

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

SUSAN J. MASLUCK, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Elmwood Park, NJ, Employer**

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**Docket No. 04-1382
Issued: December 20, 2004**

Appearances:
James D. Muirhead, Esq., for appellant
Office of 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 April 28, 2004 appellant filed a timely appeal from the May 15 and September 26, 2003 merit decisions of the Office of Workers' Compensation Programs, which denied her recurrence of disability claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review these decisions.

ISSUE

The issue is whether appellant has established a material change in the nature and extent of her injury-related condition, such that the Office should modify its July 12, 2001 wage-earning capacity determination.

FACTUAL HISTORY

On December 18, 1992 appellant, then a 38-year-old postmaster, filed a claim alleging that her post-traumatic stress disorder was a result of her federal employment. The Office accepted her claim for post-traumatic stress disorder and paid compensation for temporary total disability on the periodic rolls.

Appellant attended college at night and obtained a bachelor's degree in English and certification as a special education teacher. She applied for and was offered part-time employment as a special education teacher in July 1999. On September 1, 2000 appellant began teaching on a full-time basis.¹ As this position paid less than her pay rate for compensation purposes, the Office placed her on the periodic rolls effective September 1, 2000 and paid compensation for her loss of wage-earning capacity. On July 12, 2001 the Office issued a formal wage-earning capacity determination, finding that appellant's actual earnings in this position fairly and reasonably represented her wage-earning capacity. The Office advised that, effective the date of her reemployment, her compensation payments were based on two-thirds of the difference between her pay rate for compensation purposes and her ability to earn wages in her new position, as shown in an enclosed computation of compensation.

On August 3, 2001 appellant filed a claim asserting that she sustained a recurrence of total disability on June 30, 2001 as a result of her 1992 employment injury. Asked to explain the reason she believed her present condition was related to the original injury, she stated: "In late March, 2001, I began to experience the same symptoms of the original disability. These symptoms have become progressively worse despite ongoing treatment."

On September 12, 2001 she explained further:

"These symptoms included, severe anxiety, sleeplessness, an inability to concentrate, nightmares and subsequent depression. These symptoms began without a specific precipitating event and grew progressively worse, despite ongoing psychotherapy and an increase in medication. On April 11, 2001, my treating physician advised me that I should not continue working. Due to the nature of this disability, I am unable to perform my duties as a teacher at the present time."

In a decision dated September 19, 2001, the Office denied appellant's claim of recurrence. Noting that she submitted no supporting medical opinion, the Office found that the evidence did not establish a change in the nature or extent of her injury-related condition or a change in the nature and extent of her light-duty requirements.

On October 3, 2001 appellant requested reconsideration. The September 12, 2001 report of Dr. Patricia L. McGuire, her psychiatrist, supported total disability for work:

"As I continue to work with [appellant] as an outpatient she had extremely gradual improvement with frequent exacerbations of her depressive disorder. She remained emotionally fragile and despite a gradual reinstatement of a less stressful work schedule at the [employing establishment appellant] completely relapsed and it became clear that she would never be able to return to any position at the [employing establishment]. We reinstated her long-term disability at my request and during that period of time she was able to attend school on a part-time basis and obtain a master's degree in elementary education. [Appellant] was able

¹ By the terms of her employment contract, appellant's employment ran from July 1, 2000 to June 30, 2001 with service beginning on September 1, 2000.

eventually to get a part-time job working as a school teacher and eventually was able to work full time. However, in the stress and demands of the job she completely relapsed with her [d]epressive [d]isorder and has been completely disabled since June 30, 2001. Her symptoms at the present time include severe depression, insomnia, decreased helplessness and hopelessness.

“I have recommended that [appellant] return to her fully disabled status. If you have any further questions regarding this recommendation, please do not hesitate to call.”

In a decision dated December 31, 2001, the Office reviewed the merits of appellant’s claim and denied modification of the September 19, 2001 decision. The Office found that Dr. McGuire’s report related her disability for work to the stresses and demands of her teaching position and not to the federal employment injury.

Appellant requested reconsideration on January 7, 2002 and addressed the stressors that caused her relapse of disability:

“I began my light[-]duty employment in September 1999, working part-time as a Special Education teacher at a Middle School, teaching students in grades 6-8. Subsequently, in addition to my Middle School position, my teaching assignment was expanded to include additional work as a Resource Center teacher for students in grades one thru four and a reading teacher for a fifth Grade student. Despite my request to remain as a Middle School teacher, in September 2000, I was reassigned as a Special Education teacher at the High School level for grades 9-12, while continuing to teach classes at the Middle School, in grades 6-8. My teaching assignment was such, that in my first year as a teacher, I was eventually assigned to three different schools, providing Special Education curriculum instruction to students in grades 1-8. I did not anticipate my transfer to the High School the following year, where I was required to provide Special Education curriculum instruction to students in grades 9-12, while continuing to teach students in grades 6-8 at the Middle School. This required intensive lesson preparation, as well as continual movement between the two schools.

“I continued to receive treatment for Post-Traumatic Stress Disorder and Major Depression, including psychotherapy and medication, as a result of the original diagnosis. However, the demands of my teaching position became overwhelming and the symptoms of the original condition worsened until I became totally disabled and was advised by my physician that I could no longer work in any capacity. I subsequently filed a claim for recurrence of total disability as of June 30, 2001. The symptoms of Post-Traumatic Stress Disorder and Depression had continued since the original onset in July, 1992. Despite every attempt to control these symptoms, coupled with the excessive demands of my teaching position, my condition continued to deteriorate, until I was unable to work in any capacity.”

To support her request for reconsideration, appellant submitted the January 21, 2002 report of Dr. McGuire, who found her totally disabled as a result of a reexacerbation of post-traumatic stress disorder. She stated:

“[Appellant] began work as a part-time special education teacher in September 1999. Soon after, during that fall, additional responsibilities were assigned to her in a separate elementary school that created a highly demanding job. She began reexperiencing symptoms of [p]ost-[t]raumatic [s]tress [d]isorder and depression at that time. In September 2000[,] she was transferred to another school, the local high school, with another demanding curriculum in addition to continuing her work at the middle school. During that year [appellant] had full resumption of depression and [p]ost-[t]raumatic [s]tress [d]isorder due to the increasing demand of her work and its increasing complexity.”

In a decision dated June 17, 2002, the Office denied a merit review of appellant’s claim. The Office indicated the worsening of her condition as a result of her teaching position was not relevant because a recurrence of disability must be caused by a spontaneous change in a previous injury without an intervening injury.

Appellant requested reconsideration on July 28 and September 5, 2002. She provided a more detailed description of her employment history and argued that her claim should not be denied on the basis of her new job duties; her condition was really the result of her accepted post-traumatic stress disorder.

In a decision dated December 6, 2002, the Office reviewed the merits of appellant’s claim and denied modification of its June 17, 2002 decision. The Office found that her claimed recurrence of total disability on June 30, 2001 was not supported by any medical evidence to be a result of her accepted 1992 federal work-related disability. The Office noted that appellant’s disability was from a private-sector injury and that she should be filing for workers’ compensation on the state level.

On February 19, 2003 appellant again requested reconsideration. In support thereof, she submitted the February 6, 2003 report of Dr. McGuire, who explained that her first episode of post-traumatic stress disorder never remitted, “therefore, all apparent relapses represent a manifestation of the original episode.” Dr. McGuire found appellant completely disabled as a result of the “continuation” of the original diagnosis of post-traumatic stress disorder.

In a decision dated May 15, 2003, the Office reviewed the merits of appellant’s claim and denied modification of its December 6, 2002 decision. The Office found that she failed to show that her accepted medical condition had spontaneously worsened.

On June 30, 2003 appellant requested reconsideration and offered another statement. She argued that there was a change in her light-duty position. Appellant added that it was the nature of post-traumatic stress disorder to recur with minimal stress: “It cannot be said that the minimal stresses are the cause of the post-traumatic stress.”

In a decision dated September 26, 2003, the Office reviewed the merits of appellant’s claim and denied modification of the May 15, 2003 decision. The Office found that the

worsening of her condition was caused by her work as a special education teacher in private employment, not by the work injury of 1992.

On November 25, 2003 appellant requested reconsideration and submitted the September 29, 2003 report of Dr. McGuire.

In a decision dated February 24, 2004, the Office denied a merit review of appellant's claim. The Office found that Dr. McGuire's September 29, 2003 report was repetitious, essentially a restatement of previously considered evidence and, therefore, insufficient to warrant a merit review.

On March 17, 2004 appellant again requested reconsideration and submitted the March 4, 2004 report of Dr. McGuire, who explained that it was the nature of post-traumatic stress disorder to recur, stating:

“Although [appellant] continues to receive treatment for [post-traumatic stress disorder], she has suffered irreparable emotional, personal, professional and financial loss as a result of this disability. [She] has attempted to return to work in the [employing establishment] and in the private sector and suffered relapses. Employment in *any* capacity would have intensified the disabling symptoms of [p]ost[-t]raumatic [s]tress[d]isorder and [m]ajor [d]epression, which are directly related to the trauma [she] suffered [at] the [employing establishment]. (Emphasis in the original.)

“Please contact me directly for further clarification of the onset and history of [appellant's] medical condition and diagnosis if necessary. It is incomprehensible that [she] can be applauded by the Department of Labor for her attempts at recovery and penalized for suffering a relapse.”

In a decision dated March 25, 2004, the Office denied a merit review of appellant's claim. The Office found that the evidence submitted in support of her March 17, 2004 request for reconsideration was repetitious and insufficient to warrant a merit review.

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.²

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

² *Sharon C. Clement*, 55 ECAB ____ (Docket No. 01-2135, issued May 18, 2004).

instance the Office will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity.³

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 a modification of the wage-earning capacity determination.⁵

ANALYSIS

Appellant filed a claim alleging that she sustained a recurrence of total disability and the Office denied the claim on the grounds that the evidence failed to establish a recurrence of disability causally related to the accepted employment injury. The Board finds that the issue presented is not one of a recurrence of disability. Rather, it is whether she has established a material change in the nature and extent of her injury-related condition, such that the Office should modify its July 12, 2001 wage-earning capacity determination.

Appellant returned to a full-time regular teaching position on September 1, 2000. The Office issued a formal wage-earning capacity determination that her actual wages in this position fairly and reasonably represented her wage-earning capacity. Appellant alleges that in late March 2001 she began to experience the same symptoms of the original disability and claims total disability for work beginning June 30, 2001, the date her contract for the 2000, 2001 school year expired. The Board has held that, when a wage-earning capacity determination has been issued and a claimant submits evidence with respect to disability for work, the Office must evaluate the evidence to determine if modification of wage-earning capacity is warranted.⁶ The Board will remand the case to the Office for an appropriate decision on this issue.

CONCLUSION

The Board finds that this case is not in posture for decision. Appellant's recurrence of disability claim raised the issue of whether the Office should modify its July 12, 2001 wage-earning capacity determination. The case will be remanded for an appropriate decision.⁷

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9.a (December 1995).

⁴ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

⁵ *Id.*

⁶ *Sharon C. Clement*, *supra* note 2.

⁷ *Dennis W. Griffith*, Docket No. 04-0987 (issued October 29, 2004).

ORDER

IT IS HEREBY ORDERED THAT the September 26 and May 15, 2003 decisions of the Office of Workers' Compensation Programs are set aside. The case is remanded for further action consistent with this opinion.⁸

Issued: December 20, 2004
Washington, DC

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

⁸ Remanding the case for an appropriate merit decision renders moot the Office's February 24 and March 25, 2004 decisions not to reopen appellant's case for a merit review.