

**United States Department of Labor
Employees' Compensation Appeals Board**

KATHERINE T. KREGER, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Norwich, CT, Employer**

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**Docket No. 03-1765
Issued: August 13, 2004**

Appearances:
Katherine Smith, Esq., for the appellant
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On July 7, 2003 appellant filed a timely appeal of an Office of Workers' Compensation Programs' decision dated April 1, 2003, denying modification of a decision finding that she did not establish a recurrence of disability as of March 24, 1997. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction to review the merits of the case.

ISSUE

The issue is whether the Office properly determined that the issue presented was a recurrence of disability as of March 24, 1997.

FACTUAL HISTORY

On July 13, 1987 appellant, then a 41-year-old rural letter carrier, filed a traumatic injury claim alleging that she sustained a neck injury on that date when she reached out of her delivery vehicle and attempted to open a mailbox. The Office accepted the claim for a cervical ligamentous sprain; appellant underwent cervical surgery in October 1989 and began receiving compensation for temporary total disability.

The employing establishment offered appellant a light-duty position as a modified rural letter carrier at four hours per day, five days per week. Appellant returned to work in the light-duty position on October 16, 1996.

By decision dated January 7, 1997, the Office determined that appellant's actual earnings of \$397.00 per week as a modified rural letter carrier fairly and reasonably represented her wage-earning capacity. The Office decreased appellant's compensation based on her actual earnings.

In a report dated March 18, 1997, an attending neurosurgeon, Dr. Mario J. Sculco, recommended that appellant "drop down to two days a week for the next six to eight weeks. Thereafter she can increase to three days a week and if this is tolerated she may be able to increase and resume her current status but it will take considerable time for her to become habituated to her activities." As of March 24, 1997 appellant began working at two days per week, four hours per day and she filed claims for compensation (Form CA-8) for the balance of the hours not worked.

By decision dated June 4, 1997, the Office denied appellant's claim for compensation as of March 24, 1997 on the grounds that "the evidence of file fails to establish that the claimed recurrence is causally related" to the employment injury. In a decision dated May 29, 1998, an Office hearing representative affirmed the June 4, 1997 decision.

On January 2, 2002 the Office prepared a statement of accepted facts and further developed the medical evidence. The Office determined that a conflict in the medical evidence existed and referred the case to Dr. Camille Salame, a Board-certified neurosurgeon, to resolve the conflict.

In a decision dated April 1, 2003, the Office denied modification of its prior decisions. The Office determined that the weight of the medical evidence did not support that appellant sustained a recurrence of disability in March 1997, such that she was unable to work in the 20-hour per week light-duty position.

LEGAL PRECEDENT

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.¹

The Office's procedure manual provides that, "[i]f a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In this instance the CE [claims examiner] will

¹ See *Sharon C. Clement*, 55 ECAB ____ (Docket No. 01-2135, issued May 18, 2004).

need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity.”²

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.³ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁴

ANALYSIS

In this case, the Office developed the evidence and determined that the issue presented was whether appellant had established a recurrence of disability on March 24, 1997. Under the circumstances of this case, however, the Board finds that the issue presented was whether the January 7, 1997 wage-earning capacity determination should be modified.

According to the evidence of record appellant returned to work at 4 hours per day, 20 hours per week. The attending physician, Dr. Sculco, indicated in a March 18, 1997 report that appellant could work only two hours per day for six to eight weeks, then she could work three hours per day and “if” this was tolerated then perhaps after a “considerable time” she could return to four hours per day. It is clear that the claim in this case was that appellant could not work in the 20-hour light-duty position, the position that the Office determined had represented her wage-earning capacity, for the foreseeable future. The Board has held that, when a wage-earning capacity determination has been issued, and appellant submits evidence with respect to disability for work, the Office must evaluate the evidence to determine if modification of wage-earning capacity is warranted.⁵

As noted above, the Office’s procedure manual directs the claims examiner consider the criteria for modification when the claimant requests resumption of compensation for “total wage loss.” This section of the procedure manual covers the situation when a claimant has stopped working, but the principle is equally applicable to a claim of increased disability. If there is a claim for increased disability that would prevent a claimant from performing the position that was the basis for a wage-earning capacity decision, then clearly there is an issue of whether modification is appropriate. In this case, appellant submitted evidence of an increased partial disability that prevented her from working in the 20-hour per week light-duty position. The

² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

³ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

⁴ *Id.*

⁵ See *Sharon C. Clement*, *supra* note 1. The Board notes that consideration of the modification issue does not preclude the Office from acceptance of a limited period of employment-related disability, without a formal modification of the wage-earning capacity determination. *Id.* at n.10, slip op. at 5; *Cf. Elsie L. Price*, 54 ECAB ____ (Docket No. 02-755, issue July 23, 2003) (acceptance of disability for an extended period was sufficient to establish that modification of the wage-earning capacity determination was warranted).

Board finds that the Office should have considered the issue of modification of the wage-earning capacity determination.

CONCLUSION

The Board finds that appellant's claim for compensation raised the issue of whether a modification of the January 7, 1997 wage-earning capacity decision was warranted and the case must be remanded for an appropriate decision on this issue.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 1, 2003 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: August 13, 2004
Washington, DC

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member