

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

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**S.B., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Oakdale, NY, Employer**

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**Docket No. 11-925  
Issued: November 15, 2011**

*Appearances:*

*Paul Kalker, Esq., for the appellant*

*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**ORDER REMANDING CASE**

Before:

RICHARD J. DASCHBACH, Chief Judge

ALEC J. KOROMILAS, Judge

COLLEEN DUFFY KIKO, Judge

On March 3, 2011 appellant, through her attorney, filed a timely appeal from a January 26, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) finding that she did not establish a recurrence of disability. The Board docketed the appeal as No. 11-925.

The Board has duly reviewed the record and finds that the case is not in posture for decision. In a March 17, 2009 decision, OWCP reduced appellant's compensation based on its finding that her actual earnings as an executive assistance effective July 28, 2008 fairly and reasonably represented her wage-earning capacity.<sup>1</sup> On June 15, 2010 she filed a notice of recurrence of disability commencing on March 22, 2009 causally related to her accepted employment injury. Appellant stopped work on March 22, 2010 and did not return.<sup>2</sup> In a report

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<sup>1</sup> This case has previously been before the Board. By decision dated November 1, 2006, the Board set aside a March 22, 2006 decision finding that appellant had not established that she sustained herniated cervical discs at C4-5 and C5-6 due to employment factors. Docket No. 06-1438 (issued November 1, 2006). Following further development, OWCP accepted that she sustained employment-related left shoulder sprain, an aggravation of a cervical intervertebral disc and displacement of a cervical intervertebral disc without myelopathy.

<sup>2</sup> On the form, appellant's supervisor noted that the initial injury occurred at another work location. Management met with her on March 22, 2010 "to discuss possible termination due to poor performance." Appellant advised the employing establishment that she was sick on March 23 to 25, 2010 and resigned on March 26, 2010.

dated March 23, 2010, Dr. Magda Fahmy, a Board-certified psychiatrist, discussed appellant's work injury and diagnosed degenerative disc disease. She found that appellant was disabled due to increased symptoms and that her "disability impairs her movements and she cannot tolerate working at this time." On September 4, 2010 Dr. Fahmy determined that she remained disabled from work.

On December 17, 2010 OWCP advised appellant of the definition of a recurrence of disability and requested additional factual and medical information. By decision dated January 26, 2011, it found that she did not establish a recurrence of disability due to her accepted employment injury. OWCP determined that the medical evidence was insufficient to show that appellant's condition had materially worsened such that she was unable to perform her work duties. While it noted that the medical evidence did not show a material worsening of appellant's accepted condition, it developed the evidence and found that the issue presented was whether the claimed recurrence of disability on March 22, 2010 was due to the accepted work injury. Under the circumstances of this case, however, the Board finds that OWCP should have developed the issue of whether the March 17, 2009 wage-earning capacity determination should be modified. Appellant stopped work and submitted medical evidence indicating that she was totally disabled for the foreseeable future. The Board has held that, when a wage-earning capacity determination has been issued and a claimant submits evidence with respect to disability for work, OWCP must evaluate the evidence to determine whether modification of the wage-earning capacity finding is warranted.<sup>3</sup> The Board thus finds that OWCP should have considered the issue of modification of the wage-earning capacity determination.

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<sup>3</sup> See *Sharon C. Clement*, 55 ECAB 552 (2004); *Katherine T. Kreger*, 55 ECAB 633 (2004); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

**IT IS HEREBY ORDERED THAT** the January 26, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this order of the Board.

Issued: November 15, 2011  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board