

OWCP accepted the claim for contusions to the right elbow, upper arm and shoulder. Appellant returned to a light-duty position at four hours a day on May 9, 1988.

By decision dated October 11, 1988, OWCP stated that it was adjusting appellant's compensation pursuant to 5 U.S.C. § 8115 as she had been reemployed as of May 9, 1988.² The record indicates that she continued to work in the light-duty position. The medical evidence includes a note dated June 19, 2000 from Dr. Peter Lesniewski, an orthopedic surgeon, diagnosing a shoulder impingement based on a magnetic resonance imaging (MRI) scan.

In a letter dated February 8, 2010, the employing establishment advised appellant that, pursuant to the National Reassessment Process (NRP), it no longer had a light-duty position for her. On March 1, 2010 appellant filed a claim for a recurrence of disability (Form CA-2a) commencing February 8, 2010. She also filed claims for compensation (Form CA-7) commencing February 9, 2010. Appellant submitted a duty status report (Form CA-17) dated February 22, 2010 from a pain management specialist with work restrictions.³

By decision dated April 21, 2010, OWCP denied the claim for compensation. It found that modification of the October 11, 1988 wage-earning capacity was not warranted.

Appellant requested a hearing before an OWCP hearing representative, which was held on September 14, 2010. The hearing representative requested that she submit additional medical evidence. On October 4, 2010 appellant submitted an undated report from Dr. Jeffrey Meyer, a Board-certified orthopedic surgeon, who provided a history and results on examination, diagnosing cervical disc disease with episodic paracervical spasm and significant lag between active and passive right shoulder range of motion.

By decision dated November 9, 2010, OWCP's hearing representative found that modification of the October 11, 1988 wage-earning capacity determination was established, as the decision was issued in error. He found that there was no written job offer for the May 9, 2008 position. The hearing representative stated that pursuant to FECA Bulletin No. 09-05 he had requested that appellant submit probative medical evidence as to injury-related residuals. He found that the medical evidence did not address the issue of continuing employment-related residuals and therefore appellant was not entitled to compensation for total disability as of February 8, 2010.⁴

Appellant requested reconsideration by letter dated June 1, 2011 and argued that the wage-earning capacity determination was erroneous as it was odd-lot or makeshift. By decision dated September 12, 2011, OWCP reviewed the merits of the claim and denied modification.

² The wages reported are difficult to read. The accompanying worksheet contains an incorrect adjusted earning capacity in the position. The final calculation showed appellant's net compensation would be \$629.40 every 28 days.

³ The signature of the physician is illegible.

⁴ The record indicates that appellant continued to receive compensation for wage loss for partial disability.

Appellant again requested reconsideration and submitted medical reports dated October 5, 2011 and January 27, 2012 from Dr. Richard Obedian, a Board-certified orthopedic surgeon. In his October 5, 2011 report, Dr. Obedian provided a history and results on examination, diagnosing shoulder impingement syndrome. He stated that appellant had right shoulder pain from the time of the 1988 injury and his “symptoms are a direct result of her work[-]related injury.”

By decision dated May 9, 2012, OWCP reviewed the merits of the claim and denied modification. It found that the medical evidence was not a continuing employment-related shoulder condition.

LEGAL PRECEDENT

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.⁵ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁶

FECA Bulletin No. 09-05 provides guidelines with respect to a withdrawal of a light-duty position under NRP. If there is a wage-earning capacity determination and OWCP determines that it should be modified as it was without a proper factual or legal basis, then OWCP should proceed in the same manner as situations where no wage-earning capacity determination was made. According to FECA Bulletin No. 09-05, if the claimant has been on light duty due to an injury-related condition without an LWEC rating or OWCP has set aside the LWEC rating, payment for total wage loss should be made based on the Form CA-7 as long as the following criteria are met: (1) the current medical evidence in the file (within the last six months) establishes that the injury-related residuals continue; (2) the evidence of file supports that light duty is no longer available; and (3) there is no indication that a retroactive LWEC determination should be made.

ANALYSIS

In the present case, OWCP’s hearing representative followed the directives of FECA Bulletin No. 09-05 and found that the original October 11, 1988 wage-earning capacity determination was erroneous. He noted that the record did not contain a job offer in writing for the position accepted on May 9, 1988, as required by OWCP’s procedures.⁷

OWCP then requested current medical evidence from appellant, in accord with FECA Bulletin No. 09-05. According to FECA Bulletin No. 09-05, the current medical evidence must

⁵ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

⁶ *Id.*

⁷ *See Allen W. Hermes*, 41 ECAB 838 (1990); the current OWCP procedures requiring the job offer be in writing are found at Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.4 (October 2009).

establish that the injury-related residuals continue. Appellant eventually submitted an October 5, 2011 report from Dr. Obedian. This report is of diminished probative value and cannot be found to establish continuing employment-related residuals. Dr. Obedian diagnosed a shoulder impingement syndrome, which is not an accepted condition. On the issue of causal relationship, he simply states that appellant's symptoms are the direct result of the work injury. There is no attempt to provide a medical explanation for the opinion. To be of probative value, the opinion of Dr. Obedian must be based on a complete factual and medical background, must be of reasonable medical certainty and supported by medical rationale explaining the nature of the relationship between the diagnosed condition and employment.⁸ He does not provide a complete factual and medical background, discuss the nature of the employment injury or otherwise provide medical explanation as to why he believed that the diagnosed condition he was treating on October 5, 2011 was causally related to the January 5, 1988 employment injury.

The Board accordingly finds that the evidence does not establish entitlement to total disability as of February 8, 2010. 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 compensation for temporary total disability as of February 8, 2010.

⁸ *Jennifer Atkerson*, 55 ECAB 317, 319 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 9, 2012 is affirmed.

Issued: May 24, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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