



## **FACTUAL HISTORY**

This is the second appeal before the Board.<sup>1</sup> In a July 11, 2005 decision, the Board set aside a September 2, 2004 nonmerit decision.<sup>2</sup> The Board found that appellant's August 10, 2004 request for reconsideration of an August 12, 2003 hearing representative's decision and claim for additional compensation raised the issue of whether modification of the Office's August 13, 2002 wage-earning capacity determination<sup>3</sup> was warranted.<sup>4</sup> The facts and the history contained in the prior appeal are incorporated by reference.<sup>5</sup>

Subsequent to the Board's decision, the Office issued a decision dated November 8, 2005 denying appellant's request for modification of the August 13, 2002 loss of wage-earning capacity decision.

On December 7, 2005 appellant requested an oral hearing before an Office hearing representative.

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<sup>1</sup> Docket No. 05-428 (issued July 11, 2005).

<sup>2</sup> On September 20, 1984 appellant, then a 39-year-old engineering technician, filed a traumatic injury claim alleging that she injured her neck on September 11, 1984 while in the performance of duty. The Office accepted the claim for cervical strain and temporary aggravation of thyroid which resolved by November 15, 1984. The Office subsequently expanded the claim to include the conditions of fibrositis and fibromyalgia. On September 11, 2002 appellant requested an oral hearing before an Office hearing representative, which was held on June 11, 2003. By decision dated August 12, 2003, the Office hearing representative affirmed the August 13, 2002 loss of wage-earning capacity decision based on actual earnings.

<sup>3</sup> On May 12, 2000 Dr. Joseph B. Sleckman, appellant's treating Board-certified internist with a subspecialty in rheumatology, issued permanent restrictions for appellant in work capacity evaluation form (OWCP-5c). The restrictions included working no more than 32 hours per week, 4 hours per day of walking, repetitive wrist movement and pushing/pulling 10 pounds, 2 hours standing and operating a motor vehicle, 1 hour of reaching, twisting, elbow repetitive movements, squatting, kneeling, lifting 10 to 20 pounds and climbing and ½ hour of reaching above the shoulder. Dr. Sleckman also indicated that appellant required a five-minute break every hour.

<sup>4</sup> The Office found that appellant had been working 32 hours per week as an engineering technician with a weekly wage of \$609.72. It found that the employment was effective November 20, 2000. The Office found that the position fairly and reasonably represented her wage-earning capacity and that she had lost wages of \$39.11 per week.

<sup>5</sup> Appellant retired from the employing establishment effective January 3, 2005.

By decision dated April 14, 2006, the Office denied her request for an oral hearing as she had previously requested a hearing on her wage-earning capacity determination.<sup>6</sup>

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

The Office's procedure manual provides that, 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.<sup>7</sup> The procedure manual further indicates that, under these circumstances, the claims examiner will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity decision.<sup>8</sup>

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.<sup>9</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>10</sup>

### **ANALYSIS -- ISSUE 1**

Appellant does not allege a material change in the nature and extent of her injury-related condition. She contends that the issue is not one of modification of the loss of wage-earning capacity determination, but whether the Office erred in issuing the loss of wage-earning capacity determination in the first place. Appellant contends that, as she was performing her date-of-injury position with periods of disability, the Office erroneously issued a loss of wage-earning capacity decision. Thus, the issue is whether the original determination was erroneous.

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<sup>6</sup> On July 17, 2006 appellant requested reconsideration. She contended that she was not requesting modification of the loss of wage-earning capacity decision, but instead argued that no loss of wage-earning capacity determination should have been made in the first place. In response to appellant's request, the Office sent an informational letter dated October 17, 2006 advising appellant that it was unclear what she was requesting the Office to reconsider. It informed her that no further action would be taken and advised her as to what was required to request reconsideration. Appeal rights were attached to the letter for appellant's future reference. The Board notes that the Office's October 17, 2006 correspondence does not, on its face, have the appearance of a final decision. It does not formally identify itself as a final decision and it advised appellant as to what was needed to request reconsideration. See 20 C.F.R. § 10.126. As the October 17, 2006 letter was informational in nature and not a decision, the Board does not have the jurisdiction to review the letter. 20 C.F.R. § 501.2(c).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995). See *Mary E. Marshall*, 56 ECAB \_\_\_\_ (Docket No. 04-1048, issued March 25, 2005).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995). See *Harley Sims, Jr.*, 56 ECAB \_\_\_\_ (Docket No. 04-1916, issued February 8, 2005).

<sup>9</sup> *Stanley B. Plotkin*, 51 ECAB 700 (2000); *Tamra McCauley*, 51 ECAB 375 (2000).

<sup>10</sup> *Harley Sims, Jr.*, *supra* note 8; *Stanley B. Plotkin*, *supra* note 9.

Appellant also has not shown that the original determination of her wage-earning capacity was erroneous. She noted that she continued to perform the duties of her September 11, 1984 date-of-injury position. However, on May 12, 2000 Dr. Sleckman, appellant's treating Board-certified internist with a subspecialty in rheumatology, issued permanent restrictions including limiting appellant to working no more than 32 hours per week. Appellant contends that, since she did not stop working, the Office erred in issuing a loss of wage-earning capacity for her reduced hours. As she was no longer able to work a 40-hour week, this constituted permanent partial disability which precluded her from performing the full-time duties of her position. Thus, the Office properly issued a loss of wage-earning capacity determination.<sup>11</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8124(b)(1) of the Federal Employees' Compensation Act provides that, before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary.<sup>12</sup> Section 10.615 of the federal regulations implementing this section of the Act provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record.<sup>13</sup> The Office's regulations provide that the request must be sent within 30 days of the date of the decision for which a hearing is sought and also that the claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.<sup>14</sup>

Additionally, the Board has held that the Office, in its broad discretionary authority in the administration of the Act,<sup>15</sup> has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.<sup>16</sup> The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Board precedent.<sup>17</sup>

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<sup>11</sup> See *Elsie L. Price*, 54 ECAB 734 (2003) (the general test for determining loss of wage-earning capacity is whether injury-related residuals prevent the employee from performing the kind of work she was doing when injured).

<sup>12</sup> 5 U.S.C. § 8124(b)(1).

<sup>13</sup> 20 C.F.R. § 10.615.

<sup>14</sup> 20 C.F.R. §10.616(a).

<sup>15</sup> 5 U.S.C. §§ 8101-8193.

<sup>16</sup> *Marilyn F. Wilson*, 52 ECAB 347 (2001).

<sup>17</sup> *Teresa M. Valle*, 57 ECAB \_\_ (Docket No. 06-438, issued April 19, 2006). See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(b)(3) (October 1992).

## **ANALYSIS -- ISSUE 2**

On August 12, 2003 the Office issued a loss of wage-earning capacity decision reducing appellant's wages based upon her actual wages as an engineering technician. Appellant requested an oral hearing before an Office hearing representative. On August 12, 2003 the Office hearing representative affirmed the Office's August 13, 2002 decision. Appellant then requested reconsideration which the Office denied in a nonmerit decision on September 2, 2004. She requested review by the Board. On July 11, 2005 the Board set aside the September 2, 2004 nonmerit decision in Docket No. 05-428 and remanded the case for consideration of whether modification of the August 13, 2002 decision was warranted. By decision dated November 8, 2005, the Office denied appellant's request for modification of the August 13, 2002 loss of wage-earning capacity decision. On December 7, 2005 appellant requested an oral hearing before an Office hearing representative. The Board finds that, as appellant previously had a hearing on the August 13, 2002 loss of wage-earning capacity decision, the Board finds that she is not entitled to an oral hearing as a matter of right.<sup>18</sup>

The Board further finds that the Branch of Hearings and Review properly exercised its discretion in determining that appellant's claim could be pursued through the reconsideration process. As appellant was not entitled to an oral hearing as a matter of right and as the Branch of Hearings and Review properly exercised its discretion in denying her request for an oral hearing, the Board finds that appellant's request for an oral hearing was properly denied.

## **CONCLUSION**

The Office properly refused to modify its August 13, 2002 determination of appellant's wage-earning capacity. The Board further finds that the Branch of Hearings and Review properly denied appellant's request for an oral hearing as appellant had previously requested an oral hearing on the issue of her loss of wage-earning capacity decision and as the Branch of Hearings and Review properly exercised its discretion in denying the request.

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<sup>18</sup> 20 C.F.R. § 10.616(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated April 14, 2006 and November 8, 2005 are affirmed.

Issued: August 21, 2007  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board