

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

L.P., Appellant

and

**DEPARTMENT OF THE AIR FORCE,
SHEPPARD AIR FORCE BASE, TX, Employer**

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**Docket No. 07-1388
Issued: January 25, 2008**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 25, 2007 appellant timely appealed a March 8, 2007 merit decision of the Office of Workers' Compensation Programs, which denied modification of a wage-earning capacity determination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant established a basis for modification of the Office's November 17, 1997 wage-earning capacity determination.

FACTUAL HISTORY

This case has been before the Board on numerous prior occasions. Appellant, a 76-year-old former office automation clerk (secretary), has an accepted claim for a left knee injury she sustained on December 15, 1995 when she stumbled down a flight of stairs. The Office accepted

her claim for left knee strain and left lateral meniscus tear.¹ Appellant returned to work in a light-duty capacity on January 21, 1997 and accepted a permanent, light-duty position as an office automation clerk on May 30, 1997.

Effective August 22, 1997, appellant resigned from the employing establishment. On August 29, 1997 she underwent a left knee arthroscopic procedure, which the Office authorized. Appellant's surgeon released her to return to sedentary work effective October 27, 1997.² She did not return to the employing establishment having resigned her position two months earlier.³

In a decision dated November 17, 1997, the Office determined that appellant's actual earnings as an office automation clerk beginning June 22, 1997, fairly and reasonably represented her wage-earning capacity. Because the wages she earned as an office automation clerk equaled or exceeded the adjusted wages of her date-of-injury position, the Office found that there was no loss of wage-earning capacity. Therefore, appellant was not entitled to receive further wage-loss compensation. However, she remained eligible for medical benefits associated with her December 15, 1995 left knee injury.

The Board previously affirmed the Office's finding that the office automation clerk position appellant held until her August 22, 1997 resignation, fairly and reasonably represented her wage-earning capacity.⁴ The Board also affirmed a July 25, 2003 decision denying modification of the November 17, 1997 wage-earning capacity determination.⁵ The last time the case was on appeal, the Board issued a November 29, 2006 order remanding the case with instructions for the Office to issue an appropriate decision on appellant's August 25, 2005 request for reconsideration.⁶

On August 25, 2005 appellant contended that she was disabled and did not get her job back. She noted that her government retirement was only \$18.13 per month. Appellant enclosed copies of a January 21, 1997 request for personnel action (Form 52), an August 1, 2000 schedule award, the Office's November 17, 1997 loss of wage-earning capacity determination, and a November 17, 1997 letter to the Office of Personnel Management advising that she had elected Federal Employees' Compensation Act (FECA) benefits in lieu of benefits provided by OPM.⁷ She also provided a copy of a March 27, 2000 motion to reopen the record with respect to a claim before the Merit Systems Protection Board. Appellant also submitted a March 22, 2000

¹ The claim was also accepted for head contusion.

² The Office paid appropriate wage-loss compensation for the period August 29 through October 26, 1997.

³ The employing establishment reportedly was not in a position to rehire appellant during the fall of 1997.

⁴ Docket No. 99-1407 (issued July 3, 2000).

⁵ Docket No. 03-2127 (issued November 18, 2003).

⁶ Docket No. 06-0721. The Board's decisions dated July 3, 2000, November 18, 2003 and November 29, 2006 are incorporated herein by reference.

⁷ The November 17, 1997 letter to OPM also indicated that appellant's entitlement to FECA benefits was for a finite period ending October 26, 1997.

employing establishment referral certificate, which listed her as one of several individuals eligible for reinstatement as an office automation clerk. When the employing establishment contacted her regarding the available position, she reportedly declined further consideration due to health reasons. In a postscript to her August 25, 2005 letter, appellant noted that she was “requesting claim (sic) for compensation.” The only medical evidence accompanying the request was a December 2, 1997 left lower extremity impairment rating from Dr. Stephen D. Ruyle, her attending orthopedic surgeon, who had advised the employing establishment in October 1997 that appellant was able to perform sedentary work. The employing establishment informed the Office of appellant’s medical release on October 24, 1997.

Appellant wrote to the Office again on August 31, 2005, explaining that she had neglected to include certain medical evidence with her August 25, 2005 request for reconsideration. She submitted a January 19, 2005 lumbar x-ray and a January 24, 2005 magnetic resonance imaging (MRI) scan of the lumbar spine, which showed multilevel disc disease. Appellant also submitted an April 22, 2003 electromyography that revealed evidence of peripheral neuropathy and polyradiculopathy. She resubmitted the April 7, 2003 report of Dr. Clark W. Brazil and an April 25, 2003 report from Dr. Danny R. Bartel. According to appellant, her back was causing all of the problems she experienced with her legs. She argued that the Office’s focus should not be limited to the problems associated with her left knee.

On remand, the Office concluded that appellant had not met her burden of proof, and therefore, denied modification by decision dated March 8, 2007.

LEGAL PRECEDENT

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.⁸ Compensation payments are based on the wage-earning capacity determination and the determination remains in effect until properly modified.⁹ A wage-earning capacity determination will not be modified 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 erroneous.¹⁰ The burden of proof is on the party seeking modification of the wage-earning capacity determination.¹¹

ANALYSIS

The Board finds that appellant has not met any of the requirements for modification of the Office’s November 17, 1997 loss of wage-earning capacity determination. Appellant has not submitted any evidence to establish that the original determination regarding her wage-earning

⁸ 5 U.S.C. § 8115(a) (2000); see *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

⁹ See *Katherine T. Kreger*, 55 ECAB 633, 635 (2004).

¹⁰ *Tamra McCauley*, 51 ECAB 375, 377 (2000).

¹¹ *Id.*

capacity was erroneous. The nonmedical documentation appellant submitted in August 2005 is not relevant to establish a change in the nature or extent of her injury-related condition. She has also not established or alleged that she was retrained or otherwise vocationally rehabilitated.

As to the medical evidence that accompanied appellant's August 2005 request, this too fails to establish a basis for modification of the November 17, 1997 wage-earning capacity determination. The medical reports do not demonstrate a material change in the nature and extent of the injury-related condition. The April 2003 reports from Dr. Bartel and Dr. Brazil were initially considered by the Office in the July 25, 2003 decision denying modification. As previously noted, the Board affirmed the Office's July 25, 2003 decision.¹² This evidence has been considered and found insufficient to warrant modification of the 1992 wage-earning capacity.

With respect to the January 2005 lumbar x-ray and MRI scan, this evidence is also insufficient. Appellant's December 15, 1995 employment injury was not accepted for a lumbar condition and these reports do not address the accepted conditions of left knee strain and meniscus tear. Appellant's April 22, 2003 electromyography report is similarly insufficient. Moreover, this report does not address appellant's ability to work as an office automaton clerk or address the cause of appellant's peripheral neuropathy and polyradiculopathy. Accordingly, the medical evidence that accompanied appellant's August 2005 request for reconsideration is insufficient to establish a material change in the nature and extent of the accepted injury-related conditions. The Office, therefore, properly denied modification of the November 17, 1997 wage-earning capacity determination.

CONCLUSION

Appellant has not established a basis for modifying the Office's November 17, 1997 wage-earning capacity determination.

¹² See *supra* note 5.

ORDER

IT IS HEREBY ORDERED THAT the March 8, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 25, 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