

ISSUE

The issue is whether appellant has met her burden to show that modification of OWCP's November 17, 2008 loss of wage-earning capacity determination is warranted.

FACTUAL HISTORY

In a prior appeal,³ the Board found that OWCP properly reduced appellant's compensation for wage loss to zero, effective September 14, 2008, on the grounds that her actual earnings as an Employment Complaints Investigator and Examiner fairly and reasonably represented her wage-earning capacity and demonstrated no loss of wage-earning capacity due to her accepted employment injury.⁴

Appellant claimed compensation for wage loss beginning July 25, 2011.⁵ Dr. Hampton J. Jackson, Jr., a Board-certified orthopedic surgeon, issued disability certificates indicating that she was totally incapacitated beginning July 25, 2011.

Dr. Jackson provided nerve blocks. On September 1, 2011 he noted that an imaging scan from 2002 showed herniated discs at C4-5, C5-6 and C6-7. Dr. Jackson also noted that testing confirmed nerve injuries associated with the October 31, 1991 work incident, the most symptomatic of which was probably a nerve injury with C7 radiculopathy, highlighting and indicating a herniated disc at C6-7.

Dr. Jackson stated that appellant returned to work in 2009 "but she did not last." The symptoms, he explained, worsened to the point that she could not continue "and she has not been able to work since September 2009 and that has not changed based on today's examination." Dr. Jackson found restricted motion and painful range of motion of the neck, a positive head compression test and a positive head extension test. He saw no evidence of acute nerve root compression and no progressive neurologic change, but he stated that work activities "will clearly aggravate appellant[']s condition and increase her pain." Dr. Jackson opined that appellant's present condition was clearly causally related to her October 31, 1991 employment injury and would remain permanently.

On September 29, 2011 Dr. Jackson noted that tissues damaged on October 31, 1991 caused a tumor necrosis factor release, which was a cytokine causing a chemical radiculitis in the neck and lower back. He again stated that appellant's current complaints were related to her October 31, 1991 employment injury.

³ Docket No. 09-942 (issued November 17, 2009).

⁴ On October 31, 1991 appellant, a 39-year-old equal opportunity specialist, sustained a traumatic injury in the performance of duty when she was involved in a motor vehicle accident. OWCP accepted her claim for cervical strain, lumbosacral strain, left shoulder strain, cervical radiculopathy and herniated nucleus pulposus at C5-6. It issued its formal wage-earning capacity determination on November 17, 2008. The facts of this case as set forth in the Board's prior decision are hereby incorporated by reference.

⁵ Appellant had unsuccessfully claimed compensation for wage loss for earlier periods.

On October 27, 2011 Dr. Jackson stated that appellant was still having right upper extremity radicular symptoms from the shoulder to the hand, “more like a C7 and more in the C6 distribution.” These symptoms were new, he stated, “about a week ago.” Dr. Jackson ordered a new imaging study to rule out any worsening direct nerve root compression “which certainly might be responsible for these changing symptoms.”

In a November 25, 2011 decision, OWCP denied modification of its November 17, 2008 loss of wage-earning capacity determination. It found that appellant had failed to meet one of the three criteria for modifying a loss of wage-earning capacity determination. In particular, OWCP found that the medical evidence was not sufficient to support that her medical condition had worsened. It found that Dr. Jackson did not provide sufficient rationale to explain why the diagnosed herniated disc was believed to be attributable to the October 31, 1991 work injury.

Appellant alleges improper action in employing her under a career appointment when she was already approved for disability retirement. She also alleged actions by OWCP to cover up contradictory and false statements made by an OWCP referral physician in 2007.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁶ “Disability” means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.⁷

The wage-earning capacity of an employee is determined by the employee’s actual earnings if the employee’s actual earnings fairly and reasonably represent her wage-earning capacity.⁸ Wage-earning capacity is a measure of the employee’s ability to earn wages in the open labor market under normal employment conditions.⁹

Once OWCP issues a formal decision on wage-earning capacity, the rating should be left in place until the claimant requests resumption of compensation for total wage loss for more than a limited period of disability, in which instance OWCP will need to evaluate the request according to the customary criteria for modifying a formal wage-earning capacity determination.¹⁰

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

⁶ 5 U.S.C. § 8102(a).

⁷ 20 C.F.R. § 10.5(f).

⁸ 5 U.S.C. § 8115(a).

⁹ *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

¹⁰ *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sharon C. Clement*, 55 ECAB 552 (2004).

otherwise vocationally rehabilitated or the original determination was, in fact, erroneous. The burden of proof is on the party attempting to show modification of the award.¹¹

ANALYSIS

OWCP issued a formal loss of wage-earning capacity determination on November 17, 2008. Appellant requested resumption of compensation for total wage loss for more than a limited period of disability beginning July 25, 2011. She has the burden to establish one of the customary criteria for modifying a formal loss of wage-earning capacity determination.

Appellant did not establish a material change in the nature and extent of her injury-related condition. Dr. Jackson, the attending orthopedic surgeon, issued disability certificates that she was totally incapacitated beginning July 25, 2011; but the disability certificates alone do not establish a material change in the injury-related condition. The record contains several treatment notes in which he appeared to attribute a C7 radiculopathy to the October 31, 1991 work injury, but he did not explain. OWCP did not accept appellant's claim for a C7 radiculopathy or for a herniated disc at C6-7. Dr. Jackson noted that this was perhaps the most symptomatic nerve injury, but he offered no medical rationale on how the October 31, 1991 work injury caused this nerve injury, what medical evidence supported a causal relationship or what objective findings showed that the nature and extent of this nerve injury had materially worsened since OWCP's November 17, 2008 loss of wage-earning capacity determination.

Dr. Jackson stated that appellant's symptoms had worsened to the point that she could not continue to work since September 2009. He saw no evidence, however, of acute nerve root compression and no progressive neurologic change. Dr. Jackson stated that work activities "will clearly aggravate [appellant's] condition and increase her pain." This suggests a prophylactic work stoppage rather than disability caused by the objectively demonstrated material worsening of an injury-related condition.

Although Dr. Jackson found that appellant's current complaints were clearly related to the October 31, 1991 work injury, he provided insufficient medical rationale to establish a change in the nature and extent of an injury-related condition. He ordered a new imaging study to rule out any worsening direct nerve root compression, but the record contains no findings from that study or comment by Dr. Jackson.

Appellant did not allege that she had been retrained or otherwise vocationally rehabilitated,¹² nor did she attempt to show that the original loss of wage-earning capacity determination was, in fact, erroneous.

¹¹ *Daniel J. Boesen*, 38 ECAB 556 (1987).

¹² The criterion relating to retraining or vocational rehabilitation is typically the criterion OWCP would establish to justify the modification of a loss of wage-earning capacity determination.

Accordingly, the Board finds that appellant has not met her burden to establish that modification of OWCP's November 17, 2008 loss of wage-earning capacity determination is warranted. The Board will affirm OWCP's November 25, 2011 decision denying modification.

Appellant alleges an administrative error in employing her under a career appointment. She also alleges an OWCP cover-up of statements by a referral physician in 2007. These allegations have no bearing on whether she has met her burden to establish one of the customary criteria for modifying a formal loss of wage-earning capacity determination.

CONCLUSION

The Board finds that appellant has not met her burden to establish that modification of OWCP's November 17, 2008 loss of wage-earning capacity determination is warranted.

ORDER

IT IS HEREBY ORDERED THAT the November 25, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 24, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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