

**United States Department of Labor
Employees' Compensation Appeals Board**

L.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Newark, NJ, Employer**

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**Docket No. 08-1232
Issued: December 18, 2008**

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 20, 2008 appellant, through her attorney, filed a timely appeal from an April 3, 2007 merit decision of the Office of Workers' Compensation Programs finding that she did not establish a recurrence of disability, a July 10, 2007 nonmerit decision denying her request for reconsideration, an August 1, 2007 loss of wage-earning capacity determination and an October 23, 2007 nonmerit decision denying her request for reconsideration. 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 has established that she sustained a recurrence of disability on or after February 23, 2004 causally related to her accepted employment injury; (2) whether the Office properly reduced her compensation based on its retroactive finding that her actual earnings effective April 30, 2001 fairly and reasonable represented her wage-earning capacity; (3) whether the Office, in its July 10, 2007 decision, properly denied appellant's request for reconsideration of the merits of the case under 5 U.S.C. § 8128; and (4) whether the Office, in its October 2, 2007 decision, properly determined that she was requesting

reconsideration of its wage-earning capacity determination and, if so, whether it properly denied her request for reconsideration of the merits of the case under section 8128.

FACTUAL HISTORY

On February 3, 2000 appellant, then a 39-year-old full-time mail handler, filed an occupational disease claim alleging that she sustained tendinitis due to factors of her federal employment. The Office accepted her claim for bilateral arm tendinitis and right carpal tunnel syndrome and paid her compensation from February 2 through September 11, 2000. Appellant returned to her usual employment on September 12, 2000. The Office accepted that she sustained a recurrence of disability beginning April 30, 2001 such that she could only work four hours per day with restrictions. On April 15, 2003 it reduced appellant's wage-loss compensation based on appellant's actual earnings as a part-time mail processor effective April 30, 2001.

On June 9, 2003 Dr. Jeffrey F. Lakin, a Board-certified orthopedic surgeon, provided a second opinion examination. He found no evidence of carpal tunnel syndrome or tendinitis of the upper extremities. Dr. Lakin opined that appellant could resume her usual employment without restriction.

In a progress report dated February 23, 2004, Dr. Nazar H. Haidri, a Board-certified neurologist, noted that appellant worked four hours per day five days per week. He discussed her complaints of painful neck, shoulder and wrist movements bilaterally and listed findings of a positive Tinel's sign on examination. Dr. Haidri advised in an accompanying work restriction evaluation that appellant could work four hours per day with permanent restrictions. He submitted similar progress reports from June to November 2004. On November 29, 2004 Dr. Haidri noted that appellant had retired. On March 7, 2005 he indicated that she stopped work in March 2004 and obtained disability retirement. Dr. Haidri discussed appellant's complaints of slightly increased bilateral shoulder arm and neck pain and increased bilateral wrist pain. On examination, he found a positive Tinel's sign and tenderness in the ulnar nerve of both elbows. Dr. Haidri concluded that appellant was "unfit for gainful employment at the present time and in the foreseeable future."¹

On March 5, 2005 appellant notified the Office that she had retired on disability and requested compensation for eight hours per day. She indicated that she currently received compensation for four hours per day.

In an April 6, 2005 work restriction evaluation, Dr. Haidri found that appellant was disabled from employment. On November 17, 2005 he discussed her work history of loading mail and lifting up to 70 pounds. Dr. Haidri noted that appellant did not experience symptoms before working for the employing establishment and did not have a "history of other injuries to the neck, shoulders, arms, wrists or hands..." Appellant worked light duty from April 2001 until March 4, 2005, when she stopped work due to her symptoms. Dr. Haidri found a positive

¹ Dr. Haidri provided similar reports on March 16 and May 9, 2005, February 6, May 9, August 28 and November 13, 2006 and February 9, 2007.

Tinel's sign and ulnar nerve tenderness at the elbow bilaterally. He opined that appellant was unable to work.²

By letter dated March 27, 2006, the Office requested that appellant submit a reasoned medical opinion supporting that she was unable to perform her limited-duty employment due to her accepted employment injury.

In a work restriction evaluation dated May 9, 2006, Dr. Haidri opined that appellant was disabled from employment. On February 9, 2007 he noted that she stopped work in March 2004 because of an increase in symptoms and had "not been able to work ever since." Dr. Haidri listed findings of bilateral wrist pain and numbness with a positive Tinel's sign and ulnar nerve tenderness bilaterally. He asserted that appellant was unable to work.

On May 31, 2006 appellant filed a recurrence of disability claim on February 23, 2004 causally related to her accepted employment injury. On June 1, 2006 she related that she worked limited duty but that her pain grew more continuous. Appellant stopped work in March 2004.

By decision dated October 20, 2006, the Office found that appellant had not established that she sustained a recurrence of disability on February 23, 2004 causally related to her accepted employment injury. It determined that the medical evidence did not show that her condition worsened such that she was unable to perform her part-time limited-duty work. The Office also noted that it appeared that appellant worked until October 2004.

On November 10, 2006 appellant, through her attorney, requested an oral hearing. At the hearing, held on February 7, 2007, appellant related that she worked limited duty after her employment injury but the pain became too intense. She received compensation from the Office for four hours per day. Appellant performed limited-duty lifting under five pounds. She did not exceed her lifting limitations. In February or March 2004, appellant's bilateral elbow, shoulder and hand condition worsened such that she was unable to perform her limited-duty employment. She noted that she also had a claim accepted for Social Security disability for a disabling cyst on her brain. Appellant testified that the brain cyst contributed to her February 2004 work stoppage.

On February 9, 2007 Dr. Haidri opined that appellant had been unable to work since she stopped in 2004 because of an increase in symptoms. In a February 12, 2007 response to a request for information from appellant's attorney, Dr. Haidri referred to his progress reports for appellant's diagnosis and treatment history. He stated, "[Appellant] has not been able to work since March 2004 because her symptoms became worse. [She] is unfit for gainful employment at the present time and in the foreseeable future. In all medical probability, [appellant's] symptoms and diagnoses, as previously stated and as noted above, are related to the injuries sustained in an accident dated February 2, 2000."

By decision dated April 3, 2007, the hearing representative affirmed the October 20, 2006 decision. He determined that the medical evidence was insufficient to establish that appellant was disabled on or after February 23, 2004 due to her accepted work injury. The hearing

² In a November 28, 2005 form report, Dr. Haidri found that appellant was disabled for work but did not provide a diagnosis or causation finding.

representative further found a conflict in medical opinion between Dr. Haidri and Dr. Lakin regarding whether appellant had any further condition or disability causally related to her employment injury. On May 1, 2007 the Office referred appellant to Dr. Michael Wujciak, a Board-certified orthopedic surgeon, to resolve the conflict.

On May 25, 2007 appellant, through her attorney, requested reconsideration. Counsel submitted a letter dated May 17, 2007 from Dr. David S. Wolkstein, a Board-certified orthopedic surgeon, who indicated that he was providing a supplement to an April 23, 2007 report. He opined that appellant was able to perform part-time work in a limited-duty capacity until February 23, 2004, when her “condition worsened and deteriorated to the point where she could no longer continue working in a restricted capacity. Appellant became totally disabled from performing her duties at work in any capacity on February 23, 2004.”

In a report dated July 6, 2007, Dr. Wujciak, the impartial medical examiner, addressed the issue of whether appellant had residuals of her work injury. He reviewed her medical and work history, noting that she stopped work in 2004 and obtained disability retirement in October 2004. Appellant received treatment for a brain cyst which caused epileptic seizures. Dr. Wujciak found a positive Tinel’s sign bilaterally, bilateral thenar muscle atrophy and some hypothenar muscle atrophy. He diagnosed bilateral carpal tunnel syndrome and to rule out cervical radiculopathy and double crush syndrome. Dr. Wujciak opined that appellant continued to have carpal tunnel syndrome and that she could work four hours per day lifting under 25 pounds and less than 10 pounds repetitively.

By decision dated July 10, 2007, the Office denied appellant’s request for reconsideration on the grounds that the evidence submitted was insufficient to warrant review of the April 3, 2007 decision. It determined that Dr. Wolkstein’s report was immaterial as he did not address what condition disabled her from employment. The Office noted that the record did not contain Dr. Wolkstein’s April 23, 2007 report.

By decision dated August 1, 2007, the Office found that appellant’s actual earnings as a mail processor effective April 30, 2001 fairly and reasonably represented her wage-earning capacity. It adjusted her compensation effective February 22, 2003. The Office determined that the duties of the position were consistent with the findings of the impartial medical examiner that she could work four hours per day lifting no more than 10 pounds.

On August 14, 2007 appellant’s attorney requested reconsideration of the Office’s April 3 and July 10, 2007 decisions. Counsel submitted Dr. Wolkstein’s April 23, 2007 report. Dr. Wolkstein noted that he initially treated appellant in July 15, 2000 for upper extremity pain that she experienced after lifting at work. Appellant received a diagnosis of carpal tunnel syndrome and tendinitis. In examinations on January 23 and November 25, 2003, she had a positive Tinel’s sign and Phalen’s test. On November 14, 2005 Dr. Wolkstein evaluated appellant for tendinitis. He concluded:

“[Appellant’s] occupation required repetitive movements of her hands, wrists and upper extremities. Her job as a mail handler required repetitive pushing, pulling, grasping, lifting, and carrying of mail and parcels causing bilateral carpal tunnel syndrome. It is my opinion within a reasonable degree of medical certainty that

the duties described above caused [appellant] carpal tunnel syndrome and that her condition deteriorated to the point that she could no longer continue working at her job.”

In a nonmerit decision dated October 23, 2007, the Office denied appellant’s request for reconsideration of its August 1, 2007 decision. It noted that her attorney had requested reconsideration of a July 10, 2007 nonmerit decision. The Office indicated that it would consider the request as a request for reconsideration of its August 1, 2007 decision. It determined that Dr. Wolkstein’s April 23, 2007 report was cumulative to his May 17, 2007 report and thus insufficient to warrant a merit review of the August 1, 2007 decision.

LEGAL PRECEDENT -- ISSUE 1

Where 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 the employee 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 to show that he or 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.³

Office regulations provide that 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.⁴ This term also means an inability to work that takes place 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.⁵

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained bilateral tendinitis and right carpal tunnel syndrome causally related to factors of her federal employment. Appellant stopped work on February 2, 2000 and returned to her usual employment on September 12, 2000. She sustained a recurrence of disability on April 30, 2001 such that she could only work four hours per day at limited duty. The Office paid appellant compensation for four hours per day beginning that date. Appellant stopped work in February or March 2004. She filed a notice of recurrence of disability on February 23, 2004 due to her accepted work injury.

³ *Jackie D. West*, 54 ECAB 158 (2002); *Terry R. Hedman*, 38 ECAB 222 (1986).

⁴ 20 C.F.R. § 10.5(x).

⁵ *Id.*

Appellant has not alleged a change in the nature and extent of her light-duty job requirements. She asserted at the hearing that her part-time limited-duty position at the time she stopped work required lifting up to five pounds and she did not exceed her lifting limitations. Instead, appellant attributed her recurrence of disability to a change in the nature and extent of her employment-related conditions. She must thus provide medical evidence establishing that she was disabled due to a worsening of her accepted work-related conditions of bilateral tendinitis and right carpal tunnel syndrome.⁶

On February 23, 2004 Dr. Haidri, a neurologist, noted that appellant worked four hours per day five days per week. He discussed her complaints and listed findings on examination. In an accompanying work restriction evaluation, Dr. Haidri opined that appellant could work four hours per day with permanent restrictions. He submitted similar progress reports from June to November 2004. As Dr. Haidri did not find appellant disabled from employment, his opinion does not support that she sustained a recurrence of disability beginning February 23, 2004.

On March 7, 2005 Dr. Haidri noted that appellant had not worked since March 2004 and had obtained disability retirement. He discussed her complaints of slightly increased bilateral shoulder arm and neck pain and increased bilateral wrist pain. On examination, Dr. Haidri found a positive Tinel's sign and tenderness in the ulnar nerve of both elbows. He concluded that appellant was "unfit for gainful employment at the present time and in the foreseeable future." In an April 6, 2005 work restriction evaluation, Dr. Haidri found that appellant was disabled from employment. In his reports, however, he did not specifically attribute her inability to work beginning February 23, 2004 to her accepted conditions of bilateral arm tendinitis and right carpal tunnel syndrome. Dr. Haidri did not provide any rationale for his stated conclusion that appellant was unable to work. Medical conclusions unsupported by rationale are of diminished probative value.⁷

On November 17, 2005 Dr. Haidri reviewed appellant's work history of lifting up to 70 pounds loading mail. He noted that she did not experience symptoms before working for the employing establishment and that she worked light duty from April 2001 until March 4, 2005, when she stopped work due to her symptoms. Dr. Haidri found a positive Tinel's sign and ulnar nerve tenderness at the elbow bilaterally. He opined that appellant was unable to work. Again, Dr. Haidri did not specifically find that she was unable to work due to her accepted work injury. Additionally, a medical opinion that a condition is causally related to an employment injury because the employee was asymptomatic before the injury but symptomatic after the injury is insufficient, without supporting rationale, to establish causal relationship.⁸

In a work restriction evaluation dated May 9, 2006, Dr. Haidri opined that appellant was disabled from employment. On February 9, 2007 he noted that she stopped work in March 2004 because of an increase in symptoms and had "not been able to work ever since." On examination Dr. Haidri found bilateral wrist pain and numbness with a positive Tinel's sign and ulnar nerve

⁶ See *Jackie D. West*, *supra* note 3.

⁷ *Jacquelyn L. Oliver*, 48 ECAB 232 (1996).

⁸ *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

tenderness bilaterally. Again, he did not explain the basis for his determination that appellant was unable to work beginning March 2004 in view of his prior findings in reports dated February to November 2003 that she could work four hours per day with restrictions.

On February 9, 2007 Dr. Haidri noted that appellant stopped working in 2004 due to an increase in symptoms and had since been unable to work. On February 12, 2007 he found that appellant was disabled beginning March 2004 because of an increase in symptoms. Dr. Haidri stated, "In all medical probability, [appellant's] symptoms and diagnoses, as previously stated and as noted above, are related to the injuries sustained in an accident dated February 2, 2000." However, he did not provide any rationale for his opinion or describe the objective findings upon which he based his conclusion. A mere conclusion without the necessary rationale explaining how and why the physician believes that a claimant's accepted exposure could result in the disability or diagnosed condition is not sufficient to meet a claimant's burden of proof.⁹

On appeal the attorney questions whether the impartial medical examiner provided an opinion regarding appellant's alleged recurrence of disability. Dr. Wujciak, however, resolved a conflict on the issue of whether she had any continuing employment-related condition or disability rather than whether she established a recurrence of disability.

LEGAL PRECEDENT -- ISSUE 2

Section 8115(a) of the Federal Employees' Compensation Act 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.¹⁰ 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.¹¹ In addition, the Federal (FECA) Procedure Manual provides that the Office can make a retroactive wage-earning capacity determination if appellant worked in the position for at least 60 days, the position fairly and reasonably represented his wage-earning capacity and "*the work stoppage did not occur* because of any change in his injury-related condition affecting the ability to work."¹² (Emphasis in the original.) The procedures further indicate that an assessment of suitability need not be made since the employee's performance of the duties is considered the best evidence of whether the job is within the employee's physical limitations.¹³ The Board has concurred that

⁹ See *Beverly A. Spencer*, 55 ECAB 501 (2004).

¹⁰ 5 U.S.C. § 8115(a); *James Henderson, Jr.*, 51 ECAB 268 (2000).

¹¹ *Selden H. Swartz*, 55 ECAB 272 (2004); *Bette L. Kvetensky*, 51 ECAB 346 (2000).

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.814.7 (May 1997).

¹³ *Id.*

the Office may perform a retroactive wage-earning capacity determination in accordance with its procedures.¹⁴

As noted, under Office procedures a retroactive wage-earning capacity determination may be performed if the employment fairly and reasonably represents wage-earning capacity. The Office's procedure manual provides that factors to be considered in determining whether the claimant's work fairly and reasonably represents her wage-earning capacity includes the kind of appointment, that is, whether the position is temporary, seasonal or permanent and the tour of duty, that is, whether it is part time or full time.¹⁵ Further a makeshift¹⁶ or odd lot position designed for a claimant's particular needs will not be considered suitable.¹⁷ The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Shadrick*¹⁸ decision, has been codified by regulation at 20 C.F.R. § 10.403.

ANALYSIS -- ISSUE 2

There are situations when a retroactive wage-earning capacity determination may be appropriate. The Office's procedure manual provides that a retroactive determination may be made where the claimant worked in the position for at least 60 days, the employment fairly and reasonably represents the wage-earning capacity and the work stoppage did not occur because of any change in the claimant's injury-related condition affecting her ability to work.¹⁹ The Office properly adjudicated the issue of whether appellant sustained an employment-related recurrence of disability prior to issuing its wage-earning capacity determination. Appellant had also worked in the position over 60 days and there is no evidence that the position was makeshift or odd lot. There is no indication, however, that appellant was a part-time employee at the time of her injury. The Office found that her actual earnings in her part-time position as a mail processor fairly and reasonably represented her wage-earning capacity. As the Office procedure manual indicates, in situations where an employee is working full time when injured and is reemployed in a part-time position, a formal wage-earning capacity determination is generally not appropriate.²⁰ The Board has held that the Office must address this issue and explain why a part-time position is suitable for a wage-earning capacity determination based on the specific circumstances of the case.²¹ The Office, however, made a finding that the mail processor

¹⁴ See *Tamra McCauley*, 51 ECAB 375 (2000); *Elbert Hicks*, 49 ECAB 283 (1998).

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (May 1997).

¹⁶ A makeshift position is a position that is specifically tailed to an employee's particular needs, and generally lacks a position description with specific duties, physical requirements and work schedule. See *William D. Emory*, 47 ECAB 365 (1996); *Elizabeth E. Campbell*, 37 ECAB 224 (1985).

¹⁷ See e.g., *Michael A. Wittman*, 43 ECAB 800 (1992).

¹⁸ *Albert C. Shadrick*, 5 ECAB 376 (1953).

¹⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(e); see also *Elbert Hicks*, *supra* note 14.

²⁰ See *Connie L. Potratz-Watson*, 56 ECAB 316 (2005).

²¹ *Id.*

position represented her wage-earning capacity without consideration that her actual earnings were based on a part-time position and she was not a part-time employee when injured. The Board finds that the Office failed to meet its burden of proof in determining her wage-earning capacity.

LEGAL PRECEDENT -- ISSUE 3 & 4

To require the Office to reopen a case for merit review under section 8128(a) of the Act,²² the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.²³ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.²⁴ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.²⁵

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.²⁶ The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.²⁷ While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.²⁸

ANALYSIS -- ISSUE 3

The Office found that appellant failed to establish that she sustained an employment-related recurrence of disability on or after February 23, 2004. On May 25, 2007 appellant, through her attorney, requested reconsideration. Counsel submitted a letter dated May 17, 2007 from Dr. Wolkstein, a Board-certified orthopedic surgeon, who indicated that he was providing a supplement to an April 23, 2007 report. Dr. Wolkstein opined that appellant was able to perform part-time work in a limited-duty capacity until February 23, 2004, when her "condition worsened and deteriorated to the point where she could no longer continue working in a restricted capacity. Appellant became totally disabled from performing her duties at work in any capacity on

²² 5 U.S.C. §§ 8101-8193. Section 8128(a) of the Act provides that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application."

²³ 20 C.F.R. § 10.606(b)(2).

²⁴ 20 C.F.R. § 10.607(a).

²⁵ 20 C.F.R. § 10.608(b).

²⁶ *Arlesa Gibbs*, 53 ECAB 204 (2001); *James E. Norris*, 52 ECAB 93 (2000).

²⁷ *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

²⁸ *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

February 23, 2004.” Dr. Wolkstein’s letter is not relevant to the issue of whether appellant was unable to work beginning February 23, 2004 due to her accepted conditions of bilateral arm tendinitis and right carpal tunnel syndrome. He referenced an April 23, 2007 report, but it was not of record at the time of the Office’s July 10, 2007 decision denying appellant’s request for reconsideration.

Appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or submit new and relevant evidence not previously considered. As she did not meet any of the necessary regulatory requirements, she is not entitled to further merit review.

ANALYSIS -- ISSUE 4

On August 14, 2007 appellant’s attorney requested reconsideration of the Office’s April 3 and July 10, 2007 decisions. The Office determined that he had “improperly” requested reconsideration of a nonmerit decision dated July 10, 2007. It considered the attorney’s request as a request for reconsideration of the August 1, 2007 wage-earning capacity determination. Counsel, however, clearly specified that he was asking for reconsideration of the April 3, 2007 merit decision finding that appellant failed to establish a recurrence of disability. The Office’s regulation provides that a claimant has the right to request reconsideration within one year of a merit decision.²⁹ Consequently, the case will be remanded for the Office to consider the attorney’s timely request for reconsideration of the April 3, 2007 decision.

CONCLUSION

The Board finds that appellant has not established that she sustained a recurrence of disability on or after February 23, 2004 causally related to her accepted employment injury and that the Office, in its July 10, 2007 decision, properly denied her request for reconsideration of the merits of her claim. The Board further finds that the Office improperly reduced her compensation based on its retroactive findings that her actual earnings effective April 30, 2001 fairly and reasonable represented her wage-earning capacity and that the Office, in its October 2, 2007 decision, improperly determined that appellant requested reconsideration of its wage-earning capacity determination. The case will be remanded for the Office to adjudicate appellant’s timely request for reconsideration of the April 3, 2007 decision finding that she did not establish a recurrence of disability.

²⁹ See 20 C.F.R. § 10.607(a).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 23, 2007 is set aside and the case is remanded for further proceedings consistent with this decision of the Board. The decision dated August 1, 2007 is reversed and the decisions dated July 10 and April 3, 2007 are affirmed.

Issued: December 18, 2008
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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