

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

S.R., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Kansas City, KS, Employer**

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**Docket No. 06-2035
Issued: January 18, 2007**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 5, 2006 appellant filed a timely appeal of an Office of Workers' Compensation Programs' decision dated February 22, 2006 denying her request for reconsideration. The record also contains a January 11, 2006 merit decision denying modification of a wage-earning capacity determination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly denied modification of a July 23, 2001 wage-earning capacity determination; and (2) whether the Office properly determined that the request for reconsideration was insufficient to warrant merit review pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

The Office accepted that appellant sustained chronic cervical and lumbar strains in the performance of duty on July 18, 1996, when she was involved in a motor vehicle accident. The

claim form indicated that she returned to work on November 12, 1996. On October 4, 2000 the employing establishment offered appellant a position as a modified sales, services and distribution associate. The pay rate was \$40,472.00 per year. Appellant accepted the position and began work on October 21, 2000.

By decision dated July 21, 2001, the Office determined that appellant's actual earnings fairly and reasonably represented her wage-earning capacity. The Office found that the actual earnings were equal to the current pay for the date-of-injury position and therefore appellant had no loss of wage-earning capacity.

On October 6, 2005 appellant filed a recurrence of disability claim commencing September 12, 2005. She submitted a treatment noted from Dr. S.R. Katta, a physiatrist, who indicated that appellant had chronic lower back pain with recent exacerbation and right lumbar radiculitis with radiological evidence of degenerative disc and joint disease. Dr. Katta advised that appellant to avoid activity that irritates her back.

In a report dated September 28, 2005, Dr. Brian Jones, an anesthesiologist, noted a history of back pain with an original injury in 1998 after an accident. He indicated that a magnetic resonance imaging scan revealed a small left lateral disc protrusion at L2-3 with right lateral disc herniation at L4-5.

Appellant also submitted a December 29, 2005 report from Dr. Thomas Smith, an anesthesiologist, with a history noting that appellant developed symptoms "after a motor vehicle accident." He diagnosed chronic lumbago, which "I suspect related to chronic underlying right sacroiliac joint syndrome suspect suffered secondary to motor vehicle accident in the past." Dr. Smith recommended a right sacroiliac joint block.

By decision dated January 11, 2006, the Office found that the evidence was insufficient to warrant modification of the prior wage-earning capacity determination. Appellant requested reconsideration by letter dated February 6, 2006. She submitted a report from Dr. Smith dated January 13, 2006 indicating that a right sacroiliac joint block was performed. In a decision dated February 22, 2006, the Office found that the request for reconsideration was insufficient to warrant merit review of the claim.

LEGAL PRECEDENT -- ISSUE 1

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.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. In this instance the CE [claims examiner] will

¹ See Sharon C. Clement, 55 ECAB 552 (2004).

need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity.”²

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.³ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁴

ANALYSIS -- ISSUE 1

Appellant claimed that she was disabled due to her employment injury as of September 12, 2005. Since the Office had issued a wage-earning capacity determination on July 23, 2001, the Office properly considered whether modification was appropriate. A modification is warranted if the evidence establishes a material change in the nature and extent of the injury-related condition. In this case, however, the medical evidence is not sufficient to establish a material change in the injury-related condition as of September 12, 2005. Dr. Katta treated appellant on September 13, 2005 and noted a recent exacerbation of back pain, without providing a reasoned medical opinion. He did not provide a complete history nor discuss a material change in the employment injuries. The Board notes that the accepted injuries were chronic cervical and lumbar strains. Appellant must establish any other diagnosed condition as employment related and then establish a material change as of September 12, 2005 in an employment-related condition. Dr. Katta does not provide a probative medical report on the relevant issues.

Dr. Smith did not provide a complete history of injury, as he noted only a motor vehicle accident in the past without providing any relevant details. He noted a right sacroiliac joint syndrome secondary to motor vehicle accident, without providing any medical rationale on causal relationship with the employment injury. In addition, Dr. Smith did not discuss a change in the condition as of September 12, 2005. The Board finds that the medical evidence did not contain a reasoned medical opinion based on a complete background on the relevant issues presented.

The Board notes that the Office may accept a brief recurrence of disability even if the evidence is not sufficient to establish a modification of wage-earning capacity.⁵ To meet her burden of proof, the employee must show a change in the nature and extent of the injury-related

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

³ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

⁴ *Id.*

⁵ *See Katherine T. Kreger*, 55 ECAB 633 (2004).

condition.⁶ As the above discussion indicates, however, the medical evidence does not establish a period of disability commencing September 12, 2005 causally related to an employment injury.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, decrease, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued.”

The Office's implementing regulations provide that an employee may request reconsideration of an adverse Office decision, and the request, along with supporting statements and evidence, is called the “application for reconsideration.”⁷ The application for reconsideration must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law, (2) advances a relevant legal argument not previously considered by the Office, or (3) constitutes relevant and pertinent evidence not previously considered by the Office.⁸ Section 10.608(b) provides that, when an application for reconsideration does not meet at least one of these three requirements, the Office will deny the application for reconsideration without reviewing the merits of the claim. Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.⁹

ANALYSIS -- ISSUE 2

On reconsideration appellant submitted a medical report from Dr. Smith regarding a January 13, 2006 joint block. The evidence does not address the relevant issues with respect to an employment-related condition as of September 12, 2005. Appellant did not submit relevant and pertinent evidence not previously considered by the Office. In addition, she did not show that the Office erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by the Office. Appellant did not meet any of the requirements of section 10.606(b)(2) and therefore the Office properly refused to reopen the case for merit review.

⁶ *Terry R. Hedman*, 38 ECAB 222 (1986).

⁷ 20 C.F.R. § 10.605.

⁸ 20 C.F.R. § 10.606(b)(2).

⁹ *Eugene F. Butler*, 36 ECAB 393 (1984).

CONCLUSION

Appellant did not establish a modification of her wage-earning capacity determination was warranted or establish a period of employment-related disability commencing September 12, 2005. The application for reconsideration was properly denied without merit review of the claim as she did not meet the requirements of 20 C.F.R. § 10.606(b)(2).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 22 and January 11, 2006 are affirmed.

Issued: January 18, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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