United States Department of Labor
Employees' Compensation Appeals Board

B.B., Appellant	)	
and	)	**Docket No. 07-628**
	)	**Issued: January 25, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Kenosha, WI, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 3, 2007 appellant filed an appeal from decisions of the Office of Workers' Compensation Programs dated March 9, May 16, July 25, September 27, October 12 and November 28, 2006. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant sustained a recurrence of disability on September 6, 2005; (2) whether the Office properly determined that her actual wages as a modified mail processing clerk fairly and reasonably represented her wage-earning capacity; and (3) whether appellant met her burden of proof to establish that modification of the wage-earning capacity decision was warranted.

FACTUAL HISTORY

On January 3, 2002 appellant, then a 47-year-old distribution clerk, filed a Form CA-2, occupational disease claim, alleging that factors of employment caused tennis elbow, and right

wrist and shoulder pain. She began working modified duty. The Office accepted that appellant sustained right elbow tendinitis. She received wage-loss compensation for intermittent periods of disability.[1] On January 10, 2003 the Office accepted that appellant sustained employment-related right lateral epicondylitis and authorized surgery which was performed on January 31, 2003 by Dr. Donald J. Zoltan, a Board-certified orthopedic surgeon. Appellant began receiving wage-loss compensation for total disability on February 1, 2003. She returned to limited duty on July 7, 2003, but again stopped work and began receiving wage-loss compensation for total disability on July 12, 2003. A July 31, 2003 magnetic resonance imaging (MRI) scan of the cervical spine demonstrated severe degenerative change at C5-7. Appellant returned to four hours a day of limited duty on November 12, 2003. On November 18, 2003 the Office accepted that she sustained employment-related cervical radiculopathy. On November 24, 2003 appellant began working six hours of limited duty per day and received wage-loss compensation for two hours a day. Additional accepted conditions included right wrist tendinitis and left lateral epicondylitis.

A June 7, 2004 functional capacity evaluation indicated that appellant could perform sedentary duty for eight hours a day and light duty, beginning at four hours and working up to eight hours a day as tolerated. On August 2, 2004 appellant accepted a modified mail processing clerk position, working from 3:00 a.m. to 9:50 a.m. and off Friday and Sunday.[2] She began working eight hours a day on August 2, 2004. Based on requests by appellant's attending Board-certified family practitioner, Dr. Leonardo Montemurro, and Board-certified neurosurgeon, Dr. Arvind Ahuja, she requested that her start time be changed to 5:00 a.m. On August 14, 2004 she began work at that time, for a total of six hours a day. Appellant submitted Form CA-7 claims and received wage-loss compensation for two hours a day from August 14, 2004 to January 21, 2005.

In reports dated January 14 and 17, 2005, Dr. Montemurro and Dr. Alexander T. Hawkins, a neurosurgeon and associate of Dr. Ahuja, advised that appellant could begin a trial of working eight hours a day. On February 3, 2005 appellant accepted a job offer and began working eight hours a day from 3:00 a.m. to 11:30 a.m.[3]

On August 15, 2005 Dr. Dana R. Trotter, Board-certified in internal medicine and rheumatology, advised that it was medically necessary that appellant start work at 5:00 a.m. and be off Saturday and Sunday. In reports dated August 18, 2005, Dr. Zoltan noted that appellant had difficulty getting to sleep and recommended that she work Monday through Friday, beginning at 5:00 a.m. due to her chronic pain, fibromyalgia and arthritis. By report dated August 22, 2005, Dr. Hawkins advised that, due to appellant's neck and back pain, she could work eight hours a day but should start work at 5:00 a.m. In an August 31, 2005 report,

[1] The instant claim was adjudicated by the Office under file number 102007131. Appellant has an additional claim, file number 100493693, for an accepted lumbosacral strain and displacement of intervertebral disc.

[2] The job duties, on an as needed basis, were firm mail coverage, mark-up area duties, back-up cage duties, challenge and assist visitors entering back dock area and miscellaneous duties within restrictions. The restrictions were that she could throw mail for half an hour per hour, lift up to 20 pounds frequently and 35 pounds occasionally.

[3] The job offered was essentially the same as that accepted by appellant on August 2, 2004. *Id.*

Dr. Montemurro concurred with the shift recommendations, advising that fibromyalgia and chronic pain could lead to sleep deprivation.

In statements dated September 19, 2005, Karen Garber, the postmaster, and Bruce Murdoch, appellant's supervisor, described an August 24, 2005 meeting in which appellant discussed starting work at 5:00 a.m. with Saturday and Sunday off. On September 6, 2005 appellant began working six hours a day, with a 5:00 a.m. start time. She filed claims for compensation of two hours a day.

By letter dated October 24, 2005, the Office advised appellant of the medical evidence needed to support her claimed disability. In a November 21, 2005 letter, she stated that she needed a longer period of sleep, noting that when she began work at 3:00 a.m. her neck, shoulders, low back, and elbows hurt more and that she needed two days off in a row to recover. In a November 8, 2005 report, Dr. Montemurro advised that her markedly worsened condition, including weight gain, adverse medication reaction, pain flares and advanced progression regarding her neck, back, shoulders, elbows and hands, all worsened with a 3:00 a.m. work start and improved with a 5:00 a.m. start. He recommended that beginning work at 5:00 a.m. with Saturday and Sunday off would aid in healing. In a November 9, 2005 report, Dr. Zoltan advised: "there is no doubt that better sleep and longer sleep and rest is helpful with chronic pain, fibromyalgia, and arthritis, all of which she has." He stated that work restrictions of beginning work at 5:00 a.m. for eight hours per day, Monday through Friday with Saturday and Sunday off were permanent and medically indicated and necessary for the medical conditions "described above." In a November 14, 2005 report, Dr. Trotter found it to be "reasonable and medically necessary" for appellant to modify her work schedule "due to her medical conditions." He noted appellant's diagnoses of fibromyalgia, chronic pain, and compressed discs in her cervical and lumbar spine. Appellant stated that it was "reasonable" for her to begin work at 5:00 a.m., for eight hours a day and that she should be allowed to work Monday through Friday "as she needs the weekend days to recuperate for the week ahead." Dr. Trotter opined that "previously when appellant was put back on a 3:00 a.m. start time her condition worsened. She needs these extended sleep patterns to help with healing." Appellant returned to eight hours of work on December 3, 2005.

In a decision dated December 16, 2005, the Office found that appellant did not sustain a recurrence of disability on September 3, 2005 and was not entitled to wage-loss compensation on or after that date.

On December 28, 2005 Dr. Hawkins advised that appellant could return to her standard work schedule. By report dated December 29, 2005, Dr. Zoltan advised that she could begin work at 3:00 a.m.

On January 12, 2006 appellant requested a review of the written record. In a January 3, 2006 report, Dr. Montemurro advised that her work injuries had degenerated with time and required an alteration in her work schedule. He stated that she needed a regimen of daily exercise, healthy eating and medication with strict adherence to her work restrictions and an acceptable work schedule because pain could throw off her sleep cycle.

By decision dated March 9, 2006, the Office determined that appellant's actual earnings as a modified mail processing clerk fairly and reasonably represented her wage-earning capacity.

In a May 16, 2006 decision, an Office hearing representative affirmed the December 16, 2005 decision, finding that appellant did not sustain a recurrence of disability on September 3, 2005.

On May 30, 2006 appellant began working four hours a day. She filed claims for compensation for four hours a day.[4] In reports dated May 16 to June 21, 2006, Dr. Hawkins reiterated the diagnosis of cervical radiculopathy. He advised that appellant should limit her work to 4 hours a day, 20 hours a week of limited duty and that she should not start work earlier than 5:00 a.m., noting that throwing letters for 8 hours a day aggravated her November 20, 2001 injury. In reports dated June 1 and 5, 2006, Dr. Zoltan advised that working eight hours a day had aggravated appellant's elbow symptoms, stating that the increased hours and increased stress and repetitive use and gripping activities caused a significant worsening of pain. He opined that she could not work eight hours a day because of significant right elbow pain "among other things."

In a June 22, 2006 letter, the employing establishment advised that appellant had been working a full-time limited-duty assignment since February 3, 2005 and her work had not changed since that time. Appellant began working two hours a day on June 26, 2006. On June 27, 2006 Ms. Garber stated that appellant did not throw letters for up to eight hours per day and stated that her job rotated and many days she worked in the firm room where she threw off and on, collectively for not more than four hours. She explained that appellant's scheduled work hours of 3:00 a.m. to 11:00 a.m. with Sunday and Friday as her nonscheduled days were designed around the mail arrival.

On July 11, 2006 appellant requested reconsideration of the December 16, 2005 and May 16, 2006 decisions denying a recurrence of disability on September 3, 2005. She submitted medical reports previously of record. In a June 12, 2006 report, Dr. Hawkins noted appellant's history of chronic neck and low back pain secondary to degenerative disc disease and fibromyalgia. Dr. Hawkins stated that for the period September 3 to December 27, 2005 he recommended that appellant reduce her work hours and not work on weekends to allow her additional time to recuperate from the repetitive motion and lifting involved in her work, advising that these activities aggravated her preexisting condition that originated with the November 20, 2001 employment injury.

By decision dated July 25, 2006, the Office denied appellant's claim for compensation beginning May 26, 2006.

By letter dated August 4, 2006, appellant stated that her medication made her sleep 8 hours a night and that the employing establishment cut her schedule to 24 hours a week. She stated that she threw letters for eight hours a day, four days a week, had to bend and lift, was

[4] Appellant also submitted a Form CA-2 claim on June 15, 2006 for neck, right wrist, left and right elbow conditions, adjudicated by the Office under file number 102055290. By letter dated July 11, 2006, the Office informed her that this was a duplicate of the instant claim, file number 102007131, and would be deleted.

required to use more repetitive motions which caused many physical complaints, and that the employing establishment forced her to go home at 7:00 a.m. when her doctors wanted her to work 5:00 a.m. to 9:00 a.m.

On August 9, 2006 appellant requested reconsideration of the July 25, 2006 decision. By report dated April 20, 2006, Dr. Montemurro reiterated that appellant should work only 4 hours a day, 20 hours a week and begin work at 5:00 a.m. In reports dated June 8 to August 1, 2006, Dr. Hawkins noted appellant's report that she was working from 5:00 a.m. to 7:00 a.m., five days a week, and her complaints of low back pain with right upper and lower extremity numbness and cramping, cervical radiculopathy, and right wrist and elbow pain. He advised that appellant's limitations included no repetitive motions such as mail throwing for more than 30 minutes per hour and reiterated his diagnoses and work schedule restrictions, stating that the restrictions were required because appellant's job had changed to throwing letters for approximately 8 hours a day and this had aggravated her preexisting condition, causing more painful neck and shoulders and making her right upper extremity weaker. Dr. Hawkins explained that working earlier than 5:00 a.m. changed her sleep pattern and reduced her overall, restful sleep each night, which caused increased inflammation in her lower cervical spine leading to increased neck and right shoulder pain and weakness.

By decision dated September 27, 2006, the Office denied modification of the July 25, 2006 decision. In a decision dated October 12, 2006, the Office denied modification of the May 16, 2006 decisions.[5]

In separate requests dated October 26, 2006, appellant requested reconsideration of the September 26 and October 12, 2006 decisions. She submitted an August 11, 2006 MRI scan of the lumbar spine that demonstrated mild diffuse changes of degenerative spondylosis in the lumbar spine. A cervical spine MRI scan on August 11, 2006 demonstrated degenerative spondylosis of the lower cervical spine with a moderate disc protrusion at C5-6. The study was read as showing no significant change from the September 10, 2004 MRI scan. By report dated October 17, 2006, Dr. Hawkins advised that appellant's lifting was restricted to 20 pounds and that she should not flex or extend her neck or back more than once per minute with no more than 30 minutes of sitting, standing or repetitive motion at a time. He reiterated that she could work 4 hours a day, 20 hours a week and should begin work at 5:00 a.m. In a treatment note dated October 19, 2006, Dr. Zoltan advised that appellant was having significant pain problems with both elbows while lifting and gripping at work. Examination demonstrated tender medial and lateral epicondyles of both elbows. Dr. Zoltan advised that appellant's permanent restrictions were changed to 30 pounds lifting occasionally and she could work 4 hours a day, 20 hours a

[5] On September 25, 2006 appellant requested that her two claims be combined. By letter dated October 24, 2006, the Office denied the request.

week with 30 minutes of repetitive motions per hour and she not begin work earlier than 5:00 a.m. because of her medication.[6]

In a decision dated November 28, 2006, the Office denied modification of its prior decisions, finding that appellant did not sustain a recurrence of disability of September 3, 2005. In a separate decision also dated November 28, 2006, the Office found that appellant did not sustain a recurrence of disability on May 26, 2006 and denied modification of the March 9, 2006 wage-earning capacity decision.

LEGAL PRECEDENT -- ISSUE 1

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[7] This term also means an inability to work when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties or a reduction-in-force), or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.[8]

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that light duty can be performed, the employee has the burden to establish by the weight of reliable, probative and substantial evidence a recurrence of total disability. As part of this burden of proof, the employee must show either a change in the nature and extent of the injury-related condition, or a change in the nature and extent of the light-duty requirements.[9]

A claimant's burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the condition is causally related to the employment injury and supports that conclusion with sound medical rationale. Where no such rationale is present, the medical evidence is of diminished probative value.[10]

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[6] On November 18, 2006 appellant filed another occupational disease claim, stating that working full time with lifting and repetitive motions caused increased pain. In a letter of controversion dated November 24, 2006, the employing establishment noted that appellant had been working only two hours a day since June 6, 2006. By letter dated December 14, 2006, the Office advised appellant that the November 18, 2006 claim was considered a duplicate and filed all materials submitted with the instant claim.

[7] 20 C.F.R. § 10.5(x); *see Theresa L. Andrews*, 55 ECAB 719 (2004).

[8] *Id.*

[9] *Shelly A. Paolinetti*, 52 ECAB 391 (2001); *Robert Kirby*, 51 ECAB 474 (2000); *Terry R. Hedman*, 38 ECAB 222 (1986).

[10] *Mary A. Ceglia*, 55 ECAB 626 (2004).

ANALYSIS -- ISSUE 1

The issue of whether an employee is disabled from performing work is a medical question and must be resolved by probative medical evidence.[11] On February 3, 2005 appellant began working eight hours of limited duty per day from 3:00 a.m. to 11:30 a.m. and continued in this position until September 6, 2005 when she reduced her schedule to six hours a day with a 5:00 a.m. starting time. She returned to an eight-hour day on December 3, 2005. In support of this later starting time and reduction in the number of hours worked, appellant submitted reports from Drs. Trotter, Zoltan, Hawkins and Montemurro. They generally advised that she should begin work at 5:00 a.m. and be off Saturday and Sunday. None of the physicians, however, provided a rationalized explanation as to why this schedule modification was necessary due to the accepted conditions of bilateral/lateral epicondylitis, right wrist tendinitis and cervical radiculopathy. Dr. Trotter stated that it was reasonable and medically necessary for appellant to start work at 5:00 a.m. due to her medical conditions of fibromyalgia, chronic pain and compressed discs in the cervical and lumbar spine because she needed extended sleep to aid healing and that she needed the weekend off to recuperate. Dr. Zoltan advised that appellant had difficulty getting to sleep and recommended the schedule change because better and longer sleep was helpful for her chronic pain, fibromyalgia and arthritis. Dr. Hawkins advised that due to appellant's neck and back pain she should start work at 5:00 a.m. The conditions of fibromyalgia, chronic pain, arthritis, and compressed discs have not been accepted as employment related, and the medical evidence must demonstrate that the claimed recurrence was caused, precipitated, accelerated or aggravated by the accepted injury.[12] Dr. Montemurro advised that appellant's weight gain, adverse medication reaction, pain flares and advanced progression regarding her neck, back, shoulders, elbows and hands all worsened with a 3:00 a.m. work start and that fibromyalgia and chronic pain could lead to sleep deprivation and opined that since appellant's condition improved with a 5:00 a.m. start, beginning work at 5:00 a.m. with Saturday and Sunday off would aid in healing. While he implied that appellant's employment-related neck, back, elbow and hand conditions had worsened, he did not provide sufficient medical rationale to show that it was medically necessary for appellant to begin work at 5:00 a.m. and be off weekends.[13] The Board finds the medical reports submitted by appellant in support of her claimed recurrence of disability from September 6 to December 3, 2005 to be of diminished probative value and insufficient to support a change in the nature or extent of her employment-related conditions to establish her recurrence claim.[14]

LEGAL PRECEDENT -- ISSUE 2

Section 8115 of the Federal Employees' Compensation Act[15] and Office regulations provide that wage-earning capacity is determined by the actual wages received by an employee if

[11] *Cecelia M. Corley*, 56 ECAB 662 (2005).

[12] *See Ricky S. Storms*, 52 ECAB 349 (2001).

[13] *See Albert C. Brown*, 52 ECAB 152 (2000).

[14] *Id.*

[15] 5 U.S.C. §§ 8101-8193.

the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity or the employee has no actual earnings, wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his or her usual employment, age, qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect the wage-earning capacity in the disabled condition.[16] Generally, wages actually earned are the best measure of a wage-earning capacity and in the 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.[17] Office procedures provide that the Office can make a retroactive wage-earning capacity determination if the claimant worked in the position for at least 60 days, the position fairly and reasonably represented his or her wage-earning capacity and the work stoppage did not occur because of any change in his injury-related condition affecting the ability to work.[18]

ANALYSIS -- ISSUE 2

The Office accepted that appellant sustained employment-related right elbow and wrist tendinitis, right and left lateral epicondylitis and cervical radiculopathy. After surgery in January 2003, appellant initially returned to four hours a day of limited duty but on November 18, 2003 began working six hours of limited duty per day, and on February 3, 2005 began eight hours of limited duty. On September 6, 2005 she reduced her schedule to six hours a day, but again began working eight hours of limited duty on December 3, 2005. By decision dated March 9, 2006, the Office found that appellant's earnings as a modified mail processing clerk fairly and reasonably represented her wage-earning capacity.

The Board finds that appellant's actual earnings as a modified mail-processing clerk fairly and reasonably represent her wage-earning capacity. She began to work full time in this position on December 3, 2005 and continued working in that position until May 30, 2006, after the Office's March 9, 2006 decision. At the time of the March 9, 2006 decision, she had worked in the modified mail processing clerk position for more than 60 days, and there is no evidence that this position was seasonal, temporary or make-shift work designed for appellant's particular needs.[19] As there is no evidence that appellant's wages in this position did not fairly and reasonably represent her wage-earning capacity, they must be accepted as the best measure of her wage-earning capacity.[20]

As appellant's actual earnings in the position of modified mail-processing clerk fairly and reasonably represent her wage-earning capacity, the Board must determine whether the Office

[16] 5 U.S.C. § 8115; 20 C.F.R. § 10.520; *John D. Jackson*, 55 ECAB 465 (2004).

[17] *Hayden C. Ross*, 55 ECAB 455 (2004).

[18] *Selden H. Swartz*, 55 ECAB 272 (2004).

[19] *J.C.*, 58 ECAB ____ (Docket No. 07-1165, issued September 21, 2007). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (July 1997).

[20] *See Loni J. Cleveland*, 52 ECAB 171 (2000).

properly calculated her wage-earning capacity based on her actual earnings. The Board finds that the Office properly found that appellant had no loss of wage-earning capacity based on her actual earnings. Appellant's weekly earnings as a modified mail processing clerk of $908.26 exceeded the current weekly wages of her position on the date of injury or $818.19. Appellant, therefore, had no loss of wage-earning capacity.

LEGAL PRECEDENT -- ISSUE 3

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.[21] The Office's procedure manual provides that, "[i]f 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."[22] This principle is equally applicable to a claim of increased disability. If there is a claim for increased disability that would prevent a claimant from performing the position that was the basis for a wage-earning capacity decision, then clearly there is an issue of whether modification is appropriate, and the case should not be adjudicated as a recurrence of disability.[23] 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.[24] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[25]

Chapter 2.814.11 of the Office's procedure manual contains provisions regarding the modification of a formal loss of wage-earning capacity. 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 changed; or (3) the claimant has been vocationally rehabilitated. Office procedures further provide that the party seeking modification of a formal loss of wage-earning capacity decision has the burden to prove that one of these criteria has been met. If the Office is seeking modification, it must establish that the original rating was in error,

[21] *Katherine T. Kreger*, 55 ECAB 633 (2004).

[22] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

[23] *Katherine T. Kreger*, *supra* note 21.

[24] *Gary L. Moreland*, 54 ECAB 638 (2003).

[25] *Id.*

that the injury-related condition has improved or that the claimant has been vocationally rehabilitated.[26]

ANALYSIS -- ISSUE 3

On March 9, 2006 the Office found that appellant's actual earnings as a full-time modified mail processing clerk fairly and reasonably represented her wage-earning capacity. Thereafter, she requested reconsideration of that decision, and by decision dated November 28, 2006, the Office denied modification of the March 9, 2006 decision. On May 30, 2006 appellant, who had been working eight hours a day since December 3, 2005, reduced her work schedule to four hours a day and filed claims for compensation for four hours a day. On June 26, 2006 she further reduced her work schedule to two hours a day. Appellant contended that her medical condition had changed.

Appellant's scheduled work hours were 3:00 a.m. to 11:00 a.m. with job duties of firm mail coverage, mark-up area duties, back-up cage duties, challenging and assisting visitors entering back dock area and miscellaneous duties within her restrictions on an as needed basis. The restrictions were that she could throw mail for half an hour each hour and lift up to 20 pounds frequently and 35 pounds occasionally. On June 27, 2006 Ms. Garber advised that appellant's work rotated, with some work in the firm room where she would throw mail off and on for not more than four hours a day.

Appellant submitted May 30, 2006 MRI scan studies and reports from Dr. Montemurro, Dr. Hawkins and Dr. Zoltan. The Board finds the medical evidence of record insufficient to establish a material change in the nature and extent of appellant's accepted conditions of right elbow and wrist tendinitis, right and left lateral epicondylitis, and cervical radiculopathy because none of her physicians provided a rationalized explanation as to these conditions prevented her from beginning work at 3:00 a.m., why she could not work eight hours a day, or why she should have the weekends off.[27] In addition to the accepted conditions, appellant has also been diagnosed with chronic pain, fibromyalgia, and degenerative disc disease, and the employing establishment explained that appellant was not throwing mail eight hours a day. She began working at 3:00 a.m. in February 2005 and successfully worked those hours until September 6, 2005.

The MRI scan studies submitted by appellant do not address her ability to work and therefore provide no support for her contention that her wage-earning capacity should be modified.[28] Dr. Montemurro had previously advised that pain could throw off appellant's sleep cycle and that her markedly worsened condition including weight gain, adverse medication reaction, pain flares and advanced progression regarding her neck, back, shoulders, elbows and hands all worsened with a 3:00 a.m. work start and improved with a 5:00 a.m. start and that

[26] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11 (July 1997); *see Sharon C. Clement*, 55 ECAB 552 (2004).

[27] *See Elbert Hicks*, 55 ECAB 151 (2003).

[28] *Id.*

Saturday and Sunday off would aid in healing. He reiterated this opinion regarding a 5:00 a.m. start time on April 20, 2006. Dr. Montemurro also stated that beginning work at 5:00 a.m. with Saturday and Sunday off would aid in healing. He, however, did not demonstrate any knowledge of her work duties or provide a rationalized explanation in support of his opinion that appellant should begin work at 5:00 a.m. and have weekends off. Dr. Montemurro's reports are therefore insufficient to establish a material change in the extent and nature of her employment-related conditions to the degree that she began part-time work.[29]

Dr. Hawkins advised on December 28, 2005 that appellant could return to her standard work schedule. While in later reports dating from May to October 2006, he advised that throwing mail eight hours a day aggravated her November 20, 2001 employment injury, causing more painful neck and shoulders and making her right upper extremity weaker, and that she was restricted to no repetitive motions such as mail throwing for more than 30 minutes per hour, with lifting restricted to 20 pounds, these restrictions are within appellant's job description, and the record does not support that appellant was throwing mail eight hours a day. Medical conclusions based on an inaccurate or incomplete factual history are of diminished probative value.[30] Further, Dr. Hawkins did not explain how working earlier than 5:00 a.m. increased inflammation to appellant's lower cervical spine other than stating that it altered her sleep pattern and caused pain and weakness. His reports are also insufficient to establish a material change in appellant's employment-related conditions.[31]

Moreover, Dr. Zoltan's reports are insufficient to meet appellant's burden. On December 29, 2005 he advised that appellant could begin work at 3:00 a.m. While appellant later advised that repetitive use of the elbows for eight hours a day caused a significant increase in her elbow pain "among other things," and advised that she should not work earlier than 5:00 a.m. because of medication, he too exhibited no specific knowledge of appellant's work duties and did not provide any explanation as to why her medication prevented her from beginning work at 3:00 a.m.[32]

The medical evidence is therefore insufficient to meet appellant's burden of proof to establish that she sustained a material change in the nature and extent of the accepted conditions that would necessitate modification of the March 9, 2006 wage-earning capacity determination. Thus, under the law and the facts of this case, the Office properly denied modification by its November 28, 2006 decision.[33]

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[29] *See David L. Scott,* 55 ECAB 330 (2004).

[30] *See M.W.*, 57 ECAB ____ (Docket No. 06-749, issued August 15, 2006).

[31] *See David L. Scott, supra* note 29.

[32] *Id.*

[33] While appellant claimed that the employing establishment sent her home at 7:00 a.m. when she was willing to work from 5:00 to 9:00 a.m., it appears that the employing establishment was merely accommodating appellant's request for a four-hour workday schedule or from 3:00 a.m. to 7:00 a.m. each day.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained a recurrence of disability on September 3, 2005, that the Office properly determined that her actual earnings as a modified mail processing clerk fairly and reasonably represented her wage-earning capacity, and that she did not meet her burden of proof to establish that the wage-earning capacity determination should be modified.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 28, October 12, May 16 and March 9, 2006 be affirmed.[34]

Issued: January 25, 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

[34] The Board notes that the Office improperly adjudicated the July 25 and September 27, 2006 decisions as recurrences of disability rather than as modification of appellant's wage-earning capacity rating. *Katherine T. Kreger*, *supra* note 21. This, however, is harmless error as the Office cured its mistake by its November 28, 2006 decision finding that appellant had not met her burden of proof to modify the March 9, 2006 wage-earning capacity finding. *See generally Joan F. Martin*, 51 ECAB 131 (1999).