

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

JOYCE D. BATTLE, Appellant

and

**U.S. POSTAL SERVICE, BULK MAIL
CENTER, Jersey City, NJ, Employer**

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**Docket No. 04-710
Issued: August 30, 2004**

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On January 21, 2004 appellant filed a timely appeal of an Office of Workers' Compensation Programs' decision dated September 29, 2003, denying modification of a decision that she did not establish a recurrence of disability as of January 29, 2003. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction to review the merits of the claim.

ISSUE

The issue is whether the Office properly adjudicated appellant's claim for disability commencing January 29, 2003.

FACTUAL HISTORY

On January 28, 1999 appellant, a 43-year-old mail handler, filed a claim alleging that she sustained injuries while in the performance of duty when a forklift pinned her against a wall. The Office accepted the claim for contusions of the right thigh and forearm and internal derangement of the right knee. She stopped working and began receiving compensation for temporary total disability.

The Office developed the medical evidence and determined that a conflict existed between the attending physician, Dr. Mark Phillipone, a Board-certified psychiatrist, and a second opinion referral physician, Dr. Andrew Weiss, a Board-certified orthopedic surgeon. Dr. Phillipone opined that appellant remained totally disabled, while Dr. Weiss opined in a November 20, 2000 report, that she was able to return to regular duty. On September 5, 2001 appellant began working in a part-time (four hours per day) light-duty job.

The case was referred to Dr. Robert Dennis, a Board-certified orthopedic surgeon, to resolve the conflict. In reports dated October 2 and November 10, 2001, he opined that appellant could work four hours per day, with a gradual increase in her work hours anticipated. She continued to work four hours per day.

By decision dated June 3, 2002, the Office noted that appellant had returned to work September 5, 2001 with wages of \$372.00 per week. The Office stated that “in accordance with the provisions of 5 U.S.C. [§] 8106 and 5 U.S.C. [§] 8115, we have adjusted your compensation.” The Office enclosed a computation of compensation worksheet that found appellant had a 50 percent loss of wage-earning capacity and would be paid compensation at the new rate as of April 1, 2002.

In a letter dated September 26, 2002, the Office declared that a conflict existed between Dr. Phillipone and Dr. Weiss with regard to continuing disability.¹ On February 3, 2003 appellant filed a notice of recurrence of disability (Form CA-2a), commencing January 29, 2003. Dr. Phillipone completed a form report (Form CA-20), dated February 12, 2003 opining that appellant was totally disabled as of January 29, 2003.

By letter dated March 5, 2003, the Office again declared that a conflict existed between Dr. Phillipone and Dr. Weiss with respect to continued disability and appellant was again referred to Dr. Dennis. In a report dated March 17, 2003, he opined that appellant did not have any employment-related disability.

In a decision dated April 11, 2003, the Office denied appellant’s claim for a recurrence of disability commencing January 29, 2003. The Office found that the weight of the medical evidence was represented by Dr. Dennis. In a decision dated September 29, 2003, the Office denied modification of its prior decision.

LEGAL PRECEDENT

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

¹ Dr. Phillipone continued to indicate that appellant was limited to four hours per day; Dr. Weiss did not submit any further reports.

rehabilitated or the original determination was, in fact, erroneous.² The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.³

The Office's procedure manual provides: "If 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 need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity."⁴

ANALYSIS

In the present case, the Office issued a letter dated June 3, 2002 with respect to appellant's wage-earning capacity. Although the Office did not explicitly make findings that the actual earnings fairly and reasonably represented appellant's wage-earning capacity, the Office did state that it was adjusting appellant's compensation pursuant to 5 U.S.C. § 8115. Section 8115 provide that wage-earning capacity is determined by actual earnings if the actual earnings fairly and reasonably represent wage-earning capacity. The Office noted that appellant returned to work on September 5, 2001 with wages of \$372.00 per week and her compensation was adjusted to reflect her wage-earning capacity. The Board finds that the June 3, 2002 letter represents a formal wage-earning capacity decision.⁵

Office procedures note that, when a wage-earning capacity determination is in effect and the claimant requests resumption of compensation for total wage loss, the Office should determine whether modification of the wage-earning capacity decision is appropriate.⁶ The Board has also held that the Office must consider the modification issue under these circumstances.⁷

² *Sue A. Sedgwick*, 45 ECAB 211 (1993).

³ *Id.*

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

⁵ If the Office offsets compensation owed due to actual earnings, Office procedures require that any worksheets be clearly marked as "[a]ctual earnings calculation -- not as loss of wage earning-capacity determination." Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(d) (June 1996).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

⁷ *See Sharon C. Clement*, 55 ECAB __ (Docket No. 01-2135, issued May 18, 2004).

In the present case, when appellant filed a claim for resumption of total disability, the initial issue is whether modification of wage-earning capacity determination is warranted.⁸ Once this issue is resolved, the Office may consider appropriate additional issues such as whether a limited period of employment-related disability has been established.⁹ The case will be remanded to the Office for an appropriate decision on the issues presented.

CONCLUSION

The Board finds that the Office failed to properly identify and address the issues presented and the case will be remanded to the Office for further development.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 29 and April 11, 2003 are set aside and the case remanded for further action consistent with this decision of the Board.

Issued: August 30, 2004
Washington, DC

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

⁸ With respect to the medical issues presented, the Board notes that Dr. Dennis cannot be considered an impartial medical specialist. There was no existing conflict as to appellant's condition as of January 29, 2003, since Dr. Weiss had not submitted a report since November 2000. Moreover, Dr. Dennis was previously involved in the case. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b)(3) (May 2003).

⁹ A claimant may establish a limited period of disability without establishing that modification of the wage-earning capacity determination is warranted. See *Sharon C. Clement, supra* note 7.