

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARCIA GIBSON and DEPARTMENT OF THE TREASURY,
FINANCIAL MANGEMENT SERVICE, Philadelphia, PA

*Docket No. 03-1248; Submitted on the Record;
Issued August 29, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant has met her burden of proof to establish that modification of the wage-earning capacity determination was warranted.

The case has been before the Board on a prior appeal. In a decision dated February 27, 2001, the Board found that the Office of Workers' Compensation Programs properly determined that the constructed position of customer service representative reasonably reflected appellant's wage-earning capacity.¹ The history of the case is discussed in the Board's prior decision and is incorporated herein by reference.

By letter dated November 4, 2001, appellant requested reconsideration "of the determination that [appellant] is capable of performing any work within the restrictions of her work injury." Appellant argued that reconsideration was "premised upon the existence of a consequential emotional condition related to work injury that impairs [appellant's] ability to work." In support thereof, appellant submitted a May 18, 1999 medical report by Dr. David Appelbaum, a psychologist, who noted that appellant had dysthymia, chronic pain syndrome and herniated disc. He also noted stressors due to chronic pain, coping with loss of functioning and conflict with previous job. He indicated that appellant may benefit from antidepressant medication. Appellant also submitted a September 21, 2000 report by Dr. Guy W. Fried, a Board-certified physiatrist, wherein he indicated that he performed a needle electromyogram on appellant's cervical spine and lumbar area, and that there was evidence of muscle spasm and denervation in both areas. Dr. Fried injected Botox in the most spastic areas of appellant's neck and back. He concluded that appellant suffered from chronic pain.

By decision dated January 14, 2002, the Office found that the new evidence was not sufficient to support that the loss of wage-earning capacity determination should be modified, and was therefore insufficient to modify the prior decisions.

¹ *Marcia Gibson*, Docket No. 99-2130 (issued February 27, 2001).

The Board finds that appellant failed to meet her burden of proof to establish that modification of the wage-earning capacity determination was warranted.

Once loss of wage-earning capacity is determined, a modification of such determination is not warranted unless there is material change in the nature and extent of the injury-related condition, the employee has been retrained, or the original determination was in fact erroneous. The burden of proof is on the party seeking modification of the award.²

In the instant case, the evidence submitted by appellant does not show that the Office's original determination with regard to her wage-earning capacity was erroneous. In this case, the Office based appellant's loss of wage-earning capacity on a determination that her wage-earning capacity was represented by the position of customer service representative, and that appellant had no loss of wage-earning capacity.³ The evidence of record does not contain sufficient medical opinion explaining why an employment-related condition prevented appellant from performing the position of customer service representative or which otherwise establishes that the Office improperly determined appellant's wage-earning capacity.⁴ Neither Dr. Appelbaum nor Dr. Fried noted that appellant was unable to perform the position of customer service representative. Dr. Appelbaum's report noted that appellant had numerous difficulties related to chronic pain, coping with loss of functioning and conflict with her previous job. However, he does not indicate that any of these stressors prohibited appellant from working in the position of customer service representative. Similarly, Dr. Fried determined that appellant suffered chronic pain but does not infer that appellant cannot perform the duties of customer service representative. For these reasons, appellant has not shown that the Office improperly refused to modify its determination of her wage-earning capacity.

² *Odessa C. Moore*, 46 ECAB 681 (1995); *see also Don J. Mazurek*, 46 ECAB 447 (1995).

³ Disability is defined in the implementing federal regulations as "the incapacity, because of employment injury, to earn the wages the employee was receiving *at the time of injury*." (Emphasis added.) 20 C.F.R. § 10.5(f). The Office applied the principles enunciated in *Albert C. Shadrick*, 5 ECAB 376 (1953).

⁴ *See Norman F. Bligh*, 41 ECAB 230, 237-38 (1989).

The decision of the Office of Workers' Compensation Programs dated January 14, 2002 is hereby affirmed.

Dated, Washington, DC
August 29, 2003

Alec J. Koromilas
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member