

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of LORRAINE B. WOMACK and DEPARTMENT OF THE NAVY,  
BALBOA NAVAL HOSPITAL, San Diego, CA

*Docket No. 98-114; Submitted on the Record;  
Issued December 23, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,  
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for modification of the 1984 loss of wage-earning capacity determination.

On September 23, 1973 appellant, then a 39-year-old licensed vocational nurse, sustained a back injury. The Office accepted her claim for low back strain and disc bulges at L3-4 and L4 5. On October 22, 1984 the Office determined that appellant was no longer totally disabled and had a wage-earning capacity of 47 percent. In decisions dated May 15, 1985, October 24, 1990 and October 29, 1991, the Office denied appellant's requests for modification of the 1984 wage-earning capacity determination.<sup>1</sup>

Appellant, through her representative, requested reconsideration of the October 29, 1991 decision, and in support submitted two new medical reports. A May 22, 1997 report from Dr. Francis G. D'Ambrosio, a Board-certified orthopedic surgeon, described appellant's present condition and his history of treatment with her and opined that she was totally disabled at that time, "due to the injury she sustained in 1973 and not [due to] any other diseases or physical conditions." He opined that she was totally disabled from sedentary work and that "all disability is due directly to the injury she suffered on the job in 1973."

The record also contained multiple previously submitted reports from Dr. D'Ambrosio covering his years of treatment with her. Most recently, Dr. D'Ambrosio had noted in March 4 and April 1, 1996 reports that he was treating appellant for back pain secondary to the injury in 1973, and he noted limited motion in all directions, tenderness to palpation in the paraspinal musculature and decreased sensation in the S1 distribution on the left. He also noted that the pain that radiated from appellant's lumbar spine had reached the point where it was severely incapacitating for her, and that appellant had not improved since he began seeing her three years earlier. Dr. D'Ambrosio noted that appellant's pain and sensory deficit had made minor

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<sup>1</sup> Appellant filed an appeal with the Board on another issue, Docket No. 90-603, issued July 13, 1990.

incremental increases every time that he had seen appellant. In a January 29, 1996 report, Dr. D'Ambrosio opined that appellant was "disabled with regards to her ability to work secondary to the injury to her lumbar spine." In a November 16, 1995 letter to the Office, Dr. D'Ambrosio opined that appellant had clearly worsened over the three years he had treated her, directly related to her 1973 injury. On April 24, 1995 Dr. D'Ambrosio stated that 100 percent of appellant's injury was directly related to the 1973 injury. On December 16, 1994 Dr. D'Ambrosio noted that appellant's continued lower back pain was an exacerbation and progression of the original injury she sustained to her lumbar spine in 1973. On July 15, 1994 Dr. D'Ambrosio noted that appellant had a positive straight leg raising test and positive flip test and opined that appellant was totally disabled with no lifting over 10 pounds, no prolonged standing or walking and no excessive bending or twisting. On January 14, 1994 he opined likewise. Even in a September 9, 1993 report, Dr. D'Ambrosio reviewed her physical examination results and diagnostic testing and opined that she was totally disabled.

A July 15, 1997 second new medical report from Dr. T.J. Tarrant, a Board-certified orthopedic surgeon, was also submitted, which diagnosed chronic pain of the lumbar spine, noted refill of her pain medications and recommended referral to a pain management specialist.

By decision dated July 22, 1997, the Office performed a merit review of the evidence submitted, weighed the evidence and determined its deficiencies and denied modification of the 1984 wage-earning capacity determination. The Office found that Dr. D'Ambrosio's reports supporting total disability were unrationalized.

The Board, however, finds that this case is not in posture for decision.

Once the loss of wage-earning capacity 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. The burden of proof is on the party attempting to show modification of the award.<sup>2</sup>

In this case, the burden of proof to modify the 1984 wage-earning capacity determination is on appellant. Appellant submitted medical reports from Dr. D'Ambrosio dating from 1993 through 1997 which identify her condition as being causally related to her 1973 accepted employment injury, and which opine that she is, and has been since 1993, totally disabled due to her condition.

Proceedings under the Federal Employees' Compensation Act are not adversarial in nature, nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.<sup>3</sup> This holds true in wage-earning capacity modification claims and recurrence claims, as well as in initial traumatic and occupational claims. In the instant case, although none of appellant's treating physicians' reports contain rationale sufficient to discharge

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<sup>2</sup> *Daniel J. Boesen*, 38 ECAB 556 (1987).

<sup>3</sup> *William J. Cantrell*, 34 ECAB 1223 (1983).

appellant's burden of proving by the weight of reliable, substantial and probative evidence that she sustained a recurrence of total disability, causally related to her September 23, 1973 injury, they constitute substantial, uncontradicted evidence in support of appellant's claim and raise an uncontroverted inference of causal relationship between her allegedly disabling complaints and her original traumatic injuries, that are sufficient to require further development of the case record by the Office.<sup>4</sup> Additionally, there is no opposing medical evidence in the record.

Therefore, the case will be remanded to the Office for preparation of a statement of accepted facts and for appropriate further development of the medical evidence.

Consequently, the decision of the Office of Workers' Compensation Programs dated July 22, 1997 is hereby set aside and the case is remanded for further development in accordance with this decision of the Board.

Dated, Washington, D.C.  
December 23, 1999

Michael J. Walsh  
Chairman

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member

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<sup>4</sup> *John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978); see also *Cheryl A. Monnell*, 40 ECAB 545 (1989); *Bobby W. Hornbuckle*, 38 ECAB 626 (1987) (if medical evidence establishes that residuals of an employment-related impairment are such that they prevent an employee from continuing in the employment, he is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity).