

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of RUBY OBAKUNLE and DEPARTMENT OF VETERANS AFFAIRS,  
MEDICAL CENTER, Houston, TX

*Docket No. 98-1030; Submitted on the Record;  
Issued January 20, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,  
DAVID S. GERSON

The issues are: (1) whether appellant has established that her wage-earning capacity determination should be modified; and (2) whether the Office of Workers' Compensation Programs properly refused to reopen appellant's claim for merit review under 5 U.S.C. § 8128(a).

The case has been before the Board on a prior appeal. In a decision dated November 13, 1996, the Board affirmed decisions of the Office dated August 11 and July 25, 1995.<sup>1</sup> The Board found that the Office had properly reduced appellant's compensation to reflect her wage-earning capacity in the selected position of charge account clerk. The history of the case is provided in the Board's prior decision and is included herein by reference.

In a decision dated March 6, 1997, the Office determined that appellant's request for reconsideration was insufficient to warrant modification of the prior decisions. By decision dated October 2, 1997, the Office again denied modification. In a decision dated January 5, 1998, the Office determined that appellant's request for reconsideration was insufficient to warrant merit review of the claim.

The Board has reviewed the record and finds that the case is not in posture for decision.

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

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<sup>1</sup> Docket No. 95-2905.

rehabilitated, or the original determination was, in fact, erroneous.<sup>2</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>3</sup>

In this case, appellant has submitted new evidence from an attending physician, Dr. B.T. Wright, Jr., an orthopedic surgeon. In a report dated August 15, 1995, Dr. Wright diagnosed herniated discs at L4-5 and L5-S1. He further stated: “The dis[c] injury resulted from the back sprain that she sustained while working at [the employing establishment] on April 27, 1985. Even though her original injury was diagnosed as a sprain, what this terminology means, is that the back was hurt and the ligaments surrounding the discs were sprained, causing incompetence of the discs. Over the years, [appellant] has had a clear consistent continuous history of back complaints and these damaged dis[c]s have deteriorated to the point where they now require surgical treatment.” Dr. Wright stated that appellant had been disabled since her injury. In a report dated February 19, 1997, Dr. Wright indicated that appellant underwent back surgery. He reported in a work capacity evaluation dated September 15, 1997 that appellant was totally disabled due to the surgery.

As the Board noted in its prior decision, Dr. Wright had diagnosed disc herniation in a March 16, 1995 report, but did not explain his opinion on causal relationship with the employment injury. The August 15, 1995 report does provide medical rationale for his opinion as to causal relationship between disc herniations and the employment injury. Since Dr. Wright relates appellant’s continuing disability to the disc herniation, it is relevant to the issue of whether the wage-earning capacity determination should be modified.

On the other hand, an Office medical adviser opined in a September 3, 1997 report that the disc herniations were not causally related to employment. The medical adviser stated that the 10-year time span between the lumbar strain and the herniated discs was too long, and the surgical discectomy was most likely due to the normal aging process.

The Board finds that there is a conflict in the medical evidence that must be resolved. Section 8123(a) of the Federal Employees’ Compensation Act provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.<sup>4</sup> When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.<sup>5</sup> The Office should refer appellant to an appropriate impartial specialist for a reasoned opinion as to whether the diagnosed herniated discs are causally related to the employment injury. The specialist should also provide an opinion as to whether appellant was capable of performing the selected position as of July 1995, or whether there was subsequently a material change in the employment-related condition. After such

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<sup>2</sup> *Sue A. Sedgwick*, 45 ECAB 211 (1993).

<sup>3</sup> *Id.*

<sup>4</sup> *Robert W. Blaine*, 42 ECAB 474 (1991); 5 U.S.C. § 8123(a).

<sup>5</sup> *William C. Bush*, 40 ECAB 1064 (1989).

further development as the Office deems necessary, it should issue an appropriate decision as to whether appellant has established that modification of the wage-earning capacity determination is warranted.

In view of the Board's findings, the second issue will not be addressed.

The decisions of the Office of Workers' Compensation Programs dated January 5, 1998, October 2 and March 6, 1997 are set aside and the case remanded for further action consistent with this decision of the Board.

Dated, Washington, D.C.  
January 20, 2000

Michael J. Walsh  
Chairman

George E. Rivers  
Member

David S. Gerson  
Member