

With respect to appellant's continuing employment-related disability, OWCP further developed the evidence and found that a conflict of medical evidence existed. In a report dated April 29, 2010, Dr. James York, a Board-certified orthopedic surgeon, selected as a referee physician, opined that, while the accepted sprains had resolved, appellant continued to have chronic pain syndrome and myofascitis as residuals of the employment injury. He indicated that appellant could work in a sedentary capacity.

Appellant was referred for vocational rehabilitation services. A rehabilitation counselor identified the position of customer service representative and found that the weekly wage for the position in appellant's area was \$389.00.

OWCP prepared a statement of accepted facts and referred appellant back to Dr. York. In a report dated July 24, 2012, Dr. York provided a history and results on examination. He opined that appellant had some physical limitations, including no reaching above shoulder, no twisting, bending, stooping or operating a motor vehicle at work, but found that appellant could perform the position of customer service representative.

By letter dated August 23, 2012, OWCP advised appellant that it proposed to reduce her compensation as she had the capacity to earn wages as a customer service representative at \$389.00 per week. Appellant was advised to submit any evidence or argument within 30 days if she disagreed with the proposal.

In a report dated September 19, 2012 and received by OWCP on September 25, 2012, Dr. Eric Dawson, a Board-certified orthopedic surgeon, provided a history and results on examination, diagnosing lumbar disc and nerve impingement.

By decision dated September 26, 2012, OWCP reduced appellant's compensation based on a wage-earning capacity of \$389.00 per week as a customer service representative.

In a September 25, 2012 report, received on September 27, 2012, Dr. Daniel Ignacio, a Board-certified physiatrist, indicated that appellant had been under his care for injuries sustained at work on December 19, 2000. He provided results on examination and stated that he disagreed with the proposal to reduce her compensation. Dr. Ignacio stated that appellant had a progressive spinal injury and was unable to return to her regular job.

On November 27, 2012 appellant requested reconsideration. Dr. Ignacio provided an additional report on October 31, 2012 which reflected results on examination and diagnoses of chronic cervical strain syndrome, cervical disc syndrome with radiculopathy, chronic lumbar strain syndrome, chronic lumbar disc syndrome with radiculopathy, chronic thoracic strain syndrome and chronic pain syndrome. He stated that the effects of the work injury had not ceased, and appellant had a five-pound lifting restriction. Dr. Ignacio also indicated that she should avoid frequent reaching, bending, pushing, pulling and squatting, and avoid prolonged standing or walking. He concluded, "Due to the complex medical conditions, spinal injury and limited physical capacity described above, [appellant] is not able to perform her job or able to perform any other kind of productive vocation."

In a report dated November 6, 2012, Dr. Georgia Cu, a Board-certified physiatrist, provided results on examination and diagnosed chronic cervical and thoracolumbar strains, chronic lumbar disc syndrome with radiculopathy and complex regional pain syndrome. By

report dated December 28, 2012, Dr. Cu indicated that appellant remained unable to return to her regular job.

By decision dated January 24, 2013, OWCP denied modification of the wage-earning capacity determination. It found the evidence was insufficient to warrant modification.

On May 6, 2013 appellant again requested reconsideration. In a report dated February 11, 2013, Dr. Joshua Thomas, an osteopath, provided a history and results on examination. He diagnosed myalgia, myositis, cervical disc displacement, cervical degenerative disc disease, cervical radiculopathy, lumbar radiculopathy, sacroiliitis and lumbar spondylosis. Dr. Thomas stated that he agreed with Dr. Ignacio that appellant could not perform her prior job and was unable to perform any productive vocation at this time.

In a report dated February 19, 2013, Dr. Mark Klein, a Board-certified neurosurgeon, provided a history and results on examination. He diagnosed history of lumbar myoligamentous injury 12 years ago without evidence of ruptured lumbar intervertebral disc or ruptured cervical intervertebral disc. Dr. Klein stated that appellant had minimal change of cervical spondylosis at the C5-C6 level, with no evidence of cervical or lumbar radiculopathy. He opined that surgical intervention was not recommended. Dr. Klein also stated “it is felt this patient could be returned to the work force in a lighter duty capacity which would involve no heaving lifting in excess of 15 to 20 pounds, excessive bending, stooping, straining, pushing or pulling.”

In a report dated April 4, 2013, Dr. Ignacio provided results on examination and stated that appellant would continue with conservative treatment. He indicated that he disagreed with an OWCP “letter” and stated that there were objective findings of a progressive medical condition. Dr. Ignacio reviewed Dr. York’s report and stated that Dr. York also felt that appellant had limited physical capacity. He stated that Dr. York had indicated that appellant could “go back” to her job as a customer service representative, but he did not agree that she could return to work. By report dated June 5, 2013, Dr. Cu indicated that appellant remained disabled.

By decision dated October 3, 2013, OWCP denied modification of the wage-earning capacity determination. It found the evidence was insufficient to warrant modification.

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.² The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.³

² *Sue A. Sedgwick*, 45 ECAB 211 (1993).

³ *Id.*

ANALYSIS

In the present case, the issue is whether appellant has met her burden of proof to establish a modification of the September 26, 2012 wage-earning capacity determination. With respect to the three bases for a modification noted above, the retraining or vocational rehabilitation of the employee is not a relevant issue. This is typically an issue only when OWCP is attempting to modify a wage-earning capacity determination on the grounds that the employee has a greater earning capacity due to retraining or vocational rehabilitation.

As to error in the original determination, appellant did not present any specific arguments of error in the September 26, 2012 wage-earning capacity determination. The basis for the determination that appellant could perform the selected position of customer service representative was the July 24, 2012 report from Dr. York. Although OWCP referred to Dr. York as a referee physician, he was a referee only with respect to his prior report dated April 29, 2010. There was no continuing conflict under 5 U.S.C. § 8123(a), and therefore, in this capacity, Dr. York is a second opinion physician.⁴ Dr. York provided a complete report and specifically opined that appellant could perform the selected position. His report was the only report to address the issue of whether appellant could perform the duties of the selected position.

In a September 25, 2012 report, Dr. Ignacio stated that he disagreed with the proposed reduction in compensation because appellant was unable to do her regular job, but the issue was not whether appellant could perform her date-of-injury job. The issue was whether appellant could perform the selected position. In an April 4, 2013 report, Dr. Ignacio stated that he disagreed with Dr. York. He did not, however, discuss the duties of the selected position nor otherwise provide a probative medical opinion that appellant was unable to perform the duties of the selected position as of September 26, 2012. The Board finds that the record does not show error in the September 26, 2012 wage-earning capacity determination with respect to the medical suitability of the selected position.

The final issue is whether appellant has established a material change in an employment-related condition after September 26, 2012. Appellant has submitted medical reports from Dr. Ignacio regarding her continuing treatment but none of these reports show a material change in an employment-related condition. In his November 27, 2012 report, Dr. Ignacio provided work restrictions, but then opined that appellant could not work in any “productive vocation.” He does not indicate that a material change had occurred in appellant’s employment-related condition. The diagnoses provided, including chronic cervical strain syndrome, cervical disc syndrome with radiculopathy, chronic lumbar strain syndrome, chronic lumbar disc syndrome with radiculopathy, chronic thoracic strain syndrome, have not been accepted as employment related. The medical evidence must establish the condition as employment related, and that there was a material change such that appellant could not perform the selected sedentary position. Dr. Ignacio does not provide an opinion supported by sound medical rationale establishing the diagnosed conditions as causally related to a March 15, 2001 employment injury.

⁴ *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996). As a second opinion, Dr. York’s report can still constitute the weight of the medical evidence.

In the April 4, 2013 report, Dr. Ignacio refers to the history of the case as showing objective findings of a progressive condition but the examination findings on that date do not indicate a material change in appellant's condition.

The reports of Dr. Cu do not discuss a material change in an employment-related condition. Dr. Thomas also provides diagnoses not established as employment related and does not discuss a material change. Dr. Klein did not diagnose radiculopathy and indicated that appellant could work a sedentary position.

The Board finds that the evidence of record does not establish that a modification of the September 26, 2012 wage-earning capacity determination. Appellant did not show error in the original determination or establish a material change in an employment-related condition after September 26, 2012.

CONCLUSION

The Board finds that appellant has not established a modification of the September 26, 2012 wage-earning capacity determination was warranted.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 3, 2013 is affirmed.

Issued: July 10, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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