



## **FACTUAL HISTORY**

On July 10, 2004 appellant, then a 53-year-old modified clerk, sustained injury to her left arm, shoulder, leg and low back while attempting to open a manual elevator.<sup>1</sup> She stopped work on July 11, 2004. By letter dated September 21, 2004, the Office accepted the claim for left knee, neck and lumbar strains. Appellant received wage-loss compensation beginning August 2, 2004. The Office subsequently accepted a tear of the medial meniscus of the left knee and authorized left knee arthroscopic surgery, which was performed by Dr. Scott Orth, a Board-certified orthopedic surgeon, on September 20, 2005.

In work capacity evaluations (Form OWCP-5c) dated March 1, 2006, Dr. Andrew P. Jones, an attending Board-certified internist, stated that appellant could not perform her usual work duties and provided physical restrictions. He stated that appellant was recovering from surgery and that she continued to experience back pain. Dr. Jones stated that her physical restrictions were in effect until March 25, 2006. He concluded that appellant would be able to return to work eight hours a day in three weeks.

By letter dated March 27, 2006, the Office requested that Dr. Jones complete an accompanying OWCP-5c form regarding appellant's ability to work. On April 6, 2006 he stated that appellant was still unable to perform her regular work duties due to continuous back and knee pain. Dr. Jones advised that it was unknown as to when she could work eight hours a day.

By letter dated April 11, 2006, the Office referred appellant, together with a statement of accepted facts, the case record and list of questions, to Dr. Bernard Z. Albina, a Board-certified orthopedic surgeon, for a second opinion medical examination. In an April 24, 2006 medical report, Dr. Albina stated that appellant sustained acute cervical and lumbar sprains and a tear of the medial meniscus of the left knee superimposed on preexisting nonemployment-related degenerative cervical disc disease and osteoarthritis of the lumbar spine and left knee due to the July 10, 2004 injury. Appellant reached maximum medical improvement on March 20, 2006, six months after her arthroscopic left knee surgery. Dr. Albina advised that she had returned to her preexisting degenerative osteoarthritis condition, compatible with her age and history. He opined that her employment-related conditions had resolved. Dr. Albina found that appellant was able to perform the duties of a modified clerk, noting that she worked in this position prior to the July 10, 2004 employment injury and that it required lifting no more than 10 pounds.

On May 5, 2006 the Office requested that Dr. Jones address the report of Dr. Albina. In a May 18, 2006 OWCP-5c form, Dr. Jones stated that appellant could work eight hours a day with modifications to her preexisting restrictions.

On June 16, 2006 the Office determined that a conflict in medical opinion arose between Dr. Albina and Dr. Jones as to whether appellant's employment-related conditions had resolved and her work capabilities. The Office referred her, together with a statement of accepted facts, the case record and a list of questions to be addressed, to Dr. James F. Hood, a Board-certified orthopedic surgeon, for an impartial medical examination.

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<sup>1</sup> The Board notes that, prior to the instant claim, appellant filed a claim assigned number 16-2052088 for a left shoulder injury she sustained at work.

On August 10, 2006 appellant returned to work at the employing establishment in a modified clerk position based on Dr. Jones's restrictions.

In a September 6, 2006 report, Dr. Hood reviewed a history of appellant's July 10, 2004 and 1995 or 1996 work-related back injuries and medical treatment. He noted her complaints of left knee and leg and back pain. Dr. Hood also noted that appellant did not bring any x-ray films for his review. On physical examination, he found essentially normal range of motion findings regarding her back and left knee. As to the left knee, Dr. Hood reported well-healed arthroscopic portals. He found no effusion to the knee. Dr. Hood also found a mild sense of warmth to palpation, crepitus throughout the arc of motion mainly beneath the patella and diffuse tenderness over both medial and lateral joint lines. The knee was stable with a negative Lachman and anterior drawer sign. Dr. Hood stated that appellant's complaints of pain were supported by evidence of mild weakness of the left toe extensor. Based on his examination, her subjective complaints did not outweigh his objective findings. Dr. Hood diagnosed status post partial medial and lateral meniscectomy with evidence of degenerative and post-traumatic arthritis. He opined that appellant's current complaints of low back pain were not related to the July 10, 2004 employment injury. Appellant had preexisting back problems related to a combination of her 1997 injury and spondylolisthesis. He indicated that there was evidence that her low back pain was totally related to a combination of her congenital spondylolisthesis and the effects of her prior employment injury. Dr. Hood opined that appellant had reached maximum medical improvement and that she could return to work as a modified clerk with restrictions. He stated that she did not require prescription medication as over-the-counter medication would suffice. Dr. Hood did not believe that any additional or future treatment was necessary regarding appellant's back complaints. Regarding appellant's left knee, Dr. Hood stated that the knee was stable and the future was unknown as she might develop traumatic arthritis as a result of the July 10, 2004 employment injury and surgery.

By letter dated October 5, 2006, the Office issued a notice of proposed termination of appellant's wage-loss compensation and medical benefits regarding her employment-related lumbar strain based on Dr. Hood's September 6, 2006 impartial medical opinion. The Office provided 30 days in which appellant could respond to this notice. She did not respond within the allotted time period.

By decision dated October 10, 2006, the Office found that appellant had no loss of wage-earning capacity based on her actual earnings in a modified clerk position. The Office found that her actual earnings effective August 10, 2006 of \$911.36 per week exceeded the pay rate for her date-of-injury position of \$847.64 per week. Thus, the Office reduced her compensation to zero. The Office noted that appellant's medical compensation benefits continued.

In a decision dated November 6, 2006, the Office terminated appellant's compensation for wage loss and medical benefits with regard to her employment-related lumbar strain only, effective that date.<sup>2</sup> It determined that Dr. Hood's medical opinion as an impartial medical specialist constituted the weight of the medical evidence in finding that appellant no longer had

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<sup>2</sup> The Board notes that the Office apprised appellant that the termination of wage-loss compensation and medical benefits only applied to her lumbar strain and not to her other accepted conditions.

any residuals or disability causally related to her July 10, 2004 employment-related lumbar strain.

On November 6, 2006 appellant requested a review of the written record by an Office hearing representative regarding the Office's October 10, 2006 loss of wage-earning capacity decision. Appellant contended that Dr. Hood's report was not sufficient to establish that she no longer had any residuals causally related to her employment-related lumbar strain. She contended that he did not perform a thorough medical examination as he did not spend much time with her during the examination. Further, appellant contended that Dr. Hood did not advise her during his examination that he had not received any films from her x-ray examinations. She noted that Dr. Jones, Dr. Orth and an imaging center advised her that they would forward the films to Dr. Hood. Appellant alleged that Dr. Hood made contradictory statements in his report regarding whether she experienced pain in both her left knee and back. She also alleged that Dr. Hood's opinion that her lower back pain was related to a combination of congenital spondylolisthesis and her prior employment injuries was not rationalized as he stated that he did not review any prior films nor had any knowledge of these injuries. Further, appellant contended that he did not provide any rationale for his opinion that no prescription medication of future treatment was necessary.

Appellant submitted a November 29, 2006 request for authorization for arthroscopic left knee surgery and a hospital record which addressed the September 20, 2005 left knee surgery.

By decision dated March 15, 2007, an Office hearing representative affirmed the October 10, 2006 decision. The hearing representative found that appellant had no loss of wage-earning capacity because her current pay rate exceeded the current pay rate of her date-of-injury position.<sup>3</sup>

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

Section 8115(a) of the Federal Employees' Compensation Act<sup>4</sup> provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by her actual earnings if her actual earnings fairly and reasonably represent her wage-earning capacity.<sup>5</sup> Generally, wages actually earned are the best measure of a wage-earning capacity, and in the absence of showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such a measure.<sup>6</sup> The formula for determining loss of wage-earning capacity based on actual earnings, developed in the

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<sup>3</sup> Following the issuance of the Office's March 15, 2007 decision, the Office received additional evidence. The Board may not consider evidence for the first time on appeal which was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c). Appellant can submit this evidence to the Office and request reconsideration. 5 U.S.C. § 8128; 20 C.F.R. § 10.606.

<sup>4</sup> 5 U.S.C. §§ 8101-8193.

<sup>5</sup> 5 U.S.C. § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

<sup>6</sup> *Lottie M. Williams*, 56 ECAB 367 (2005).

*Albert C. Shadrick* decision,<sup>7</sup> has been codified at 20 C.F.R. § 10.403. The Office calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury job.<sup>8</sup> Office procedures provide that the Office can make a retroactive wage-earning capacity determination if the claimant worked in the position for at least 60 days, the position fairly and reasonably represented his or her wage-earning capacity and the work stoppage did not occur because of any change in her injury-related condition affecting the ability to work.<sup>9</sup>

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

The Office accepted that appellant sustained left knee, neck and lumbar strains and a tear of the medial meniscus of the left knee caused by an employment injury on July 10, 2004. She stopped work on July 11, 2004. Following medical treatment, which included arthroscopic left knee surgery on September 20, 2005, Dr. Jones, an attending physician, found that appellant could return to work with restrictions. Appellant returned to work as a modified clerk at the employing establishment on August 10, 2006 and continued working in the position through October 10, 2006, the date the Office issued its loss of wage-earning capacity determination. Appellant worked in the position for 60 days and there is no evidence that the position was seasonal, temporary or make-shift work designed for her particular needs.<sup>10</sup> As there is no evidence that her wages in the modified clerk position did not fairly and reasonably represent her wage-earning capacity, they must be accepted as the best measure of her wage-earning capacity.<sup>11</sup>

As appellant's actual earnings in the position of modified clerk fairly and reasonably represent her wage-earning capacity, the Board must determine whether the Office properly calculated her wage-earning capacity based on her actual earnings. The Board finds that the Office properly found that she had no loss of wage-earning capacity based on her actual earnings. Appellant's current weekly earnings of \$911.63 exceeded the current weekly wages of her position on the date of injury or \$847.64. Therefore, she had no loss of wage-earning capacity under the *Shadrick* formula.

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

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to her employment, the Office may not terminate compensation without

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<sup>7</sup> 5 ECAB 376 (1953).

<sup>8</sup> 20 C.F.R. § 10.403(c).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (July 1997); *Selden H. Swartz*, 55 ECAB 272 (2004).

<sup>10</sup> *J.C.*, 58 ECAB \_\_\_\_ (Docket No. 07-1165, issued September 21, 2007).

<sup>11</sup> See *Loni J. Cleveland*, *supra* note 5.

establishing that the disability had ceased or that it was no longer related to the employment.<sup>12</sup> The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>13</sup>

Section 8123 of the Act provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician, who shall make an examination.<sup>14</sup> When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>15</sup>

### ANALYSIS -- ISSUE 2

A conflict in the medical opinion evidence arose between Dr. Albina, an Office referral physician, and Dr. Jones, an attending physician, as to whether appellant had any continuing residuals causally related to her accepted July 10, 2004 employment-related left knee, neck and lumbar strains and a tear of the medial meniscus of the left knee. Dr. Albina opined that, appellant's employment-related conditions had resolved as of March 20, 2006 and that she could return to her modified clerk position. Dr. Jones opined that, appellant could not perform her regular work duties but she could work eight hours a day with modifications to her preexisting restrictions.

The Office properly referred appellant to Dr. Hood, selected as the impartial medical specialist. In a September 6, 2006 report, Dr. Hood listed no objective findings of residuals relative to the accepted July 10, 2004 employment-related lumbar strain. After reviewing appellant's medical records and reporting essentially normal findings on physical examination, Dr. Hood diagnosed status post partial medial and lateral meniscectomy with evidence of degenerative and post-traumatic arthritis. He opined that appellant's current complaints of lower back pain were not related to the July 10, 2004 employment injury. Dr. Hood stated that her subjective complaints did not outweigh his objective findings. He further stated that appellant had preexisting back problems related to a combination of a 1997 injury and spondylolisthesis. Dr. Hood explained that there was evidence that her lower back pain was totally related to a combination of her congenital spondylolisthesis and the effects of her prior injury. He found that appellant had reached maximum medical improvement and that she could return to work as a modified clerk with restrictions. He stated that she did not require prescription medication as

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<sup>12</sup> *Jason C. Armstrong*, 40 ECAB 907 (1989).

<sup>13</sup> *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>14</sup> 5 U.S.C. § 8123.

<sup>15</sup> *James F. Weikel*, 54 ECAB 660 (2003); *Beverly Grimes*, 54 ECAB 543 (2003); *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Daniel F. O'Donnell, Jr.*, 54 ECAB 456 (2003); *Phyllis Weinstein (Elliot H. Weinstein)*, 54 ECAB 360 (2003); *Robert V. Disalvatore*, 54 ECAB 351 (2003); *Bernadine P. Taylor*, 54 ECAB 336 (2003); *Karen L. Yeager*, 54 ECAB 317 (2003); *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

over-the-counter medication would suffice. Dr. Hood did not believe that any additional or future treatment was necessary regarding appellant's back complaints.

The Board finds that Dr. Hood's opinion is based on a proper factual and medical background and is entitled to special weight. He found that appellant no longer had any residuals or disability causally related to the accepted July 10, 2004 employment-related lumbar strain. For this reason, Dr. Hood's report constitutes the special weight of the medical opinion evidence afforded an impartial medical specialist.

### **LEGAL PRECEDENT -- ISSUE 3**

As the Office met its burden of proof to terminate appellant's compensation benefits related to her accepted lumbar strain, the burden shifted to her to establish that she had any disability causally related to this accepted injury.<sup>16</sup> To establish a causal relationship between the condition, as well as any attendant disability claimed and the employment injury, an employee must submit rationalized medical evidence, based on a complete factual and medical background, supporting such a causal relationship.<sup>17</sup> Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.<sup>18</sup> Rationalized medical evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>19</sup>

### **ANALYSIS -- ISSUE 3**

The relevant medical evidence regarding continuing employment-related residuals submitted by appellant after November 6, 2006 consists of a November 29, 2006 request for authorization for arthroscopic left knee surgery and a hospital record which addressed the September 20, 2005 left knee surgery. This evidence failed to provide an opinion as to whether appellant had any continuing back strain due to the July 10, 2004 employment injury. The Board finds that the surgery request and hospital record are insufficient to establish appellant's claim of an ongoing lumbar strain after November 6, 2006.

### **CONCLUSION**

The Board finds that the Office properly reduced appellant's compensation to zero effective August 10, 2006 on the grounds that her actual earnings as a modified clerk fairly and

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<sup>16</sup> See *Manuel Gill*, 52 ECAB 282 (2001).

<sup>17</sup> *Id.*

<sup>18</sup> *Elizabeth Stanislav*, 49 ECAB 540 (1998).

<sup>19</sup> *Leslie C. Moore*, 52 ECAB 132 (2000); *Victor J. Woodhams*, 41 ECAB 345 (1989).

reasonably represented her wage-earning capacity. The Board further finds that the Office properly terminated appellant's compensation regarding her July 10, 2004 employment-related lumbar strain effective November 6, 2006 on the grounds that she no longer had any residuals causally related to this accepted condition. Lastly, the Board finds that appellant failed to establish that she had any continuing employment-related residuals or disability after November 6, 2006.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 15, 2007 and November 6 and October 10, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 21, 2008  
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