

wage-loss compensation based on her ability to earn wages in the selected position of telephone order clerk.¹ The Office denied modification in a May 17, 1996 merit decision and a January 16, 1998 nonmerit decision. By decision dated December 3, 1999,² the Board found that the Office did not abuse its discretion under section 8128(a) of the Act by denying appellant's January 5, 1998 request for reconsideration as it was untimely filed and failed to present clear evidence of error.³ The law and the facts of the case as set forth in the Board's prior decision are hereby incorporated by reference.

Appellant submitted periodic reports from October 1998 to April 2001 from Dr. Michael E. Batipps, an attending Board-certified neurologist,⁴ who diagnosed chronic cervical and shoulder strains, headaches, cervical radiculopathy and a chronic lumbosacral sprain with radiculopathy.⁵ In an October 5, 2001 report, he noted that appellant experienced increased memory loss and cognitive dysfunction such that she required assistance with some activities of daily living. Dr. Batipps performed neuropsychological tests demonstrating impaired memory, diminished attention span, depression and chronic post-traumatic stress disorder. He opined that appellant's cognitive impairments were caused by concussions sustained in the October 29, 1988 and March 28, 1989 occupational incidents. Dr. Batipps found appellant totally disabled for work due to cognitive impairments and memory loss. He reiterated these findings and diagnoses in reports through May 15, 2002, noting that appellant had reached maximum medical improvement.

On April 26, 2002 appellant claimed a schedule award. In a September 20, 2002 report, Dr. Batipps opined that appellant's bilateral C5-6 radiculopathy was equal to a 16 percent permanent impairment of the left and right upper extremities. He noted on November 7, 2002 that appellant remained totally and permanently disabled for all work. The Office referred the record to an Office medical adviser, who opined in a November 26, 2002 report that the C5-6 cervical radiculopathy observed by Dr. Batipps was equal to a 16 percent impairment of each upper extremity according to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

¹ On July 27, 1995 the employing establishment offered appellant a light-duty position as a telephone receptionist. However, the offer was misaddressed and the record indicates that appellant may not have received the offer. Regardless, appellant did not earn actual wages in the selected position of telephone order clerk.

² Docket No. 98-1673 (issued December 3, 1999).

³ During the pendency of the first appeal, on October 13, 1999, appellant filed a claim for a recurrence of disability commencing December 17, 1995. There is no final decision of record regarding this claim.

⁴ Appellant participated in physical therapy periodically from December 1998 to January 2002. February 3, 1999, January 5, 2000 and November 28, 2001 electromyography (EMG) and nerve conduction velocity (NCV) studies of the cervical paraspinals and upper extremities were normal. March 24, 1999 EMG and NCV studies of the lower extremities and lumbar paraspinals were normal. A December 7, 2001 magnetic resonance imaging (MRI) scan of appellant's brain was also normal.

⁵ The record indicates that appellant's lumbar symptoms were due to a nonoccupational 1994 motor vehicle accident.

By decision dated December 16, 2002, the Office awarded appellant a schedule award for a 16 percent permanent impairment of the left upper extremity and a 16 percent impairment of the right upper extremity due to C5-6 radiculopathy. The period of the award ran from December 1, 2002 to October 29, 2004.

Appellant filed a second appeal with the Board on December 16, 2002.

On April 16, 2003 appellant requested reconsideration of the wage-earning capacity determination.⁶ By decision dated April 23, 2003, the Office denied appellant's April 16, 2003 request for reconsideration on the grounds that it did not raise substantive legal questions or include new or relevant evidence.

By order issued July 30, 2003,⁷ the Board dismissed appellant's December 16, 2002 appeal at her request.

In an October 20, 2003 report, an Office medical adviser opined that additional development was necessary to determine if appellant's condition had changed as her symptoms were not corroborated by objective findings. The Office referred appellant to Dr. Ravi Yalamanchili, a Board-certified neurosurgeon, for a second opinion examination. In a December 17, 2003 report, Dr. Yalamanchili provided a history of injury and treatment. On examination, he found tenderness throughout the paraspinals and restricted cervical motion but noted that he found no objective evidence of cervical radiculopathy. He also noted that her symptoms of weakness and tremor in all extremities disappeared if she was distracted. Dr. Yalamanchili diagnosed a chronic cervical sprain and closed-head injury. He opined that appellant was partially disabled for work and could perform sedentary duties.

In a February 20, 2004 report, Dr. Batipps again found appellant permanently and totally disabled since March 28, 1999 due to bilateral cervical radiculopathy, headaches, chronic memory loss and cognitive dysfunction caused by the accepted October 29, 1988 and March 28, 1989 injuries.

By decision dated March 10, 2004, the Office denied modification of the December 6, 1995 wage-earning capacity determination, based on Dr. Yalamanchili as the weight of medical opinion evidence. The Office found that Dr. Batipps' reports were insufficient to establish a change in appellant's medical condition that would warrant modification of the December 6, 1995 wage-earning capacity determination.

LEGAL PRECEDENT

Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and

⁶ Appellant also submitted requests for reconsideration on July 17, 2000, January 15, 2001 and March 3, 2003. She also submitted a January 23, 2003 claim for compensation for the period December 14, 1988 and continuing and a May 2, 2003 request for additional vocational rehabilitation. There are no final decisions of record which directly adjudicate these claims.

⁷ Docket No. 03-1673 (issued July 30, 2003).

reasonably represent her wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity or if the employee has no actual earnings, her wage-earning capacity is determined with due regard to the nature of her injury, her degree of physical impairment, her usual employment, her age, her qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect her wage-earning capacity in her disabled condition.⁸ When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office or to an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits that employee's capabilities with regard to physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.⁹ Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.¹⁰

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.¹¹ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.¹²

ANALYSIS

In this case, the Office accepted that appellant sustained two head injuries resulting in scalp contusions, a neck strain, left shoulder strain and post-traumatic headaches. The Office determined in a December 6, 1995 decision that the position of telephone order clerk represented appellant's wage-earning capacity. Subsequent to this determination, Dr. Batipps, an attending Board-certified neurologist, diagnosed bilateral cervical radiculopathy and cognitive dysfunction which he attributed to the accepted head injuries. He found appellant totally disabled for work as of the March 28, 1989 head injury. On December 16, 2002 the Office awarded appellant a schedule award for a 16 percent impairment of each upper extremity due to C5-6 radiculopathy.

⁸ *David L. Scott*, 55 ECAB ____ (Docket No. 03-1822, issued February 20, 2004).

⁹ See *Dennis D. Owen*, 44 ECAB 475 (1993); *Albert C. Shadrick*, 5 ECAB 376 (1953). See also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8 (December 1993).

¹⁰ See *Sharon C. Clement*, 55 ECAB ____ (Docket No. 01-2135, issued May 18, 2004).

¹¹ *Katherine T. Kreger*, 55 ECAB ____ (Docket No. 03-1765, issued August 13, 2004); *Sue A. Sedgwick*, 45 ECAB 211 (1993).

¹² *Sue A. Sedgwick*, *id.*

To determine if a modification of the December 6, 1995 wage-earning capacity was warranted due to a substantial change in appellant's condition, the Office referred appellant to Dr. Yalamanchili, a Board-certified neurosurgeon, for a second opinion examination. In contrast to Dr. Batipps' opinion, Dr. Yalamanchili found no objective evidence of cervical radiculopathy and opined that appellant was able to perform sedentary duty. Based on Dr. Yalamanchili's report as the weight of the medical evidence, the Office found in a March 10, 2004 decision that the December 6, 1995 wage-earning capacity determination should remain undisturbed as there was insufficient evidence that appellant's condition had changed.

The Board finds a conflict of medical opinion between Dr. Batipps, for appellant, and Dr. Yalamanchili, for the government, regarding the nature of appellant's impairments and her ability to work. Section 8123(a) of the Act provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.¹³ When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.¹⁴ The Board finds that Dr. Yalamanchili's opinion is of no greater probative quality than that of Dr. Batipps as the two physicians presented medical rationale of relatively equal weight. Therefore, the case must be remanded to the Office for resolution of the conflict.

On remand of the case, the Office shall refer appellant, the case record and an updated statement of accepted facts, to an appropriate Board-certified specialist or specialists to determine if appellant's medical condition has substantially changed. Following this and any other development deemed necessary, the Office shall issue an appropriate decision regarding whether the December 1995 wage-earning capacity determination requires modification.

CONCLUSION

The Board finds that the case is not in posture for a decision as there is an outstanding conflict of medical evidence regarding appellant's ability to perform the selected position of telephone order clerk.

¹³ 5 U.S.C. § 8123(a); *Robert W. Blaine*, 42 ECAB 474 (1991).

¹⁴ *Delphia Y. Jackson*, 55 ECAB ____ (Docket No. 04-165, issued March 10, 2004).

ORDER

IT IS HEREBY ORDERED THAT the March 10, 2004 decision of the Office of Worker's Compensation Programs is set aside, and the case remanded to the Office for further development consistent with this opinion.

Issued: January 12, 2005
Washington, DC

Alec J. Koromilas
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member