

FACTUAL HISTORY

On September 16, 1996 appellant, then a 50-year-old immigration inspector, filed a traumatic injury claim alleging that on September 13, 1996 she injured her neck and jaw during exercises and activities which involved how to fire a weapon and how to tail someone. OWCP accepted the claim for neck strain, aggravation of cervical degenerative disc disease, thoracic neuropathy and cervical disectomy. Appellant stopped work on September 13, 1996. By letter dated May 22, 1998, OWCP placed her on the periodic rolls for temporary total disability.

In an October 29, 2009 work capacity evaluation form, Dr. John G. Fan, an attending physician, diagnosed chronic neck pain and indicated that appellant was permanently disabled from any type of work.

In a March 23, 2010 report, Dr. Michael J. Johnson, a second opinion Board-certified orthopedic surgeon, diagnosed thoracic neuropathy, aggravation of cervical degenerative disc disease and cervical sprain. He opined that the conditions of cervical sprain and thoracic neuropathy had resolved, but she continued to have chronic pain due to a permanent aggravation of cervical degenerative disc disease and surgeries. Based on a review of appellant's underlying conditions, objective findings and the stability of her cervical degenerative disc disease aggravation, Dr. Johnson opined that appellant was unable to perform the duties of her date-of-injury position of immigration inspector. However, appellant was capable of working a sedentary position for eight hours with restrictions including no lifting more than five pounds.

In a May 17, 2010 progress report, Dr. Fan reported physical findings including limited cervical range of motion and that her condition was stable.

On July 19, 2010 OWCP found a conflict in the medical opinion evidence between Dr. Fan, appellant's treating physician and and Dr. Johnson, a second opinion Board-certified orthopedic surgeon, on the issue of appellant's ability to work and referred appellant to Dr. Joseph W. Huston, a Board-certified orthopedic surgeon, to resolve the conflict.

In an August 10, 2010 report, Dr. Huston reviewed the medical evidence, statement of accepted facts and conducted a physical examination. Physical findings included full shoulder range of motion, limited cervical range of motion, mild tenderness and soreness on palpation of the neck and upper back. Dr. Huston noted that appellant was unable to perform quick head motions and looking upwards on either side with her neck. He concluded that she had reached maximum medical improvement and was capable of performing a light-duty position with restrictions.

By letter dated November 28, 2010, OWCP referred appellant for another impartial medical examination with Dr. Huston to resolve the conflict in the medical opinion evidence between Drs. Fan and Johnson regarding her ability to work.

In a December 28, 2010 report, Dr. Huston provided physical findings and again concluded that appellant was capable of working with restrictions. He recommended that a functional capacity evaluation be performed to determine her work capabilities.

In a March 28, 2011 work capacity evaluation form, Dr. Huston indicated that appellant was capable of working an eight-hour workday in a light-duty position with restrictions. Restrictions included: no more than two to four hours of reaching above the shoulder; two hours twisting; one to two hours bending/stooping; up to two hours of pushing 30 pounds; up to one hour of pulling 45 pounds; and up to two hours of lifting 20 pounds or 210 pounds frequently. Dr. Huston also noted that appellant was limited to occasional looking up at high levels and looking down at low levels.

On April 1, 2011 appellant was referred for vocational rehabilitation.² By letter dated April 8, 2011, the vocational rehabilitation counselor informed appellant of her responsibilities in the rehabilitation effort.

On July 25, 2011 the vocational rehabilitation counselor performed a preliminary labor market survey report indicating that in conjunction with the June 16, 2011 transferable skills analysis report and other factors, appellant was vocationally and medically suited for the positions of receptionist and appointment clerk with selected classes at Hutchinson Community College to update her clerical skills. The weekly wage was listed as \$385.20 for both positions.

On August 29, 2011 the vocational rehabilitation counselor identified the positions of receptionist Department of Labor's *Dictionary of Occupational Titles* (DOT) #237.367.038 and hotel clerk (DOT #238.367.038) as being vocationally appropriate as they required four to six months specific vocational preparation and appellant had more than nine years of experience; both jobs fell within the light-duty category that her work restrictions suggested and both jobs were performed in sufficient numbers so as to make it reasonably available in her commuting area. The weekly wage for the hotel clerk position was listed as \$297.60. The job classification (Form CA-66) for the identified position of receptionist (DOT #237.367.038) described the position as: receives callers, determines the nature of the caller's business and direct them to a destination; obtains caller's name and arrange for an appointment with the individual called upon; records name, time, call, nature of business and individual called upon; may operate private branch exchange (PBX) telephone console; may type correspondence, reports, memorandum and other documents, may perform variety of clerical duties; may issue visitor's pass when required; may collect and distributed mail; and may work in medical practitioner or other health care facility office and be designated receptionist or outpatient receptionist. The weekly wage for the position of receptionist was listed as \$330.00 per week.

On October 10, 2011 appellant signed a job search plan indicating that she would pursue employment in the identified positions of receptionist and hotel clerk.

In a November 2, 2011 letter to appellant, OWCP indicated that appellant would receive 90 days of job placement assistance. Appellant was also informed that, at the end of the 90-day period, FECA required that her compensation be reduced based on the wage-earning capacity of the selected position, even if she was not employed at that time. OWCP listed \$385.20 as a weekly salary for a receptionist and \$297.60 as a weekly salary for a hotel clerk.

² Darryl Martinez is listed as the claims examiner who made the referral.

In a January 24, 2012 status report, the vocational rehabilitation counselor noted that the 90 days of placement services had been completed without appellant being reemployed. The vocational rehabilitation counselor identified the positions of receptionist (DOT #237.367.038 with weekly wages of \$382.20 and hotel clerk (DOT #238.367.038) with weekly wages of \$297.60 as being reasonably available in appellant's commuting area and within her vocational, educational and physical limitations.

On February 3, 2012 OWCP issued a notice proposing to reduce appellant's wage-loss compensation finding that the medical evidence established that she was no longer totally disabled. It found that she had the capacity to earn wages as a receptionist with a weekly salary of \$382.20

By decision dated March 13, 2012, OWCP finalized the reduction of appellant's wage-loss compensation based on the constructed position of receptionist with the ability to earn \$382.20 a week.

In a letter dated April 30, 2012, appellant's counsel requested reconsideration and submitted a March 22, 2012 report from Dr. Timothy L. Moore, an examining osteopath Board-certified in family medicine. Based upon a review of the medical evidence, employment injury history and physical examination, Dr. Moore diagnosed cervical sprain/strain, C4-5 and C5-6 disc fusion, spinal cord injury affecting appellant's right side, depression, consequential left wrist fracture and consequential right knee strain with degenerative joint disease. He reported that she noted lower extremity weakness, that she spontaneously fell on several occasions and she collapsed off of a ladder. Appellant reported that the fall off of the ladder resulted in a fracture of her right wrist, which had been treated and repaired. A physical examination revealed decreased range of motion in the cervical and lumbar spine; tenderness on palpation of the cervical paravertebral muscles, thoracolumbar spine and lumbosacral and iliac joints; decreased pelvic range of motion with rotation decreased left biceps strength; left leg weakness. Dr. Moore attributed appellant's right-sided sensory loss to the trauma from falling off a ladder which was caused by her cervical spine injury and decreased sensory from the clavicle down to the left foot. Due to appellant's thoracic, lumbar, cervical and lower extremity sensory deficits she was unsteady and showed instability in normal activities. Based on a review of the hotel clerk and receptionist position descriptions, Dr. Moore opined that she was unable to perform the duties of either position. Specifically, he attributed appellant's disability to her cervical spine injury and the right-sided neurological changes which precluded her from working on a computer or sitting for long periods of time. Dr. Moore also indicated that she was unable to stand or walk for prolonged periods of time and was precluded from routine neck, shoulder and upper back movement as it caused her pain. Lastly, he related that appellant lacked the manual dexterity or functional capacity to perform the identified positions and would be unable to focus on the job. In conclusion, Dr. Moore asserted that she has been totally disabled due to her employment injury from 1998 until the present and that this disability was for an indeterminate period.

In a March 22, 2012 work capacity evaluation form, Dr. John W. Ellis, a Board-certified family participationer, concluded that appellant was totally disabled from working. He checked "no" to the question of whether she was capable of working an eight-hour day and referred the viewer to a narrative report for his supporting medical rationale. Dr. Ellis checked "no" to the question of whether maximum medical improvement had been reached.

In a June 29, 2012 decision, OWCP denied modification of its March 13, 2012 decision.³

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.⁴ Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.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

ANALYSIS

OWCP accepted appellant's claim for neck strain, aggravation cervical degenerative disc disease, thoracic neuropathy and cervical discectomy. On March 13, 2012 it determined that she could perform the duties of a receptionist and reduced her compensation to reflect her wage-earning capacity in this constructed position. The issue is whether appellant established that the March 13, 2012 loss of wage-earning capacity decision should be modified.

As OWCP found that appellant could perform the duties of receptionist, the pertinent issue is whether there had been a material change in her condition that would render her unable to perform those duties.⁸ For a physician's opinion to be relevant on this issue, the physician must address the duties of the constructed position. The Board finds that the medical evidence submitted by appellant after the loss of wage-earning capacity determination did not sufficiently explain why the duties of the position of receptionist were unsuitable.

Appellant did not allege that she had been retrained or otherwise vocationally rehabilitated. She has contended that reports from Drs. Moore, Fan and Ellis establish that she was no longer able to work because of her physical conditions which were caused by the September 13, 1996 work injury. The Board finds that the record does not contain medical

³ The Board notes that, following the June 29, 2012 decision, OWCP received additional evidence. However, the Board may only review evidence that was in the record at the time OWCP issued its final decision. *See* 20 C.F.R. § 501.2(c)(1); *M.B.*, Docket No. 09-176 (issued September 23, 2009); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

⁴ *See* 5 U.S.C. § 8115 (determination of wage-earning capacity).

⁵ *Sharon C. Clement*, 55 ECAB 552 (2004).

⁶ *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Tamra McCauley*, 51 ECAB 375 (2000).

⁷ *Id.*

⁸ *T.M.*, Docket No. 08-975 (issued February 6, 2009); *Phillip S. Deering*, 47 ECAB 692 (1996).

evidence that establishes that appellant's accepted work conditions of neck strain, aggravation cervical degenerative disc disease, thoracic neuropathy and cervical disectomy had materially changed in a way that would render her unable to perform the receptionist duties.

Appellant submitted a March 22, 2012 report from Dr. Moore which noted diagnoses of cervical sprain/strain, C4-5 and C5-6 disc fusion, spinal cord injury affecting her right side, depression, consequential left wrist fracture and consequential right knee strain with degenerative joint disease. Dr. Moore noted that her cervical injury caused her to fall off a ladder resulting in right-sided sensory loss. He also noted that appellant was unsteady and showed instability in normal activities as a result of her lower extremity, lumbar, thoracic and cervical sensory deficits. The Board finds that Dr. Moore did not provide sufficient medical rationale to explain the reasons why appellant had a material change in the nature and extent of the injury-related conditions. While he attributed appellant's fall off a ladder to her cervical condition, Dr. Moore provided no explanation as to how the cervical condition caused the fall or when it occurred. The Board has found that vague and unrationalized medical opinions on causal relationship have little probative value.⁹

Appellant also submitted a March 22, 2012 work capacity evaluation form from Dr. Ellis indicating that she was totally disabled from working. When asked to provide supporting medical rationale, Dr. Ellis referenced a narrative report. However, he did not specifically attribute appellant's inability to work to the conditions arising from her accepted employment injury or provide any rationale for his finding and thus his opinion is of diminished probative value.¹⁰

The Board finds that there is no medical evidence which establishes a change in appellant's employment-related condition such that a modification of OWCP's loss of wage-earning capacity determination would be warranted. The reports of Drs. Moore and Ellis do not establish that the position of receptionist was improper. Appellant also did not otherwise establish a basis for modification by submitting evidence establishing that she had been retrained or otherwise vocationally rehabilitated.

The Board further finds that OWCP properly based the loss of wage-earning capacity decision on appellant's ability to earn weekly wages of \$382.20 in the position of receptionist based on January 24, 2012 status report by the vocational rehabilitation specialist. The labor market analysis supported that the position of receptionist was reasonably available at a weekly salary of \$382.20. The record therefore supports that the position was reasonably available and OWCP properly calculated appellant's loss of wage-earning capacity based on her ability to earn weekly wages of \$382.20.

⁹ See *D.U.*, Docket No. 10-144 (issued July 27, 2010) (medical reports not containing adequate rationale on causal relationship are of diminished probative value and are insufficient to meet claimant's burden of proof); *Richard A. Neidert*, 57 ECAB 474 (2006); *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value); *Jimmie H. Duckett*, 52 ECAB 332 (2001).

¹⁰ *Conard Hightower*, 54 ECAB 796 (2003).

On appeal, appellant asserted that the original loss of wage-earning capacity determination was, in fact, erroneous. She asserts that the selected position was not within her restrictions as it required frequent looking up and down, which was outside the work restrictions set by Dr. Hutson. A review of the job classification for receptionist shows that it does not require frequent looking up and down as prohibited by Dr. Hutson. Appellant also contended that OWCP erred in relying on Dr. Hutson's opinion as he failed to consider her preexisting conditions when making her work restrictions. The record contains no evidence indicating any disability due to her preexisting conditions. Dr. Moore attributed any disability to appellant's cervical strain and not to any preexisting condition. Consequently, appellant has failed to carry her burden of proof to establish modification of the loss of wage-earning capacity determination.

Appellant also asserts that OWCP erred in having Daryl Martinez issue a decision on her request for modification of the loss of wage-earning capacity decision. She argues that he was inappropriate to review her request and issue a decision for two reasons. The reasons given were that Mr. Martinez had been involved in the vocational rehabilitation portion of her file and he listed his title as "iFECS site manager" and not claims examiner. The Board finds that appellant's assertions are insufficient to set aside the June 29, 2012 decision. Appellant has not cited to any portion of the procedure manual or any case law showing that OWCP erred in its selection of Mr. Martinez to issue a decision on her request for modification of her loss of wage-earning capacity decision.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP properly denied modification of the established March 13, 2012 loss of wage-earning capacity determination.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 29, 2012 is affirmed.

Issued: August 22, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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