

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

L.D., Appellant)	
)	
and)	Docket No. 13-695
)	Issued: August 27, 2013
U.S. POSTAL SERVICE, POST OFFICE)	
Milwaukee, WI, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., 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 February 5, 2013 appellant, through her attorney, filed a timely appeal from an October 19, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) denying modification of a loss of 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 the case.

ISSUE

The issue is whether appellant met her burden of proof to establish that modification of an April 21, 2010 loss of wage-earning capacity determination is warranted.

FACTUAL HISTORY

On January 18, 2008 appellant, then a 42-year-old full-time transitional mail carrier, sustained injury to her right shoulder when she fell down icy steps while delivering mail. OWCP

¹ 5 U.S.C. § 8101 *et seq.*

accepted her claim for right rotator cuff tear and authorized arthroscopic surgery on September 24, 2008. Appellant stopped work on January 19, 2008.

On January 24, 2008 appellant came under the treatment of Dr. John T. Kroner, a Board-certified orthopedic surgeon. On September 24, 2008 Dr. Kroner performed a right shoulder arthroscopy with partial rotator cuff tear debridement and subacromial decompression. In reports dated October 6, 2008 to March 12, 2009, he noted that appellant was making slow, steady progress postoperatively and recommended physical therapy. Dr. Kroner noted performing subacromial injections to improve range of motion and recommended a work conditioning and hardening program. He returned appellant to full-time limited duty on November 24, 2008. A January 29, 2008 magnetic resonance imaging (MRI) scan of the right shoulder revealed a partial undersurface posterior supraspinatus tear with anterior supraspinatus bursal-sided cuff fraying. In a May 8, 2009 report, Dr. Kroner advised that appellant had a 50-pound maximum lift/push/pull restriction as well as restrictions on reaching or lifting over chest height.

On April 21, 2009 OWCP referred appellant to vocational rehabilitation as the employing establishment could not accommodate her restrictions. In a May 22, 2009 rehabilitation plan, the counselor recommended a 90-day job placement plan and noted that appellant could perform light sedentary work. A rehabilitation plan was prepared and approved by the rehabilitation counselor with the objective of obtaining a job as a mortgage loan interviewer or a claims clerk I. The counselor noted that appellant had a high school diploma, prior work and experience as a loan originator and realtor; however, her loan originator license expired in 2006. Appellant was taking college courses in pursuit of a Bachelor's degree in business. The average annual salary for a mortgage loan interviewer was \$657.50 per week. The counselor stated that the jobs were within appellant's educational capabilities and were reasonably available in her commuting area. The counselor attached job classification for the positions.

The rehabilitation counselor's vocational evaluation and survey of the local labor market revealed a wage-earning capacity of \$657.50 per week for the position of mortgage loan interviewer. OWCP advised appellant that, at the end of the rehabilitation program, whether employed or not, it would reduce her monetary compensation. In a December 2, 2009 status report, the rehabilitation counselor noted that appellant returned to work part time as an accounting assistant at a restaurant earning \$10.00 per hour, 20 hours per week. The counselor noted that the job effort continued as the medical evidence supported appellant's ability to work full time. If a full-time position was not obtained, she would be rated on one of the identified target jobs. In a February 2, 2010 status report, the rehabilitation counselor noted that appellant was granted a 30-day extension from February 2 to March 2, 2010 to locate full-time work. In a March 2, 2010 status report, the counselor advised that appellant was unsuccessful in obtaining full-time work and the case was being closed.

On March 11, 2010 OWCP proposed to reduce monetary compensation finding that the evidence established that appellant was partially disabled and had the capacity to earn wages as a mortgage loan interviewer, DOT # 241.367.018, at the rate of \$657.50 per week. It referenced the rehabilitation counselor's reports which determined that she was employable as a mortgage loan interviewer. OWCP noted that the job constricted position was consistent with Dr. Kroner's physical restrictions.

Appellant submitted an April 8, 2010 letter and disagreed with the proposed reduction of compensation. She contended that, although she had the capacity to earn wages as a mortgage loan originator or interviewer, the position required a state license. Appellant held a valid real estate license. She asserted that the majority of the positions were paid on a commission basis and not on an hourly wage. Appellant's rehabilitation counselor advised that she was only eligible for hourly wage jobs. She requested that she be permitted to attend school full time to obtain a degree. Appellant submitted pay stubs from the restaurant at which she worked part time.

In an April 21, 2010 decision, OWCP reduced appellant's compensation to reflect her wage-earning capacity as a mortgage loan interviewer.

On September 29, 2010 appellant requested reconsideration. She contended that she had not worked as a loan originator since 2006 and her license expired in December 2006. Appellant had a real estate license but had not sold property in over two years. She reiterated that the position was paid on a commission basis and her counselor advised that she was only eligible for hourly wage jobs. Although OWCP determined that the position of a mortgage loan interviewer was medically and vocationally suitable, but it was not obtainable without a valid state license. Appellant again requested a return to school to obtain a degree or get a license. She submitted an April 8, 2010 letter to OWCP, previously of record and pay stubs dated April 10 and 24, 2010. A May 4, 2010 letter from appellant's employer, noted that she was terminated that day for failure to timely file a tax form with the state which resulted in the restaurant incurring a financial penalty. Appellant submitted a June 29, 2010 letter to OWCP requesting that her monthly pay be increased as she was terminated from her part-time job on May 4, 2010.

In a November 2, 2010 decision, OWCP denied appellant's reconsideration request finding that it was insufficient to warrant merit review of the prior decision.² Appellant appealed to the Board and, in a December 12, 2011 order remanding case, the Board set aside the November 2, 2010 decision. The Board found that appellant's September 29, 2010 request for reconsideration was a request for modification of the April 21, 2010 wage-earning determination. The Board directed OWCP to adjudicate appellant's request for modification of the wage-earning capacity determination.³

On February 13, 2012 OWCP advised appellant to submit medical evidence if she believed she sustained a change in the nature and extent of her injury-related condition. It also noted that, to the extent that appellant alleged the original wage-earning capacity determination was erroneous, she should submit supporting argument or evidence. No additional information was submitted.

In a decision dated March 27, 2012, OWCP denied modification of the April 21, 2012 wage-earning capacity determination.

² On December 8, 2010 OWCP granted appellant a schedule award for three percent impairment of the right arm. In a July 5, 2011 decision, an OWCP hearing representative affirmed the schedule award decision.

³ Docket No. 11-591 (issued December 12, 2011).

On April 4, 2012 appellant requested a telephonic oral hearing which was held on July 11, 2012. At the hearing, her attorney stated that the matter was a medical question. In a July 2, 2012 treatment note, Dr. Kroner examined appellant's right shoulder. He stated that appellant related that OWCP asked her to have a reevaluation. Appellant reported that her condition was basically status quo, but maybe a little worse than her last visit two years ago. On examination, Dr. Kroner found full range of motion, positive impingement, some discomfort and weakness with external rotation, no atrophy of the shoulder girdle with some tenderness over the acromioclavicular joint. He opined that appellant's condition was "status quo" and noted that she had five percent impairment for residuals from her surgery. Dr. Kroner advised appellant to return for additional treatment if she felt her symptoms worsened. Also submitted was July 6, 2012 work capacity evaluation from Dr. Kroner who noted that appellant reached maximum medical improvement and could return to work with restrictions to avoid reaching above the shoulder and pushing, pulling and lifting limited to 50 pounds.

In a decision dated October 19, 2012, an OWCP hearing representative affirmed the decision dated March 27, 2012.

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 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.⁶ 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.⁷

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.⁸ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁹

⁴ *D.M.*, 59 ECAB 164 (2007).

⁵ *Katherine T. Kreger*, 55 ECAB 633 (2004); *see Robert H. Merritt*, 11 ECAB 64 (1959).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995). *See Mary E. Marshall*, 56 ECAB 420 (2005).

⁷ Federal (FECA) Procedure Manual, *supra* note 6. *See Harley Sims, Jr.*, 56 ECAB 320 (2005).

⁸ *See D.M.*, *supra* note 4; *Stanley B. Plotkin*, 51 ECAB 700 (2000); *Tamra McCauley*, 51 ECAB 375 (2000); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

⁹ *Id.*; *Jack E. Rohrbaugh*, 38 ECAB 186, 190 (1986).

ANALYSIS

OWCP accepted that appellant sustained a right rotator cuff tear and authorized arthroscopic surgery on September 24, 2008 as a result of the January 19, 2008 work injury. On April 21, 2010 it found that appellant could perform the duties of a mortgage loan interviewer and reduced her monetary compensation to reflect her wage-earning capacity. The question is whether she established that the April 21, 2010 wage-earning capacity decision should be modified. Appellant must establish either that the determination was erroneous or a change in her condition that would render her unable to perform those duties.¹⁰ For a medical opinion to be relevant on this issue, the physician must address the duties of the constructed position.¹¹ The medical evidence submitted by appellant does not establish that she is not capable of performing the duties of the selected position.

Appellant did not allege she had been retrained or otherwise vocationally rehabilitated and there is no evidence presented that shows that the original wage-earning capacity determination was, in fact, erroneous. She has contended that the medical evidence established that she was no longer able to work due to persistent problems with her right shoulder. Appellant asserted that after surgery she returned to work part time but continued to have a burning sensation in her right shoulder which prevented her from working full time. The Board finds that the record does not contain adequate medical evidence establishing that her accepted work-related right rotator cuff tear had materially changed such that it rendered her unable to perform the mortgage loan interviewer duties.

Dr. Kroner's July 2, 2012 treatment note found a full range of shoulder motion on examination, positive impingement, some discomfort and weakness with external rotation with tenderness over the acromioclavicular joint. He opined that appellant's condition was "status quo." In a July 6, 2012 work capacity evaluation, Dr. Kroner noted that appellant had restrictions on reaching above the shoulder and pushing, pulling and lifting limited to 50 pounds. These restrictions were the same as set forth in his May 8, 2009 report which OWCP found were consistent with the duties of the selected mortgage loan interviewer position. Dr. Kroner did not specifically address appellant's ability to perform the duties of the selected position but indicated that her condition and restrictions remained the same. He did not support a material change in the accepted condition shoulder, but maintained the same restrictions that were in place before the April 21, 2010 wage-earning capacity determination. Therefore Dr. Kroner's reports are insufficient to meet appellant's burden of proof.

The Board finds that there is no medical evidence to establish a change in appellant's employment-related condition such that a modification of OWCP's wage-earning capacity determination would be warranted. The evidence from Drs. Kroner does not establish that the position of mortgage loan interviewer is outside her physical limitations. Appellant did not establish a basis for modification of the wage-earning capacity by submitting evidence establishing that she had been retrained or otherwise vocationally rehabilitated.

¹⁰ *Phillip S. Deering*, 47 ECAB 692 (1996).

¹¹ *Id.*

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 OWCP properly denied modification of the established April 21, 2010 wage-earning capacity determination.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 19, 2012 is affirmed.

Issued: August 27, 2013
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