

FACTUAL HISTORY

On February 1, 1985 appellant, then a 34-year-old mail carrier, filed an occupational disease claim (Form CA-2) alleging that her job duties caused foot pain. She had stopped work on December 29, 1984. OWCP adjudicated the claim under file number xxxxxx126 and accepted temporary aggravation of right foot neuroma. Appellant had foot surgery in 1985.²

On January 28, 1987 appellant filed an occupational disease claim, adjudicated by OWCP under file number xxxxxx050, alleging that her right foot condition caused chronic pain. By decision dated June 9, 1987, OWCP denied the claim. On August 19, 1988 it accepted right foot neuroma in a claim adjudicated by OWCP under file number xxxxxx129. The files were combined with claim number xxxxxx126 serving as the master file.

In a December 6, 1988 decision, OWCP found that appellant's actual earnings as a mark-up clerk with the employing establishment fairly and reasonably represented her wage-earning capacity and reduced her compensation "based on ... 75 percent of the difference between [her] pay rate as determined for compensation purposes and [her] ability to earn wages in [her] new position." Appellant stopped work at the employing establishment in December 1988 and successfully completed a two-year training program, earning a certificate in office procedures through OWCP's vocational rehabilitation training program. The annual wages for a mark-up clerk were \$28,157.00 effective March 11, 1988. Appellant was reemployed as a secretary in an accountant's office on November 19, 1991.

By decision dated October 9, 1992, OWCP found that appellant's actual earnings in private employment as a secretary fairly and reasonably represented her wage-earning capacity to reflect the difference between the weekly pay rate in her date-of-injury position and the adjusted earning capacity per week for the secretary position, and reduced her compensation applying the *Shadrick* formula.³

On October 26, 1992 OWCP granted appellant a schedule award for 19 percent permanent impairment of the right lower extremity.⁴ Following expiration of the schedule award, compensation based on her wage-earning capacity was reinstated. Appellant continued to receive compensation based on the loss of wage-earning capacity decision, and continued to work, at least until 1998. She worked as a volunteer until 2005.

OWCP also accepted ischemia of the right foot and adjustment disorder due to her right foot condition.

² The record also indicates that appellant had foot surgery in 1981 or 1984. She worked for the employing establishment in Pennsylvania and New Jersey from November 1971 to April 1982. In November 1983, appellant began employment with the current employing establishment.

³ See *Albert C. Shadrick*, 5 ECAB 376 (1953) codified at 20 C.F.R. § 10.403(c)-(e).

⁴ By decision dated July 23, 1993, OWCP found that an overpayment of compensation in the amount of \$368.00 was created because appellant's schedule award was based on an incorrect pay rate.

In May 2008, appellant filed a recurrence claim (Form CA-2a) alleging that the recurrence occurred on November 1, 1998 when she could not complete job duties due to stress from continuous foot pain. By decision dated July 3, 2008, OWCP denied the claimed recurrence because the medical evidence did not establish that it was due to the accepted consequential emotional condition.

Dr. Trent Moyer, an attending Board-certified psychiatrist, submitted a work capacity evaluation dated June 20, 2011 in which he advised that appellant could not perform her usual job because dealing with supervisors and clients and other exposures to pressures caused intolerable panic and anxiety.

In March 2012 Dr. Sharon M. Dreeben, an attending Board-certified orthopedic surgeon, requested authorization for revision surgery. An electrodiagnostic study on March 15, 2012 demonstrated right superficial peroneal sensory neuropathy at the ankle/foot. On April 6, 2012 Dr. Leonard A. Simpson, an orthopedic surgeon and OWCP medical adviser, reviewed the record including the request for surgery. He advised that it was medically reasonable and related to the accepted conditions. The record does not indicate that the surgery was performed.

Dr. Franklin Kozin, an attending Board-certified internist, advised on a November 21, 2013 work capacity evaluation form that appellant could not perform her usual job as mail carrier because she was unable to walk one-half block with a cane.

In December 2013, Dr. Sanjoy Banerjee, Board-certified in anesthesiology and pain medicine, began treating appellant. Following physical examination he diagnosed chronic regional pain syndrome (CRPS) II of the lower extremity and unspecified neuralgia, neuritis, and radiculitis. Dr. Banerjee advised that appellant was unable to work.

In correspondence dated March 7, 2014, appellant requested total disability compensation. Dr. Banerjee continued to treat her on a monthly basis for pain management. He advised that appellant could not work, noting that she could walk less than one block, sit for one hour, and could not stand due to chronic neuropathic pain.

On February 28, 2015 appellant requested modification of OWCP's loss of wage-earning capacity determination, stating that she could no longer work. Evidence submitted included work capacity evaluations from Dr. Moyer dated June 20, 2011 and Dr. Kozin dated November 21, 2011, who both advised that she could not work. To a March 9, 2015 treatment note, Dr. Banerjee appended a note dated March 18, 2015 in which he advised that appellant was unable to work due to CRPS II of the right foot. He indicated that she could walk and stand for less than five minutes and was unable to concentrate in a desk job because of pain and medication side effects. In a March 15, 2015 report, Dr. Moyer advised that he had been supervising appellant's psychiatric treatment since June 2011. He noted that she had an ongoing problem with panic attacks and diagnosed panic disorder without agoraphobia; major depressive disorder, recurrent, mild; and right foot neuroma with chronic pain. Dr. Moyer opined that appellant's psychiatric problems were a direct manifestation of the treatment she received at the employing establishment. He concluded that she was not employable due to continued anxiety symptoms and should be on full disability, based on her psychiatric limitations in conjunction with her chronic physical limitations.

By letter dated July 1, 2015, OWCP informed appellant of the evidence needed to support her request for modification of the October 9, 1992 loss of wage-earning capacity decision.

In a July 6, 2015 report, Dr. Banerjee reiterated his diagnoses and his opinion that appellant could not work. He advised that her condition had worsened since her original diagnosis and surgeries, maintaining that she had developed CRPS II as a result, advising that she could not walk or stand for an extended period of time, and was unable to drive due to loss of use of her right foot. Dr. Banerjee submitted additional reports dated August 5, September 4, and October 2, 2015 describing appellant's pain management.

By decision dated November 10, 2015, OWCP denied modification of the October 9, 1992 loss of wage-earning capacity decision. It found that appellant had submitted insufficient evidence to establish that she was unable to perform the duties of the modified position on which the loss of wage-earning capacity determination was made.

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

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless it meets the requirements for modification.⁶ OWCP procedures at section 2.1501 contain provisions regarding the modification of a formal loss of wage-earning capacity.⁷ The relevant part provides that a formal loss of wage-earning capacity will be modified when: (1) the original rating was in error; (2) the claimant's medical condition has materially changed; or (3) the claimant has been vocationally rehabilitated.⁸

The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁹

ANALYSIS

OWCP issued an October 9, 1992 decision findings that appellant's actual earnings in private employment as a secretary fairly and reasonably represented her wage-earning capacity and reduced her compensation accordingly. Beginning in March 2014, appellant requested total disability compensation.

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

⁶ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity*, Chapter 2.1501 (June 2013).

⁸ *Id.* at § 2.1501.3(a).

⁹ *Jennifer Atkerson*, 55 ECAB 317 (2004).

As a formal loss of wage-earning capacity determination was in effect at the time of the claimed recurrence of total disability, appellant must show a basis for modification of that decision. She did not allege that she was retrained or otherwise vocationally rehabilitated or that the original loss of wage-earning capacity determination was erroneous. Furthermore, the evidence does not establish a material change in appellant's employment-related condition.

The accepted conditions in this case are neuroma and ischemia of the right foot and adjustment disorder due to her right foot condition. While Dr. Kozin advised on November 21, 2013 that appellant was unable to perform her regular job duties, he referenced a mail carrier position, not the modified secretary position on which the loss of wage-earning capacity determination was made. As he provided no discussion of the duties of the modified secretary position on which the loss of wage-earning capacity determination was made, his report is of limited probative value and insufficient to establish modification of the loss of wage-earning capacity determination.¹⁰

Dr. Moyer advised in June 2011 that appellant could not work eight hours a day, noting that she would become panicked and anxious when dealing with supervisors and clients. He advised on March 15, 2015 that he had been supervising appellant's psychiatric treatment since June 2011 and that she had an ongoing problem with panic attacks. Dr. Moyer diagnosed panic disorder without agoraphobia; major depressive disorder, recurrent, mild; and right foot neuroma with chronic pain. He opined that appellant's psychiatric problems were a direct manifestation of the treatment she received at the employing establishment and concluded that she was not employable due to continued anxiety symptoms. Dr. Moyer maintained that she should be on full disability, based on her psychiatric limitations in conjunction with her chronic physical limitations.

As noted above, the accepted emotional condition in this case is adjustment disorder due to appellant's right foot condition. Dr. Moyer did not sufficiently explain why this accepted condition prevented appellant from performing the modified secretarial duties, in light of his additional diagnoses that included a panic disorder that has not been accepted.

Likewise, while Dr. Banerjee advised on March 18, 2015 that, because appellant could only walk and stand briefly and was unable to concentrate in a desk job because of pain and medications, he related this to his diagnosis of CRPS II, also a condition that has not been accepted.

None of appellant's physicians provided a reasoned explanation as to how appellant's accepted conditions worsened such that she was unable to perform the duties-of-the job in which her loss of wage-earning capacity determination was based. Drs. Moyer and Banerjee attributed her symptoms to conditions not accepted as employment related. The Board has held that appellant has the burden of proof to establish that the unaccepted conditions are employment related.¹¹ The Board finds that appellant did not submit sufficient medical evidence to establish a material change in the nature and extent of her injury-related conditions and, therefore, she did

¹⁰ See *F.B.*, Docket No. 15-1188 (issued November 6, 2015).

¹¹ See *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

not meet her burden of proof to show that the October 9, 1992 loss of wage-earning capacity determination should be modified.¹²

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

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish modification of an October 9, 1992 loss of wage-earning capacity decision.

ORDER

IT IS HEREBY ORDERED THAT the November 10, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 12, 2016
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹² See *T.M.*, Docket No. 08-975 (issued February 6, 2009).