

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

M.M., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS ADMINISTRATION MEDICAL)
CENTER, Alexandria, LA, Employer)

Docket No. 14-1166
Issued: December 1, 2014

Appearances:
Daniel E. Broussard, 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 April 23, 2014 appellant, through her attorney, filed a timely appeal from a January 28, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 this case.

ISSUE

The issue is whether appellant has met her burden of proof to modify her wage-earning capacity determination.

FACTUAL HISTORY

This case has previously been before the Board. Appellant, a 50-year-old nurse, filed a traumatic injury claim on September 4, 2003 for an incident that occurred on August 21, 2003 when she was lifting a patient. OWCP accepted the claim for cervical sprain. Appellant stopped

¹ 5 U.S.C. § 8101 *et seq.*

working on August 21, 2003 and was placed on the periodic rolls. OWCP later accepted the additional conditions of degeneration of cervical intervertebral disc, cervical spondylosis without myelopathy, lumbar sprain, degeneration of lumbar or lumbosacral intervertebral disc and lumbosacral neuritis or radiculitis.²

By letter dated September 29, 2009, appellant was notified by the employing establishment that OWCP had found her medically capable of working in a modified, full-time capacity. It offered her the position of program support assistant with an availability date of November 8, 2009. On October 29, 2009 appellant accepted the position which was defined as basically sedentary, but required a lot of walking. OWCP advised her that the position identified by the employing establishment was suitable and met her physical restrictions. By decision dated January 20, 2010, OWCP reduced appellant's compensation benefits based upon her actual earnings as a program support assistant. It found that the position fairly and reasonably represented her wage-earning capacity. OWCP determined that, as appellant had demonstrated the ability to perform the duties of this job for two months or more, the position was suitable to her partially disabled condition.

On April 20, 2010 appellant filed a claim for recurrence of disability, alleging that she was totally disabled as of April 9, 2010. She referred to her condition not as a recurrence but as continued and increased pain from her original injury, with decreased function and motion.

In an April 5, 2010 performance review, appellant's supervisor, Fay C. Thrasher, Ph.D, stated that appellant had both physical and cognitive difficulties, which interfered with her ability to successfully perform the functions of her position. Ms. Thrasher noted that appellant had a hard time typing and focusing due to the numerous medications she was required to take for pain.

Dr. DeVinder Verma, a specialist in internal medicine, provided in an April 9, 2010 note that "[d]ue to [appellant's] job-related injury and increase pain, I feel [appellant] needs to be off work from 4-7-10 to further testing completed."

Appellant also submitted an April 19, 2010 report from Dr. John M. Burdine, Board-certified in pain medicine, who diagnosed cervical syndrome; cervico-brachial neuralgia; facet arthropathy of the spine; lumbar spondylosis and lumbosacral radiculitis. Dr. Burdine recommended that appellant undergo a functional capacity examination and outline temporary work restrictions of no lifting, bending, prolonged activities, overhead activities; he also recommended that she take frequent breaks. Dr. Burdine stated that without surgery appellant's prognosis was poor for recovery. There is no functional capacity evaluation from that time period in the record.

OWCP requested additional information from appellant regarding her recurrence claim on June 1, 2010. Appellant contacted OWCP on June 14, 2010 and requested that her claim be expanded to include a shoulder condition. OWCP referred the case to its medical adviser to

² In a decision dated June 29, 2005, OWCP terminated appellant's wage-loss and schedule award benefits, because she had refused an offer of suitable work. By decision dated May 21, 2007, an OWCP hearing representative affirmed the June 29, 2005 decision. In an August 26, 2008 decision, the Board reversed the May 21, 2007 suitable work termination decision as OWCP had failed to consider all of the medical evidence of record. OWCP reinstated appellant's compensation benefits.

review the case to determine whether the left shoulder should be included as consequential to the original injury.

In a July 6, 2010 report, the medical adviser reviewed the medical record and opined that the left shoulder condition should be considered consequential to the original injury of August 21, 2003. On July 9, 2010 OWCP accepted “other affections of the shoulder region” and authorized treatment of the left shoulder as consequential to the original August 21, 2003 injury.

By decision dated July 19, 2010, OWCP denied modification of the January 20, 2010 wage-earning capacity decision. It adjudicated the recurrence claim as a request to modify the loss of wage-earning capacity (LWEC) determination. OWCP found that the medical evidence failed to establish a change in the nature and extent of appellant’s injury-related condition, that she had been retrained or vocationally rehabilitated or that the original determination was erroneous. It noted that the consequential shoulder condition had been accepted, reviewed the additional evidence, but determined that it was not sufficient to modify the prior wage-earning capacity determination.

By decision dated October 4, 2011,³ the Board set aside OWCP’s July 19, 2010 decision. The Board noted that the medical adviser had found the left shoulder condition consequential to the original August 21, 2003 work injury, but noted that OWCP had failed to seek consideration as to whether appellant’s condition had worsened due to her shoulder or other conditions. The Board found that without such information an informed decision could not be reached on the wage-earning capacity.

By decision dated December 5, 2011, OWCP denied modification of its January 20, 2011 wage-earning capacity decision. It claimed that appellant had filed a recurrence due to her lumbar condition. OWCP acknowledged that the medical evidence generally supported that her lumbar condition may have worsened, but it found no evidence supporting that the lumbar condition had worsened to the point that she could no longer work in the modified position. Accordingly it denied appellant’s request to modify the January 20, 2010 wage-earning capacity determination.

Appellant submitted additional medical reports from Dr. Burdine.

In his February 13, 2012 report, Dr. Burdine stated that there had been no change in appellant’s level of pain since her last visit. He advised that she was scheduled for surgery with Dr. Gerard L. Murtagh, a Board-certified orthopedic surgeon, but cancelled the surgery because of her husband’s heart condition. Dr. Burdine prescribed continued home exercises and medication as directed.

Dr. Burdine advised in his April 18, 2012 report that appellant’s overwhelming problem was left shoulder pain. He reiterated that she had not been able to undergo surgery on the shoulder and continued to recommend conservative treatment.

In his July 11, 2012 report, Dr. Burdine reiterated his previous findings and conclusions. He noted that appellant had continued left shoulder pain and opined that her neck was not “a

³ Docket No. 11-681 (issued October 4, 2011).

fixable issue.” Appellant had bone spurs and herniations in her neck which were not necessarily repairable.

In a July 13, 2012 report, Dr. Kyle F. Dickson, Board-certified in orthopedic surgery, opined that appellant had a history of left shoulder pain since the August 21, 2003 work injury and advised that she had constant pain, which was occasionally severe. He recommended that she have an “adjustment” or she would become progressively worse as her body developed a tolerance to pain medication.

Dr. Burdine reiterated his previous findings and conclusions in his October 3 and December 20, 2012 reports.

On December 13, 2012 OWCP received a request for reconsideration from appellant, through her counsel, requesting reconsideration of OWCP’s December 5, 2011 decision. Counsel contended that the medical evidence showed that there had been a material change in the nature and extent of appellant’s injury-related condition of her back, her neck, as well as her shoulder and that the original determination was, in fact, erroneous. Counsel argued that, after working for only two months in the restricted position, which was the basis for the wage-earning capacity decision, appellant stopped working and only two months later her shoulder condition was accepted as consequential to her original injury. He contends that the shoulder condition, coupled with her other problems in her neck and back, interfered with her ability to perform in the restricted position warranting a modification of her wage-earning capacity.⁴

In a report dated January 28, 2013, Dr. Murtagh, an orthopedic surgeon, advised that appellant had ongoing issues with her left shoulder. He stated that she was seen and treated in August 2011 for rotator cuff tendinitis, acromioclavicular (AC) joint arthritis impingement and partial thickness rotator cuff tear left shoulder. Dr. Murtagh advised that appellant’s proposed left shoulder surgery was delayed due to her need to care for her husband’s heart condition. Appellant related that she continued to have pain, problems, difficulties, tightness, stiffness and discomfort in her neck in addition to pain in her left shoulder, which radiated from her shoulder into her upper arm. Dr. Murtagh advised that x-rays of her left shoulder showed sclerotic changes about the AC joint; she had changes about the proximal humerus, which might indicate a previous injury and late effects with greater tuberosity involvement. He also noted some slight early degenerative intraarticular changes.

Dr. Murtagh stated that appellant had chronic symptoms of left shoulder pain with attendant problems and difficulties which continued to worsen. He expressed concern over the persistence and worsening of symptoms. Dr. Murtagh stated that appellant was scheduled to have a magnetic resonance imaging (MRI) scan of the left shoulder to assess the severity of her condition. He asserted that she was a candidate for arthroscopic evaluation, decompression,

⁴ By decision dated February 1, 2013, OWCP denied appellant’s request for reconsideration without a merit review, finding that she had not timely requested reconsideration and had failed to submit factual or medical evidence sufficient to establish clear evidence of error. It did not consider or evaluate the medical evidence she submitted. In a January 10, 2014 decision, (Docket No. 13-1832 (issued January 10, 2014)), the Board set aside OWCP’s nonmerit decision, finding that appellant requested modification of the January 20, 2010 wage-earning capacity determination in her December 5, 2013 letter. The Board remanded to the district office for a merit review on that issue and instructed OWCP to adjudicate her request for modification of the wage-earning capacity determination and issue an appropriate decision in the case.

debridement, distal clavicle excision and would be considered for debridement versus rotator cuff repair, depending on her findings.

In a March 11, 2013 report, Dr. Burdine advised that appellant's proposed MRI scan had been rescheduled because she had a previous bone stimulator present in the cervical spine. He advised that she had undergone a very extensive but failed fusion in her neck. Dr. Burdine opined that appellant's neck was a very delicate issue and that he did not believe that she would be returning to work due to her neck condition, in addition to all the other problems that she was experiencing.

In a report dated June 10, 2013, Dr. Burdine stated that appellant had a new onset of left sacroiliitis. Appellant also complained of significant back pain and neck pain.

By decision dated January 28, 2014, OWCP denied modification of the January 20, 2010 wage-earning capacity determination. It noted that the original claim was filed due to worsening of appellant's lumbar condition. OWCP found the evidence insufficient to modify the December 5, 2011 decision because the work stoppage on April 9, 2010 was not due to the consequential left shoulder injury and the evidence did not support a worsening of the lumbar condition.

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. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.⁵ OWCP procedure manual and Board precedent provide 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 The procedure manual and Board precedent further provide that, under these circumstances, the claims examiner will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity decision.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

⁵ *Katherine T. Kreger*, 55 ECAB 633 (2004).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501.2(b). (June 2013). See *Mary E. Marshall*, 56 ECAB 420 (2005).

⁷ *Id.* See also *Harley Sims, Jr.*, 56 ECAB 320 (2005).

⁸ *Tamra McCauley*, 51 ECAB 375 (2000).

⁹ *Linda Thompson*, 51 ECAB 694 (2000).

Section 20 C.F.R. § 10.126 requires OWCP to issue a decision containing findings of fact and a statement of reasons.¹⁰

ANALYSIS

The Board finds that the case is not in posture for decision.

On January 20, 2010 OWCP reduced appellant's compensation benefits based upon a finding that her actual earnings as a program support assistant represented her wage-earning capacity. Appellant stopped work on April 9, 2010 and alleged total disability. Based upon an OWCP medical adviser's report dated July 6, 2010, OWCP accepted that her left shoulder condition was consequential to the August 21, 2003 injury and authorized treatment. On July 19, 2010 OWCP initially denied modification of the January 20, 2010 determination, however, the Board remanded the case for clarification as to whether appellant's condition had materially worsened due to the shoulder or other conditions, sufficient to render her unable to perform in the restricted position.

Following further review of the medical evidence in the record, OWCP, by decision dated January 28, 2014, decision denied appellant's claim finding that the April 9, 2010 work stoppage was not due to the consequential shoulder injury nor did the evidence establish that the lumbar condition had worsened to the extent that she was no longer able to perform her limited-duty position.

The Board finds that OWCP has failed to adequately review the medical evidence in the record to determine whether appellant had established a worsening of her accepted conditions rendering her incapable of working in her limited-duty position. OWCP failed to adequately consider all the accepted conditions. It noted only the shoulder and lumbar conditions. Further, OWCP has not provided an adequate decision with findings of fact and statement of reasons as to whether appellant has provided sufficient evidence to support her claim of modification of her wage-earning capacity. It failed to discuss or analyze the numerous medical reports from 2010 through 2013 to adequately determine whether appellant's accepted left shoulder, back and neck conditions had materially worsened such that she would be unable to continue to perform in her wage-earning capacity position.

Section 8124(a) of FECA provides: "[OWCP] shall determine and make a finding of fact and make an award for or against payment of compensation...."¹¹ Section 10.126 of Title 20 of the Code of Federal Regulations provide: "The decision shall contain findings of fact and a statement of reasons." The Board has held that the reasoning behind OWCP's evaluation should be clear enough for the reader to understand the precise defect of the claim and the kind of evidence which would overcome it.¹²

¹⁰ 20 C.F.R. § 10.126. *Supra* note 6 at *Disallowances*, Chapter 2.1400.5 (February 2013) (all decisions should contain findings of fact sufficient to identify the benefit being denied and the reason for the disallowance).

¹¹ *Supra* note 1 at 8124(a).

¹² *L.C.*, Docket No. 12-978 (issued October 26, 2012); *L.M.*, Docket No. 13-2017 (issued February 21, 2014); *D.E.*, Docket No. 13-1327 (issued January 8, 2014); *supra* note 10.

The case must be returned to OWCP for a proper decision to include findings of fact and a clear and precise statement including all the accepted conditions as to whether appellant has met her burden of proof under the customary standards to establish modification of her wage-earning capacity determination. Following this and such further development as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the January 28, 2014 decision of the Office of Workers' Compensation Programs is set aside and remanded in accordance with this decision.

Issued: December 1, 2014
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