

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SANDRA TROTTER and DEPARTMENT OF VETERANS AFFAIRS,
MEDICAL CENTER, Biloxi, MS

*Docket No. 98-455; Submitted on the Record;
Issued March 8, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether appellant has established a recurrence of disability commencing January 31, 1995, causally related to her December 4, 1987 employment injury; (2) whether appellant has established that her wage-earning capacity determination should be modified; and (3) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing.

In the present case, the Office accepted that appellant sustained a low back strain and herniated L5-S1 disc in the performance of duty on December 4, 1987. Appellant initially returned to work on a part-time basis and then as of March 7, 1994 returned to a full-time light-duty position. She filed a notice of recurrence of disability (Form CA-2a) commencing January 31, 1995.

By decision dated May 16, 1995, the Office determined that the light-duty position represented her wage-earning capacity. In a separate decision dated May 16, 1995, the Office denied appellant's claim for a recurrence of disability.

In a decision dated April 12, 1996, an Office hearing representative remanded the case for further development as to the claim for a recurrence of disability.¹ By decision dated November 18, 1996, the Office denied appellant's claim for a recurrence of disability. The Office also issued a separate decision on that date finding that no modification of the prior wage-earning capacity determination was warranted.

By decision dated September 11, 1997, the Office denied appellant's request for a hearing as untimely.

¹ The decision made no findings with respect to wage-earning capacity.

The Board has reviewed the record and finds that a conflict in the medical evidence exists and further development of the evidence is necessary.

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that light duty can be performed, the employee has the burden to establish by the weight of reliable, probative and substantial evidence a recurrence of total disability. As part of this burden of proof, the employee must show either a change in the nature and extent of the injury-related condition, or a change in the nature and extent of the light-duty requirements.²

In this case, the Office hearing representative found that the evidence from appellant's attending physician, Dr. M.F. Longnecker, Jr., an orthopedic surgeon, was sufficient to require further development of the record. In a report dated August 16, 1995, Dr. Longnecker stated that appellant had been off work since March 1995 due to continuing low back complaints that represented an "acceleration and aggravation of the work-related injury" from 1987. The Office referred appellant to Dr. Tomas Flores, an orthopedic surgeon. In a report dated July 26, 1996, he provided a history and results on examination. Although the Office found that the weight of the evidence was represented by Dr. Flores, the Board finds that the report is not of such probative value that it outweighs the reports of the attending physician. With respect to a recurrence of disability, Dr. Flores stated "her physical problems on flare-ups since January 31, 1995 are due to this underlying condition,"³ noting that magnetic resonance imaging scan had shown some desiccation of the L5-S1 disc and in his opinion this would be part of the aging process.

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.⁴ 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.⁵

In this case, there are opposing opinions of virtually equal weight on the issue of whether appellant's continuing disability after January 31, 1995 was causally related to the employment injury. The Board finds that there is a conflict under section 8123(a) and the case must be remanded to the Office for proper resolution of the conflict.

² *Terry R. Hedman*, 38 ECAB 222 (1986).

³ The "underlying condition" is apparently a reference to the diagnosis of chronic degenerative disc disease that was provided by Dr. Longnecker in a March 28, 1995 form report (Form CA-20). Dr. Longnecker checked a box "yes" that the condition was employment related; the Office, in providing questions for Dr. Flores to answer, had noted the diagnosis by Dr. Longnecker and requested an opinion as to whether appellant's condition after January 31, 1995 was due to this "underlying condition."

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

⁵ *William C. Bush*, 40 ECAB 1064 (1989).

The Board notes that, with respect to modification of a wage-earning capacity determination, a similar medical issue is raised. 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.⁶ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁷

A report from the impartial medical specialist as to the nature and extent of appellant's employment-related condition on and after January 31, 1995 will permit the Office to make a determination as to whether there was a material change in appellant's employment-related condition. After such further development as the Office deems necessary, it should issue an appropriate decision with respect to modification of the wage-earning capacity determination.

In view of the Board's holding on the above issues, the denial of a hearing request will not be addressed.⁸

The decisions of the Office of Workers' Compensation Programs dated September 17, 1997 and November 18, 1996 are set aside and the case remanded to the Office for further action consistent with this decision of the Board.

Dated, Washington, D.C.
March 8, 2000

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

⁶ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

⁷ *Id.*

⁸ The Board notes that the record contains an Office decision with respect to a reconsideration request that was issued after appellant filed the appeal in this case. It is well established that the Board and the Office may not have concurrent jurisdiction over the same case and those Office decisions, which change the status of the decision on appeal are null and void. *Douglas E. Billings*, 41 ECAB 880, 895 (1990).