

FACTUAL HISTORY

On March 29, 1996 appellant, then a 38-year-old education specialist, filed a claim for an injury to her upper back and neck occurring on February 29, 1996 in the performance of duty.¹ Appellant stopped work on March 29, 1996 and returned to work on April 1, 1996.² The Office initially accepted appellant's claim for cervical strain and subsequently also accepted a herniated disc at C6-7 and an aggravation of cervical degenerative disc disease.

In a report dated May 5, 2000, Dr. Susan S. Council, a Board-certified physiatrist, stated:

“Diagnosis of [appellant] has been myofascial pain syndrome, posterior neck and upper trapezius. This can frequently result from a strain injury but is a long-term condition. This is related to her February 29, 1996 work injury. The degenerative dis[c] disease at C6-7 may compound this but is not the specific cause of the continuation.

“Though [appellant] did have some mild problems with her neck and upper trapezius, it was not significant until her work injury. This condition is still ongoing due to continued trigger points and tightness of the musculature as well as pain. The trigger points and muscular tightness I feel are an objective findings.”

In a report dated May 22, 2000, Dr. Council diagnosed “myofascial pain, bilateral posterior neck and upper trapezius as well as associated depression due to ongoing problems.” She noted that a magnetic resonance imaging (MRI) study dated March 21, 2000 showed a “central dis[c] herniation at C6-7 with mild impingement on the ventral aspect of the spinal cord with broad central dis[c] bulging at C5-6.” Dr. Council opined that stress at work aggravated appellant's condition. She diagnosed cervical myalgia and found that appellant should consider retiring on disability as she was unable to “tolerate even a sedentary job at this point.”

The Office of Personnel Management granted appellant a disability retirement effective September 9, 2000. On September 15, 2000 appellant filed a claim for compensation on account of disability (Form CA-7), requesting workers' compensation benefits beginning September 10, 2000.

By letter dated February 8, 2001, the Office referred appellant to Dr. Raymond R. Fletcher, a Board-certified orthopedic surgeon, for a second opinion evaluation. The Office requested that Dr. Fletcher provide the diagnoses due to appellant's February 29, 1996 employment injury and an opinion regarding the degree of disability.

In a report dated February 23, 2001, Dr. Fletcher reviewed appellant's history of injury and listed detailed findings on physical examination. He diagnosed cervical strain and a bilateral

¹ On December 6, 1996 the Office informed appellant that it was changing her claim to a claim for an occupational disease as her physician indicated that carrying luggage over a period of time caused her condition.

² Appellant received treatment from 1996 onwards for myofascial pain syndrome and depression.

trapezius muscle strain, left cervical radiculitis without radiculopathy, a central herniated nucleus pulposus (HNP) at C6-7 with mild cord impingement and a disc bulge at C5-6. Dr. Fletcher further noted that she had received counseling for stress and depression. He stated:

“The evaluation reveals that the subjective complaints outweigh the objective findings. The pain pattern is well established and spontaneous recovery is unlikely. [Appellant’s] described impairment is greater than the true impairment prediction based on this evaluation. There is a component of depression which amplifies [her] musculoskeletal pain complaints. There is a moderate degree of secondary gain demonstrated both voluntary and involuntary. [Appellant] has much work experience which coincides with current physical limitations.”

Dr. Fletcher opined that appellant could perform the duties of her usual employment “with the exception of travel duties. She is fully capable of performing the sedentary job position in the office setting.” He attributed appellant’s cervical strain, disc herniation at C6-7 and aggravation of preexisting cervical degenerative disc disease to her employment injury. Dr. Fletcher further noted that she had preexisting spondylosis. He opined that appellant could work in a sedentary to light capacity with lifting limitations of 15 pounds infrequently and 10 pounds frequently. He further found that she could sit and stand for two hours with the “freedom to alternate sitting and standing during a workday.” In an accompanying work capacity evaluation, Dr. Fletcher found that appellant could perform all listed activities, including sitting, walking, standing and reaching for 8 hours per day with a weight restriction of 15 pounds.

On March 26, 2001 appellant elected to receive workers’ compensation benefits in lieu of disability retirement effective September 10, 2000. The Office began paying appellant compensation for temporary total disability beginning September 10, 2000.

The Office authorized appellant’s treatment with Dr. David E. LeMay, a Board-certified psychiatrist, on October 17, 2001.³ On October 26, 2001 the Office referred appellant for vocational rehabilitation.

In a report dated November 13, 2001, Dr. LeMay discussed appellant’s history of injury and her current treatment by a rheumatologist, Dr. Ellen McKnight, a Board-certified internist, for post-traumatic fibromyalgia and an elevated sedimentation rate (SED). He diagnosed depression and “[m]uscular pain consistent with her diagnosis of post-traumatic myofascial pain with possible connective tissue disease versus fibromyalgia.”

Dr. LeMay, in progress notes dated December 3, 2001 and January 14, 2002, continued to treat appellant for myofascial pain and depression.⁴ In a progress note dated February 15, 2002, Dr. LeMay indicated that appellant was undergoing treatment by a rheumatologist and was “felt to have a possible undifferentiated connective tissue disease.” He diagnosed myofascial pain “in the neck region related to work injury,” depression and a connective tissue disease

³ The record indicates that appellant’s prior attending physician, Dr. Council, relocated outside the area.

⁴ In an internal memorandum, an Office rehabilitation specialist noted that an impartial medical evaluation may be required to see if appellant could perform work.

workup. He stated, "It is felt that she has post-traumatic fibromyalgia, although with a workup that shows an elevated sedimentation rate, it is also possible that she may have a connective tissue disease which may be unrelated." Dr. LeMay opined that appellant had a poor prognosis for returning to work.

In a report dated April 4, 2002, addressed to appellant's rehabilitation counselor, Dr. LeMay diagnosed myofascial neck pain, a HNP at C6-7 and a central disc bulge at C5-6 due to her employment injury and connective tissue disease unrelated to employment. He noted that appellant took the medication Prednisone for her connective tissue disease.⁵ Dr. LeMay stated:

"I do not believe at this point in time after reviewing records from Dr. McKnight that [appellant] has post-traumatic fibromyalgia. I do believe more likely that this is a connective tissue problem separate from her work injury, and although she may have neck pain and occasional headaches related to her injury, this is not the cause of her total disability. I have suggested to her that she look into disability through other means than workman's compensation as I do not believe that she is totally disabled as a result of her work injury.... I do believe that, with regards to her work injury, she would therefore be at a light-duty capacity as long as she is allowed frequent position changes but, with regards to the connective tissue disorder that she has ongoing, I am not sure that she would be able to tolerate any work."

The rehabilitation counselor submitted a report dated June 19, 2002. He noted that appellant had received a college degree in management. The rehabilitation counselor identified positions, including that of secretary, for which she had the physical abilities and vocational qualifications. He provided the salaries for the various positions and stated, "Because of [appellant's] background and specific work experience, she would be highly likely to start an employment position in a pay rate for more experienced individuals. Based on the information above, all the jobs listed would have reasonable availability and potential for significant growth over the next decade."

In a progress note dated June 20, 2002, Dr. LeMay noted that appellant had visited an out-of-state physician, Dr. Mark J. Pellegrino, a Board-certified physiatrist. Dr. LeMay stated, "According to [Dr. Pellegrino's] notes, he feels that she has generalized post-traumatic fibromyalgia and meets the defined criteria for this. He believes that this developed after her neck injury in 1996." He further noted that appellant related that her gastroenterologist informed appellant that she had liver damage due to medications. Dr. LeMay diagnosed a history of a C6-7 disc herniation, C5-6 disc bulge and "[m]yofascial pain which is generalized that may possibly be post-traumatic fibromyalgia according to Dr. Pellegrino." He recommended physical therapy in order to "get her to the point where she could at least tolerate sedentary level duty part time. I do not believe that she is at that point at this period in time."

An Office rehabilitation specialist, in a status report dated July 2, 2002, determined that appellant was capable of performing the position of secretary with wages of \$408.00 per week.

⁵ Dr. LeMay also noted that the Prednisone helped appellant's pain from her herniated disc.

A job classification from the Department of Labor's *Dictionary of Occupational Titles*, DOT #201.362-030, identified the position as sedentary with occasional lifting up to 10 pounds and mostly sitting with brief periods of standing and walking.

On July 16, 2002 the Office notified appellant that it proposed to reduce her compensation on the grounds that she had the capacity to earn wages as a secretary. The Office noted that both Dr. Fletcher and Dr. LeMay found that she could perform sedentary work.⁶ The Office indicated that it could not consider subsequently acquired medical conditions, such as appellant's connective tissue disease, in determining her wage-earning capacity.

In response, appellant asserted that she had not received a definite diagnosis of connective tissue disease, that her connective tissue disease may be due to her employment injury and that her connective tissue disease may predate her injury. She further contended that the Office had not established that the position of secretary was suitable because it had not consulted Dr. LeMay and as Dr. Fletcher rendered his opinion without knowledge of her diagnosed condition of fibromyalgia. She noted that Dr. LeMay had altered his opinion from that of his April 2002 report and maintained that Dr. Pellegrino diagnosed post-traumatic fibromyalgia due to her employment injury. Appellant also argued that she was unable to perform the position of secretary because she could not take dictation and as the position required mostly sitting and, according to Dr. Fletcher, she needed to alternate standing and sitting.⁷

By decision dated August 23, 2002, the Office reduced appellant's compensation effective September 9, 2002 on the grounds that she had the capacity to earn wages as a secretary. The Office noted that both Drs. LeMay and Fletcher found that appellant could perform sedentary employment based on her employment injury. The Office further indicated that the fact that appellant may be disabled due to either fibromyalgia or connective tissue disease was not relevant to her wage-earning capacity as neither condition was accepted as related to or preexisting her employment injury. The Office also found that the record contained no evidence that she had depression preexisting her employment injury. The Office additionally noted that it had not received a copy of Dr. Pellegrino's report.

In a progress note dated August 30, 2002, Dr. LeMay recommended that appellant undergo an impartial medical examination by a rheumatologist to determine whether she had either connective tissue disorder or post-traumatic fibromyalgia and whether the condition was employment related.

⁶ The Office included language regarding the weight accorded an impartial medical specialist; however, it appears that this inclusion was a typographical error.

⁷ Appellant submitted progress notes from Dr. McKnight. In a progress note dated February 15, 2000, Dr. McKnight diagnosed "[d]iffuse arthralgias with a facial rash, possibly related to SLE [systemic lupus erythematosus], and fibromyalgia. In a progress note dated March 28, 2000, Dr. McKnight diagnosed diffuse arthralgias and a facial rash "possibly related to undifferentiated connective tissue disease" and fibromyalgia. She stated, "I do believe that the majority of her symptoms are related to fibromyalgia." In a progress note dated March 18, 2002, Dr. McKnight diagnosed "[d]iffuse arthralgias with a history of an elevated SED rate possibly related to undifferentiated connective tissue disease versus seronegative rheumatoid arthritis," a history of a positive antinuclear antibody (ANA), fibromyalgia and tendinitis of the left shoulder.

On August 27, 2002 appellant, through her representative, requested an oral hearing.

In a progress note dated October 7, 2002, Dr. LeMay diagnosed myofascial pain due to appellant's 1996 employment injury and either fibromyalgia due to her employment injury or connective tissue disorder. In a progress note dated October 31, 2002, Dr. LeMay again recommended an impartial medical examination to determine whether "the generalized fibromyalgia is a connective tissue disorder independent of her injury...."

A hearing was held on February 6, 2003. At the hearing, appellant, contended that she had not received a definite diagnosis of connective tissue disorder and, therefore, the Office had not met its burden to establish that she was disabled due to a post-existing condition. He argued that the Office should consider the side effects of her medication, in particular Prednisone, in determining her wage-earning capacity and should further develop whether the connective tissue disease was a preexisting condition. Appellant's representative contended that Dr. LeMay reversed his April 8, 2002 finding in his June 2002 report and found that she had a post-traumatic condition. He also noted that Dr. Fletcher's opinion was more than one year prior to the date of the Office's wage-earning capacity determination, that she had not had a functional capacity evaluation, and that the Office had found a conflict in the medical evidence. Appellant's representative further maintained that the Office should have accepted depression as related to her employment injury. The hearing representative held the record open for 30 days after instructing appellant to submit a report from Dr. LeMay addressing whether he believed that injury-related residuals prevented gainful employment and whether he believed that she sustained depression due to her employment injury.

By decision dated April 18, 2003, an Office hearing representative affirmed the August 23, 2002 wage-earning capacity determination. The hearing representative noted that the Office had not accepted either fibromyalgia or connective tissue disorder as employment related. He found that Dr. Fletcher's report constituted the weight of the medical evidence and established that appellant had the capacity to earn wages as a secretary. The hearing representative noted that if appellant believed that she had an additional condition not yet accepted as related to her employment injury it was her burden to establish causal relationship with supporting medical evidence. He additionally found that there was no evidence in the record to show that a claims examiner had found a conflict in medical opinion.

In a progress note dated April 30, 2003, Dr. LeMay diagnosed cervical myofascial pain and fibromyalgia by history.

By letter dated January 29, 2004, appellant requested reconsideration. She contended that, while Dr. Fletcher found that she was partially disabled, the Office had overruled his report and accepted that she was totally disabled, and therefore his opinion should not have weight. She again argued that Dr. Fletcher's work tolerance limitations were outdated and that Dr. LeMay's reports were not sufficient to meet the Office's burden of establishing that she was disabled due to an unrelated post-existing condition. Appellant next contended that she was denied due process because the Office initially reduced her compensation based on Dr. LeMay's report and then changed the basis to Dr. Fletcher's report. She also contended that the Office wrongfully denied her treatment of depression and that the hearing representative failed to acknowledge her letter of arguments.

In a decision dated March 3, 2004, the Office denied appellant's request for reconsideration on the grounds that the arguments submitted were irrelevant and immaterial and thus insufficient to warrant merit review of the prior decision.

LEGAL PRECEDENT -- ISSUE 1

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of benefits.⁸ An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.⁹

Under section 8115(a) of the Federal Employees' Compensation Act,¹⁰ wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent her wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or the employee has no actual earnings, her wage-earning is determined with due regard to the nature of the employee's injuries and the degree of physical impairment, her usual employment, the employee's age and vocational qualifications, the availability of suitable employment and other factors and circumstances which may affect her wage-earning capacity in her disabled condition.¹¹

The Office must initially determine appellant's medical condition and work restrictions before selecting an appropriate position that reflects her vocational wage-earning capacity. The Board has stated that the medical evidence upon which the Office relies must provide a detailed description of appellant's condition.¹² Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.¹³

After the Office has made a determination of partial disability and of specific work restrictions, it may refer the employee's case to an Office wage-earning capacity specialist for selection of a position listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits the employee's capabilities with regard to his or her physical limitations, education, age and prior experience.¹⁴ Once this selection is made, a determination of wage rate and availability in the open labor market should be made

⁸ *David W. Green*, 43 ECAB 883 (1992).

⁹ 20 C.F.R. §§ 10.402, 10.403 (2002); see *Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

¹⁰ 5 U.S.C. §§ 8101-8193.

¹¹ 5 U.S.C. § 8115(a); see *Dorothy Lams*, 47 ECAB 584 (1996); *Mary Jo Colvert*, 45 ECAB 575 (1994).

¹² See *John D. Jackson*, 55 ECAB ____ (Docket No. 03-2281, issued April 8, 2004); *William H. Woods*, 51 ECAB 619 (2000).

¹³ *Carl C. Green, Jr.*, 47 ECAB 737, 746 (1996).

¹⁴ *James Henderson, Jr.*, 51 ECAB 268 (2000); *James A. Birt*, 51 ECAB 291 (2000).

through contact with the state employment service or other applicable service.¹⁵ Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.¹⁶

In determining a loss of wage-earning capacity where the residuals of an injury prevent an employee from performing his or her regular duties, the impairments which preexisted the injury, in addition to the injury-related impairments, must be taken into consideration in the selection of a position.¹⁷ Subsequently acquired impairments unrelated to the injury are excluded from consideration in the determination of the employee's work capabilities.¹⁸

ANALYSIS -- ISSUE 1

In this case, the medical evidence of record supports a finding that appellant was not totally disabled due to residuals of her employment injury. The Office referred appellant for a second opinion evaluation with Dr. Fletcher.¹⁹ In a report dated February 23, 2001, Dr. Fletcher diagnosed cervical strain, a disc herniation at C6-7, an aggravation of preexisting cervical degenerative disc disease and preexisting spondylosis. He found that appellant could perform sedentary to light work with limitations on lifting up to 10 pounds frequently and 15 pounds occasionally and could sit and stand for 2 hours alternating positions throughout the day. In an accompanying work capacity evaluation, Dr. Fletcher found that appellant could perform all listed activities, including sitting, standing and walking, for eight hours per day with a weight restriction of 15 pounds. In a report to appellant's rehabilitation counselor dated April 4, 2002, Dr. LeMay, appellant's attending physician, diagnosed myofascial neck pain, a HNP at C6-7 and a disc bulge at C5-6 which he found were causally related to her employment injury. He also diagnosed connective tissue disease unrelated to her employment injury and stated that he did not believe that she had post-traumatic fibromyalgia. Dr. LeMay opined that, considering only appellant's employment injury, she could perform light employment with "frequent position changes." He found, however, that she was disabled due to her nonemployment-related connective tissue disease. The Office properly relied upon Dr. Fletcher's February 23, 2001 report and Dr. LeMay's April 4, 2002 report in finding that appellant had the capacity, considering the residuals of her employment injury, to perform the selected position of secretary. As found by the Office, the reports of Drs. Fletcher and LeMay constitute the weight of evidence and establish that appellant was capable of performing work within the designated physical

¹⁵ *Id.*

¹⁶ *Albert C. Shadrick*, 5 ECAB 376 (1953). The formula developed in the *Shadrick* decision has been codified by regulation at 20 C.F.R. § 10.403 (1999).

¹⁷ See *William H. Woods*, *supra* note 12.

¹⁸ *Id.*

¹⁹ In a report dated May 5, 2000, Dr. Council diagnosed myofascial pain due to appellant's employment injury but did not address the relevant issue of her degree of disability. In a report dated May 22, 2000, Dr. Council diagnosed cervical myalgia and depression and recommended that appellant retire on disability. However, she did not specifically attribute appellant's disability to her employment injury. Medical evidence that does not offer an opinion regarding the cause of an employee's condition is of little probative value on the issue of causal relationship. *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

restrictions. As the job classification of secretary is sedentary and requires only occasional lifting up to 10 pounds and sitting with occasional standing and walking, the medical evidence supports a finding that appellant has the physical capacity to perform the duties of the position as regards her employment injury.

On appeal, appellant contends that Dr. Fletcher's work tolerance limitations were outdated; however, the Office properly relied upon Dr. Fletcher's February 2001 findings in conjunction with the more recent April 2002 opinion of Dr. LeMay in finding that she could perform the position of secretary. Appellant also argues that Dr. LeMay's June 20, 2002 report superceded his April 4, 2002 opinion. In a progress note dated June 20, 2002, Dr. LeMay related that appellant indicated that she had seen a physician, Dr. Pellegrino, who diagnosed post-traumatic fibromyalgia which occurred subsequent to her 1996 neck injury. Dr. LeMay diagnosed a history of a C6-7 disc herniation, C5-6 disc bulge and "[m]yofascial pain which is generalized that may possibly be post-traumatic fibromyalgia according to Dr. Pellegrino." He found that she was currently unable to work. In his June 20, 2002 report, however, Dr. Fletcher did not alter his prior finding that appellant was able to perform sedentary to light work taking into account only her employment injury.²⁰

Appellant further argued that the Office erroneously failed to develop whether she sustained employment-related stress, depression and myofascial pain syndrome. However, it is appellant's burden of proof to establish that a condition not accepted by the Office is employment related through the submission of rationalized medical evidence.²¹ In this case, appellant has not submitted rationalized medical evidence sufficient to establish that she sustained stress, depression or myofascial pain syndrome due to her employment injury.

Appellant additionally contended that the Office did not meet its burden to establish that her current disability was due to a post-existing nonemployment-related condition. However, the Office, in order to meet its burden of proof to justify a reduction in compensation benefits in a constructed position case, must demonstrate that the selected position is within the employee's work restrictions taking into account the employment injury and impairments that preexisted the employment injury.²² The Office met this burden through the reports of Drs. Fletcher and LeMay.²³

As noted, in assessing the claimant's ability to perform the selected position, the Office must consider not only physical limitations but also take into account her work experience, age, mental capacity and educational background.²⁴ In this case, the rehabilitation counselor found

²⁰ Appellant also contends that the Office violated due process because the hearing representative found that Dr. Fletcher's report rather than Dr. LeMay's report constituted the weight of the medical evidence. However, the hearing representative affirmed the Office's wage-earning capacity determination, which found that both physicians opined that appellant could perform sedentary to light work given her employment injury.

²¹ *Jacquelyn C. Oliver*, 48 ECAB 232 (1996).

²² *See Gary L. Moreland*, 54 ECAB ____ (Docket No. 03-1063, issued June 20, 2003).

²³ There is no evidence in the record supporting that appellant had connective tissue disease, fibromyalgia or depression preexisting her employment injury.

²⁴ *See* 5 U.S.C. § 8115(a).

that appellant had the skills necessary to perform the position of secretary based on her previously work experience and education. He further found that the position was reasonably available within appellant's commuting area and provided wage information. The Board finds that the Office considered the proper factors, such as the availability of suitable employment, appellant's physical limitations and employment qualifications, in determining that the position of secretary represented her wage-earning capacity. The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and training to perform the position and that such a position was reasonably available within the general labor market of appellant's commuting area. The Office further properly determined appellant's loss of wage-earning capacity in accordance with the formula developed in *Albert C. Shadrick*,²⁵ and codified at 20 C.F.R. § 10.403. Therefore, the Office properly found that the position of secretary reflected appellant's wage-earning capacity effective September 9, 2002.

LEGAL PRECEDENT -- ISSUE 2

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.²⁶ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.²⁷

ANALYSIS -- ISSUE 2

Subsequent to the Office's August 23, 2002 wage-earning capacity decision, appellant submitted a progress note from Dr. LeMay dated August 30, 2002. Dr. LeMay recommended an evaluation by another physician to determine whether appellant had either connective tissue disorder or post-traumatic fibromyalgia and its relationship to her injury. In a progress note dated October 7, 2002, Dr. LeMay diagnosed myofascial pain due to appellant's employment injury; however, he did not provide any rationale for his opinion or address the relevant issue of whether she remained totally disabled due to her employment injury and thus his opinion is entitled to little probative value.²⁸ In a progress note dated October 31, 2002, Dr. LeMay again recommended an evaluation of appellant by another physician. The medical evidence submitted by appellant does not contain a rationalized medical opinion explaining how her employment-related condition prevented her from performing the position of secretary or otherwise establish that the Office improperly determined her wage-earning capacity. As appellant did not submit evidence showing that the Office's original determination with regard to her wage-earning capacity was erroneous or that she sustained a material change in the nature and extent of her employment-related condition, she has not met her burden of proof to establish that the Office's wage-earning capacity decision should be modified.

²⁵ See *Albert C. Shadrick*, *supra* note 16.

²⁶ *Tamra McCauley*, 51 ECAB 375 (2000).

²⁷ *Linda Thompson*, 51 ECAB 694 (2000).

²⁸ A medical opinion not fortified by medical rationale is of little probative value. *Ronald C. Hand*, 49 ECAB 113 (1997).

LEGAL PRECEDENT -- ISSUE 3

To require the Office to reopen a case for merit review under section 8128(a) of the Act,²⁹ the Office's regulations provide that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal arguments not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office.³⁰ Section 10.608(b) provides that, when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.³¹

The Board has held that the submission of evidence or argument which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.³² Additionally, the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.³³ While a 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.³⁴

ANALYSIS -- ISSUE 3

In her request for reconsideration, appellant contended that the Office erred in relying on Dr. Fletcher's opinion to reduce compensation because it had previously found his opinion entitled to little weight and as his work restrictions were outdated. She also argued that the Office failed to meet its burden to show she was disabled by a nonemployment-related post-existing condition based on Dr. LeMay's reports. Appellant further asserted the Office erred in failing to accept her claim for depression and should have considered all of the conditions that prevented her from working prior to reducing her compensation. However, appellant previously raised these contentions before the Office on numerous occasions. As noted above, the Board has held that the submission of evidence or argument which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.³⁵

Appellant additionally contends that the Office denied her due process in according weight initially to Dr. LeMay's April 2002 report in its notice of proposed reduction of compensation and then increasing the weight accorded to Dr. Fletcher's opinion in subsequent decisions. However, the Office properly accorded weight to both Dr. Fletcher and Dr. LeMay in

²⁹ 5 U.S.C. § 8128(a).

³⁰ 20 C.F.R. § 10.606(b)(2).

³¹ 20 C.F.R. § 10.608(b).

³² *Edwards W. Malaniak*, 51 ECAB 279 (2000).

³³ *Kevin M. Fatzner*, 51 ECAB 407 (2000).

³⁴ *Robert P. Mitchell*, 52 ECAB 116 (2000).

³⁵ *James E. Norris*, 52 ECAB 93 (2000).

its reduction of compensation, which was affirmed by the hearing representative. Appellant's contention, therefore, does not have a reasonable color of validity and is insufficient to constitute a basis for reopening the case.³⁶

In a progress note dated April 30, 2003, Dr. LeMay diagnosed cervical myofascial pain and fibromyalgia by history. He did not, however, address the relevant issue of whether residuals of appellant's employment injury prevented her from working in the selected position of secretary. As noted above, evidence that does not address the particular issue involved does not constitute as basis for reopening a case.³⁷

As appellant has not shown that the Office erred in applying a point of law, advanced a relevant legal argument not previously considered or submitted relevant and pertinent new evidence, the Office properly denied her application for review of the merits of her claim.

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation benefits effective September 8, 2002 on the grounds that she had the capacity to earn wages in the selected position of secretary. The Board further finds that appellant has not established that the Office's wage-earning capacity determination should be modified. The Board also find that the Office properly refused to reopen appellant's case for further consideration of the merits under section 8128.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 2, 2004 and April 18, 2003 are affirmed.

Issued: November 1, 2004
Washington, DC

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

³⁶ See *Robert P. Mitchell*, *supra* note 34.

³⁷ *Alan G. Williams*, 52 ECAB 180 (2000).