

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ADORA L. WATKINS-PORTER and U.S. POSTAL SERVICE,  
POST OFFICE, Capital Heights, MD

*Docket No. 01-508; Oral Argument Held November 7, 2002;  
Issued March 14, 2003*

Appearances: *Adora L. Watkins-Porter, pro se; Miriam D. Ozur, Esq.,*  
for the Director, Office of Workers' Compensation Programs.

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DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO,  
DAVID S. GERSON,

The issues are: (1) whether appellant has established a recurrence of disability as of June 1996; and (2) whether appellant has established that her March 7, 1997 wage-earning capacity determination should be modified.

In this case, the Office of Workers' Compensation Programs has accepted that appellant sprained her left thumb while at work on July 19, 1988. Appellant had worked light duty intermittently until October 4, 1989 when she stopped work entirely. The Office authorized surgical intervention, which appellant underwent on October 22, 1992. Appellant began receiving payments for wage-loss compensation after she underwent the Office-approved surgery.

By decision dated March 7, 1997, the Office terminated appellant's compensation benefits on the basis that her wage-earning capacity, as represented by her actual earnings as a self-employed business operator, were greater than her date-of-injury position.

On June 5, 1998 appellant filed a notice of recurrence of disability commencing June 1996. By decision dated August 30, 1999, the Office determined that appellant had not established a recurrence of disability. In a decision dated August 25, 2000 and finalized August 28, 2000, an Office hearing representative affirmed the prior decision.<sup>1</sup>

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<sup>1</sup> In a decision dated May 7, 1999, the Board affirmed the Office's decision of February 28, 1998 which determined that appellant had forfeited her right to compensation for the period October 31, 1994 through January 31, 1996 because she knowingly failed to report her earnings to the Office. The Board additionally upheld the Office's finding that the resulting overpayment was not subject to waiver.

Oral argument was requested and held before the Board on November 7, 2002. At the oral argument held in this matter, appellant requested, and the Board granted in its Order dated November 7, 2002, additional time to file a further reply to the memorandum in justification filed by the Director of the Office on October 10, 2002. In a letter dated November 16, 2002, and postmarked November 20, 2002, appellant submitted her additional reply to the Director's memorandum in justification. The Director has not responded to appellant's letter.

The Board finds that appellant has not established a recurrence of disability commencing June 1996.

When an employee, who is disabled from the job she 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.<sup>2</sup>

A recurrence of disability is defined as a spontaneous material change in the employment-related condition without an intervening injury.<sup>3</sup> A person who claims a recurrence of disability has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which she claims compensation is causally related to the accepted employment injury.<sup>4</sup> To meet this burden of proof, a claimant must furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.<sup>5</sup>

Causal relationship is a medical issue<sup>6</sup> and the medical evidence required to establish a causal relationship, generally, is rationalized medical evidence. This consists of a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors.<sup>7</sup> The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>8</sup>

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<sup>2</sup> *Terry R. Hedman*, 38 ECAB 222 (1986).

<sup>3</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3.b(a)(1) (May 1997).

<sup>4</sup> *Kenneth R. Love*, 50 ECAB 193, 199 (1998).

<sup>5</sup> *Helen K. Holt*, 50 ECAB 279, 282 (1999).

<sup>6</sup> *Elizabeth Stanislav*, 49 ECAB 540, 541 (1998).

<sup>7</sup> *Duane B. Harris*, 49 ECAB 170, 173 (1997).

<sup>8</sup> *Gary L. Fowler*, 45 ECAB 365 (1994).

Appellant has argued that the evidence establishes a change in the nature and extent of the employment-related condition as of June 1996. The medical evidence is not, however, of sufficient probative value to meet appellant's burden of proof. The Board notes that there is limited contemporaneous evidence regarding any change in appellant's accepted employment-related condition commencing June 1996.<sup>9</sup> In progress reports dated September 18, 1997 and May 27, 1998, Dr. Norman J. Cowan, a Board-certified hand surgeon and appellant's treating physician, reported painful swelling and crepitus at the carpometacarpal (CMC) joint of the thumb. In a report dated September 3, 1998, Dr. Cowan noted that appellant had been under his care since September 2, 1987. He advised that appellant has consistently been diagnosed with arthritis of the CMC joint left thumb along with requests for surgery. He further reported that the May 27, 1998 examination revealed that appellant was worse than before her arthroscopic examination. Dr. Cowan noted that the x-rays confirmed marked arthritis and subluxation of joint. He stated that appellant needs and has needed arthroplasty for seven years. In his September 4, 1998 report, Dr. Cowan stated that he "took [appellant] off duty on the sixth of October 1989. We have not returned her to any duty status as of the above date." He further related that appellant still requires surgery on her left thumb as detailed over the past ten years and, until such surgery is done, he could not authorize her to return to duty. Dr. Cowan, however, does not provide a reasoned medical opinion establishing that there was a change in appellant's employment-related condition. He refers to arthritis and subluxation of the joint and the need for an arthroplasty without discussing the specific diagnosed conditions that continue to be related to the July 19, 1988 injury and describing the cause and mechanism of any change that occurred. Dr. Cowan's reports further fail to provide sufficient rationale to support the need for the arthroplasty surgery of appellant's left thumb as they do not indicate what specific conditions would be treated and/or corrected by the surgery; the reason why surgery is necessary; and the relationship of the surgery to the work injury of July 19, 1988. Moreover, his reports do not appear to be based on a complete and accurate background as he does not appear to know that appellant performed the duties as a self-employed business operator for several years.

The Board finds that the medical evidence from Dr. Cowan is not of sufficient probative value to meet appellant's burden of proof in this case. She did not provide a reasoned medical opinion, based on a complete factual and medical background, establishing a recurrence of disability in this case.

The Board further finds that appellant has not established that a modification of the wage-earning capacity determination is warranted.

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

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<sup>9</sup> The Board notes that appellant suffered right knee and right ankle injuries in a nonwork-related automobile accident on December 2, 1988 which were not consequential to the accepted work injury of July 19, 1988.

rehabilitated, or the original determination was, in fact, erroneous.<sup>10</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>11</sup>

Since a wage-earning capacity determination was made on March 7, 1997, appellant's subsequent claim for compensation raises the issue of whether a modification of the determination may be warranted. The original wage-earning capacity determination was based on appellant's actual wages averaging \$704.00 per week as a result of her employment as the president/vice-president of the A.T.L.C. towing company. This position was denoted to be that of a self-employed business operator. Appellant worked in such position for approximately two years since 1993. Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent her wage-earning capacity.<sup>12</sup> Generally, wages actually earned are the best measure of a wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.<sup>13</sup> The Office followed appropriate procedures for wage-earning capacity based on actual earnings,<sup>14</sup> and reduced appellant's compensation in accord with 20 C.F.R. § 10.303. There is no evidence of error in the original wage-earning capacity determination.<sup>15</sup>

With respect to a material change in the nature and extent of the injury-related condition, the Board finds, for the reasons discussed above, that the medical evidence did not establish a change in the employment-related condition as of May 26, 1996. Accordingly, the Board finds that a modification of the wage-earning capacity determination is not warranted in this case.

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<sup>10</sup> *Sue A. Sedgwick*, 45 ECAB 211 (1993).

<sup>11</sup> *Id.*

<sup>12</sup> 5 U.S.C. § 8115(a).

<sup>13</sup> *Dennis E. Maddy*, 47 ECAB 259 (1995).

<sup>14</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (December 1995).

<sup>15</sup> The Board notes that Chairman Michael J. Walsh who participated in the oral argument was no longer a member of the Board after January 10, 2003, as his appointment expired, and he did not participate in the preparation of this decision.

The August 25, 2000 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC  
March 14, 2003

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member