

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ELAINE M. JACKSON and DEPARTMENT OF THE ARMY,  
SUPPLY & SERVICES DIVISION, Fort Benning, Ga.

*Docket No. 96-931; Submitted on the Record;  
Issued October 8, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,  
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant had no employment-related loss of wage-earning capacity effective June 19, 1995; (2) whether the Office properly denied appellant's request for review of the case on its merits under 5 U.S.C. § 8128; and (3) whether the Office properly denied appellant's request for a hearing under 5 U.S.C. § 8124.

The Board has duly reviewed the case record and finds that the Office properly determined that appellant had no loss of wage-earning capacity.

The Office accepted that appellant, a temporary employee, sustained a left leg sprain on October 27, 1994 while in the performance of duty. Appellant returned to a light-duty position as a materials handler on July 19, 1995. Appellant worked in this position until her temporary position ended effective September 11, 1995.

By decision dated October 5, 1995, the Office found that appellant had no loss of wage-earning capacity effective July 19, 1995. By decision dated December 4, 1995, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant review of the prior decision, and, in a decision dated February 15, 1996, the Office denied appellant's request for a hearing on the grounds that she had previously requested a reconsideration of her claim.

Section 8115(a) of the Federal Employees' Compensation Act<sup>1</sup> provides that in determining compensation for partial disability, "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." The Board has stated, "Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing that they do not

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<sup>1</sup> 5 U.S.C. § 8115(a).

fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure."<sup>2</sup>

In the present case, the Office accepted that appellant sustained left leg sprain in the performance of duty on October 27, 1994. On June 5, 1995 the employing establishment offered appellant a light-duty position in accordance with the physical restrictions found by Dr. J.C. Serrato, Jr., an orthopedic surgeon and her attending physician.<sup>3</sup> The light-duty position offered by the employing establishment was a temporary position not to exceed September 30, 1995.<sup>4</sup> Appellant returned to work in the light-duty position on June 19, 1995 at the same or higher pay rate as her date-of-injury position. She continued to work in the position until her temporary employment ended on September 11, 1995.

The evidence in this case establishes that appellant's actual earnings as a modified materials handler fairly and reasonably represented her wage-earning capacity. Appellant worked in this position from June 19 until September 11, 1995, a period of more than 60 days.<sup>5</sup> As appellant was in a temporary position at the time of her employment injury, it was proper for the employing establishment to reemploy her in a temporary position.<sup>6</sup> The position did not provide a lower pay rate as her date-of-injury position, and thus the Office properly determined that appellant has no loss of wage-earning capacity.

Once a loss of wage-earning capacity is properly determined, it remains undisturbed regardless of actual earnings or lack of earnings.<sup>7</sup> 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.<sup>8</sup> The burden of proof is on the party attempting to show the award should be modified.<sup>9</sup>

There is no evidence that appellant's actual earnings did not fairly and reasonably represent her wage-earning capacity and thus she has not shown that the Office's original

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<sup>2</sup> *Floyd A. Gervais*, 40 ECAB 1045 (1989).

<sup>3</sup> In an undated report, Dr. Serrato found that appellant could return to work on June 6, 1995 with restrictions on lifting over 25 pounds.

<sup>4</sup> The record indicates that appellant was initially hired as a temporary employee for a period not to exceed January 28, 1995.

<sup>5</sup> Under the Office's procedures, a wage-earning capacity determination based on actual wages is made after the claimant has been working for 60 days. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (March 1997).

<sup>6</sup> When the claimant's date-of-injury job was permanent and the actual wages are from a temporary job, the Office must consider this factor in a wage-earning capacity determination. *See id.* at Chapter 2.814.7(a).

<sup>7</sup> *See Clarence D. Ross*, 42 ECAB 556 (1991).

<sup>8</sup> *Charles D. Thompson*, 35 ECAB 220 (1983).

<sup>9</sup> *Jack E. Rohrbaugh*, 42 ECAB 320 (1991).

determination with regard to her wage-earning capacity was erroneous. Appellant has not alleged, and the evidence does not show, that she stopped work on September 11, 1995 due to a material change in the nature and extent of her injury-related condition. Nor has appellant argued or shown that she was retrained or otherwise vocationally rehabilitated such that her actual wages would not adequately represent her wage-earning capacity. Thus, appellant has not established that the Office wage-earning capacity determination was erroneous.

The Board further finds that the Office properly denied appellant's request for reconsideration of its loss of wage-earning capacity determination under section 8128.

The Office has issued regulations regarding its review of decisions under section 8128(a) of the Act. Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his claim by written request to the Office identifying the decision and the specific issue(s) within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed and by:

“(i) Showing that the Office erroneously applied or interpreted a point of law, or

“(ii) Advancing a point of law or fact not previously considered by the Office, or

“(iii) Submitting relevant and pertinent evidence not previously considered by the Office.”<sup>10</sup>

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.<sup>11</sup> Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.<sup>12</sup> Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.<sup>13</sup>

In the present case, the Office terminated appellant's compensation benefits on the grounds that she had no further loss of wage-earning capacity based upon her actual earnings in a modified position with the employing establishment. In support of her request for reconsideration, appellant submitted a statement arguing that she began working on June 19, 1995 rather than June 6, 1995 as stated by the Office in its decision. However, this does not alter the fact that appellant worked over 60 days in her position prior to the Office wage-earning capacity determination. As this evidence does not show either that appellant sustained a material change in the nature of her condition, was rehabilitated, or that the Office's original wage-earning capacity determination was erroneous, it is not relevant in the instant case.

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<sup>10</sup> 20 C.F.R. § 10.138(b)(1).

<sup>11</sup> See 20 C.F.R. § 10.138(b)(2).

<sup>12</sup> *Daniel Deparini*, 44 ECAB 657 (1993).

<sup>13</sup> *Id.*

As appellant has not established that the Office erroneously applied or interpreted a point of law, advanced a point of law or fact not previously considered by the Office or submitted relevant and pertinent evidence not previously considered by the Office, she has not established that the Office abused its discretion in denying her request for review under section 8128 of the Act.

The Board further finds that the Office did not abuse its discretion in denying appellant's request for a hearing before an Office hearing representative.

Section 8124(b) of the Act, concerning a claimant's entitlement to a hearing, states: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."<sup>14</sup> As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.<sup>15</sup>

The Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings, and the Office must exercise this discretionary authority in deciding whether to grant a hearing. Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing,<sup>16</sup> when the request is made after the 30-day period established for requesting a hearing,<sup>17</sup> or when the request is for a second hearing on the same issue.<sup>18</sup> The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.<sup>19</sup>

The Office, in its February 15, 1996 decision, properly determined that appellant was not entitled to a hearing as a matter of right since appellant's request was made after a reconsideration of her case pursuant to section 8128(a). The Office also exercised its discretion and further considered the hearing request but concluded that appellant could equally well pursue her claim by requesting reconsideration along with the submission of factual and medical evidence. For these reasons, the Office acted properly in denying appellant's January 4, 1996 request for a hearing.

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<sup>14</sup> 5 U.S.C. § 8124(b)(1).

<sup>15</sup> *Frederick D. Richardson*, 45 ECAB 454 (1994).

<sup>16</sup> *Rudolph Bermann*, 26 ECAB 354 (1975).

<sup>17</sup> *Herbert C. Holley*, 33 ECAB 140 (1981).

<sup>18</sup> *Johnny S. Henderson*, 34 ECAB 216 (1982).

<sup>19</sup> *Sandra F. Powell*, 45 ECAB 877 (1994).

The decisions of the Office of Workers' Compensation Programs dated February 15, 1996, December 4 and October 5, 1995 are hereby affirmed.

Dated, Washington, D.C.  
October 8, 1998

Michael J. Walsh  
Chairman

George E. Rivers  
Member

Michael E. Groom  
Alternate Member