

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 January 2, 2002*

DECISION and ORDER

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

The issue is whether appellant has established that her April 27, 1999 loss of wage-earning capacity determination should be modified.

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 of Workers' Compensation Programs authorized a spinal fusion as causally related to the July 17, 1998 employment injury and the surgery was performed on April 18, 2000.

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 letter dated October 6, 1999, appellant requested reconsideration of the Office's April 27, 1999 decision.

By decision dated October 15, 1999, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was irrelevant and insufficient to warrant further merit review.

By letter dated April 25, 2000, appellant requested modification of the Office's April 27, 1999 wage-earning capacity determination. She asserted that there had been a change in the nature and extent of her employment-related condition and the Office had improperly failed to consider the medical evidence she had submitted.

By decision dated May 11, 2000, the Office found that the evidence submitted was immaterial and not sufficient to warrant further merit review of its April 27, 1999 decision. The Office stated:

“The fact that [appellant] had been working the position successfully for more than 60 days relieves the Office from having to make a decision on the suitability of the position, because actual performance is considered [to] outweigh medical opinions of physical ability. [Appellant] failed to provide probative contemporaneous medical evidence to demonstrate that she could not perform the duties assigned.”¹

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 modification of its April 27, 1999 decision. The Board has no jurisdiction to consider the Office's April 27, 1999 wage-earning capacity decision.³

The Board finds that this case is not in posture for a determination of whether the evidence warrants modification of appellant's loss of wage-earning capacity

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.⁴ The burden of proof is on the party attempting to show modification.⁵ In this case, appellant sought modification of the Office's wage-earning determination and therefore bears the burden to show a material change in the nature and extent of her injury-related condition.

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).

² 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

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

⁴ *Stanley B. Plotkin*, 51 ECAB ____ (Docket No. 99-1838, issued September 28, 2000); *Derrick Higgin*, 50 ECAB 213 (1998).

⁵ *See James D. Champlain*, 44 ECAB 438, 440 (1993).

In this case, appellant submitted medical evidence in support of her contention that there had been a material change in the nature and extent of her injury-related condition.

In reports dated April 29, 1999 through February 17, 2000, Dr. J. Bradley Gibson, a neurologist, provided a history of appellant's condition, findings on examination, and described her ongoing treatment. He stated that appellant had a chronic lumbosacral sprain due to her July 17, 1998 employment injury and was unable to work.

In reports dated June 18 and 21, 1999, Dr. Leonard E. Berk, an orthopedic surgeon, diagnosed facet arthropathy at L5-S1 and indicated that appellant was totally disabled.

In reports dated December 22, 1999 and January 14, 2000, Dr. John A. Odom, Jr. stated that appellant had experienced back pain since her July 17, 1998 employment injury. He diagnosed degenerative disc disease at L5-S1, as shown on a magnetic resonance imaging (MRI) scan and recommended back surgery.

In a report dated April 18, 2000, Dr. Michael C. Fagan indicated that appellant was scheduled to undergo back surgery. He noted that she injured her back and left ankle on July 17, 1998 while delivering mail. Dr. Fagan stated that appellant had continued to have low back pain and pain over the left buttock and down to the left leg and foot and that multiple studies, including an MRI scan, had demonstrated a significant degenerative disc at L5-S1 which necessitated the spinal fusion at L5-S1. He stated that appellant's employment injury resulted in severe degenerative disc disease at L5-S1 and sciatica on the left side secondary to the degenerative disc disease.

On April 18, 2000 appellant underwent a discectomy and spinal fusion authorized by the Office and performed by Dr. Odom.

These medical reports indicate that appellant had periods of disability on and after November 12, 1998 causally related to her July 17, 1998 employment injury. Furthermore, the Office authorized appellant's surgery on April 18, 2000 as causally related to her July 17, 1998 employment injury. Accordingly, the Board will set aside the Office's May 11, 2000 and October 15, 1999 decisions and remand the case for further development based on the medical evidence submitted by appellant and the legal argument that there has been a material change in the nature and extent of her injury-related condition. Appellant has submitted sufficient evidence to require a review of the Office's April 27, 1999 wage-earning capacity determination.

The May 11, 2000 and October 15, 1999 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further action consistent with this decision.

Dated, Washington, DC
January 2, 2002

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member