any of his reports that the 1985 and 1986 lumbar strains caused appellant's current low back condition. The Board therefore concludes that the evidence supports that appellant's injury-related low back strains had resolved such that she was capable of full-time work and OWCP met its burden of proof to modify the January 4, 1989 wage-earning capacity determination.

Appellant may request modification of the 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 modify a January 4, 1989 wage-earning capacity decision for the period May 13 to November 29, 2011 and that OWCP met its burden of proof to modify the wage-earning capacity decision on November 29, 2011.

¹⁶ See *John D. Jackson*, 55 ECAB 465 (2004).

¹⁷ *P.C.*, 58 ECAB 504 (2007).

¹⁸ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the July 11, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 16, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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