

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

SHARON C. CLEMENT, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Crowley, LA, Employer**

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**Docket No. 01-2135
Issued: May 18, 2004**

Appearances:
J. Louis Gibbens, III, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On July 11, 2001 appellant filed a timely appeal from decisions of the Office of Workers' Compensation Programs dated February 22, 2001, terminating her entitlement to compensation benefits on the grounds that she refused an offer of suitable work, April 21, 2001, denying appellant's request for an oral hearing as untimely and June 20, 2001, denying modification of the February 22, 2001 decision terminating benefits. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case and over the Office's decision denying appellant's request for an oral hearing.

ISSUES

The issues are: (1) whether the Office met its burden of proof to terminate appellant's compensation benefits effective September 25, 2001 on the grounds that she refused an offer of suitable work; (2) whether the Office properly denied appellant's request for an oral hearing; and (3) whether appellant met her burden to establish that her refusal of the offered position was justified.

FACTUAL HISTORY

On November 22, 1996 appellant, then a 48-year-old clerk, filed a claim for traumatic injury alleging that on that date she sustained injuries when she was struck in the head by an unlatched gate in the performance of duty. She stopped work on the date of injury. Based on the medical evidence submitted by appellant, on February 13, 1997, the Office accepted her claim for cervical strain and forehead contusion and paid all appropriate compensation benefits.

On April 14, 1997 appellant filed an occupational disease claim alleging that after being struck on the head, she developed bilateral carpal tunnel syndrome. She returned to limited-duty work four hours a day on May 22, 1997, but again stopped work on October 8, 1997. In a decision dated June 10, 1997, the Office denied appellant's claim for employment-related bilateral carpal tunnel syndrome. Following an oral hearing, held at her request and a review of the additional medical evidence submitted by appellant, in a decision dated April 22, 1998, an Office hearing representative reversed the Office's June 10, 1997 decision. By letter dated May 7, 1998, the Office accepted appellant's claim for bilateral carpal tunnel syndrome and authorized surgical treatment and therapy. Her two claims were subsequently combined for more efficient case management.

On August 28, 1998 appellant returned to full-time limited duty.¹ In a decision dated July 14, 1999, the Office determined that she had been reemployed on August 28, 1998 as a modified distribution clerk, 8 hours a day, at a wage of \$752.40 per week and had successfully performed this job for more than 60 days. The Office found that this position fairly and reasonably represented her wage-earning capacity and that her actual wages met or exceeded the wages of the job she held when injured. Therefore, the Office reduced appellant's compensation benefits to zero.

On June 1, 1999 appellant stopped work on the advice of her physician, pending her carpal tunnel release surgery. The surgery was approved by the Office on October 20, 1999 and a left carpal tunnel release was performed on December 8, 1999.

On March 17, 2000 appellant filed a claim for a recurrence of disability, beginning June 1, 1999. The Office authorized compensation for total disability beginning December 8, 1999, the date of her carpal tunnel release surgery. The Office issued a check on June 9, 2000 to cover the period from June 2 through December 7, 1999.

On September 5, 2000 appellant underwent a functional capacity evaluation and was found to be capable of performing sedentary work. In a December 11, 2000 report, Dr. Louis Blanda, appellant's Board-certified orthopedic surgeon, released her to perform sedentary work with no repetitive use of the hands.

¹ On September 10, 1998 appellant raised an objection to the lifting requirements described in the limited-duty job offer. She stated that the position required lifting 10 pounds frequently and 24 pounds occasionally, but that her functional capacity evaluation described sedentary duties as lifting only 10 pounds occasionally and negligible amounts frequently. Appellant did not stop work. The Board notes, however, that on July 9, 1998 an ergonomic analysis of the modified position was performed and the position was found to be in the sedentary category.

By letter dated December 21, 2000, the employing establishment offered appellant a position as a modified distribution clerk. The duties of the position were essentially the same as the position she held previously, but the job description was updated to reflect that the duties were now to be performed within the restrictions set forth in the September 5, 2000 functional capacity evaluation.

In a letter dated January 3, 2001, the Office found this position to be suitable and allowed appellant 30 days to accept the position or offer her reasons for refusal. On January 18, 2001 she refused the position "with explanation." While no explanation was actually provided, appellant did submit a January 18, 2001 treatment note from Dr. Blanda, who noted appellant's concern that the employing establishment was trying to return appellant to the same job she had previously held, which she did not think she could do. Dr. Blanda stated that he did not think appellant could return to the same occupation. In an accompanying form report also dated January 18, 2001, Dr. Blanda indicated by check mark that appellant was unable to work pending further treatment.

By letter dated February 5, 2001, the Office informed appellant that her reasons for refusing the position were not adequate and allowed her an additional 15 days to accept the position.

The record indicates that appellant retired from the employing establishment prior to the Office's February 22, 2001 decision. In a letter dated February 14, 2001 and received by the Office on February 21, 2001, the Office of Personnel Management (OPM) noted that, as a compensationeer, appellant was eligible to continue the Federal Employees' Group Life Insurance coverage. OPM further stated that the post retirement election was 50 percent reduction, the commencing date for the post retirement deductions was June 3, 2000 and that basic and optional coverage premiums begin on the Office commencing date.²

By decision dated February 22, 2001, the Office terminated appellant's compensation benefits effective February 25, 2001 on the grounds that she refused an offer of suitable work.

By letter dated March 29, 2001 and received by the Office on April 2, 2001, appellant requested an oral hearing. In a decision dated April 24, 2001, the Office denied her request for an oral hearing on the grounds that her request was untimely and that her claim could be resolved through the reconsideration process.

By letter dated May 14, 2001, appellant requested reconsideration of the Office's prior decision. In a merit decision dated June 20, 2001, the Office found the newly submitted evidence to be insufficient to warrant modification of its prior decision.

² However, on a June 14, 2000 Form EN1032, appellant indicated that while she received a portion of her husband's retirement due to a divorce settlement, she had not received a regular, nor disability retirement check in the 15 months preceding the form.

LEGAL PRECEDENT -- ISSUE 1

Once the wage-earning capacity of an injured employee is properly determined, it remains undisturbed regardless of actual earnings or lack of earnings.³ 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.⁴ The burden is on the Office to establish that there has been 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.⁵

In addition, Chapter 2.814.11 of the Office's procedure manual contains provisions regarding the modification of a formal loss of wage-earning capacity. 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.⁶

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.

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. If the claimant retires, the CE should offer an election between [Act] and OPM benefits if appropriate. A penalty decision under 5 U.S.C. § 8106(c) should not be issued.”⁷

³ *Roy Mathew Lyon*, 27 ECAB 186, 188-90 (1975).

⁴ *Elmer Strong*, 17 ECAB 226, 228 (1965).

⁵ *Ronald M. Yokota*, 33 ECAB 1629, 1632 (1982).

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

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

ANALYSIS -- ISSUE 1

In the present case, the Office terminated appellant's compensation benefits effective February 25, 2001 in a decision dated February 22, 2001, on the grounds that she refused an offer of suitable work. Section 8106(c) of the Act provides in pertinent part, "A partially disabled employee who ... (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation."⁸ Prior to terminating appellant's compensation on February 22, 2001, effective February 25, 2003, the Office issued a formal loss of wage-earning capacity decision on July 14, 1999 in which it determined that the position of modified distribution clerk fairly and reasonably represented appellant's wage-earning capacity.⁹ However, the Office did not follow the applicable case law and procedures regarding appellant's wage-earning capacity prior to terminating her compensation. The Office did not address its prior formal loss of wage-earning capacity decision or otherwise formally modify this loss of wage-earning capacity decision¹⁰ which was in place at the time that it made its suitable work determination on February 22, 2001.¹¹

Moreover, the Office did not act in accordance with its procedures which specifically address cases where a claimant stops work after reemployment. In the present case, the Office issued a formal loss of wage-earning capacity decision on July 14, 1999 and the record suggests that appellant retired effective June 2000. Office procedures specifically provide that a decision effectuating a termination of compensation based on refusal of an offer of suitable work should not be issued in a case in which a claimant has retired following a formal loss of wage-earning capacity determination.¹² As the record before the Board suggests that appellant retired after June 15, 2000, the Office improperly terminated her compensation under section 8106(c). Furthermore, Board precedent establishes that a formal loss of wage-earning capacity decision remains undisturbed unless appropriately modified. As the Office has not appropriately

⁸ 5 U.S.C. § 8106(c).

⁹ This position was found to reflect a 100 percent loss of wage-earning capacity. Appellant retired from the employing establishment in June 2000. 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.

¹⁰ The Board notes that the Office informally modified the formal loss of wage-earning capacity decision by authorizing compensation for temporary total disability beginning on December 8, 1999.

¹¹ 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. 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 she had been performing. The Office then terminated the employee's compensation based on her 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 her wage-earning capacity.

¹² *Robert L. Edwards*, Docket No. 01-1197 (issued May 19, 2003).

modified appellant's formal loss of wage-earning capacity decision, the suitable work termination is not appropriate.¹³

For these reasons, the Office improperly terminated appellant's compensation benefits effective February 25, 2000 on the grounds that she refused an offer of suitable work and, therefore, the February 22, 2000 decision is reversed.¹⁴

CONCLUSION

The Board finds that in its decision dated February 22, 2001, the Office improperly terminated appellant's wage-loss compensation effective February 25, 2001 on the grounds that she unjustifiably refused an offer of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 20, April 24 and February 22, 2001 are hereby reversed.

Issued: May 18, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

¹³ *Wallace D. Ludwick*, 38 ECAB 176 (1986).

¹⁴ Due to the resolution of the first issue, the remaining issues of whether the Office properly denied appellant's request for an oral hearing and whether she met her burden to establish that her refusal of the offered position was justified are moot and will not be addressed in this decision.