

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

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**BARBARA J. VICTORS, Appellant**

**and**

**U.S. POSTAL SERVICE, MOIRAIN VALLEY  
STATION, Bridgeview, IL, Employer**

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**Docket No. 04-607  
Issued: June 24, 2004**

*Appearances:*  
*Arthur Alford, for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Member  
DAVID S. GERSON, Alternate Member  
MICHAEL E. GROOM, Alternate Member

**JURISDICTION**

On January 6, 2004 appellant, through her representative, filed a timely appeal from the Office of Workers' Compensation Programs' merit decisions dated May 27 and January 7, 2003 finding that the Office properly terminated appellant's compensation benefits for the failure to accept suitable work. Appellant also filed a timely appeal from a December 23, 2003 nonmerit decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issues are: (1) whether the Office met its burden of proof to terminate appellant's compensation benefits on the grounds that she refused an offer of suitable work; (2) whether appellant has established entitlement to continuing benefits; and (3) whether the Office properly declined to reopen appellant's claim for consideration of the merits on December 23, 2003.

## **FACTUAL HISTORY**

On January 5, 1983 appellant, then a 35-year-old letter carrier, filed a traumatic injury claim alleging that she injured her back in an employment-related motor vehicle accident. The Office accepted her claim for lumbar and cervical strain with bronchia neuritis. Appellant sustained additional injuries on September 17, 1983 in another employment-related motor vehicle accident including right forearm contusion, as well as right shoulder and cervical strains. On June 14, 1986 she fell in the performance of duty sustaining a dislocation of her coccyx and lumbar contusion. Appellant sustained a recurrence of disability on January 26, 1987 as the result of the additional accepted conditions of degenerative arthritis of the cervical and lumbar spines and chronic pain syndrome.

By decision dated September 17, 1991, the Office found that appellant's light-duty position working four hours a day beginning on June 1, 1991 represented her wage-earning capacity and reduced her compensation benefits based on her earnings in this position. The Office expanded appellant's claim to include chronic myofascial pain syndrome on December 6, 1994.

On May 31, 1999 appellant filed a notice of recurrence of disability alleging on May 24, 1999 she sustained a recurrence of total disability due to her accepted June 14, 1984 employment injury. The Office denied this claim by decision dated August 11, 1999. Appellant requested reconsideration on August 9, 2000. By decision dated February 15, 2001, the Office denied modification of its August 11, 1999 decision.<sup>1</sup>

The Office proceeded to develop the medical evidence by referring appellant for a second opinion evaluation with Dr. Julie M. Wehner, a Board-certified orthopedic surgeon. In a report dated March 19, 1999, Dr. Wehner found that appellant could work eight hours a day with restrictions. Appellant's attending physician, Dr. Stavros N. Maltezos, a Board-certified neurosurgeon, disagreed finding that appellant could work only four hours a day. The Office determined that there was a conflict of medical opinion evidence and referred appellant to Dr. James P. Elmes, a Board-certified orthopedic surgeon, for an impartial medical evaluation. In a report dated February 17, 2000, Dr. Elmes found that appellant could gradually return to work eight hours a day with restrictions and various treatment modalities.

The employing establishment offered appellant a limited-duty position on July 7, 2001 gradually increasing to eight hours a day which the Office determined was suitable work. In a letter dated July 26, 2001, the Office informed appellant that she had 30 days to accept the position or offer her reasons for refusal. On August 20, 2001 appellant refused the position on the grounds that she could not work more than four hours a day. In a letter dated August 28, 2001, the Office informed appellant that her reasons for refusal were not acceptable and allowed her an additional 15 days to accept the position. On September 6, 2001 appellant again stated that she could work only four hours a day. By decision dated October 7, 2001, the Office terminated appellant's compensation benefits effective October 10, 2001 on the grounds that she refused a suitable work position.

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<sup>1</sup> As this decision was issue more than one year prior to the date of appellant's appeal to the Board on January 6, 2004, the Board may not review this decision on appeal. 20 C.F.R. § 501.2(c).

Appellant requested reconsideration of this decision on October 9, 2002 and submitted additional medical evidence. By decision dated January 7, 2003, the Office denied modification of its October 7, 2001 decision. Appellant requested reconsideration on May 2, 2003 and submitted legal arguments and new evidence in support of her claim. By decision dated May 27, 2003, the Office denied modification of its prior decisions. Appellant again requested reconsideration on September 29, 2003. By decision dated December 23, 2003, the Office declined to reopen appellant's claim for consideration of the merits.

### **LEGAL PRECEDENT -- ISSUE 1**

It is well settled that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>2</sup> Once the wage-earning capacity of an injured employee is properly determined, it remains undisturbed regardless of actual earnings or lack of earnings.<sup>3</sup> A modification of such a 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.<sup>4</sup> The burden of proof is on the party attempting to show a change so as to affect the employee's capacity to earn wages in the job determined to represent her earning capacity. Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn and not on actual wages lost.<sup>5</sup>

In addition, Chapter 2.814.11 of the Office's procedure manual contains provisions regarding the modification of formal loss of wage-earning capacity decisions. The relevant part provides that a formal loss of wage-earning capacity will be modified when: (1) the original rating was in error; (2) the claimant's medical condition has changed; or (3) the claimant has been vocationally rehabilitated. Office procedures further provide that the party seeking modification of a formal loss of wage-earning capacity decision has the burden to prove that one of these criteria has been met. If the Office is seeking modification, it must establish that the original rating was in error, that the injury-related condition has improved, or that the claimant has been vocationally rehabilitated.<sup>6</sup>

The Office's procedure manual also provides in relevant part:

“9. Claims Actions after Reemployment. Cases where a claimant stops work after reemployment may require further action, depending on whether the rating has been completed at the time the work stoppage occurs.

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<sup>2</sup> *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

<sup>3</sup> *Roy Mathew Lyon*, 27 ECAB 186, 190-98 (1975).

<sup>4</sup> *Elmer Strong*, 17 ECAB 226, 228 (1965).

<sup>5</sup> *Ronald M. Yokota*, 33 ECAB 1629, 1632 (1982).

<sup>6</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11 (July 1997).

a. Formal Loss of Wage-Earning Capacity Decision Issued. 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 decision (see paragraph 11 below)....”<sup>7</sup>

### ANALYSIS -- ISSUE 1

In this case, the Office issued a formal decision determining appellant’s loss of wage-earning capacity on September 17, 1991 in which it determined that the four-hour-a-day position of modified clerk/carrier fairly and reasonably her wage-earning capacity.<sup>8</sup> Appellant then alleged a recurrence of total disability beginning on May 24, 1999, which the Office denied by decisions dated August 11, 1991 and February 15, 2001. Finally, the Office then terminated appellant’s compensation benefits based on her refusal to accept a suitable work position which entailed gradually increasing her work hours to eight hours a day in accordance with section 8106(c) of the Federal Employees’ Compensation Act provides in pertinent part, “A partially disabled employee who ... (2) refused or neglects to work after suitable work is offered ... is not entitled to compensation.”<sup>9</sup>

The Office did not follow the applicable case law and its procedures regarding modification of the decision on appellant’s wage-earning capacity prior to terminating appellant’s compensation. The Office did not address its prior formal loss of wage-earning capacity decision or otherwise modify this loss of wage-earning capacity decision<sup>10</sup> as required by the procedure manual<sup>11</sup> in response to appellant’s claim for recurrence of disability. Furthermore, the Board has consistently held that once the wage-earning capacity of an injured employee is properly determined, it remains undisturbed regardless of actual earnings or lack of

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<sup>7</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9a (December 1995).

<sup>8</sup> This position was found to reflect a \$260.40 loss of wage-earning capacity. The Board notes that the above-described criteria for modifying formal loss of wage-earning capacity decisions remains the same regardless of whether a given claimant continues to work or stops work after the issuance of a formal loss of wage-earning capacity decision.

<sup>9</sup> 5 U.S.C. § 8106(c).

<sup>10</sup> The Board notes that the Office’s August 11, 1999 and February 15, 2001 decisions denying appellant’s claim for a recurrence of total disability do not constitute an appropriate formal modification of the formal loss of wage-earning capacity decision in place beginning September 17, 1991.

<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9a (July 1997).

earnings unless appropriately modified.<sup>12</sup> The loss of wage-earning capacity decision which remains in place is determinative of appellant's capacity to perform work activity. As the Office has not appropriately addressed nor modified appellant's formal loss of wage-earning capacity decision dated September 17, 1991, this decision remains in effect and represents appellant's physical and vocational abilities. Any position offered by the employing establishment following a formal unmodified loss of wage-earning capacity decision must be found by the Office as equivalent to the designated loss of wage-earning capacity position in both the physical abilities and vocational training required in order to be designated "suitable work." As the Office neither modified the September 17, 1991 formal loss of wage-earning capacity decision to allow for additional physical requirements or vocational training nor made any findings which determined that the position offered by the employing establishment was equivalent to the position which formed the basis of the loss of wage-earning capacity decision, termination of appellant's compensation benefits under section 8106(c) of the Act following the 1991 loss of wage-earning capacity decision was inappropriate.

### CONCLUSION

The Board finds that, as the Office issued a formal decision regarding appellant's wage-earning capacity on September 17, 1991, appellant then alleged a recurrence of total disability, that the Office did not formally modify or address the findings implicit in the loss of wage-earning capacity decision to determine if the position offered by the employing establishment was suitable, and that therefore it was not appropriate for the Office to issue the October 9, 2001 decision regarding appellant's refusal of suitable work. The other two issues are rendered moot by this decision.

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<sup>12</sup> *Stanley B. Plotkin*, 51 ECAB 700, 700-01 (2000); *Linda Thompson*, 51 ECAB 695, 696 (2000). The Board has previously addressed instances in which formal loss of wage-earning capacity decisions remain undisturbed unless modified in accordance with the above-described criteria. *Alma E. Dixon*, Docket No. 03-1622, (issued February 23, 2004); *Robert L. Edwards*, Docket No. 01-1187, (issued May 19, 2003). In *Wallace D. Ludwick*, 38 ECAB 176 (1986), the Office issued a formal loss of wage-earning capacity in which it determined that the employee's wage-earning capacity was represented by the position of deputy, a position which he had been performing. The Office then terminated the employee's compensation based on his refusal of a job which had been offered by the employing establishment and determined by the Office to be suitable. The Board reversed the Office's termination indicating that the loss of wage-earning capacity decision had not been modified and that the employee's refusal of the offered position was justified by the work which had been determined to represent his wage-earning capacity.

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 23, May 27 and January 7, 2003 decisions of the Office of Workers' Compensation Programs are hereby reversed.

Issued: June 24, 2004  
Washington, DC

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member