

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARY L. HERBIN and U.S. POSTAL SERVICE,
POST OFFICE, Philadelphia, PA

*Docket No. 98-1137; Submitted on the Record;
Issued March 1, 2000*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly adjusted appellant's compensation to reflect her wage-earning capacity of a general clerk.

This case is on appeal to the Board for the second time.¹ The Office accepted appellant's claim for a low back strain. On the first appeal, the Board reviewed the May 6 and December 24, 1996 decisions, by which the Office terminated appellant's compensation benefits, effective May 25, 1996. The Board found that the opinion of the impartial medical specialist, Dr. William H. Simon, a Board-certified orthopedic surgeon, that appellant had no work-related residuals from the May 3, 1970 employment injury justified the termination of benefits.

On this appeal, appellant challenged the Office's March 2, 1998 decision, denying modification of the Office's April 19, 1978 decision, by which the Office adjusted appellant's wage-earning capacity to reflect that of a general clerk.

In a medical report dated December 9, 1977, Dr. M. Barry Lipson, an orthopedic surgeon and appellant's treating physician, diagnosed psychophysiological musculoskeletal disorder with functional component. He stated that appellant had no organic involvement of her musculoskeletal system. Dr. Lipson opined that appellant could work unless it was precluded "by any functional disorder." In a work restriction evaluation dated December 9, 1977, he indicated that appellant could work full time, performing sedentary light-duty work, with lifting of 10 to 20 pounds and limited bending, pulling, pushing and reaching or working above the shoulder.

¹ Docket No. 97-1210 (issued May 13, 1999). The facts and history surrounding the prior appeal are set forth in the initial decision and are hereby incorporated by reference. Appellant requested reconsideration of the Board's May 13, 1999 decision under separate appeal, No. 97-1210, which the Board denied on September 9, 1999.

In a vocational rehabilitation report dated March 29, 1978, the rehabilitation specialist found that appellant could perform the position of general clerk. The position was sedentary, required lifting of up to 20 pounds, was reasonably available and was a job appellant had the qualifications to perform based on the Department of Labor, *Dictionary of Occupational Titles* (DOT) Code, 209.588, page 135, Volume I and page 289, Volume II. The rehabilitation specialist stated that “it might be wise to check with the D.M.D. as to whether the claimant’s psychophysiological musculoskeletal disorder with functional component would hinder her ability to work.” He stated that in May 1974 appellant’s case was closed by the Pennsylvania “BVR” who felt her emotional disability was too severe to consider her for rehabilitation services.

In a report dated April 12, 1978, the district medical adviser opined that appellant could perform the position of general clerk as outlined by the job description on file. He stated that according to Dr. Lipson’s December 9, 1977 evaluation, appellant had no organic involvement of her musculoskeletal system or in other words, there were no objective or orthopedic clinical findings of her low back strain resulting from the May 3, 1970 employment injury.

By decision dated April 19, 1978, the Office adjusted appellant’s compensation to reflect her wage-earning capacity of a general clerk.

By letter dated March 17, 1997, appellant requested reconsideration of the Office’s decision.

By decision dated March 2, 1998, the Office denied appellant’s request for modification.

Once a 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.²

In the present case, appellant has not shown that there was a material change in the nature and extent of her work-related back condition, that she was retrained or otherwise vocationally rehabilitated. Further, appellant has not shown that the original determination was in fact erroneous. In his December 9, 1977 report, Dr. Lipson, appellant’s treating physician, indicated that appellant could return to work unless she was precluded by the functional disorder. He indicated on the work restriction evaluation dated December 9, 1977 that appellant could perform sedentary work full time with no lifting over 20 pounds and limited pulling, pushing and carrying and reaching or working above the shoulder. The work requirements of the general clerk were within appellant’s physical limitations as the job was sedentary and required no lifting over 20 pounds. Appellant had the qualifications to perform the job based on the DOT job description and the job was reasonably available. In his March 29, 1978 report, the rehabilitation specialist recommended that the district medical adviser should consider whether appellant’s psychophysiological musculoskeletal disorder with functional component would

² Don J. Mazurek, 46 ECAB 447, 451 (1995).

hinder her ability to work and noted that, in May 1974, the Pennsylvania “BVR” felt appellant’s emotional disability was too severe to consider her for rehabilitation services. On April 12, 1978 the district medical adviser opined that appellant could perform the position of general clerk based on Dr. Lipson’s December 9, 1977 evaluation, which noted that appellant had no objective or orthopedic clinical findings resulting from the May 3, 1970 employment injury. Appellant had the burden to show that an emotional condition prevented her from performing the job of general clerk but she did not submit any medical evidence to support her contention. The Office, therefore, properly adjusted appellant’s compensation to reflect her wage-earning capacity of a general clerk.

The decision of the Office of Workers’ Compensation Programs dated March 2, 1998 is hereby affirmed.

Dated, Washington, D.C.
March 1, 2000

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member