

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

---

**R.B., Appellant** )

**and** )

**U.S. POSTAL SERVICE, POST OFFICE,  
Charlotte, NC, Employer** )

---

**Docket No. 10-132  
Issued: December 20, 2010**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant  
Office of the 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 October 19, 2009 appellant, through her attorney, filed a timely appeal from an Office of Workers' Compensation Programs' September 24, 2009 merit decision. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant met her burden of proof to establish that the January 22, 2009 wage-earning capacity determination should be modified.

**FACTUAL HISTORY**

Appellant, a 52-year-old clerk, injured her left shoulder and neck while separating mail on March 26, 2004. The Office accepted her claim for aggravation of cervical strain and left shoulder impingement. It authorized surgery on February 2, 2007 for acromioplasty, arthroscopic subacromial decompression and resection arthroplasty. The procedure was performed by Dr. Jerry Barron, Board-certified in orthopedic surgery and appellant's treating physician.

In reports dated April 15, 2008, Dr. Barron, advised that appellant had persistent neck and left shoulder pain with weakness of the supraspinatus, in addition to decreased active range of motion secondary to pain in her left shoulder and neck. He noted that she had refused the employing establishment's April 10, 2008 light-duty offer because she did not believe that she would not be required to perform repetitive motion activities for the full eight-hour shift. Dr. Barron noted that appellant contended such activities aggravated/exacerbated her neck and left shoulder conditions.<sup>1</sup>

On June 19, 2008 appellant accepted a modified, 40 hour a week job as a mail processing clerk. The job description stated that she would be required to remove labels and place them on pieces of mail in a mail tray using her right arm and hand. The job required sitting, picking up mail, pulling labels off and permitted a 15-minute break each hour.

In a July 17, 2008 report, Dr. John A. Weishofer, Board-certified in neurosurgery, stated that appellant was experiencing worsening neck pain without significant radiation down the arms. Appellant had known disc bulges at C5-6 and C6-7 and had previously accepted claims for her neck and back, with L3-4 and L4-5 disc protrusions and some degeneration. Dr. Weishofer stated that he would have appellant undergo another cervical MRI scan and consider whether she was a suitable candidate for a two level discectomy infusion or possible disc replacement surgery. He advised that all other restrictions and ratings would remain the same.

By letter dated July 23, 2008, the Office advised the employing establishment that the duties listed in its June 12, 2008 job offer were somewhat vague. It asked that the employer submit a clear description of the duties appellant was performing.

By letter dated July 28, 2008, the employing establishment specified the job duties pertaining to appellant's modified job. These included placing an return to sender (RTS) label on a piece of mail one at a time, placing a letter in a stationary tray on a table, sitting in a chair at a table and reaching directly in front of her to slightly to remove labels and removing the RTS labels from a box situated on the table where appellant worked.

In a July 28, 2008 letter to the Office, appellant asserted that the duties of her modified job exceeded her work restrictions, resulting in an increase in pain and an aggravation of her work-related conditions.

On July 29, 2008 appellant underwent a cervical MRI scan which showed ossification of the posterior longitudinal ligament from lower C3 to upper C7; osteophytic ridges at each of the intervening cervical disc spaces; subtle atrophy at the mid-cervical spinal cord; mild foramen stenosis and adequate neural foramina at other levels.

---

<sup>1</sup> It is unclear from the instant record when appellant began or stopped working. The record contains a copy of an August 17, 2007 modified job offer, which she signed and accepted. However, there is no documentation indicating that appellant ever worked at this job. Dr. Barron's report indicated that she was not working at the time of his examination.

In an August 6, 2008 report, Dr. Daniel Oberer, a specialist in neurosurgery, advised that appellant had cervical spondylosis, lumbar spondylosis, degenerative changes of the spine and cervical spinal stenosis. He stated that her neck pain was likely secondary to cervical spondylosis and opined that surgery was not necessary.

On February 3, 2009 appellant submitted a (Form CA-17) in which she requested compensation for wage loss for 27.99 hours from January 22 to 30, 2009. She attached a January 21, 2009 CA-17 form report from Dr. Barron, who opined that she could do no more than four hours of work a day which required repetitive motions. Dr. Barron checked a box indicating that she could do part-time work. Appellant submitted a February 3, 2009 time analysis form which documented that she began working four hours a day as of January 22, 2009.

On January 23, 2009 the employing establishment offered the claimant a part-time, four-hour a day job placing RTS labels on mail, one at a time with her right hand, placing the letters in the tray with her right hand and sitting in a chair and reaching slightly to remove labels. The position required no lifting, carrying, bending, stooping, pushing, pulling, standing, twisting, repetitive motion, reaching above shoulders and she would grasp one piece of mail at a time. Appellant accepted the job offer that day.

By letter dated February 3, 2009, the employing establishment controverted appellant's wage-loss claim, asserting that the Form CA-17 appellant submitted was unclear and conflicting. Although Dr. Barron indicated on the form that she was capable of performing physical activities such as sitting, standing, walking for more than four hours a day, he also stated that she could do no more than four hours of repetitive motion activity a day.

On February 6, 2009 the Office issued a formal wage-earning capacity determination, finding that the job she accepted on June 19, 2008 fairly and reasonably represented her wage-earning capacity. It based her wage-earning capacity on her actual wages since she worked more than 60 days at the modified mail processing clerk job, which was permanent, not seasonal.

In a February 2, 2009 (Form CA-20), received by the Office on February 23, 2009, Dr. Barron indicated that the claimant could do lifting and carrying 5 pounds, could do no more than four hours of repetitive motion activities a day and indicated that she was part time as of January 22, 2009.

In a January 21, 2009 report, received by the Office on February 25, 2009, Dr. Barron indicated that appellant had recently undergone surgery on her left knee, which was progressing well, but that her chief complaint was chronic left shoulder pain. He stated that she experienced a recurrence of her left shoulder pain which she believed was related to her continued repetitive motion at work. On examination, appellant had some decreased range of motion of the neck with radiation of pain into the left upper extremity. Dr. Barron stated that she had continued left shoulder impingement and pain with overhead range of motion, which was decreased. He continued to restrict appellant at work with regards to her use of the left shoulder.

By letter dated February 6, 2009, the Office noted that appellant had filed a claim for a recurrence of her work-related disability as of January 22, 2009 and asked her to submit additional factual and medical evidence in support of her claim. It advised her to provide evidence showing

either a change in the nature and extent of her injury-related condition or a change in the nature and extend of her light-duty job requirements.

In a February 11, 2009 statement, received by the Office on February 23, 2009, appellant stated that the job she accepted on June 19, 2008 had aggravated her accepted left shoulder condition, resulting in swelling to her neck and shoulder and pain. She asserted that the activities of this position placed stress on her upper body because it required her to reach and grasp mail continuously to complete her work. Appellant saw Dr. Barron on January 21, 2009, who restricted her to a four-hour workday and four hours a day of repetitive motion activities. She also stated that she developed a painful bilateral carpal tunnel, for which she filed a separate claim, that the Office accepted.

In a February 18, 2009 report, received by the Office on February 23, 2009, Dr. Barron indicated that on January 8, 2009 the claimant had mild impingement of the left shoulder, mild crepitus, pain and weakness of the rotator cuff and weakness of the scapular rotators. He stated that on January 22, 2009 appellant experienced a recurrence of left shoulder pain, decreased range of motion of the neck and radiation of pain into her neck, continued left shoulder impingement, pain with overhead range of motion, decreased overhead range of motion and weakness with resisted supraspinatus testing. Dr. Barron advised that as of January 22, 2009 he provided appellant with the following restrictions: no more than four hours of repetitive motion a day, no lifting exceeding five pounds; no carrying for more than two hours a day; no sitting for more than four hours a day; no standing for more than two hours a day; no walking for more than one hour a day; no simple grasping for more than four hours a day; no fine manipulation exceeding four hours a day; and no driving vehicles for more than three hours a day.

By decision dated March 9, 2009, the Office denied appellant compensation for a recurrence of her work-related disability as of January 22, 2009. It found that the evidence she submitted in support of her claim indicated that she sustained a new injury, not a recurrence of disability, on January 22, 2009.

By letter dated April 6, 2009, appellant's attorney requested an oral hearing, which was held on July 6, 2009. At the hearing the hearing representative informed counsel that the issue in the case was not whether appellant had sustained a recurrence of disability, but whether the Office's January 22, 2009 wage-earning capacity decision should be modified. Appellant testified that she stopped working on January 22, 2009 due to an increase in left shoulder pain, which was caused by the work duties of her modified job. She also noted that she developed bilateral carpal tunnel syndrome as a result of her repetitive work duties, for which she had filed a separate claim.

By decision dated September 24, 2009, an Office hearing representative denied modification of the Office's February 6, 2009 wage-earning capacity determination.

#### **LEGAL PRECEDENT**

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from 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>2</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 claims examiner (CE) will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity."<sup>3</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>4</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>5</sup>

The Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995) provides for a retroactive determination where an employee has worked for at least 60 days and the work stoppage following that date was not due to the employment-related condition.

### ANALYSIS

The Board finds that appellant met her burden of proof to establish that the Office's February 6, 2009 wage-earning capacity determination should be modified as it was issued in error.

The Office accepted the conditions of aggravation of cervical strain and left shoulder impingement and subsequently authorized an acromioplasty, arthroscopic subacromial decompression and resection arthroplasty of the left shoulder on February 2, 2007. Dr. Barron, who performed the procedure, restricted appellant from doing work requiring repetitive motion activities for a full eight-hour shift in an April 15, 2008 report. Appellant accepted a modified, 40-hour a week full-duty job as a mail processing clerk on June 19, 2008; this job entailed removing labels and placing them on pieces of mail in a mail tray using her right arm and hand. The job required sitting, picking up mail and pulling labels off, but purportedly did not require repetitive activity.

A January 21, 2009 CA-17 form completed by Dr. Barron stated that appellant could do no more than four hours of work a day which required repetitive motions. He checked a box indicating that she could do part-time work.

---

<sup>2</sup> See *Katherine T. Kreger*, 55 ECAB 633 (2004).

<sup>3</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

<sup>4</sup> *Sue Sedgwick*, 45 ECAB 211 (1993).

<sup>5</sup> *Id.*

The employing establishment offered appellant a modified job as a processing clerk for four hours a day on January 23, 2009 -- a job whose duties were virtually identical to the ones entailed by the eight hour a day job she had been working at since June 19, 2008, except that she would now be working daily at that job for four hours instead of eight. Appellant accepted the job offer on January 23, 2009. Notwithstanding that she was no longer working the modified position eight hours a day, the Office issued a formal wage-earning capacity determination two days later, on February 6, 2009. It found that the modified mail processing clerk job she accepted on June 19, 2008 for work eight hours a day fairly and reasonably represented her wage-earning capacity since she had worked at this position for more than 60 days. This finding ignored the employing establishment's January 23, 2009 offer of a modified mail processing clerk job with the same duties as her previous job, for four hours a day due to Dr. Barron's new restrictions. As appellant no longer had actual earnings in the position for eight hours a day and she was restricted to work for four hours a day due to her accepted conditions, she has established error in the February 6, 2009 wage-earning capacity determination, which found that her earning in the eight-hour a day position fairly and reasonably represented her wage-earning capacity.

The Board also finds that while the hearing representative stated that the wage-earning capacity determination should not be modified because the evidence of record indicated that appellant sustained a new injury, the Board finds that the evidence supports a worsening of the employment-related conditions of aggravation of cervical strain and left shoulder impingement.

The modified work position appellant performed since June 19, 2008 required that she only work with her right hand and arm. As she explained this work placed stress on her entire upper body and she experienced increasing pain in the neck and left shoulder. The Office on February 25, 2009 received a January 21, 2009 report from Dr. Barron which indicated that appellant had experienced a recurrence of her left shoulder pain. Dr. Barron stated that she continued to have chronic left shoulder impingement -- her accepted condition -- and advised that he would continue to restrict her at work with regards to her use of the left shoulder. He also submitted a February 18, 2009 report which reiterated that appellant experienced a recurrence of left shoulder pain and had left shoulder impingement on January 22, 2009. The evidence of record does not establish a new injury of the left shoulder, but rather a worsening of the accepted employment-related conditions of cervical strain and left shoulder impingement.

For the foregoing reasons the Board will reverse the Office's September 29, 2009 decision affirming the February 6, 2009 wage-earning capacity determination.

### **CONCLUSION**

The Board reverses the September 29, 2009 Office hearing representative decision affirming the Office's February 22, 2009 wage-earning capacity determination.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 24, 2009 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 20, 2010  
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