

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ACQUILLA S. HILL and NATIONAL AERONAUTICS & SPACE
ADMINISTRATION, LANGLEY RESEARCH CENTER, Hampton, VA

*Docket No. 02-1762; Submitted on the Record;
Issued September 9, 2004*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly refused to modify its determination of appellant's loss of wage-earning capacity determination.

On November 14, 1996 appellant, then a 52-year-old full-time computer specialist, filed a claim for pain in her lower back and hip. The Office accepted that appellant sustained an acute sacroiliac strain and disc herniation at L4-5 and authorized an L4-5 laminectomy and discectomy which was performed on January 20, 1997. Thereafter, appellant's claim was expanded to include left leg neuralgia/neuritis as consequential injuries. She stopped work on November 12, 1996. Appellant was paid appropriate compensation for all periods of disability.

Appellant submitted various medical records from Dr. Mark D. Kerner, a Board-certified orthopedic surgeon, and a magnetic resonance imaging (MRI) scan dated November 25, 1996. Dr. Kerner noted a history of appellant's work-related injury and subsequent treatment and surgeries. In an operative report dated January 20, 1997, he indicated that he performed an L4 laminectomy and discectomy. Dr. Kerner diagnosed appellant with a large extruded foramina herniation at L4-5 with a subligamentous extrusion.

Thereafter, appellant returned to work in a light-duty capacity on June 15, 1997 and stopped work on July 28, 1997. On September 15, 1997 she returned to work in a light-duty capacity. On January 20, 1998 appellant returned to full-time regular duty as a home commuter specialist, telecommuting from her residence with the approval of her treating physician, Dr. Kerner.

In a decision dated September 23, 1998, the Office reduced appellant's compensation effective that same date based on her ability to earn wages as a home computer specialist. The Office indicated that she had been employed in the position for over 60 days. The Office indicated that appellant was considered a permanent federal worker and there were no changes to her wages due to the job change. Appellant's actual earnings of the current position met or

exceeded the wages of the job she held at the date of injury. The Office concluded the position of a home computer specialist represented her wage-earning capacity.

On May 25, 1999 appellant filed a CA-2a, notice of recurrence of disability. She indicated a recurrence of back and leg pain on April 22, 1999 causally related to the work-related injury of November 7, 1996. Appellant stopped work in April 1999 and returned to part-time work, six hours per day, three to four days per week commencing February 22, 2000. The Office accepted her claim for recurrence of disability and paid appropriate compensation.

Appellant submitted various medical records from Dr. Kerner dated May 11, 1999 to February 22, 2000. In his report of August 24, 1999, Dr. Kerner indicated that appellant sustained a recurrence of disability on April 22, 1999 when she fell and thereafter experienced a progression of orthopedic and neurological complications which rendered her unable to return to work. The doctors September 28, 1999 report also advised that appellant experienced a give-way episode with her left leg in April 1999, which caused a worsening of her condition. Dr. Kerner opined that he attempted to conservatively treat appellant's sacroiliac strain and disc herniation at L4-5 since the April 1999 fall; however, he had been unsuccessful and noted that surgical intervention in the form of a lumbar decompression was the most feasible option at this juncture. In a disability slip dated February 22, 2000, Dr. Kerner indicated that appellant could return to her position as a home computer specialist, subject to the same restrictions on sitting, walking and lifting previously set forth.

On February 22, 2000 the Office offered appellant a part-time position as a home computer specialist effective the same date. The position was six hours per day and three to four days per week. The job offer was within the limitations provided by Dr. Kerner which included intermittent sitting, walking, lifting and minimal commuting to her place of employment as she could not sit for long periods of time. Appellant accepted the position.

In a decision dated May 17, 2002, the Office reduced appellant's compensation effective that same date based on her ability to earn wages as a home computer specialist. The Office determined that because of the severity of appellant's accepted medical condition she would not be able to return to the date-of-injury position. The Office indicated that appellant had been employed in the position for over 60 days. The Office indicated that appellant was considered a permanent federal worker and there were no changes to her wages due to the job change. Her actual earnings of the current position met or exceeded the wages of the job she held at the date of injury. The Office concluded that the position of a home computer specialist represented appellant's wage-earning capacity.

In a loss of wage-earning capacity worksheet, dated June 11, 2002, the Office determined that appellant's pay rate when she was initially injured was \$1,189.15 and the pay rate when her disability recurred on April 22, 1999 was \$1,135.90. The Office noted that the wage-earning capacity loss was \$488.44 and the compensation rate was 75 percent of this amount or \$366.33. The Office further indicated that taking into account the consumer price index the weekly award would be \$383.75 and the four-week compensation totaled \$1,535.00.

The Board finds that this case is not in posture for decision.

Once the wage-earning capacity of an injured employee is properly determined, it remains undisturbed regardless of actual earnings or lack of earnings.¹ 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.² 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 wage-earning capacity. Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn and not on actual wages lost.³

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.⁴

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 [the Act] and OPM benefits if appropriate. A penalty decision under 5 U.S.C. § 8106(c) should not be issued."⁵

¹ *Sharon C. Clement*, 55 ECAB ____ (Docket No. 01-2135, issued May 18, 2004), *Roy Mathew Lyon*, 27 ECAB 186, 188-90 (1975).

² *Elmer Strong*, 17 ECAB 226, 228 (1965).

³ *Ronald M. Yokota*, 33 ECAB 1629, 1632 (1982).

⁴ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11 (July 1997).

⁵ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

In this case, on May 17, 2002, effective the same date, the Office issued a formal loss of wage-earning capacity decision in which it determined that the part-time position of home computer specialist fairly and reasonably represented appellant's wage-earning capacity.⁶ However, the Office did not follow the applicable case law and procedures regarding appellant's wage-earning capacity. The Office did not address its prior formal loss of wage-earning capacity decision of September 23, 1998 or otherwise formally modify this loss of wage-earning capacity decision which was in place at the time that it made its decision on May 17, 2002.⁷

Moreover, the Office did not act in accordance with their procedure which specifically addresses cases where a claimant stops work after reemployment. In the present case, the Office issued a formal loss of wage-earning capacity decision on September 23, 1998. The record reveals that the Office accepted that appellant sustained a recurrence of disability on April 22, 1999 causally related to her November 7, 1996 employment injury and stopped working at this time. Accompanying her claim for recurrence appellant submitted medical evidence from Dr. Kerner, her treating physician, which supported that there had been a material change in the nature and extent of her injury-related condition. In his report of August 24, 1999, Dr. Kerner indicated that appellant sustained a recurrence of disability on April 22, 1999 when she fell and thereafter experienced a progression of orthopedic and neurological complications which rendered her unable to return to work. His September 28, 1999 report also advised that appellant experienced a give-way episode with her left leg in April 1999, which caused a worsening of her condition. The doctor opined that he attempted to conservatively treat appellant's sacroiliac strain and disc herniation at L4-5 since the April 1999 fall; however, he had been unsuccessful and noted that surgical intervention in the form of a lumbar decompression may be the most feasible option at this juncture. These medical reports indicate that appellant sustained a recurrence of disability on April 22, 1999 causally related to her November 7, 1996 employment injury. Furthermore, the Office accepted the recurrence of disability as causally related to her November 7, 1996 employment injury and appellant was thereafter only able to return to part-time employment. Therefore, the Board finds that the medical evidence submitted by appellant supports that there was a material change in the nature and extent of her injury-related condition.

On May 17, 2002 the Office reduced appellant's compensation effective the same date based on her ability to earn wages as a computer home specialist; however, she failed to consider the prior loss of wage-earning capacity in effect. Furthermore, Board precedent establishes that a formal loss of wage-earning capacity decision remains undisturbed unless appropriately modified. As the Office has not appropriately modified appellant's formal loss of wage-earning

⁶ 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.

⁷ 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.

capacity decision of September 23, 1998, the formal loss of wage-earning capacity of May 17, 2002 was not appropriate.⁸

The May 17, 2002 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC
September 9, 2004

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

⁸ *Wallace D. Ludwick*, 38 ECAB 176 (1986).