

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

G.A., Appellant)
and) Docket No. 15-161
DEPARTMENT OF DEFENSE, DEFENSE) Issued: May 6, 2015
AGENCIES, Fort Lee, VA, Employer)

)

Appearances:

John S. Evangelisti, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 3, 2014 appellant, through counsel, filed a timely appeal of an October 21, 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 to consider the merits of the case.

ISSUE

The issue is whether appellant has met her burden of proof to modify her loss of wage-earning capacity determination based on the constructed position of bank teller.

On appeal, counsel argued that appellant had submitted sufficient medical evidence to establish a material change in the nature and extent of her injury-related condition or that there was a conflict of medical opinion evidence.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board on appeal. On May 16, 2001 appellant, then a 42-year-old cashier, filed a traumatic injury claim alleging that she sustained shoulder and neck pain in the performance of duty on that same date. OWCP accepted her claim for cervical strain on January 24, 2002. It included the additional condition of right shoulder sprain as work related on January 21, 2003. Appellant underwent a right shoulder arthroscopic acromioplasty with subacromial decompression on February 18, 2003. She returned to light-duty work on July 9, 2003.

By decision dated March 5, 2004, appellant received a schedule award for 11 percent impairment of her right upper extremity.

Appellant underwent a functional capacity evaluation on April 20, 2004 which demonstrated that she was capable of performing medium work lifting 10 pounds consistently and 25 pounds frequently. She underwent a second functional capacity evaluation on June 22, 2005 which again indicated that she was capable of performing medium work.

OWCP referred appellant for vocational rehabilitation services on January 27, 2006. The vocational rehabilitation counselor found that appellant was a high school graduate who had worked as cashier checker, fast food worker, and sales clerk.

On April 26, 2007 OWCP accepted the additional condition of calcifying tendinitis of the right shoulder as due to appellant's employment.

OWCP referred appellant for a second opinion evaluation on May 1, 2007 with Dr. Hendrick J. Arnold, a Board-certified orthopedic surgeon. In his report dated May 31, 2007, Dr. Arnold noted her history of repetitive lifting as a cashier in the performance of duty. He stated that appellant had full range of motion and no findings other than tenderness in the neck and right shoulder. Dr. Arnold stated that she should not drive while taking her prescribed medications and should not have to do mentally exacting maneuvers such as cashing or figuring change and would not be able to do reports. He indicated that appellant could work eight hours a day with restrictions including no reaching above the shoulder and no operating a motor vehicle while on her medication. Dr. Arnold indicated that she could push, pull, and lift 35 pounds, eight hours a day.

Appellant underwent a second opinion examination by Dr. William V. Watson, a Board-certified orthopedic surgeon, on April 2, 2009. Dr. Watson noted her history of injury and medical history. He found tenderness of the right shoulder, cervical spine, and right trapezial muscle with no other objective findings. Dr. Watson stated that appellant's medications of Percocet and Valium should not be used when she was driving or any activities involving higher cognitive skills. He recommended Tramadol for pain and Flexeril for muscle relaxer as medications that would not reduce her work capacity. Dr. Watson indicated that appellant could work with no reaching above the shoulder, no operating a motor vehicle when on medication, and pushing, pulling, and lifting up to 35 pounds. He did not indicate that she required any breaks.

OWCP again referred appellant for vocational rehabilitation counseling on August 31, 2010. In a letter dated September 28, 2010, it noted that she refused to participate in vocational rehabilitation and explained the penalties for failing to cooperate with vocational rehabilitation. Appellant signed a vocational plan on October 28, 2010 and chose the goals of bank teller and sales attendant.

On February 23, 2011 OWCP noted that, in addition to the accepted conditions of neck sprain, right shoulder sprain, and right shoulder tendinitis, appellant had another claim which had been accepted for right carpal tunnel syndrome. It noted that left carpal tunnel syndrome was not an accepted condition and requested additional information if she believed that she had developed a consequential injury.

The vocational rehabilitation counselor identified the position of bank teller as physically and vocationally appropriate for appellant. This position required light strength levels including occasionally lifting up to 20 pounds and frequently lifting up to 10 pounds within appellant's established work restrictions. The vocational rehabilitation counselor concluded that appellant's high school diploma and a work history of handling money, balancing cash drawers, and working work with customers as well as her nine years' experience as cashier-checker would meet the specific vocational preparation for the position of bank teller. She further found that the job was being performed in sufficient numbers as to make it reasonably available to appellant as confirmed by internet research with Pikes Peake Workforce Center. The vocational rehabilitation counselor noted full-time openings with three employing establishments.

The vocational rehabilitation counselor submitted a copy of appellant's résumé, which included a statement that she received a high school diploma in 1977.

In a letter dated June 13, 2011, OWCP proposed to reduce appellant's compensation benefits based on her capacity to earn wages as a bank teller. By decision dated September 21, 2011, it finalized the proposed reduction of her compensation effective September 25, 2011. OWCP found that the position of a bank teller was medically and vocationally suitable for appellant and fairly and reasonably represented her wage-earning capacity.

Counsel requested an oral hearing before an OWCP hearing representative on October 19, 2011. By decision dated May 7, 2012, an OWCP hearing representative found that the position of a bank teller fairly and reasonably represented appellant's wage-earning capacity.

Appellant appealed the May 7, 2012 decision to the Board and, on June 25, 2013,² the Board affirmed the May 7, 2012 OWCP hearing representative's decision finding that the weight of the medical opinion evidence established that she could physically perform the duties of a bank teller which requires light strength levels of lifting up to 20 pounds occasionally and 10 pounds frequently. The Board found that the medical evidence established that she could work with no reaching above the shoulder and a pushing, pulling, and lifting limitation of 35 pounds, that she should not operate a motor vehicle while on medications and that she did not need breaks as recommended by her physician. The Board further found that the position was

² Docket No. 12-1826 (issued June 25, 2013).

vocationally suitable for appellant. The facts and circumstances of the case as set forth in the Board's prior decision are adopted herein by reference.

In a note dated October 2, 2013, appellant's attending physician, Dr. Timothy V. Sandell, Board-certified in physical medicine and rehabilitation, noted that appellant underwent a functional capacity evaluation which indicated that she could work at the sedentary or light physical demand level. He noted that the test indicated that she exhibited poor effort or voluntary submaximal effort not necessarily related to pain, impairment, or disability. On October 7, 2013 Dr. Sandell continued to support appellant's disability for work.

Appellant underwent an additional functional capacity evaluation in December 2013. This report found that she was not capable of performing the essential job duties of a bank teller due her shoulder and right hand conditions. Appellant also exhibited extra fatigue and muscle soreness due to fibromyalgia. She put forth full and consistent effort. The report concluded that lifting was limited to 10 pounds on an infrequent rather than occasional basis and that repetitive reaching, handling, or fingering with appellant's right hand could not be tolerated.

Counsel requested reconsideration on March 12, 2014 of the May 17, 2012 OWCP decision based on the December 2013 functional capacity evaluation and a report from Dr. Sandell. He argued that appellant could not physically perform the duties of a bank teller. Counsel also argued that her medications limited her from driving and impaired her cognitive functions. On February 17, 2014 Dr. Sandell reviewed appellant's functional capacity evaluation dated December 2013 and provided restrictions of no lifting greater than 10 pounds on an infrequent basis, no repetitive reaching with the right arm, no repetitive handling, or fingering with the right arm, frequent change of position with no prolonged sitting, standing, or walking.

By decision dated May 16, 2014, OWCP denied modification of the loss of wage-earning capacity determination. It found that appellant had not submitted sufficient medical evidence to establish a material change in her injury-related condition. OWCP also stated that there was no evidence that the original loss of wage-earning capacity determination was in error.

Counsel requested reconsideration on July 7, 2014 of the May 7, 2012 and submitted additional medical evidence. In a report dated June 3, 2014, Dr. Sandell stated that his work restrictions were based on the functional capacity evaluation. He noted that this testing determined a patient's functional abilities and limitations and that some limitations were based on pain tolerance. On July 22, 2014 Dr. Sandell stated that appellant had accepted claims for cervical sprain, right shoulder sprain, right shoulder calcifying tendinitis, and right carpal tunnel syndrome. He restricted her from lifting more than 15 pounds on the basis that heavier lifting may aggravate her cervical symptoms, right shoulder symptoms, and right wrist. Dr. Sandell also restricted appellant from repetitive reaching with her right arm to avoid increased inflammation in her shoulder sprain and calcifying tendinitis. He stated that repetitive activities of the upper extremities could cause recurrence of carpal tunnel syndrome.

By decision dated August 18, 2014, OWCP denied modification of the loss of wage-earning capacity determination finding that the medical evidence did not establish a change in the nature and extent of appellant's injury-related condition and that the restrictions provided appear to be based on the fear of possible injury.

Dr. Sandell performed an electromyogram and nerve conduction velocity study on August 15, 2014, which he found was within normal limits in the right upper extremity.

Counsel requested reconsideration on September 11, 2014 and stated that right carpal tunnel syndrome was an accepted condition under a separate claim.

By decision dated October 21, 2014, OWCP denied modification of the loss of wage-earning capacity determination finding that the medical evidence in the record did not establish a material change in appellant's accepted employment conditions and that she had not established a basis to modify the loss of wage-earning capacity determination.

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.³ Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn and not on actual wages lost.⁴ Compensation payments are based on the wage-earning capacity determination, which remains undisturbed until properly modified.⁵

Modification of a standing loss of wage-earning capacity 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 erroneous.⁶ OWCP's procedures 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. 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.⁷ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁸

ANALYSIS

OWCP accepted that appellant sustained cervical sprain, right shoulder sprain, right shoulder calcifying tendinitis, and right carpal tunnel syndrome due to her employment. It found that the constructed position of teller fairly and reasonably represented her wage-earning

³ 5 U.S.C. § 8115(a); *K.R.*, Docket No. 09-415 (issued February 24, 2010); *Lee R. Sires*, 23 ECAB 12, 14 (1971) (the Board held that actual wages earned must be accepted as the measure of a wage-earning capacity in the absence of evidence showing they do not fairly and reasonably represent the employee's wage-earning capacity).

⁴ *K.R.*, *id.*; *Roy Matthew Lyon*, 27 ECAB 186, 190 (1975). *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

⁵ See *Sharon C. Clement*, 55 ECAB 552, 557 (2004).

⁶ *Sue A. Sedgwick*, 45 ECAB 211, 215-16 (1993); *Elmer Strong*, 17 ECAB 226, 228 (1965).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501.4(a) (June 2013).

⁸ *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

capacity and on June 25, 2013 the Board affirmed this determination finding that the weight of the evidence established that this position was medically and vocationally suitable for appellant. Following the Board's June 25, 2013 decision, counsel requested reconsideration and submitted additional medical evidence.

In support of appellant's claim, she submitted several medical reports from Dr. Sandell. She underwent an additional functional capacity evaluation in December 2013, which determined that she was not capable of performing the essential job duties of a bank teller due her shoulder and right hand conditions. The report concluded that lifting was limited to 10 pounds on an infrequent rather than occasional basis and that repetitive reaching, handling, or fingering with her right hand could not be tolerated. On February 17, 2014 Dr. Sandell reviewed appellant's second functional capacity evaluation dated December 2013 and provided restrictions of no lifting greater than 10 pounds on an infrequent basis, no repetitive reaching with the right arm, no repetitive handling, or fingering with the right arm, frequent change of position with no prolonged sitting, standing, or walking.

The Board finds that the functional capacity evaluation and Dr. Sandell's report are not sufficiently detailed to establish either that the original loss of wage-earning capacity determination was in error or that appellant's has sustained a material change in her injury-related condition. The functional capacity evaluation and Dr. Sandell provided work restrictions more stringent than those in the constructed position of bank teller. He did not explain why appellant's work restrictions were further limited and did not diagnose a new condition or provide additional findings supporting a material change in her accepted conditions. These reports are not sufficient to meet her burden of proof.

In a report dated June 3, 2014, Dr. Sandell stated that his work restrictions were based on the functional capacity evaluation. He noted that this testing determined a patient's function abilities and limitations and that some limitations were based on pain tolerance. On July 22, 2014 Dr. Sandell restricted appellant from lifting more than 15 pounds on the basis that heavier lifting may aggravate her cervical symptoms, right shoulder symptoms, and right wrist. He also restricted her from repetitive reaching with her right arm to avoid increased inflammation in her shoulder sprain, and calcifying tendinitis. Dr. Sandell stated that repetitive activities of the upper extremities could cause recurrence of carpal tunnel syndrome. He did not provide a clear opinion that appellant could not perform the selected position of a bank teller and did not indicate that the additional restrictions he placed upon her were medically necessary. Instead Dr. Sandell indicated that his restrictions were to avoid the possible recurrence or aggravation of her accepted condition. This medical evidence is not sufficient to establish a material change in appellant's employment-related conditions and does not establish that the original loss of wage-earning capacity determination was in error.

Counsel also submitted several arguments before OWCP and on appeal alleging that OWCP failed to consider right carpal tunnel syndrome in finding the bank teller position appropriate, that OWCP failed to consider the impact of appellant's medications had on her ability to drive and to function cognitively, the loss of wage-earning capacity determination was based on stale medical evidence, and that vocational rehabilitation counsel's opinion that the bank teller position did not require overhead reaching was not probative. The Board previously reviewed counsel's arguments in reaching its June 25, 2013 decision. Dr. Sandell's opinion on

the effect of appellant's medications was before the Board, and the Board noted that she had an accepted claim for right carpal tunnel syndrome. He opined that she could not reach above the shoulder at the time of the Board's decision and the Board reviewed the medical evidence in reaching the conclusion that the position of bank teller was medically suitable for appellant.

The Board finds that appellant has not established that her loss of wage-earning capacity determination should be modified based on a material change in her injury-related condition or as the original determination was in error. There is no evidence in the record that appellant has been vocationally rehabilitated and no basis to modify the loss of wage-earning capacity determination.

Appellant may request modification of the wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

CONCLUSION

The Board finds that appellant has not met her burden of proof to modify her loss of wage-earning capacity determination.

ORDER

IT IS HEREBY ORDERED THAT October 21, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 6, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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