

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

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C.A., Appellant )

and )

U.S. POSTAL SERVICE, POST OFFICE, )  
West Lynn, MA, Employer )

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**Docket No. 07-2133  
Issued: August 8, 2008**

*Appearances:*  
*John L. Whitehouse, Esq., for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
COLLEEN DUFFY KIKO, Judge

**JURISDICTION**

On August 16, 2007 appellant, through counsel, filed a timely appeal of a merit decision of the Office of Workers' Compensation Programs' hearing representative dated July 11, 2007, which modified the April 8, 1993 loss of wage-earning capacity (LWEC) decision and denied her claim for wage-loss compensation for total disability, commencing December 19, 2003. 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 the Office properly modified appellant's April 8, 1993 LWEC decision; and (2) whether the Office properly determined that the issue presented was a recurrence of disability as of December 19, 2003.

**FACTUAL HISTORY**

On July 9, 1999 appellant, then a 33-year-old window clerk, filed a traumatic injury claim alleging that on July 6, 1990 she injured her back when her left knee caught on a parcel

which caused her to trip and fall backwards into a safe. The Office accepted the claim for lumbosacral strain and also accepted her July 30 and November 1, 1990 recurrence claims. Subsequently, it expanded acceptance of appellant's claim to include acute lumbar sprain with secondary left L4-5 nucleus pulposus and permanent aggravation of her lumbar degenerative disc disease. The Office accepted her January 8, 2002 recurrence claim and paid wage-loss compensation for the period February 23, 2002 through December 12, 2003.<sup>1</sup>

By decision dated April 8, 1993, the Office issued a LWEC determination. It found that the actual earnings appellant received as a postal clerk beginning August 24, 1992 fairly and reasonably represented her wage-earning capacity.

On March 7, 1995 the Office accepted appellant's February 22, 1994 recurrence claim and authorized partial left L4-5 hemilaminectomy with removal of a ruptured disc, which was performed on April 18, 1994.

On January 12, 2002 appellant filed a claim for a recurrence of disability beginning January 8, 2002, due to her accepted July 6, 1990 employment injury.

In a July 13, 2002 attending physician's report (Form CA-20), Dr. Sidney N. Paly, an attending Board-certified neurologist, diagnosed degenerative back disease which he opined was probably related to her original work injury. He concluded that appellant was currently totally disabled.

In a September 6, 2002 attending physician's Form CA-20 report, Dr. Paly, an attending Board-certified neurologist, diagnosed degenerative back disease and checked "no" to the question of whether the condition had been caused or aggravated by her employment. He concluded that appellant was currently totally disabled due to her low back pain.

In a September 5, 2002 office visit report, Dr. Paly noted that appellant continued to be limited in her activities due to low back pain. He reported that she had limited back flexion and extension. Dr. Paly opined that appellant's "problem relates to her prior injury, the patient having had a disc herniation at L4-5, operated upon in 1994." In concluding he stated that while appellant initially did well following the surgery, "the pain in the back has recurred and the patient considers that she cannot perform her usual occupation."

Dr. Paly, in a November 6, 2002 office visit report, noted "no true radicular discomfort," but appellant continues to have pain across her lower back particularly when performing any bending or physical activity. He opined as appellant had lower back surgery due to "a significant disc herniation, the pain the patient currently exhibits simply must relate to that original injury."

On February 1, 2003 appellant filed an occupational disease claim alleging that on January 1, 2002 she first realized her lower back pain was due to intrusive surgery in 1994 due to the accepted July 6, 1990 employment injury.

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<sup>1</sup> Appellant was approved for disability retirement from the employing establishment effective May 26, 2006.

In a March 13, 2003 office visit report, Dr. Paly concluded that appellant was permanently disabled due to her back condition. A physical examination revealed limited straight left raising; positive Lasegue sign, left L5 sensory diminution; intact motor function; symmetrical reflexes; and moderate restriction of lower back flexion and extension “with increased pain on hyperextension to the left. Dr. Paly related that appellant’s disability is due to the “progressive degenerative changes superimposed on the prior problem of her low back herniation.”

In an office visit report dated July 8, 2003, Dr. Paly reported that appellant continued to have lumbar radicular pain. He opined that appellant is totally disabled due to her left lumbar radicular pain and low back pain which he attributed to her 1990 employment injury. Dr. Paly noted that appellant was unable to lift, twist or perform the excessive bending required in her job. He opined that due to her restrictions she is totally disabled.

On October 23, 2003 Dr. Mordechai M. Kamel, a second opinion Board-certified orthopedic surgeon, concluded that there had been a permanent aggravation of appellant’s back condition due to the accepted employment injury. Range of motion included 10 degrees extension, 20 degrees right lateral flexion, 30 degrees left lateral flexion; 70 degrees straight leg raising in a sitting position; positive Lasegue sign bilaterally and free range of motion in both hips. Dr. Kamel stated that appellant’s low back pain symptoms were supported by physical examination findings. He opined that appellant’s back condition after January 8, 2002 was causally related to the July 6, 1990 employment injury. In support of this conclusion, Dr. Kamel attributed appellant’s permanent aggravation and the “acceleration of the normal process of degeneration” to the July 6, 1990 employment injury and subsequent surgery. In an attached work capacity evaluation (Form OWCP-5c), he indicated that appellant was capable of working four hours per day with restrictions. Restrictions included walking, standing, bending/stooping, climbing and sitting between 2 to 4 hours; pushing, pulling and lifting up to 10 pounds for 2 to 4 hours; and a 5 minute break every 30 minutes.

On December 13, 2003 appellant returned to light-duty work for four hours per day.

On January 14, 2004 appellant filed a claim for a recurrence of disability beginning December 19, 2003 and continuing due to her accepted July 6, 1990 employment injury.<sup>2</sup> In support of her recurrence claim, she submitted a December 19, 2003 report, December 19, 2003 duty status report and December 19, 2003 attending physician’s CA-20 form report, by Dr. Steven C. Hollis, a treating Board-certified orthopedic surgeon.

In a December 19, 2003 report, Dr. Hollis diagnosed chronic low back pain. Appellant related that she was unable to tolerate working four hours of limited-duty work. A physical examination revealed some pain when transiting from sitting to standing; guarded lumbar motion; 60 degrees forward flexion, 5 degrees extension; limited side bending; lumbar region diffuse tenderness, pain on straight leg raising; and normal reflex and motor examination. In an attached CA-20 form, Dr. Hollis diagnosed lumbar pack pain which he checked “yes” as due to her employment. He opined that appellant was totally disabled due to her lumbar back pain. In

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<sup>2</sup> The Office continued to pay appellant compensation for four hours per day following her stopping work on December 19, 2003.

the December 19, 2003 duty status report, Dr. Hollis noted that appellant was totally disabled due to chronic lower back pain which he opined limited her function.

On March 5, 2004 Dr. Hollis diagnosed chronic back pain and stated that appellant was “currently not working due to prohibitive back pain.”

By decision dated April 7, 2004, the Office denied appellant’s claim for a recurrence of total disability and noted that she was entitled to compensation for four hours per day based on Dr. Kamel’s report

On April 9, 2004 Dr. Hollis diagnosed chronic back pain and significant functional limitations. A physical examination revealed lumbar spine tenderness “with guarded spinal motion from extension 10 [degrees] to flexion 30 [degrees].”

On April 27, 2004 appellant refused the employing establishment’s offer of a limited-duty job working four hours per day based on the restrictions noted by Dr. Kamel.

On May 7, 2004 appellant requested an oral hearing, which was held on November 30, 2004.

On May 28 and August 3, 2004 Dr. Hollis diagnosed chronic back pain. A physical examination on May 28, 2004 revealed 5 degrees extension, 20 degrees flexion and “[d]iffuse paramidline lumbar tenderness, no deformity or spasm.”

On December 28, 2004 Dr. Hollis diagnosed chronic back pain. He opined that appellant has “very impaired function and limited if any ability to function in an employment scenario.” A physical examination revealed diffuse lumbar tenderness. Range of motion included 40 degrees flexion, 10 degrees extension, 20 degrees bilateral side bending and “motion and points restricted by pain.”

In a February 3, 2005 report, Dr. Paly opined that appellant was totally disabled from working due to her back condition. He reviewed her work duties and opined that “in terms of the number of hours of work, sitting, standing, twisting and the degree of lifting that would be necessary was clearly not reasonable for this patient in terms of her persisting discomfort.” Dr. Paly concluded that appellant’s current problem was “a combination of scarring and the degenerative changes in the area that had been afflicted by the disc herniation that had required surgery.”

By decision dated February 17, 2005, the Office hearing representative affirmed the April 7, 2004 decision denying appellant’s recurrence of total disability claim.

On May 15, 2005 Dr. Donald Rosen filled out a form indicating that appellant was capable of working with restrictions including frequent breaks. He noted that appellant’s impairment would result in her likely to be absent the majority of days from work. Dr. Rosen checked “yes” to the questions of whether her condition would likely cause her to miss two to three days of work monthly and that she would be able to work in a position that had “a flexible, part-time schedule with a liberal absentee policy.”

Appellant filed an appeal to the Board on March 7, 2005, which the Board docketed as No. 05-877. On September 2, 2005 the Board issued an order remanding the case.<sup>3</sup> The Board found that Office should have adjudicated appellant's recurrence claim as a request for modification of the April 8, 1993 wage-earning capacity decision.

On remand, the Office issued a decision dated November 7, 2006, denying appellant's claim for compensation for total disability beginning December 19, 2003. It also denied appellant's request for modification of the April 8, 1993 wage-earning capacity decision.

On November 9, 2006 appellant, through her representative, requested an oral hearing which was held on April 25, 2007.

In a July 11, 2007 report, the hearing representative found the evidence sufficient to establish modification of the April 8, 1993 LWEC decision effective December 13, 2003 as the evidence established appellant's condition had worsened such that she could only work four hours per day. However, he found the evidence insufficient to warrant that appellant was totally disabled beginning December 19, 2003.

### **LEGAL PRECEDENT -- ISSUE 1 and ISSUE 2**

The general test for determining LWEC is whether the injury-related residuals prevent the employee from performing the kind of work she was doing when injured. When the medical evidence establishes that the residuals of an employment injury prevent the employee from continuing in her employment, the employee is entitled to compensation for any resulting LWEC.<sup>4</sup>

Under section 8115(a) of the Federal Employees' Compensation Act,<sup>5</sup> wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. 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.<sup>6</sup> Office procedures provide that a determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity should be made after an employee has been working in a given position for more than 60 days.<sup>7</sup> Compensation payments

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<sup>3</sup> Docket No. 05-877 (issued September 2, 2005).

<sup>4</sup> *Elsie L. Price*, 54 ECAB 734 (2003).

<sup>5</sup> 5 U.S.C. §§ 8101-8193, 8115(a).

<sup>6</sup> *S.B.*, 59 ECAB \_\_\_\_ (Docket No. 07-346, issued April 23, 2008); *E.C.*, 59 ECAB \_\_\_\_ (Docket No. 07-1634, issued March 10, 2008); *Hayden C. Ross*, 55 ECAB 455 (2004).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993).

are based on the wage-earning capacity determination and it remains undisturbed until properly modified.<sup>8</sup>

The Office's procedure manual provides that, "[i]f a formal [LWEC] 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 [LWEC.]"<sup>9</sup>

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless the original rating was in error, there is a material change in the nature and extent of the injury-related condition or that the employee has been retrained or otherwise vocationally rehabilitated.<sup>10</sup>

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

The Office can modify an established wage-earning capacity determination by showing a material change in the nature and extent of the employee's injury-related condition or that the employee has been retrained or vocationally rehabilitated.<sup>11</sup>

Dr. Kamel, an Office referral physician, explained that his findings on physical examination supported appellant's low back pain symptoms. He also related that the objective evidence supporting a finding that appellant had sustained a permanent aggravation of her back condition due to her accepted employment injury and subsequent back surgery. In an attached work capacity evaluation sheet, Dr. Kamel concluded that appellant was capable of working four hours per day with restrictions. His opinion, which is thorough and rationalized, establishes that appellant's condition has materially changed such that she was only capable of working four hours per day with restrictions instead of the eight hours she had been working in her original light-duty job. The Office, therefore, properly modified the LWEC determination showing that appellant was only capable of working four hours per day.

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

Appellant briefly returned to a modified job working four hours per day on December 13, 2003. She stopped work on December 19, 2003. As noted above, the Office properly found modification of the April 3, 1993 LWEC decision was warranted and determined her December 13, 2003 job represented her new LWEC. Following her work stoppage, the Office then developed the evidence and determined that the issue presented was whether appellant had established a recurrence of total disability on December 19, 2003. Under the

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<sup>8</sup> See *Sharon C. Clement*, 55 ECAB 552 (2004).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995); see also *Katherine T. Kreger*, 55 ECAB 633 (2004).

<sup>10</sup> *D.M.*, 59 ECAB \_\_\_\_ (Docket No. 07-1230, issued November 13, 2007); *Elsie L. Price*, *supra* note 4; *Sue A. Sedwick*, 45 ECAB 211 (1993).

<sup>11</sup> *Tamra McCauley*, 51 ECAB 375 (2000).

circumstances of this case, however, the Board finds that the issue presented was whether the December 13, 2003 wage-earning capacity determination should be modified.

According to the evidence of record, appellant returned to work on August 24, 1992 to a light-duty postal clerk job within her restrictions. She subsequently stopped work and returned to a modified position working four hours per day on December 13, 2003. The Office found that the evidence established that her condition had worsened and modified the April 3, 1993 LWEC. Appellant subsequently filed a notice of recurrence on July 14, 2004, stopping work on December 19, 2003 and contending that she was unable to work even four hours per day. In this regard, she contends that her condition has deteriorated or worsened to the extent that she became totally disabled for work. The Board has held that, when a wage-earning capacity determination has been issued and appellant submits evidence with respect to disability for work, the Office must evaluate the evidence to determine if modification of wage-earning capacity is warranted.<sup>12</sup> The Office's procedure manual directs the CE to consider the criteria for modification when the claimant requests resumption of compensation for total wage loss. This section of the procedure manual covers the situation when a claimant has stopped working, but the principle is equally applicable to a claim of increased disability. The Board finds that the Office should have considered the issue of modification of the December 13, 2003 wage-earning capacity determination.

### **CONCLUSION**

The Board finds that the Office properly modified its determination of appellant's April 3, 1993 LWEC effective December 13, 2003. The Board further finds that appellant's claim for compensation for a recurrence of total disability raised the issue of whether a modification of the December 13, 2003 wage-earning capacity decision was warranted and the case must be remanded for an appropriate decision on this issue.

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<sup>12</sup> See *Sharon C. Clement*, *supra* note 8. The Board notes that consideration of the modification issue does not preclude the Office from acceptance of a limited period of employment-related disability, without a formal modification of the wage-earning capacity determination. *Id.* at n.10, slip op. at 5; *Cf. Elsie L. Price*, *supra* note 4 (acceptance of disability for an extended period was sufficient to establish that modification of the wage-earning capacity determination was warranted).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs' hearing representative dated July 11, 2007 is affirmed in part, set aside in part and the case remanded for further action consistent with this decision of the Board.

Issued: August 8, 2008  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board