United States Department of Labor
Employees' Compensation Appeals Board

M.A., Appellant	)	
and	)	**Docket No. 14-700**
	)	**Issued: August 12, 2014**
U.S. POSTAL SERVICE, NORTH BAY PROCESSING & DISTRIBUTION CENTER, Petaluma, CA, Employer	)	

Appearances:
Stephen J. Duggan, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Acting Chief Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 9, 2014 appellant, through her attorney, filed a timely appeal from a September 20, 2013 decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 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 met her burden of proof to establish that an October 18, 2012 wage-earning capacity decision should be modified.

On appeal, appellant asserts that she was physically incapable of performing the constructed position of surveillance system monitor and that the position was not readily available in her commuting area.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On July 21, 2006 appellant, then a 43-year-old small parcel bar code sorter clerk, filed an occupational disease claim alleging that she injured her right arm working on postal machines for 23 years. On September 26, 2006 she filed a traumatic injury claim, alleging that she injured her left upper extremity while lifting heavy bundles that day. Appellant did not stop work after either claimed injury. The occupational disease claim was adjudicated under file number xxxxxx466 and the traumatic injury claim under file number xxxxxx804.

On November 3, 2006 OWCP accepted that appellant sustained a sprain of the left shoulder and upper arm under file number xxxxxx804. After an initial denial, it accepted that she sustained bilateral carpal tunnel syndrome and right shoulder strain under file number xxxxxx466. The two claims were combined. Appellant was off work intermittently and received compensation. She began modified duty in June 2007.

On January 29, 2009 appellant was granted a schedule award for nine percent impairment of the left arm. On February 2, 2009 OWCP issued a schedule award for 10 percent impairment of the right arm, based on her shoulder injury.

Dr. Michael E. Hebrard, a Board-certified physiatrist, began treating appellant in March 2009. By decision dated August 28, 2009, OWCP denied that she sustained a recurrence of disability on February 11, 2009. The employing establishment withdrew appellant's modified position effective November 2, 2009, based on the National Reassessment Process (NRP). Appellant was placed on the periodic compensation rolls. On March 31, 2010 Dr. Scott M. Taylor, an orthopedic surgeon, performed surgery for a right shoulder arthroscopy with subacromial decompression.

In a December 6, 2010 report, Dr. Joel Weddington, an orthopedic surgeon, noted that appellant had not worked for a year and described symptoms that included difficulty with activities of daily living. Physical examination demonstrated positive Phalen's and Tinel's tests bilaterally and diminished wrist flexion and shoulder range of motion bilaterally with positive impingement signs. Dr. Weddington diagnosed multiple upper extremity complaints and chronic pain, bilateral carpal tunnel syndrome and bilateral shoulder problems status post arthroscopy on the right. He recommended continued conservative care.

OWCP referred appellant to Dr. Ramon L. Jimenez, Board-certified in orthopedic surgery, for a second-opinion evaluation. In a December 23, 2010 report, Dr. Jimenez noted his review of a statement of accepted facts and the medical record and her complaints of bilateral shoulder, elbow and hand pain, right worse than left and numbness and tingling.[2] He noted that appellant was right-hand dominant. Physical examination demonstrated limited range of motion of both shoulders and localized tenderness in the subacromial region. Wrist and hand range of motion was good bilaterally with an equivocally positive Tinel's sign on the right. Dr. Jimenez diagnosed bilateral carpal tunnel syndrome, rotator cuff syndrome and shoulder sprain. He advised that appellant was not totally disabled and currently able to work and participate in

[2] Dr. Jimenez also reported that appellant had a right carpal tunnel release in 2007. A copy of the operative report is not found in either case record.

vocational rehabilitation. In an attached work capacity evaluation Dr. Jimenez indicated that maximum medical improvement had been reached and provided permanent restrictions of no reaching or reaching above the shoulder, two hours of repetitive movements of the wrists and elbows and four hours of pushing, pulling and lifting 10 pounds.

In January 2011, appellant was referred for vocational rehabilitation and underwent vocational assessment on March 29, 2011. Computer training was recommended. In a supplemental report dated April 23, 2011, Dr. Jimenez revised his work capacity evaluation to find that appellant could do three hours of reaching in a sedentary position but no reaching to shoulder or higher and that she could perform repetitive movements of the wrist and elbow for up to three hours daily.

On May 2, 2011 Dr. Hebrard reviewed Dr. Jimenez' December 16, 2010 report. He provided physical examination findings and referred appellant to Dr. Weddington. In a May 5, 2011 report, Dr. Weddington reiterated his diagnoses and recommended electrodiagnostic testing of the upper extremities. The testing was obtained by Dr. Hebrard on May 27, 2011 and demonstrated right C6 radiculopathy and evidence of left median sensory mononeuropathy across the wrist. A June 16, 2011 magnetic resonance imaging (MRI) scan of the cervical spine demonstrated minimal degenerative changes.

In June 2011, James M. Graham, a vocational rehabilitation counselor, identified the positions of call-out operator and surveillance-system monitor as within appellant's physical limitations. A rehabilitation plan was approved and in June 2011 appellant began a 26-week training program in computer skills. An October 7, 2011 training progress report indicated that she successfully completed 310 hours of training and was a model student. Appellant completed computer training on December 2, 2011 and earned a certificate as computer operator and customer service representative.

On October 27, 2011 Dr. Hebrard advised that appellant had permanent restrictions of minimal repetitive overhead work with pushing, pulling and lifting of no more than 10 pounds and no reaching above the shoulder. A March 30, 2012 MRI scan study of the left shoulder demonstrated moderate to moderately severe cuff tendinosis, degenerative-type fraying of the labrum, probable adhesive capsulitis, moderate degeneration of the acromioclavicular joint with bone and soft tissue inflammation and other factors likely to contribute to subacromial impingement. In an April 2, 2012 treatment note, Dr. Hebrard provided restrictions of no pushing, pulling or reaching at or above the shoulder; no lifting greater than 8 to 10 pounds intermittently; pushing and pulling were not to exceed 10 pounds; no repetitive grasping, finger or pinching for more than 30 minutes each hour; no repetitive forceful grasping or pinching more than 30 minutes at a time; and allow for breaks of five minutes each hour.

On August 13, 2012 Mr. Graham updated the labor market surveys for the positions of call-out operator and surveillance-system monitor. He noted that the positions were within appellant's physical limitations and advised that they were reasonably available in the local labor market, each with wages of $400.00 per week. OWCP obtained updated salary information from the employing establishment.

By letter dated September 4, 2012, OWCP proposed to reduce appellant's compensation benefits based on her capacity to earn wages as a surveillance system monitor.[3] Based on the opinion of Dr. Jimenez, she could return to full-time work and that the surveillance system position was within the permanent restrictions identified by the physician. OWCP further noted that the labor market survey prepared by the rehabilitation counselor indicated that the position was reasonably available in the local labor market at a weekly wage of $400.00. The physical demands indicated that the position was sedentary with no climbing, balancing, stooping, kneeling, crouching, crawling and occasional reaching and handling and occasional lifting of 10 pounds.

Appellant disagreed with the proposed reduction, contending that it was not within restrictions provided by Dr. Hebrard on September 24, 2012 and her MRI scan studies of the cervical spine and left shoulder.

On October 18, 2012 OWCP found that the weight of the medical evidence rested with the opinion of Dr. Jimenez. It reduced appellant's compensation benefits, effective that day, based on her capacity to earn wages as a full-time surveillance system monitor, which represented a 60 percent loss of wage-earning capacity. OWCP noted that the record did not contain a September 24, 2012 report from Dr. Hebrard.

On November 28, 2012 appellant requested reconsideration and submitted Dr. Hebrard's September 24, 2012 treatment note. Dr. Hebrard reported her complaints of ongoing problems with both shoulders. He provided examination findings and advised that appellant could work in a sedentary environment with no work at or above shoulder level and no pulling or reaching of more than 7 to 10 pounds. An October 9, 2012 MRI scan study of the right shoulder demonstrated deficiency of the intra-articular portion of the biceps, moderate-to-moderately severe cuff tendinitis, mild subacromial bursal synovitis and broad spurring from the undersurface of the acromial process that could contribute to impingement.

In treatment notes dated December 14, 2012 and January 23, 2013, Dr. Hebrard reiterated his findings and conclusions. He added an additional restriction that simple grasping or fine manipulation was limited to no more than 15 minutes per hour. A January 23, 2013 upper extremity electrodiagnostic study demonstrated no evidence for a peripheral neuropathy.

By decision dated March 12, 2013, OWCP denied modification of the October 18, 2012 wage-earning capacity determination. It noted that the restrictions provided by Dr. Hebrard would not prevent appellant from performing the sedentary position of surveillance system monitor.

[3] The *Dictionary of Occupational Titles* job description for surveillance system monitor is as follows: Monitors premises of public transportation terminals to detect crimes or disturbances, using closed circuit television monitors and notifies authorities by telephone of need for corrective action: Observes television screens that transmit in sequence views of transportation facility sites. Pushes hold button to maintain surveillance of location where incident is developing and telephones police or other designated agency to notify authorities of location of disruptive activity. Adjusts monitor controls when required to improve reception and notifies repair service of equipment malfunctions.

Appellant again requested reconsideration on June 23, 2013. She submitted reports dated May 16, 2013, in which Dr. Hebrard advised that she could not drive more than two hours in a day or more than 20 minutes each hour; could not lift more than 7 to 10 pounds intermittently or continually; sitting was limited to three hours at a time; sitting and standing were to be alternated for 10 minutes each hour; and fine manipulation and simple grasping were restricted to 15 minutes per hour, not to exceed four hours a day. Dr. Hebrard reiterated his findings and conclusions on August 6, 2013.

In a merit decision dated September 20, 2013, OWCP found that appellant did not meet her burden of proof to modify the October 18, 2012 wage-earning capacity decision. It again noted that the restrictions provided by Dr. Hebrard did not preclude appellant from performing the duties of the selected position of surveillance system monitor.

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.[4]

OWCP's procedures in effect at the time OWCP rendered its October 18, 2012 decision provided 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."[5]

The procedures contained provisions regarding the modification of a formal loss of wage-earning capacity. The relevant part provided 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. OWCP's procedures further provided 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 OWCP is seeking modification, it must establish that the original rating was in error, that the injury-related condition has improved or that the claimant has been vocationally rehabilitated.[6]

Applicable case law and OWCP's procedures require that once a formal wage-earning capacity decision is in place, 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,

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

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995); *see* Chapter 2.1501.3 (June 2013).

[6] *Id.*, at Chapter 2.814.11 (June 1996).

erroneous.[7] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[8]

ANALYSIS

The Board finds that appellant did not submit sufficient evidence to show that the October 18, 2012 wage-earning capacity determination should be modified. On appeal, appellant generally asserted that the wage-earning capacity determination was erroneous because she was physically incapable of performing the selected position of surveillance system monitor. Further, the position was not readily available in her commuting area. Appellant, however, did not submit sufficient evidence to show error in OWCP's October 18, 2012 decision.

The selected position, surveillance system operator, is sedentary with physical demands requiring no climbing, balancing, stooping, kneeling, crouching, crawling and occasional reaching, handling and occasional lifting of 10 pounds. The position is described as observing television screens, pushing button to maintain surveillance of location, telephoning police or other designated agency to notify authorities of location of disruptive activity, adjusting monitor controls when required to improve reception and notifying repair service of equipment malfunctions.

In the October 18, 2012 decision, OWCP found that the weight of the medical evidence rested with Dr. Jimenez, an OWCP referral orthopedic surgeon, who provided permanent restrictions of three hours of reaching; no reaching above the shoulder; three hours of repetitive movements of the wrists and elbows; and four hours of pushing, pulling and lifting 10 pounds. Dr. Weddington, an attending orthopedic surgeon, did not discuss appellant's work capabilities in his December 6, 2010 and May 5, 2011 reports. Dr. Hebrard, an attending physiatrist, advised on October 27, 2011 and April 2, 2012 that she had permanent restrictions of no pushing, pulling or reaching at or above the shoulder; no lifting greater than 8 to 10 pounds intermittently; pushing and pulling were not to exceed 10 pounds; no repetitive grasping, finger or pinching for more than 30 minutes each hour; no repetitive forceful grasping or pinching more than 30 minutes at a time; and allow for breaks of 5 minutes each hour. As these restrictions are within those of the surveillance system monitor position, OWCP properly found that appellant had the physical capacity of performing the constructed position. The medical evidence does not support total disability.

Moreover, appellant submitted no evidence to establish that the selected position was not readily available in her commuting area. Mr. Graham, the vocational rehabilitation counselor, provided a labor market survey on August 13, 2012 in which he certified that he found sufficient

[7] *Stanley B. Plotkin*, 51 ECAB 700 (2000).

[8] *Id.*

jobs in her commuting area.[9] Appellant did not meet her burden of proof to establish that the original wage-earning capacity determination was in error.[10]

The medical evidence submitted by appellant subsequent to the October 18, 2012 decision is insufficient to establish a material change in the nature and extent of her injury-related condition. In a September 24, 2012 report, Dr. Hebrard noted her complaints of ongoing problems with both shoulders and advised that she could work in a sedentary environment with no work at or above shoulder level and no pulling or reaching of more than 7 to 10 pounds. In later reports, he additionally advised that appellant could not drive more than 2 hours in a day or more than 20 minutes each hour; could not lift more than 7 to 10 pounds intermittently or continually, was unable to tolerate sitting for 3 hours at a time; was to alternate between sitting and standing for 10 minutes each hour. Fine manipulation and simple grasping were restricted to 15 minutes per hour not to exceed 4 hours a day. The accepted conditions in this case are left shoulder and upper arm sprain, right shoulder strain and bilateral carpal tunnel syndrome. The surveillance system monitor position does not require fine manipulation and minimal grasping.[11] The medical evidence submitted by appellant is insufficient to establish a material change in the nature and extent of her injury-related condition such that the October 18, 2012 wage-earning capacity decision should be modified. Dr. Hebrard did not explain how the accepted conditions affected either appellant's driving or sitting and the additional restrictions do not show that appellant's condition had materially changed.

The record contains no evidence to show that appellant had been vocationally retrained since the October 18, 2012 wage-earning capacity determination. Appellant, therefore, did not meet her burden of proof to establish that the October 18, 2012 wage-earning capacity should be modified.[12]

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

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that an October 18, 2012 wage-earning capacity decision should be modified.

[9] OWCP's procedures provided that a rehabilitation specialist is an expert in the field. The claims examiner may rely on his or her opinion as to whether a job is reasonably available and vocationally suitable. *See Lawrence D. Price*, 54 ECAB 590 (2003).

[10] Federal (FECA) Procedure Manual, *supra* note 5.

[11] *Supra* note 3.

[12] Federal (FECA) Procedure Manual, *supra* note 5; *see C.H.*, Docket No. 13-2179 (issued April 23, 2014).

ORDER

IT IS HEREBY ORDERED THAT the September 20, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 12, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

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

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