



## **FACTUAL HISTORY**

This case has previously been on appeal before the Board. Appellant, a 73-year-old former secretary, sustained a traumatic injury to her left knee on December 15, 1995 when she stumbled down a stairway at work. The Office accepted her claim for left knee strain and lateral meniscus tear of the left knee. On May 30, 1997 appellant accepted a permanent, light-duty position as an office automation clerk, with no decrease in pay. She resigned from her position on August 22, 1997.<sup>2</sup> In a decision dated November 17, 1997, the Office determined that appellant's actual earnings as an office automation clerk fairly and reasonably represented her wage-earning capacity and that she had no loss of wage-earning capacity. The Board affirmed the Office's loss of wage-earning capacity determination on July 3, 2002.<sup>3</sup> In a subsequent appeal the Board remanded the case to the Office to address appellant's request for modification of the Office's November 17, 1997 wage-earning capacity determination.<sup>4</sup> Thereafter, the Office denied modification by decisions dated April 17 and July 25, 2003. In a decision dated November 18, 2003, the Board affirmed the Office's July 25, 2003 decision.<sup>5</sup> Appellant requested reconsideration before the Board, which denied her request by order dated March 30, 2004.

On April 8, 2004 appellant requested reconsideration before the Office. By decision dated June 9, 2004, the Office denied appellant's request for reconsideration.

## **LEGAL PRECEDENT**

Under section 8128(a) of the Federal Employees' Compensation Act, the Office has the discretion to reopen a case for review on the merits.<sup>6</sup> Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.<sup>7</sup> Section 10.608(b) provides that when an application for reconsideration does not meet at least one of the three requirements enumerated

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<sup>2</sup> The Office authorized arthroscopic surgery to repair the torn meniscus in appellant's left knee. Dr. Stephen D. Ruyle, a Board-certified orthopedic surgeon, performed a partial lateral meniscectomy on August 29, 1997 and he released appellant to return to sedentary work on October 27, 1997.

<sup>3</sup> Docket No. 99-1407 (issued July 3, 2000).

<sup>4</sup> Docket No. 02-1154 (issued January 31, 2003).

<sup>5</sup> Docket No. 03-2172 (issued November 18, 2003). The Board's decisions dated July 3, 2000, January 31, 2003 and November 18, 2003 are incorporated herein by reference.

<sup>6</sup> 5 U.S.C. § 8128(a).

<sup>7</sup> 20 C.F.R. § 10.606(b)(2) (1999).

under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.<sup>8</sup>

### ANALYSIS

Appellant's April 8, 2004 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance a relevant legal argument not previously considered by the Office. Appellant referenced various laws and regulations pertaining to age discrimination in employment. This information, however, is not relevant to the issue of whether she has demonstrated a basis for modifying the Office's November 17, 1997 wage-earning capacity determination.<sup>9</sup> Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).<sup>10</sup> With respect to the third requirement, the information submitted does not constitute relevant and pertinent new evidence not previously considered by the Office. Appellant did not submit any additional evidence with her April 8, 2004 request for reconsideration. Accordingly, she is not entitled to a review of the merits of her claim based on the third requirement under section 10.606(b)(2).<sup>11</sup> As appellant is not entitled to a review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(2), the Office properly denied the April 8, 2004 request for reconsideration.

### CONCLUSION

The Board finds that the Office properly denied appellant's request for a review of the merits of her claim.

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<sup>8</sup> 20 C.F.R. § 10.608(b) (1999).

<sup>9</sup> Once the Office has rendered a determination regarding wage-earning capacity, modification of such a determination is unwarranted unless the party seeking modification demonstrates that the original determination was in fact erroneous, or that there has been a material change in the nature and extent of the injury-related condition, or that the employee has been retrained or otherwise vocationally rehabilitated. *Stanley B. Plotkin*, 51 ECAB 700 (2000). The burden of proof is on the party seeking modification. *Id.*

<sup>10</sup> 20 C.F.R. §§ 10.606(b)(2)(i) and (ii) (1999).

<sup>11</sup> 20 C.F.R. § 10.606(b)(2)(iii) (1999).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 9, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 9, 2004  
Washington, DC

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member