

The issues are: (1) whether appellant has met her burden of proof to establish that modification of the wage-earning capacity determination was warranted; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits pursuant to 5 U.S.C. § 8128(a).

## **FACTUAL HISTORY**

This case has previously been on appeal before the Board.<sup>1</sup> In a January 24, 2005 decision, the Board set aside and remanded the Office's February 13, 2004 decision. The Board found that appellant's claim for compensation raised the issue of whether a modification of the December 13, 2002 wage-earning capacity decision was warranted. The facts and the history contained in the prior appeal are incorporated by reference. The facts and the history germane to the present issue have been reiterated.

Dr. Olayinka Ogunro, a Board-certified orthopedic surgeon, in reports dated January 23, 2003, advised that appellant was unable to work from January 18 to 23, 2003 but could return on January 24, 2003. He prescribed restrictions that included avoiding overhead activity and above the shoulder activity. Dr. Ogunro also advised that appellant had shooting pains in the elbow and was dropping things. He diagnosed carpal tunnel syndrome, cubital tunnel syndrome bilaterally, status post release and indicated that appellant appeared to have tendinitis in the right shoulder. In a January 28, 2003 report, Dr. Ogunro advised that appellant was performing modified duty. He submitted additional disability certificates dated March 6, 7 and 27, 2003, which indicated that appellant was unable to work and needed retraining. On April 25, 2003 Dr. Ogunro noted appellant's symptoms and opined that appellant's shoulder pain evolved from her bilateral arm tendinitis, which evolved into carpal tunnel syndrome and cubital tunnel syndrome bilaterally. He attributed appellant's findings of tendinitis in the elbow and shoulders to her employment and advised reassigning appellant. On June 4, 2003 Dr. Ogunro opined that appellant was taken off work because she was unable to perform her modified duties. He continued to support that appellant could not perform her modified duties in reports dated June 4 and August 27, 2003. However, on October 22, 2003, Dr. Ogunro advised that appellant had a normal examination and could return to work.

In a November 6, 2003 fitness-for-duty report, Dr. Arthur L. Sarris, a Board-certified orthopedic surgeon, opined that there was no reason why appellant could not return to her modified duties.

In a November 26, 2003 report, Dr. Ogunro diagnosed tendinitis of both shoulders and indicated that appellant was not at work because of "confusion" over requirements. He recommended a second opinion examination.

Following the Board's remand, the Office, in a decision dated May 9, 2005, denied modification of appellant's December 13, 2002 wage-earning capacity decision. The Office determined that the medical evidence was not sufficient to establish that the accepted conditions had changed and that the evidence of file was not sufficient to establish that the original loss of wage-earning capacity decision was in error.

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<sup>1</sup> Docket No. 04-1487 (issued January 24, 2005).

On May 3, 2006 appellant requested reconsideration and submitted additional evidence.<sup>2</sup> The additional evidence included a Form CA-7 claim for compensation for the period May 1 to 10, 2006, a copy of her offer of limited duty dated March 3, 2006, which appellant rejected and a March 7, 2006 offer of limited duty which she accepted. She submitted medical reports dating from January 26, 2005 to April 15, 2006 from Dr. Ogunro. On August 15, 2005 Dr. Ogunro noted that appellant presented for an impairment rating and that she had complaints of occasional numbness in the hands with activity. He conducted an examination and noted that it revealed negative Tinel's sign over the transverse carpal ligament and negative Tinel's sign over the cubital tunnel. Dr. Ogunro determined that the Phalanx test and elbow flexion tests were negative and recommended that appellant continue with her present work capacity.

In an October 25, 2005 duty status report, Dr. Ogunro advised that appellant could not perform regular duty; however, he prescribed light-duty restrictions for eight hours per day that included no lifting over two pounds and keyboarding for only two hours.

In a report dated February 2, 2006, Dr. Ogunro noted that appellant presented for a "follow-up evaluation of bilateral hand numbness and swelling and right index that feels jammed. These symptoms reoccurred (sic) since she resumed work last October 2005." Dr. Ogunro diagnosed bilateral carpal tunnel syndrome and bilateral endoscopic release and recommended that appellant continue using Ibuprofen and splinting, especially at night.

In reports dated February 28, 2006, Dr. Ogunro noted that appellant may continue using "Ibuprofen and splinting which seems to be helping with symptoms." He noted that appellant's work hours were temporarily reduced for one month from eight hours a day to six hours a day for five days a week to alleviate her symptoms.

In reports dated March 9 and 28, 2006, Dr. Ogunro opined that appellant was unable to return to work and that she should continue on her current restrictions and minimize overhead motions. On April 12, 2006 he diagnosed bilateral carpal tunnel syndrome and bilateral carpal tunnel release and opined that appellant could return to limited duty for eight hours a day with "noted restrictions." In an April 21, 2006 duty status report, Dr. Ogunro restricted appellant to intermittent lifting and twisting of no more than two pounds and keyboarding for no more than two hours per day.

An April 26, 2006 magnetic resonance imaging (MRI) scan of the right shoulder, read by Dr. Timothy Ponder, a Board-certified diagnostic radiologist, revealed a normal right shoulder.

By decision dated June 16, 2006, the Office denied modification of the May 9, 2005 decision.

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<sup>2</sup> On June 10, 2005 appellant requested a hearing. By decision dated June 27, 2005, the Office denied appellant's request for an oral hearing on the grounds that the request was untimely. The Board does not have jurisdiction over the June 27, 2005 decision as it was issued more than one year prior to the filing of the present appeal. See 20 C.F.R. § 501.3(d).

By letter dated July 22, 2006, appellant requested reconsideration. She alleged that the medical evidence clearly established that her on-the-job injury caused her to develop tendinitis in her right shoulder. Appellant noted that she was including a copy of a report from Dr. Ogunro which showed that she was taken off work to allow her shoulders to rest. However, no report accompanied her request.

By decision dated August 9, 2006, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that her request neither raised substantial legal questions nor included new and relevant evidence and, thus, it was insufficient to warrant review of its prior decision.

### **LEGAL PRECEDENT -- ISSUE 1**

A wage-earning capacity decision is a determination that actual earnings in employment or earnings in 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.<sup>3</sup>

The Office's procedure manual provides 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 CE [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity."<sup>4</sup>

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.<sup>5</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>6</sup>

### **ANALYSIS -- ISSUE 1**

Appellant alleged that she sustained a recurrence on January 22, 2003 while replacing labels on containers, as her shoulder started hurting.<sup>7</sup> As noted, the Board found that appellant's recurrence of disability claim raised the issue of whether her December 13, 2002 wage-earning capacity decision should be modified. The Board finds that the evidence does not establish that

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<sup>3</sup> See *Sharon C. Clement*, 55 ECAB 552 (2004).

<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

<sup>5</sup> *Sue A. Sedgwick*, 45 ECAB 211 (1993).

<sup>6</sup> *Id.*

<sup>7</sup> Appellant alleged that commencing on February 12, 2003, her job was no longer available, and that her condition had worsened. However, in a March 6, 2003 memorandum, the employing establishment confirmed that the work provided to appellant was within her restrictions and that she refused to return to the position.

the Office's December 13, 2002 wage-earning capacity determination was, in fact, erroneous nor does the evidence show that appellant's wage-earning capacity determination should be modified because she has been retrained or otherwise vocationally rehabilitated.

On December 13, 2002 the Office found that appellant's actual earnings in her limited-duty position as a bulk mail distributor, with weekly earnings of \$867.32, fairly and reasonably represented her wage-earning capacity effective August 15, 2001. In determining that the position was medically suitable, the Office found that appellant had demonstrated the ability to perform the job for two months or more and the position was considered suitable to her partially disabled condition. Appellant has not submitted any evidence to establish that the Office's original determination was erroneous.

With regard to whether appellant established a material change in her injury-related condition, she submitted numerous medical reports. However, the medical evidence is insufficient to establish a material change in the nature and extent of her injury-related condition. Dr. Ogunro did not provide an opinion that appellant's injury-related condition had materially worsened such that she was unable to perform the duties of her limited-duty job. On January 23, 2003 Dr. Ogunro provided findings upon examination and recommended that appellant avoid overhead activity; however, he did not opine that appellant's injury-related condition had materially worsened such that she could no longer perform the duties of her limited-duty position as a bulk mail distributor. On January 28, 2003 Dr. Ogunro indicated that appellant could perform modified duty. In a March 6, 2003 report, Dr. Ogunro stated that appellant was unable to work but did not explain why she could not work. His report did not address any material worsening in appellant's work-related conditions. In subsequent disability slips, Dr. Ogunro did not address whether appellant had experienced any material worsening in her work-related conditions.

On April 25, 2003 Dr. Ogunro noted that appellant should be retrained into another type of work. As noted, he did not explain why appellant could not perform her limited-duty position or how her disability due to a material change of her condition was employment related. In a June 4, 2003 report, Dr. Ogunro opined that appellant could not perform her modified job but did not provide any rationale to support his opinion. He did not advise that there was a material worsening in the work-related conditions. On October 22, 2003 Dr. Ogunro recommended that appellant return to her "normal activities." He repeated his opinion that appellant continue in her present capacity in his August 15, 2005 report. In reports dated November 26, 2004 through January 26, 2005, Dr. Ogunro did not address her ability to work. In reports dated December 10, 2003 and October 25, 2005, he opined that appellant could not do regular duty and prescribed light-duty restrictions. However, Dr. Ogunro did not explain why appellant could not perform the duties of the bulk mail distributor position that was determined to be medically suitable for appellant. He did not advise that her condition had materially worsened such that she could not perform this position.

In reports dated February 2 and 28, 2006, Dr. Ogunro noted that appellant had bilateral hand numbness and swelling and a jammed right index. He advised that these symptoms recurred since she resumed work in October 2005. Dr. Ogunro diagnosed bilateral carpal tunnel syndrome and bilateral endoscopic release. As noted, he did not provide any opinion that appellant's condition had materially worsened such that she could no longer perform the limited-

duty position. In reports dated March 9 and 28, 2006, Dr. Ogunro opined that appellant was unable to work but that she should continue on her current restrictions and minimize overhead motions. However, he did not provide any findings on examination or explain how her injury-related condition had materially worsened such that she could no longer perform the limited-duty position. On April 12, 2006 Dr. Ogunro opined that appellant could return to limited duty for eight hours a day with “noted restrictions.” He completed a duty status report on April 21, 2006 which included restrictions of intermittent lifting and twisting of no more than two pounds and keyboarding for no more than two hours per day. Dr. Ogunro’s report did not provide any opinion that appellant could not perform the limited-duty position which was the basis of the loss of wage-earning capacity decision.

The medical evidence submitted by appellant does not adequately explain that she had a material worsening of her injury-related condition. Consequently, the medical evidence is insufficient to establish that appellant was unable to perform the duties of the limited-duty job that provided the basis for the December 13, 2002 loss of wage-earning capacity decision.

### **LEGAL PRECEDENT -- ISSUE 2**

Under section 8128(a) of the Federal Employees’ Compensation Act,<sup>8</sup> the Office may reopen a case for review on the merits in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations, which provides that a claimant may obtain review of the merits if the written application for reconsideration, including all supporting documents, sets forth arguments and contains evidence that:

“(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or

“(ii) Advances a relevant legal argument not previously considered by [the Office]; or

“(iii) Constitutes relevant and pertinent new evidence not previously considered by the [the Office].”<sup>9</sup>

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.<sup>10</sup>

### **ANALYSIS -- ISSUE 2**

Appellant requested reconsideration on July 22, 2006. The underlying issue on reconsideration was whether she met her burden of proof to establish that modification of the wage-earning capacity decision was warranted. However, appellant did not provide any relevant

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<sup>8</sup> 5 U.S.C. § 8128(a).

<sup>9</sup> 20 C.F.R. § 10.606(b).

<sup>10</sup> 20 C.F.R. § 10.608(b).

or pertinent new evidence to the issue of whether modification of the wage-earning capacity decision was warranted.

In her July 22, 2006 request for reconsideration, appellant alleged that her on-the-job injury caused her to develop tendinitis in her right shoulder and that she was including a report from her physician to show that she was taken off work due to her shoulder condition. However, no report accompanied her request. As the issue of whether appellant had a material worsening of an injury-related condition is medical in nature, her arguments are not relevant. The submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.<sup>11</sup>

Consequently, the evidence submitted by appellant on reconsideration does not satisfy the third criterion, noted above, for reopening a claim for merit review. Furthermore, appellant also has not shown that the Office erroneously applied or interpreted a specific point of law, or advanced a relevant new argument not previously submitted. Therefore, the Office properly denied her request for reconsideration.

### **CONCLUSION**

The Board finds that the evidence is insufficient to warrant modification of the December 13, 2002 wage-earning capacity decision. The Board also finds that the Office properly refused to reopen appellant's case for further review of the merits of her claim under 5 U.S.C. § 8128(a).

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<sup>11</sup> *Alan G. Williams*, 52 ECAB 180 (2000); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000); *Robert P. Mitchell*, 52 ECAB116 (2000).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated August 9 and June 16, 2006 are affirmed.

Issued: March 6, 2007  
Washington, DC

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

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

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