

FACTUAL HISTORY

The Office accepted that on October 20, 1999 appellant, then a 39-year-old clerk, sustained a lumbosacral strain and herniated nucleus pulposi (HNP) at L3-4 and L4-5 due to pushing a rack of mail. The Office paid appropriate compensation for periods of disability.

The findings of December 6, 1999 magnetic resonance imaging (MRI) scan testing revealed that appellant had a mild posterior disc bulge indenting the ventral thecal sac at L2-3, a small central posterior HNP indenting the ventral thecal sac at L3-4, a small central posterior HNP indenting the ventral thecal sac at L4-5 and a small central posterior HNP effacing epidural fat at L5-S1.

On June 9, 2000 Dr. David G. Lehrman, a Board-certified orthopedic surgeon, indicated that appellant could return to full-time work with restrictions. He stated that appellant could intermittently lift 5 to 10 pounds. Dr. Lehrman indicated that appellant could stand, walk or lift for four hours per day and could sit for eight hours per day.

In June 2000, appellant returned to work for the employing establishment in a modified clerk position, which was tailored to the work restrictions provided by Dr. Lehrman. On August 11, 2000 Dr. Lehrman indicated that appellant could frequently lift up to 10 pounds and intermittently lift up to 20 pounds. He stated that she could reach, grasp, lift or sit for eight hours per day and could walk, push, pull or twist for four hours per day. In late August 2000, appellant began working in another modified clerk position for the employing establishment which was within Dr. Lehrman's new work restrictions.

In a July 24, 2002 decision, the Office made a formal wage-earning capacity determination. The Office adjusted appellant's compensation to zero based on its finding that the actual wages she earned as a modified clerk fairly and reasonably reflected her wage-earning capacity. The Office indicated that appellant's actual wages as a modified clerk exceeded the wages of the job she held when injured.

The Office accepted that on April 5, 2004 appellant sustained an aggravation of displacement of a lumbar intervertebral disc without myelopathy and aggravation of spinal stenosis of the lumbar region. The injury occurred when appellant turned to pick up a sweater from the back seat of her car.¹ She returned to her usual limited-duty work for the employing establishment. On January 17, 2006 Dr. Lehrman indicated that appellant complained of low back pain. Examination showed that she had flexion to 70 degrees and extension to 15 degrees and that she was neurologically intact.

Appellant stopped work from September 26 to October 10, 2006 and filed a claim for wage-loss compensation for this period because she was disabled due to her October 20, 1999 employment injury.

¹ The Office indicated that appellant's disability due to this injury ended by May 13, 2004. The file for April 5, 2004 injury has been combined with the file for the October 20, 1999 injury.

Appellant submitted a September 26, 2006 report in which she stated that she reported experiencing pain in her back and right leg after “she tried to get out of a chair” on a Saturday during the prior week. Dr. Lehrman indicated that examination showed that appellant was neurologically intact but that extension was limited to about 15 degrees and lateral bending was painful to about 10 degrees to the left and right. There was tenderness of the S1 joint and paravertebral spasm on the right and straight leg raising testing yielded positive results. Dr. Lehrman diagnosed acute lumbar pain over preexisting herniated disc and spinal stenosis and stated, “She is to hold off working for two weeks and see me again for followup.”²

In a form report dated September 26, 2006, Dr. Lehrman listed the date of injury as October 20, 1999 and history of injury as “ongoing history lumbosacral pain exacerbation remission.” He listed findings of lumbosacral spasms, listing and loss of range of motion and diagnosed herniated disc and spinal stenosis. Dr. Lehrman checked a “yes” box indicating that the diagnosed condition was caused or aggravated by the reported employment activity and indicated that period of disability was “to be determined.”

On October 10, 2006 Dr. Lehrman indicated that appellant reported that her condition was “much improved” although she still had “a sense of spasm of her back going out.” He indicated that appellant exhibited no further listing and was neurologically intact but noted that she did have S1 area tenderness. Dr. Lehrman noted that appellant could return to her regular light-duty work.³

In a November 21, 2006 letter to the employing establishment, Dr. Lehrman stated:

“This is in response to your recent letter asking for further consideration of [appellant’s] claim requiring medical evidence to support her current conditions as related to the work injury sustained [on] October 20, 1999.

“Since I have been treating her for this period of time, [appellant] has had chronic lumbar complaints with radicular complaints. [She] has rarely been without pain during this entire process, has had episodic exacerbations without new injuries and I have been of the opinion that she has been suffering from the same back-related complaints that were initiated in 1999 through November 21, 2006.

“[Appellant’s] general condition has not been worsening. [She] has been able to work light duty but has had exacerbations unrelated to any specific injury. [Appellant] has responded well to therapy and treatments and returned to work continuing her productivity.”⁴

² In a brief note dated September 26, 2006, Dr. Lehrman diagnosed spinal stenosis and HNP at L5. In another September 26, 2006 note, he indicated that appellant should not work for two weeks.

³ Appellant returned to her light-duty work on October 11, 2006. Her work restrictions continued to include continuous lifting of no more than 10 pounds and intermittent lifting of no more than 20 pounds.

⁴ In a November 21, 2006 clinical note, Dr. Lehrman stated that appellant reported intermittent back and left leg pain but was able to continue with her light-duty work.

In a January 5, 2007 decision, the Office denied appellant's claim on the grounds that she did not submit sufficient medical evidence to establish that she sustained a recurrence of total disability for the period September 26 to October 10, 2006 due to her October 20, 1999 employment injury. The Office did not consider whether appellant's work stoppage from September 26 to October 10, 2006 warranted a modification of her July 24, 2002 wage-earning capacity determination.

Appellant stopped work from June 21 to July 2, 2007 and filed a claim alleging that she was entitled to compensation for this period because she was disabled due to her October 20, 1999 employment injury.

Appellant submitted a June 26, 2007 report in which Dr. Lehrman stated that she reported that she was "getting on a bench" and developed severe right low back pain which radiated into her right buttock and intermittently into her right thigh and right calf. Dr. Lehrman indicated that examination showed no gross loosening and that flexion was limited to 10 degrees with spasm, extension was limited to about 15 to 20 degrees and lateral bending was limited to about 10 to 15 degrees. Appellant had tenderness over the paraspinals and marked tenderness over the sacroiliac joint on the right. Dr. Lehrman diagnosed "lumbosacral exam[ination] show[ing] abrasion of preexisting disc with lumbar radiculitis."⁵ In a July 26, 2007 form report, he listed the date of injury as June 19, 2007 and listed the history of injury as "no injury sudden onset [illegible]." Dr. Lehrman diagnosed "exacerbation status post herniated disc L5," checked a "yes" box indicating that the diagnosed condition was caused or aggravated by the reported employment activity and indicated that period of disability was "to be determined."⁶

In an August 14, 2007 decision, the Office determined that appellant did not meet her burden of proof to modify the wage-earning capacity determination based on a change in her medical condition during her work stoppage from June 20 to July 2, 2007.

Appellant requested a hearing before an Office hearing representative of the Office's January 5, 2007 decision. At the July 25, 2007 hearing, she indicated that she wanted the Office to consider two claims, *i.e.*, (1) that beginning June 20, 2007 her October 20, 1999 employment injury caused a material change in her medical condition which required modification of the Office's July 24, 2002 wage-earning capacity determination; and (2) that she sustained recurrences of total disability for the periods September 26 to October 10, 2006 and June 21 to July 2, 2007 due to her October 20, 1999 employment injury.

Appellant submitted a July 24, 2007 letter in which Dr. Lehrman stated that the first sentence of the third paragraph of his November 21, 1999 should have read, "[Appellant's] general back condition has not been worsening; meaning that she has not suffered new injuries." Dr. Lehrman noted that appellant had rarely been without pain since her October 20, 1999 injury

⁵ In a June 26, 2007 note, Dr. Lehrman diagnosed "status post herniated disc L5 exacerbation."

⁶ Dr. Lehrman also indicated that if appellant responded to treatment she could return to her usual light-duty work on July 2, 2007.

which caused permanent impairment “with a diagnosis of herniated disc of the lumbar spine and spinal stenosis.” He stated:

“[Appellant] continues to have vulnerability from her underlying condition, with significant symptoms and episodic severe exacerbations which causes her total disability and to be out of work on occasions due to her original injury.

“[Appellant] has been totally disabled for work: from September 26 to October 10, 2006 and June 26 to July 2, 2007.”

The findings of a June 27, 2007 MRI scan showed degenerative changes at L2-3, L3-4, L4-5 and L5-S1. The report indicated that no change had occurred since an April 13, 2007 MRI scan test.

In a September 27, 2007 decision, the Office hearing representative affirmed the January 5, 2007 decision. The Office hearing representative determined that appellant had not met her burden of proof to modify the Office’s wage-earning capacity determination based on her medical condition during her work stoppage from September 26 to October 10, 2006.⁷

LEGAL PRECEDENT -- ISSUE 1

Once a loss of wage-earning capacity is determined, a modification of such a 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 the award should be modified.⁹

Section 8115(a) of the Federal Employees’ Compensation Act provides that the “wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity.”¹⁰ The position in which actual wages are earned generally should not be an odd-lot or makeshift position designed for appellant’s particular needs; it also generally should not be seasonal in nature.¹¹ The Board has stated, “Generally, wages actually earned are the best measure of a wage-earning capacity and in the

⁷ It should be noted that in its January 5, 2007 decision the Office did not address the July 24, 2002 wage-earning capacity determination and only analyzed whether appellant had established a recurrence of disability for the period September 26 to October 10, 2006 due to her October 20, 1999 employment injury.

⁸ *George W. Coleman*, 38 ECAB 782, 788 (1987); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

⁹ *Jack E. Rohrabough*, 38 ECAB 186, 190 (1986).

¹⁰ 5 U.S.C. § 8115(a).

¹¹ See *James D. Champlain*, 44 ECAB 438, 440-41 (1993); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.814.7 (July 1997).

absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure."¹²

ANALYSIS -- ISSUE 1

The Office accepted that on October 20, 1999 appellant, then a 39-year-old clerk, sustained a lumbosacral strain and HNP at L3-4 and L4-5 due to pushing a rack of mail.¹³ In August 2000, she returned to work for the employing establishment in a modified clerk position which was tailored to the work restrictions provided by Dr. Lehrman, an attending Board-certified orthopedic surgeon.¹⁴ In a July 24, 2002 decision, the Office conducted a formal wage-earning capacity determination. The Office adjusted appellant's compensation to zero based on its finding that the actual wages she earned as a modified clerk fairly and reasonably reflected her wage-earning capacity.¹⁵

Appellant stopped work from September 26 to October 10, 2006 and filed a claim alleging that she was entitled to compensation for this period because she was disabled due to her October 20, 1999 employment injury. She stopped work from June 21 to July 2, 2007 and filed a claim alleging that she was entitled to compensation for this period because she was disabled due to her October 20, 1999 employment injury. The Office initially considered appellant's claim in terms of whether she had established a recurrence of total disability on or after September 26, 2006 due to her October 20, 1999 employment injury. It later adjudicated whether she met her burden of proof to modify the Office's July 24, 2002 wage-earning capacity determination. The Board has jurisdiction over both these issues.

Appellant has not claimed or otherwise shown that the Office's original July 24, 2002 wage-earning capacity determination was erroneous. In the present case, the Office based appellant's wage-earning capacity determination that her actual earnings as a modified clerk beginning in August 2000 represented her wage-earning capacity.¹⁶ There is no evidence that appellant's actual earnings as a modified clerk did not fairly and reasonably represent her wage-earning capacity and the Office properly adjusted her compensation based on this wage-earning capacity determination.¹⁷ The position was not an odd-lot or makeshift position designed for

¹² *Floyd A. Gervais*, 40 ECAB 1045, 1048 (1989); *Clyde Price*, 32 ECAB 1932, 1934 (1981).

¹³ The Office also accepted that on April 5, 2004 appellant sustained an aggravation of displacement of a lumbar intervertebral disc without myelopathy and aggravation of spinal stenosis of the lumbar region when she turned to pick up a sweater from the back seat of her vehicle.

¹⁴ The job limited frequent lifting to 10 pounds and intermittent lifting to 20 pounds.

¹⁵ The Office indicated that appellant's actual wages as a modified clerk exceeded the wages of the job he held when injured.

¹⁶ Disability is defined in the implementing federal regulations as "the incapacity, because of an employment injury, to earn the wages the employee was receiving *at the time of injury*." (Emphasis added.) 20 C.F.R. § 10.5(f). The Office applied the principles enunciated in *Albert C. Shadrick*, 5 ECAB 376 (1953), in order to calculate the adjustment in appellant's compensation.

¹⁷ See *Clarence D. Ross*, 42 ECAB 556, 561-62 (1991).

appellant's particular needs; nor was it seasonal in nature.¹⁸ For these reasons, appellant has not shown that the Office's original determination with regard to her wage-earning capacity was erroneous. She also has not alleged or otherwise shown that she has been retrained or otherwise vocationally rehabilitated.

Appellant has not shown that was a material change in the nature and extent of her employment-related condition such that the Office's July 24, 2002 wage-earning capacity determination should be modified. She received primary care from Dr. Lehrman, a Board-certified orthopedic surgeon. The Board has carefully reviewed Dr. Lehrman's reports and notes that they show that appellant occasionally experienced notable flare-ups of back and lower extremity symptoms, most notably during the periods when she stopped work between September 26 and October 10, 2006 and between June 21 and July 2, 2007.

On September 26, 2006 Dr. Lehrman stated that examination showed that appellant was neurologically intact but that extension was limited to about 15 degrees and lateral bending was painful to about 10 degrees to the left and right. There was tenderness of the S1 joint and paravertebral spasm on the right and straight leg raising testing yielded positive results. He attributed this flare-up in symptoms to appellant's October 20, 1999 employment injury and later indicated that her work stoppage from June 20 to July 2, 2007 was due to this injury. On June 26, 2007 Dr. Lehrman stated that appellant showed no gross loosening and that flexion was limited to 10 degrees with spasm, extension was limited to about 15 to 20 degrees and lateral bending was limited to about 10 to 15 degrees. Appellant had tenderness over the paraspinals and marked tenderness over the sacroiliac joint on the right. He again attributed this flare-up in symptoms to appellant's October 20, 1999 employment injury and later indicated that her work stoppage from June 20 to July 2, 2007 was due to this injury.

The Board notes that, while appellant's symptoms worsened to some extent during the above-mentioned two brief periods, her symptoms during these periods appear similar to when she was able to work.¹⁹ In other words, while it can be said that appellant's employment-related condition worsened during these periods there was no "material" worsening in her employment-related condition which would warrant modification of the wage-earning capacity determination. As stated by Dr. Lehrman in a November 21, 2006 letter, appellant had occasional increases in symptoms, but her essential condition related to the October 20, 1999 employment injury remained the same. Regarding appellant's medical condition related to the October 20, 1999 employment injury, Dr. Lehrman stated:

"Since I have been treating her for this period of time, the patient has had chronic lumbar complaints with radicular complaints. The patient has rarely been without pain during this entire process, has had episodic exacerbations without new injuries and I have been of the opinion that she has been suffering from the same

¹⁸ See *supra* note 11 and accompanying text.

¹⁹ Appellant was able to work almost seven years after the October 20, 1999 injury before experiencing her first two-week flare-up and then was able to work another eight weeks before suffering another two-week flare-up. Appellant returned to her regular light-duty work after the second brief work stoppage. Even during the periods she worked, appellant had back and leg pain and exhibited limited back motion.

back-related complaints that were initiated in 1999 through today, November 21, 2006.

“The patient’s general condition has not been worsening.²⁰ The patient has been able to work light duty but has had exacerbations unrelated to any specific injury. She has responded well to therapy and treatments and returned to work continuing her productivity.”

For these reasons, appellant did not meet her burden of proof to modify the Office’s July 24, 2002 wage-earning capacity determination.

LEGAL PRECEDENT -- ISSUE 2

When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative, and substantial evidence a recurrence of total disability and show that she cannot perform such light duty. As part of this burden the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.²¹ It is well established that proceedings under the Act are not adversarial in nature, and while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.²²

ANALYSIS -- ISSUE 2

Appellant also alleged that she sustained recurrences of total disability for the periods September 26 to October 10, 2006 and June 20 to July 2, 2007 due to her October 20, 1999 employment injury.

The Board notes that, while none of the reports of Dr. Lehrman are completely rationalized, they are consistent in indicating that appellant sustained recurrences of disability for the periods September 26 to October 10, 2006 and June 21 to July 2, 2007 due to her October 20, 1999 employment injury. This evidence is not contradicted by any substantial medical or factual evidence of record. In reports dated September 26, 2006 to July 24, 2007, Dr. Lehrman indicated that appellant had increased symptoms due to her October 20, 1999 employment injury, including more restrictive back motion, during the periods September 26 to October 10, 2006 and June 21 to July 2, 2007. He determined that residuals of the October 20, 1999 employment injury prevented appellant from working during the periods September 26 to October 10, 2006 and June 21 to July 2, 2007.

²⁰ In a July 24, 2007 letter, Dr. Lehrman stated that this sentence should have read, “[Appellant’s] general back condition has not been worsening; meaning that she has not suffered new injuries.”

²¹ *Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

²² *Dorothy L. Sidwell*, 36 ECAB 699, 707 (1985); *William J. Cantrell*, 34 ECAB 1233, 1237 (1983).

While these reports are not sufficient to meet appellant's burden of proof to establish her recurrence of disability claim, they raise an uncontroverted inference between appellant's claimed periods of disability and the October 20, 1999 employment injury, and are sufficient to require the Office to further develop the medical evidence and the case record.²³ The case is remanded to the Office for further development of this matter. After such development it deems necessary, the Office should issue an appropriate decision.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to modify the Office's July 24, 2002 wage-earning capacity determination. The Board further finds that the case is not in posture for decision regarding whether appellant met her burden of proof to establish that she sustained a recurrence of total disability on or after September 26, 2006 due to her October 20, 1999 employment injury. The case is remanded to the Office for further development.

²³ See *Robert A. Redmond*, 40 ECAB 796, 801 (1989). The Board notes that there is no inherent contradiction between the denial of appellant's claim for modification of the Office's wage-earning capacity determination and the remand of the case, based on the same medical evidence, for further consideration of the recurrence of disability issue. As discussed in the respective legal precedent sections, the legal standards are different for modifying wage-earning capacity determinations and for establishing recurrence of disability claims.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' September 27 and August 14, 2007 decisions are affirmed with respect to the issue of modification of the Office's wage-earning capacity determination. The September 27 and January 5, 2007 decisions are set aside with respect to the issue of recurrence of disability. The case is remanded to the Office for further proceedings consistent with this decision of the Board.

Issued: May 19, 2008
Washington, DC

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

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

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