

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

Y.C., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE
Philadelphia, PA, Employer**

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**Docket No. 12-1407
Issued: January 24, 2013**

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 15, 2012 appellant, through her attorney, filed a timely appeal from a June 13, 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 her August 15, 2011 loss of wage-earning capacity determination is warranted.

FACTUAL HISTORY

This is the second appeal in this case. In a March 10, 2009 decision, the Board affirmed an April 14, 2006 OWCP decision denying appellant's claim for a schedule award. The Board

¹ 5 U.S.C. § 8101 *et seq.*

found that she failed to establish that she sustained permanent impairment due to her accepted cervical condition.² The facts of the case as set forth in the Board's prior decision are incorporated herein by reference.³

On May 13, 2009 appellant claimed a recurrence of disability, asserting that on May 13, 2009 the employing establishment withdrew her position as there was no work available within her restrictions. On July 30, 2009 OWCP accepted the recurrence claim.⁴ On September 15, 2009 appellant was referred for vocational rehabilitation.

Appellant was treated by Dr. Steven J. Valentino, a Board-certified orthopedic surgeon, who noted in a July 14, 2009 duty status report that she could work full time with restrictions on repetitive motion of the right hand and arm and lifting. In a work capacity evaluation of April 27, 2010, Dr. Valentino diagnosed degeneration of an intervertebral disc and opined that appellant could return to work full time with no reaching above the shoulder, driving limited to two hours and pushing, pulling and lifting limited to four hours and 10 pounds. From August 24, 2010 to May 17, 2011, he diagnosed aggravation of cervical degenerative disc disease with facet syndrome. Dr. Valentino opined that appellant could return to full-time sedentary work. In an August 24, 2010 work capacity evaluation, he diagnosed degenerative cervical disc disease and noted that appellant could return to work full time, sedentary duties, with no reaching above the shoulder, driving limited to two hours, repetitive movements of the wrists and elbow limited to four hours, pushing, pulling and lifting limited to four hours and 10 pounds with 5-minute breaks three times a day and one 45-minute break.

In a May 13, 2010 plan, the rehabilitation counselor noted that the employing establishment had no work available to accommodate appellant's medical restrictions. A rehabilitation plan was prepared and approved by the rehabilitation counselor and appellant with the objective of obtaining a position of accounting clerk or customer service clerk. The rehabilitation counselor stated that the jobs were within appellant's educational capabilities based on vocational testing. The counselor found that the positions were reasonably available in her commuting area. In a September 26, 2010 closure report, the rehabilitation counselor noted that appellant was not cooperative with placement efforts and was adamant that her former employer should reemploy her.

On June 1, 2011 appellant was again referred to vocational rehabilitation. On June 7, 2011 the rehabilitation counselor noted that OWCP requested that appellant's rehabilitation case be reopened. The rehabilitation counselor provided the current wages and availability for the job of accounting clerk in appellant's commuting area. In a June 9, 2011 report, the rehabilitation

² Appellant, a letter carrier, alleged that on April 30, 2001 she experienced neck, shoulder and arm pain. OWCP accepted her claim for aggravation of degenerative disc disease of the cervical spine. Appellant stopped work on July 18, 2001 returned on September 26, 2002 and worked intermittently thereafter.

³ Docket No. 08-1545 (issued March 10, 2009).

⁴ In a decision dated April 29, 2009, OWCP granted appellant a schedule award for nine percent permanent impairment of the right arm. The period of the award was from August 17, 2008 to March 1, 2009.

counselor advised that the current wages for an accounting clerk, DOT #216.482.010, was \$26,620.00 per year and that such positions were reasonably available in her commuting area.

On June 28, 2011 OWCP issued a proposed reduction of compensation finding that the evidence established that appellant was partially disabled and had the capacity to earn wages as an accounting clerk, DOT #216.482.010 at the rate of \$511.92 per week. It noted that the position was in compliance with Dr. Valentino's restrictions set forth on August 24, 2010. OWCP referenced the rehabilitation counselor's report which determined that she was employable as an accounting clerk which represented her wage-earning capacity.

In a July 14, 2011 statement, appellant stated that she had work-related neck and shoulder pain. She noted meeting with the vocational rehabilitation counselor three times and considered her recommendations for employment in a clerical position, but had left the clerical field on the advice of her doctor. Appellant submitted a February 24, 2011 cervical spine x-ray which revealed no abnormalities. An August 2, 2011 report from Dr. Valentino noted that appellant's examination remained unchanged. In an August 2, 2011 work capacity evaluation, Dr. Valentino opined that appellant was unable to perform her usual job and could not work eight hours per day due to pain but could work four hours per day with a gradual increase in hours. He noted that appellant could return to work four hours per day with no reaching or reaching above the shoulder, repetitive movements of the wrist and elbow were limited to two hours and 10 pounds and pushing, pulling and lifting were limited to two hours and 10 pounds.

In an August 15, 2011 decision, OWCP reduced appellant's compensation to reflect her wage-earning capacity as an accounting clerk effective August 28, 2011.⁵

In an August 31, 2011 report, Dr. Scott M. Fried, an osteopath, noted appellant's history and her complaints of neck and right paracervical area radiating into her right arm. She had right shoulder tenderness at the acromioclavicular joint and anterior and posterior glenohumeral joint and grade 2 weakness in abduction. Appellant had limited range of motion of the cervical spine as well as tenderness at the posterior neck muscles, the occipital region, the right cervical muscles, the right superior medial scapular border and left trapezius muscle. Dr. Fried noted spasm and tenderness at T1, positive Tinel's sign at the radial nerve and positive Phalen's test at the median nerve. He diagnosed cervical strain/sprain with radiculopathy on the right, disc bulges at C5-6 and C6-7, radial and medial neuropathy on the right, brachial plexopathy/cervical radiculopathy on the right, thoracic neuritis, scapular winging, right rotator cuff strain and capsulitis of the shoulder. Dr. Fried noted that appellant had a significant repetitive strain injury and cervical sprain emanating initially from her work as a carrier and casing and repetitive hand, wrist and arm activities with reexacerbations and reaggravations over her work history. He found that appellant could perform sedentary work with no use of the right arm, nonrepetitive, no lifting over five pounds, headset for telephone and minimal keying.

⁵ On September 12, 2011 appellant requested a telephonic hearing. On October 27, 2011 OWCP advised her that a telephone hearing would be held December 8, 2011 at 10:45 p.m., eastern time. It instructed appellant how to call and access the hearing. In a December 29, 2011 decision, OWCP found that she abandoned her request for a hearing. This matter is not presently before the Board.

In a September 28, 2011 report, Dr. Valentino noted that appellant's condition worsened and she was complaining of neck, right shoulder and arm pain worse with activity. He noted worsening symptoms over the past year as appellant was working on the computer and practicing her typing in an attempt to find a job. The physician noted restricted cervical range of motion with spasm and tenderness, weakness of the upper extremity, and decreased range of motion of the right shoulder. Dr. Valentino diagnosed aggravation of the cervical degenerative disc disease with facet syndrome. He noted appellant did not feel as though she could work in any capacity and he advised that she was totally disabled at that time. A November 2, 2011 EMG revealed mild bilateral C5-6 cervical nerve root radicular compromise, very borderline bilateral median nerve compromise at the wrists, mild left posterior intraosseous nerve compromise at the dorsal elbow and radial tunnel and mild left lower brachial plexus level nerve compromise involving the postganglion sensory component.

On March 15, 2012 appellant requested reconsideration and asserted that she was not medically able to work as an accounting clerk. She submitted reports from Dr. Fried dated November 7, 2011 to March 14, 2012. Dr. Fried diagnosed cervical strain/sprain with radiculopathy on the right, disc bulges at C5-6 and C6-7 and radial tunnel and median neuropathy on the right. In reports dated November 7, 2011 to March 14, 2012, he noted appellant's complaints of bilateral neck pain radiating into her right arm. Dr. Fried noted diagnoses and recommended ultrasound and massage therapy. On December 2, 2011 appellant underwent a functional capacity evaluation (FCE). On January 11, 2012 Dr. Fried reviewed the FCE and noted appellant had diminished ability to manipulate small objects, increased symptoms with lifting and carrying consistent with the underlying injuries. Appellant was able to write for 1.4 minutes before exacerbating symptomology and keying was tolerated for .8 minutes. Dr. Fried recommended vocational rehabilitation and noted that he did not foresee appellant returning to her prior activity level or job but she should be trained for a new job. Reports from Dr. Valentino dated January 24 to March 28, 2012, noted that appellant presented with neck pain at C4-7 and C4-T1 with radiation into the arms with paresthesias and weakness. He diagnosed aggravation of cervical degenerative disc disease with facet syndrome and recommended facet injections.

In a March 10, 2012 report, Dr. Clancy McKenzie, a Board-certified psychiatrist, noted treating appellant since September 14, 2011 for severe chronic pain and major depression. He diagnosed major depression, recurrent, severe with suicidal ideation and chronic pain syndrome and chronic severe degenerative disc disease. Dr. McKenzie opined that appellant was 100 percent disabled and could not perform accounting duties because she could not type for any length of time and could not turn her head or look down at a keyboard. He noted that appellant's history was significant for cutting her wrist in 2007. Dr. McKenzie opined that her physical injuries, chronic pain, inability to work and the dramatic reduction in her income caused her depression. He opined that appellant's depression was the direct result of her cervical spine injuries which caused chronic pain, inability to sleep and function.

In a decision dated June 13, 2012, OWCP denied modification of the August 15, 2011 wage-earning capacity determination. It found that the medical evidence did not establish that appellant's depression was caused or aggravated by her employment.

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.⁶ Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.⁷ 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.⁸ 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 fact, erroneous.¹⁰ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.¹¹

ANALYSIS

OWCP accepted that appellant sustained an aggravation of degenerative disc disease of the cervical spine as a result of the April 30, 2001 employment injury. On August 15, 2011 it determined that she could perform the duties of an accounting clerk and reduced her compensation to reflect her wage-earning capacity in this constructed position. The issue is whether appellant established that the August 15, 2011 wage-earning capacity decision should be modified.

After OWCP found that appellant could perform the duties of an accounting clerk, the pertinent issue is whether there had been a material change in her condition that would render her unable to perform those duties.¹² For a physician's opinion to be relevant on this issue, the physician must address the duties of the constructed position.¹³ The medical evidence submitted

⁶ *D.M.*, 59 ECAB 164 (2007).

⁷ *Katherine T. Kreger*, 55 ECAB 633 (2004); see *Robert H. Merritt*, 11 ECAB 64 (1959).

⁸ 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).

⁹ Federal (FECA) Procedure Manual, *id.* See *Harley Sims, Jr.*, 56 ECAB 320 (2005).

¹⁰ See *D.M.*, *supra* note 6; *Stanley B. Plotkin*, 51 ECAB 700 (2000); *Tamra McCauley*, 51 ECAB 375 (2000); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

¹¹ *Id.*; *Jack E. Rohrbaugh*, 38 ECAB 186, 190 (1986).

¹² *Phillip S. Deering*, 47 ECAB 692 (1996).

¹³ *Id.*

by appellant after the loss of wage-earning capacity determination did not sufficiently explain why the duties of the position of accounting clerk were unsuitable.

Appellant did not allege that she had been retrained or otherwise vocationally rehabilitated. She has contended that reports from Drs. Valentino, Fried and McKenzie establish that she was no longer able to work because of her physical and psychiatric conditions which were caused by the April 30, 2001 work injury. The Board finds that the record does not contain medical evidence that establishes appellant's accepted work-related condition, aggravation of degenerative disc disease of the cervical spine, had materially changed that would render her unable to perform the accounting clerk duties.

Appellant submitted reports dated August 31, 2011 to March 14, 2012 from Dr. Fried who noted appellant's complaints and diagnosed cervical strain/sprain with radiculopathy on the right, disc bulges at C5-6 and C6-7, radial and medial neuropathy on the right, brachial plexopathy/cervical radiculopathy on the right, thoracic neuritis, scapular winging, right rotator cuff strain and capsulitis of the shoulder. Dr. Fried noted that appellant had a significant repetitive strain injury and cervical sprain emanating initially from her work as a carrier and casing and repetitive hand, wrist and arm activities with reaggravations over her work history. He noted that appellant could perform sedentary work within certain restrictions including no use of the right arm. After reviewing a December 2, 2011 FCE, Dr. Fried noted that he did not foresee appellant returning to her prior activity level or job but she should be trained for a new job. The Board finds that he did not provide sufficient medical rationale¹⁴ explaining how appellant's injury-related conditions rendered her disabled from the accounting clerk position. Dr. Fried did not specifically address the duties of the accounting clerk or note any change in appellant's injury-related condition that would render her unable to perform the position of accounting clerk.¹⁵ Therefore, these reports did not establish that appellant could not perform the duties of an accounting clerk.

Appellant submitted a September 28, 2011 report from Dr. Valentino who noted appellant's symptoms worsened over the past year and diagnosed aggravation of the cervical degenerative disc disease with facet syndrome. Dr. Valentino noted that appellant did not believe she could work in any capacity and he advised that she was totally disabled at this time. In reports dated January 24 to March 28, 2012, he noted appellant's diagnoses and her complaints of neck pain at C4-7 with radiation into the arms. However, Dr. Valentino did not provide adequate medical rationale explaining how appellant's injury-related conditions rendered her totally disable from the duties of accounting clerk. His reports do not establish that, medically, the original wage-earning capacity determination was erroneous. This is particularly important where he gave prior work restrictions consistent with the requirements of the accounting clerk position. Dr. Valentino did not clearly explain the medical reasons why a

¹⁴ See *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

¹⁵ Dr. Fried also attributed disability to several conditions not accepted by OWCP as being employment related. For conditions not accepted by OWCP as being employment related, appellant has the burden of proof to establish causal relationship. See *Jaja K. Asaramo*, 55 ECAB 200 (2004).

material change in the accepted conditions caused increased disability. Therefore these reports are insufficient to meet appellant's burden of proof.

Appellant submitted a March 10, 2012 report from Dr. McKenzie who treated her for severe chronic pain and major depression. Dr. McKenzie opined that appellant was totally disabled and could not work for more than 30 minutes or perform accounting duties which required typing, turning her head or looking down at a keyboard. He diagnosed major depression, recurrent, severe with suicidal ideation and chronic pain syndrome and chronic severe degenerative disc disease which caused depression. OWCP did not accept that appellant developed depression as a result of her work injury. Dr. McKenzie did not provide sufficient rationale to explain how particular work injuries or conditions caused her depression.¹⁶ He also did not otherwise explain the reasons why appellant had a material change in the nature and extent of the injury-related conditions. The Board has found that vague and nationalized medical opinions on causal relationship have little probative value.¹⁷

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 wage-earning capacity determination would be warranted. The evidence from Drs. Valentino, Fried and McKenzie do not establish that the position of accounting clerk was improper. Appellant also did not otherwise establish a basis for modification by submitting evidence establishing that he had been retrained or otherwise vocationally rehabilitated.

On appeal, appellant asserted that the original wage-earning capacity determination was, in fact, erroneous. She asserts that the selected position was not within her restrictions and references the Form CA-66 for the offered position which described the accounting clerk position required reaching, handling and fingering frequently. Appellant asserts that the Form CA-66 defined "frequently" as being up to 2/3 of the day or more than 5.3 hours a day. She advised that these duties were contrary to the restrictions set forth by Dr. Valentino's April 27, 2010 report which provides that appellant could work eight hours a day, sedentary work where appellant was not permitted to reach above the shoulder. The Board notes that, upon further review of the Form CA-66, job classification for an accounting clerk, appellant's interpretation of the job classification is inaccurate. The physical demands for the job include "reaching" and is categorized as "frequent" which is defined as "activity or condition exists from 1/3 to 2/3 of the time." This description is contrary to appellant's assertion of more than 5.3 hours per day. Further the job classification for an accounting clerk does not require "reaching above the shoulder" as prohibited by Dr. Valentino. Consequently, appellant has failed to carry her burden of proof to establish modification of the wage-earning capacity determination.

CONCLUSION

The Board finds that OWCP properly denied modification of the established August 15, 2011 wage-earning capacity determination.

¹⁶ See *Jaja K. Asaramo, id.*

¹⁷ See *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)*.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 13, 2012 is affirmed.

Issued: January 24, 2013
Washington, DC

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

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

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