

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLEEN Y. ARAGON and U.S. POSTAL SERVICE,
STOCKYARD STATION, Denver, CO

*Docket No. 00-2219; Submitted on the Record;
Issued October 1, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation properly denied appellant's request for reconsideration.

On July 17, 1998 appellant, then a 36-year-old temporary casual employee, sustained a left ankle sprain, fracture of the left foot and left sacroiliac dysfunction in the performance of duty when she slipped and fell while delivering mail. She was released to return to work July 29, 1998 with restrictions of no prolonged standing or walking. Although appellant's original temporary appointment expired on July 29, 1998, the employing establishment rehired her on August 1, 1998 for another temporary appointment expiring December 31, 1998. She stopped work on November 12, 1998. On January 25, 2000 the Office authorized a spinal fusion as causally related to the July 17, 1998 employment injury.

By decision dated April 27, 1999, the Office determined that appellant's reemployment as a casual clerk effective August 1, 1998 fairly and reasonably represented her wage-earning capacity and that she had no loss of wage-earning capacity because her actual wages met or exceeded the wages of the job held when injured. The Office advised appellant that the decision did not affect her entitlement to medical expenses as needed for her work-related medical conditions.

By decisions dated October 15, 1999 and May 11, 2000, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was irrelevant and immaterial and not sufficient to warrant further merit review.¹

¹ This record contains additional evidence which was not before the Office at the time it issued its May 11, 2000 decision. The Board has no jurisdiction to review this evidence for the first time on appeal. See 20 C.F.R. § 501.2(c); *Robert D. Clark*, 48 ECAB 422, 428 (1997).

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.² As appellant filed her appeal with the Board on June 23, 2000, the only decisions properly before the Board are the Office's October 15, 1999 and May 11, 2000 decisions denying appellant's request for reconsideration. The Board has no jurisdiction to consider the Office's April 27, 1999 wage-earning capacity decision.³

The Board finds that the Office properly denied appellant's request for reconsideration.

The Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.⁴ When an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim.⁵

In support of her request for reconsideration, appellant submitted additional evidence and argument.⁶

In reports dated April 29, 1999 through February 17, 2000, Dr. J. Bradley Gibson stated that appellant had a chronic lumbosacral sprain due to the July 17, 1998 employment injury and described her ongoing treatment. In his July 23, 1999 report, he indicated that appellant was unable to work.

In reports dated June 18 and 21, 1999, Dr. Leonard E. Berk indicated that appellant was totally disabled.

In a report dated October 7, 1999, Dr. David A. Wong recommended further evaluation of appellant's condition.

In reports dated December 22, 1999 and January 14, 2000, Dr. John A. Odom, Jr. recommended back surgery.

In a preoperative report dated April 18, 2000, Dr. Michael C. Fagan indicated that appellant was scheduled to undergo back surgery.

² 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

³ *Leon D. Faidley, Jr.*, 41 ECAB 104, 108-09 (1989).

⁴ 20 C.F.R. § 10.606(b)(2) (1999).

⁵ 20 C.F.R. § 10.608(b) (1999).

⁶ Appellant also submitted evidence previously of record. As this evidence was previously submitted, it does not constitute relevant and pertinent evidence not previously considered by the Office.

These medical reports do not address the issue of whether the position appellant held from August 1 to November 12, 1998 fairly and reasonably represented her wage-earning capacity and therefore they do not constitute relevant and pertinent evidence not previously considered by the Office.

In her request for reconsideration, appellant also argued that, at the time of the Office's wage-earning capacity decision on April 27, 1999, she was not performing the job used for making the wage-earning capacity decision, the Office did not provide her with a written limited-duty job offer and did not make a determination that the job was suitable. She argued that, after the April 27, 1999 decision, the Office accepted an additional medical condition, a spinal fusion, which demonstrated a change in her work-related medical condition. She argued that she was found to be disabled for her regular job and was never found capable of performing all of the duties of her light-duty position. Appellant also argued that the employer coerced her into not requesting immediate medical attention, coerced her into working beyond her physical restrictions and illegally paid her wages from the budget of a different work location.

In this case, the Office performed a retroactive wage-earning capacity determination after appellant stopped working. The Office's procedure manual provides that a retroactive determination may be made where the claimant has worked in the position for at least 60 days, the employment fairly and reasonably represents wage-earning capacity, and the work stoppage did not occur because of any change in the claimant's work-related condition affecting her ability to work.⁷ An assessment of suitability need not be made since the employee's performance of the duties is considered the best evidence of whether the job is within the employee's physical limitations. The Board has concurred that the Office may perform a retroactive wage-earning capacity determination in accord with its procedures.⁸

There is no indication that the work stoppage in this case was due to a change in the accepted left leg and back conditions as no medical evidence was provided showing a change in the accepted employment injury as of August 1, 1998. Appellant performed the position from August 1 to November 12, 1998, more than 60 days. The Office determined that the position fairly and reasonably represented appellant's wage-earning capacity. The Office correctly followed the procedures for making a retroactive wage-earning capacity decision in this case. Therefore, appellant's argument regarding the retroactive nature of the April 27, 1999 decision, the fact that she did not receive a written job offer, the fact that the Office did not make a determination of suitability of the job and her argument that she was not found medically capable of performing the limited-duty job do not constitute relevant legal arguments not previously considered by the Office.

Her argument that the Office's acceptance of a spinal fusion at L4-5 subsequent to the April 27, 1999 wage-earning capacity decision showed a change in her work-related condition does not constitute relevant and pertinent evidence or legal argument not previously considered

⁷ Federal (FECA) Procedure Manual, Part 1 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(e) (May 1997).

⁸ See *Tamra McCauley*, 51 ECAB ____ (Docket No. 98-1820, issued March 17, 2000); *Elbert Hicks*, 49 ECAB 283 (1998).

by the Office as it does not address the issue of whether the job she performed from August 1 to November 1, 1998 fairly and reasonably represented her wage-earning capacity.

Regarding appellant's arguments that her employer coerced her into not requesting immediate medical attention, coerced her into working beyond her physical restrictions and illegally paid her wages from the budget of another work location, none of these arguments is relevant to the question as to whether she demonstrated the ability to earn wages comparable to those earned at the time of injury. Therefore, the arguments do not constitute relevant or pertinent evidence or legal argument not previously considered by the Office.

Because appellant failed to show that the Office erroneously applied or interpreted a specific point of law, did not advance a relevant legal argument not previously considered by the Office; and did not submit relevant and pertinent evidence not previously considered by the Office, the Office properly denied her request for reconsideration.

The October 15, 1999 and May 11, 2000 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
October 1, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member