United States Department of Labor
Employees' Compensation Appeals Board

J.T., Appellant	)	
and	)	**Docket No. 08-484**
	)	**Issued: October 6, 2008**
U.S. POSTAL SERVICE, FIVE POINTS STATION, Albuquerque, NM, Employer	)	

Appearances:
Gordon Reiselt, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 28, 2007 appellant, through her attorney, filed a timely appeal from a December 29, 2006 merit decision of the Office of Workers' Compensation Programs, a July 19, 2007 hearing representative's decision and an October 31, 2007 merit decision denying modification of a wage-earning capacity determination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established that the Office's March 27, 2006 wage-earning capacity determination should be modified.

FACTUAL HISTORY

This case is before the Board for the second time. By decision dated January 24, 2005, the Board reversed a June 18, 2004 decision terminating appellant's wage-loss compensation

under 5 U.S.C. § 8106(c) on the grounds that she abandoned suitable work.[1] The Board found that the Office failed to provide her with notice and an opportunity to respond prior to terminating her compensation under section 8106(c). The findings of fact and conclusions of law from the prior decision are hereby incorporated by reference.

On January 24, 2006 appellant accepted a position as a modified rural carrier with the employing establishment. The position required 2 hours of intermittent sitting and walking, 3 hours of sitting and fine manipulation, 1 hour of intermittent sitting, standing and fine manipulation with no standing or walking over 30 minutes at a time. The scheduled hours were from 8:00 a.m. to 3:15 p.m., five days a week.

By decision dated March 27, 2006, the Office reduced appellant's wage-loss compensation to zero based on its finding that her actual earnings as a modified rural carrier effective January 24, 2006 fairly and reasonably represented her wage-earning capacity. It found that her actual earnings in the position met or exceeded the current wages held at the time of her employment injury.

On July 24, 2006 Dr. Barry R. Maron, a Board-certified orthopedic surgeon, discussed appellant's history of a December 30, 1995 motor vehicle accident and her current complaints of low back spasm with pain radiating into her abdomen, neck and upper back. He indicated that she was currently 32 weeks' pregnant and deferred a physical examination until she was postpartum. Appellant performed clerical work for the employing establishment from 8:00 a.m. to 3:15 p.m. for two weeks but "was then moved to three to four hours per day but has not received workman's compensation for her job[-]related continuing health issues." Dr. Maron attributed appellant's prepartum symptoms to the December 30, 1995 motor vehicle accident and found that her "additional pregnancy symptoms (beyond the usual and customary symptoms of pregnancy) are probably caused by the same [motor vehicle accident]." In an accompanying work restriction evaluation, he determined that she was unable to work in her usual position because she was 32 weeks' pregnant and experienced pain in her low back, right side, right thorax and right neck. Dr. Maron opined that appellant could work 2 to 4 hours per day with restrictions, including lifting under 10 pounds, sitting 2 to 3 hours per day, walking 30 minutes at a time and alternating standing and sitting for 30 minutes per day.[2]

On July 31, 2006 appellant filed a recurrence of disability claim commencing on July 29, 2006 causally related to her December 30, 1995 employment injury.[3] She related that the chair provided by the employing establishment in January 2006 to accommodate her medical

[1] Docket No. 04-1887 (issued January 24, 2005). The Office accepted that appellant, then a 21-year-old rural carrier, sustained cervical sprain, multiple contusions and abrasions, a fractured nasal bone requiring septorhinoplasty, aggravation of temporomandibular joint disorder and a herniated nucleus pulposus at L4-5 due to a December 30, 1995 motor vehicle accident.

[2] In a July 24, 2006 letter, Dr. Maron informed the employing establishment that appellant could continue working three to four hours per day. On July 27, 2006 he opined that without her ergonomic chair appellant's low back and neck stress was "significantly aggravated."

[3] In a report dated July 31, 2006, Dr. Lewis Nemes, a licensed psychologist, opined that she should discontinue work in the interest of her pregnancy due to verbal harassment and demands to work outside her restrictions.

restrictions had broken. A supervisor gave her a manager's chair but another supervisor took that chair away.

In a letter dated September 2, 2006, the employing establishment informed appellant that it had purchased a chair for her and that she was to return to work on September 5, 2006. On September 7, 2006 appellant's attorney contended that she had established a recurrence of disability due to the withdrawal of her light-duty assignment.[4] He further related that her physician provided new work restrictions on July 24, 2006 of three to four hours per day.

On October 26, 2006 the Office accepted that appellant sustained a recurrence of disability beginning July 29, 2006. It paid her compensation from July 29 to September 1, 2006.[5]

By letter dated November 6, 2006, counsel argued that the January 10, 2006 position upon which the Office based her wage-earning capacity was no longer suitable as she had increased work restrictions beginning July 24, 2006. He also asserted that the employing establishment did not notify her that it had purchased a chair for her use. Counsel noted that appellant obtained the updated work restrictions at the request of the employing establishment.

By decision dated December 29, 2006, the Office found that appellant had not established that she sustained either an employment-related recurrence of disability after September 2, 2006 or that its determination of her wage-earning capacity should be modified. On January 8, 2007 she requested an oral hearing.

In a report dated February 27, 2007, Dr. Maron discussed appellant's symptoms of low back and sacral pain bilaterally with radiating pain to her hips, knees, upper back and neck. He listed findings on examination and opined that she was temporarily totally disabled from employment. Dr. Maron attributed appellant's symptoms to her December 30, 1995 work injury. In a form report dated February 28, 2007, he diagnosed neck sprain, a herniated disc at L4-5, a right rotator cuff tear, multiple contusions and possible post-traumatic fibromyalgia. Dr. Maron checked "yes" that the condition was caused or aggravated by employment and explained that "all were caused by the head-on [motor vehicle accident] of December 30, 1995." He opined that she was totally disabled beginning December 30, 1995.

At the hearing held on April 11, 2007, appellant contended that she did not receive notice that her chair had been replaced. She had not returned to work because the employing establishment did not offer her a position within her updated restrictions.

In a report dated April 14, 2007, Dr. Maron related that, when he examined appellant on July 24, 2006, he found that the objective findings supported a change in work restrictions. He

[4] On September 6, 2006 appellant related that on July 20, 2006 the employing establishment requested medical documentation of her restrictions. She provided the restrictions on July 25, 2006. Appellant noticed that her ergonomic chair was broken. When she returned to work from July 27 to 29, 2006 she did not have a new chair available.

[5] Appellant gave birth to a daughter on September 27, 2006.

noted that she was fatigued because she was 32 weeks' pregnant and experienced discomfort because she could not take analgesics due to her pregnancy. Dr. Maron stated:

> "[Appellant] had chronic and recurring low back pain which preceded her pregnancy but was worsened by it. Her low back pain went on to, additionally, become a right L5 radiculopathy. Such a pain syndrome caused by (in all reasonable medical probability) a herniated L4-L5 nucleus pulposis, results from direct pressure on the L5 nerve root. The reactive low back muscle spasms and posturing to minimize her symptoms caused a 'low back pain syndrome.' She could not repetitively (and for any useful length of time) bend, stoop, twist, walk, and climb; which posturing was a necessary part of her job description. These symptoms prevented her from working an [eight-]hour shift."

He further attributed her reduction in work hours to right shoulder pain, right thorax and neck pain resulting from her motor vehicle accident, and limitations in cervical and lumbosacral spine motion. In a report dated April 15, 2007, Dr. Maron diagnosed right shoulder impingement syndrome, neck sprain, a herniated disc at L4-5 and L5-S1, multiple contusions and a right rotator cuff tear.

On April 24, 2007 counsel again contended that she was unaware of the reordered chair. He submitted an order form showing that the employing establishment ordered an ergonomic chair on September 19, 2006.

By decision dated July 19, 2007, the Office hearing representative affirmed the December 29, 2006 decision as modified to find that appellant was entitled to compensation for wage loss from September 2 to October 13, 2006. She determined that appellant was unaware that the employing establishment had purchased her an ergonomic chair until she received an Office letter advising her of that fact on October 13, 2006. The hearing representative determined that she had not submitted sufficient medical evidence to establish that her wage-earning capacity should be modified.

In an August 3, 2007 report, Dr. Maron indicated that he had reviewed the hearing representative's July 19, 2007 decision. He found that appellant experienced difficulty meeting the requirements of her January 2006 modified position. Regarding her increased work restrictions, Dr. Maron stated:

> "[Appellant's] pregnancy was a factor as I stated, but only to the degree that it aggravated her deteriorating medical condition (as I explained in the April 14, 2007 report). Her condition remained the same post pregnancy (as stated in my April 14, 2007 report).
>
> "Therefore the objective medical evidence demonstrates that there was material change in [appellant's] injury-related condition not attributable solely to her pregnancy. Her materially changed medical condition, (post pregnancy) would have required a new job accommodation (viz: [three to four] hours per day rather than [seven to eight] hours per day as previously required)."

On August 10, 2007 appellant, through her attorney, requested reconsideration. In a report dated September 4, 2007, Dr. Maron diagnosed right shoulder impingement syndrome, neck sprain, a herniated disc at L4-5 and L5-S1 and a rotator cuff tear. He listed findings on examination and found unchanged work restrictions. By decision dated October 31, 2007, the Office denied modification of its July 19, 2007 decision.

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.[6] Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.[7]

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

ANALYSIS

The Office accepted that appellant sustained cervical sprain, multiple contusions and abrasions, a fractured nasal bone requiring septorhinoplasty, aggravation of temporomandibular joint disorder and a herniated nucleus pulposus at L4-5 due to a December 30, 1995 motor vehicle accident. Following periods of disability, appellant returned to work from 8:00 a.m. to 3:15 p.m. on January 24, 2006 as a modified rural carrier. By decision dated March 27, 2006, the Office reduced appellant's compensation to zero on the grounds that her actual earnings fairly and reasonably represented her wage-earning capacity.

Appellant stopped work on July 29, 2006 and filed a notice of recurrence of disability beginning that date. She attributed her work stoppage to the employing establishment's failure to replace her broken ergonomic chair. When an employee claims compensation for total disability after a wage-earning capacity determination has been made, this raises the issue of whether the wage-earning capacity determination should be modified.[10] This does not preclude the Office, however, from acceptance of a limited period of employment-related disability, without a formal modification of the wage-earning capacity determination.[11] The Office accepted that appellant sustained a recurrence of disability from July 29 to October 13, 2006

[6] *See* 5 U.S.C. § 8115 (determination of wage-earning capacity).

[7] *Sharon C. Clement*, 55 ECAB 552 (2004).

[8] *Tamra McCauley*, 51 ECAB 375, 377 (2000).

[9] *Id*.

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

[11] *See Sharon C. Clement*, *supra* note 7.

because she was not provided with an ergonomic chair. Appellant further contended, however, that she had additional work restrictions beginning July 24, 2006 such that the position upon which the Office based its wage-earning capacity determination was no longer suitable. She has not alleged and the record does not support that the Office's March 27, 2006 wage-earning capacity determination was erroneous. Instead, appellant argued that her condition worsened beginning July 24, 2008 such that she was unable to perform the duties of the January 24, 2006 position. The issue is whether she has established a material change in the nature and extent of her injury-related condition warranting modification of the wage-earning capacity decision.

In July 24, 2006 reports, Dr. Maron discussed appellant's December 30, 1995 motor vehicle accident and complaints of radiating back pain and spasm. He noted that she was currently 32 weeks' pregnant and deferred a physical examination pending delivery of her baby. Dr. Maron reviewed appellant's work history and noted that she returned to work from 8:00 a.m. to 3:15 p.m. but currently worked three to four hours per day. He found that her symptoms before pregnancy were related to her December 30, 1995 work injury and that her additional symptoms with pregnancy were "probably caused by the [motor vehicle accident]." Dr. Maron's finding that appellant's additional symptoms with pregnancy were "probably" due to her work injury is speculative in nature and thus of diminished probative value.[12] Further, he did not provide any rationale for his stated conclusion on causal relation. A mere conclusion without the necessary rationale explaining how and why the physician believes that a claimant's accepted exposure could result in a diagnosed condition is not sufficient to meet a claimant's burden of proof.[13]

In a work restriction evaluation of the same date, Dr. Maron determined that appellant was unable to work in her usual position because she was 32 weeks' pregnant and had chronic, recurring low back, right side, right thorax and right neck pain. He opined that she could work two to four hours per day with restrictions, including lifting under 10 pounds. Dr. Maron did not specifically attribute appellant's increased work restrictions to conditions arising from her accepted employment injury or provide any rationale for his finding and thus his opinion is of diminished probative value.[14]

On February 27, 2007 Dr. Maron reviewed appellant's complaints of low back and sacral pain radiating to her hips, knees, upper back and neck. He opined that she was temporarily totally disabled from employment due to her December 30, 1995 motor vehicle accident. Dr. Maron, however, did not explain how or why appellant's employment injury caused disability from her modified position. Medical reports not containing rationale on causal relation are entitled to little probative value and are generally insufficient to meet an employee's burden of proof.[15]

[12] *Id*.

[13] *See Beverly A. Spencer*, 55 ECAB 501 (2004).

[14] *Conrad Hightower*, 54 ECAB 796 (2003).

[15] *Richard A. Neidert*, 57 ECAB 474 (2006).

In a form report dated February 28, 2007, Dr. Maron diagnosed neck sprain, a herniated disc at L4-5, a right rotator cuff tear, multiple contusions and possible post-traumatic fibromyalgia. He checked "yes" that the condition was caused or aggravated by employment and provided as rationale that it was caused by her head-on collusion on December 30, 1995. Dr. Maron opined that she was totally disabled beginning December 30, 1995. He did not, however, adequately address how appellant's condition materially changed in July 2006 such that she was unable to perform the duties of her modified clerk position. Instead, Dr. Maron asserted that she was totally disabled from the date of the original employment injury. As his opinion regarding disability is unexplained and inconsistent with appellant's history of performing modified work after her injury, it is of diminished probative value.

In a report dated April 14, 2007, Dr. Maron related that when he examined appellant on July 24, 2006 he found the objective findings supporting a change in work restrictions. He noted that she was fatigued because she was 32 weeks' pregnant and experienced discomfort because she could not take analgesics. Dr. Maron found that appellant's pregnancy worsened her back pain and that the back pain "went on to, additionally, [to] become a right L5 radiculopathy. Such a pain syndrome caused by (in all reasonable medical probability) a herniated L4-L5 nucleus pulposis, results from direct pressure on the L5 nerve root." Dr. Maron further attributed her reduction in work hours to right shoulder pain, right thorax and neck pain resulting from her motor vehicle accident, and limitations in cervical and lumbosacral spine motion. He concluded that appellant could not repetitively bend, stoop, twist, walk or climb as required by her work duties and was thus unable to work full time. It does not appear, however, that Dr. Maron's opinion is based on an accurate history of appellant's work duties in her modified position, which require 2 hours of intermittent sitting and walking, 3 hours of sitting and fine manipulation, 1 hours of intermittent sitting, standing and fine manipulation and no standing or walking over 30 minutes. Medical conclusions based on an inaccurate or incomplete factor history are of diminished probative value.[16]

In a report dated April 15, 2007, Dr. Maron diagnosed right shoulder impingement syndrome, neck sprain, a herniated disc at L4-5 and L5-S1, multiple contusions and a right rotator cuff tear. He did not address the relevant issue of whether appellant's condition changed such that she was unable to perform her modified employment and thus his opinion is of diminished probative value.

On August 3, 2007 Dr. Maron again related that appellant's pregnancy was a factor in her increased work restrictions as it aggravated her progressively worsening medical condition. Subsequent to her pregnancy her condition remained the same. He stated, "Therefore the objective medical evidence demonstrates that there was material change in her injury-related condition not attributable solely to her pregnancy." Dr. Maron found that she required a new position working three to four hours per day instead of seven to eight hours post pregnancy. He did not explain how or why appellant's condition deteriorated except to note that her pregnancy

[16] *M.W.*, 57 ECAB 710 (2006); *James R. Taylor*, 56 ECAB 537 (2005).

was a factor.[17] Medical conclusions unsupported by rationale are of diminished probative value.[18]

Appellant has the burden of proof to show that modification of her wage-earning capacity is warranted. She has not submitted sufficient medical evidence to establish a material change in the nature and extent of her injury-related condition. Dr. Maron did not sufficiently explain how appellant's accepted conditions caused her to be totally disabled from her position as a modified rural carrier. Appellant, consequently, has not show that the Office's determination of her loss of wage-earning capacity should be modified.[19]

CONCLUSION

The Board finds that appellant has not established that that the Office's March 27, 2006 wage-earning capacity determination should be modified.

[17] If a member weakened by an employment injury contributes to a later fall or other injury, the subsequent injury will be compensable as a consequential injury, if the further medical complication flows from the compensable injury, so long as it is clear that the real operative factor is the progression of the compensable injury, with an exertion that in itself would not be unreasonable in the circumstances. *See S.M.*, 58 ECAB ___ (Docket No. 06-536, issued November 24, 2006). To the extent that appellant's pregnancy is cited as the operative factor in her increased work restrictions, it constitutes an intervening factor arising independent of her federal employment rather than a direct and natural progression of her accepted conditions. *Id*.

[18] *Jacquelyn L. Oliver*, 48 ECAB 232 (1996).

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

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 31 and July 19, 2007 and December 29, 2006 are affirmed.

Issued: October 6, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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