

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

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S.T., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,  
Los Angeles, CA, Employer**

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**Docket No. 08-1272  
Issued: October 15, 2008**

*Appearances:*

*Brat Blumstein, Esq.*, for the appellant  
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
COLLEEN DUFFY KIKO, Judge

**JURISDICTION**

On April 1, 2008 appellant filed a timely appeal of a February 27, 2008 merit decision of the Office of Workers' Compensation Programs denying her claim for a recurrence of disability. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether the Office properly determined that the issue presented was whether appellant sustained a recurrence of disability.

**FACTUAL HISTORY**

On September 1, 1989 appellant, then a 43-year-old letter carrier, filed a traumatic injury claim for a right shoulder injury sustained when she was shot while delivering mail on August 31, 1989. On November 29, 1989 she filed an occupational disease claim alleging that she developed stress as a result of the August 31, 1989 incident. The Office administratively consolidated the claims under File No. 13-898682. Appellant's claim was accepted for

contusion of the right shoulder and episode of post-traumatic stress disorder (PTSD). She returned to light duty on November 1, 1992.

By decision dated January 20, 1993, the Office determined that appellant's actual earnings in the light-duty position since November 1, 1992 fairly and reasonably represented her wage-earning capacity. It found that she had no loss of wage-earning capacity.

On March 29, 2006 appellant filed a claim for a recurrence of disability as of February 2005. In a June 7, 2005 report, Dr. Henry S. Johnson, a Board-certified internist, stated that appellant's physical and psychological condition had progressively worsened over the past five years to the degree that she was totally and permanently disabled. On May 25, 2006 he indicated that appellant's acute reaction to stress had degenerated over time and had become chronic. Dr. Johnson stated that she had developed PTSD as a result of the 1989 shooting incident, and opined that she was totally disabled due to this condition.

By decision dated June 16, 2006, the Office denied the claim for a recurrence of disability. It found that the medical evidence did not establish that the claimed recurrence resulted from the accepted condition. On February 14, 2007 an Office hearing representative affirmed the June 16, 2006 decision finding that the evidence failed to establish that the alleged disability was causally related to the accepted employment injury.

On June 4, 2007 appellant requested reconsideration. In a report dated April 19, 2007, Barbara Sziraki, PhD., a psychologist, stated that appellant had developed PTSD as a result of her accepted injury. She opined that appellant had been totally disabled since March 7, 2005, when she stopped working.

By decision dated February 27, 2008, the Office denied modification of its previous decisions. It found that the evidence failed to establish that appellant sustained a recurrence of disability.

#### **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. Compensation payments are based on the wage-earning capacity determination, which remains undisturbed until properly modified.<sup>1</sup>

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 claims examiner will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity.<sup>2</sup>

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<sup>1</sup> See *Sharon C. Clement*, 55 ECAB 552 (2004).

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

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

### **ANALYSIS**

In the present case, the Office developed the evidence and determined that the issue presented was whether appellant had established a recurrence of disability as of February 2005. Under the circumstances of this case, however, the Board finds that the issue presented was whether the January 20, 1993 wage-earning capacity determination should be modified.

The record reflects that on January 20, 1993 the Office determined that appellant's wage-earning capacity was represented by her actual earnings in a light-duty position since November 1, 1992. Appellant filed a notice of recurrence, claiming total disability from her job as of February 2005 and submitted evidence from her treating physicians supporting her inability to work. The Board has held that, when a wage-earning capacity determination has been issued, and appellant submits evidence with respect to disability for work, the Office must evaluate the evidence to determine if a modification of his wage-earning capacity is warranted.<sup>5</sup> As noted, the Office's procedure manual directs the claims examiner to consider the criteria for modification when the claimant requests resumption of compensation for total wage loss. Appellant's entitlement to compensation is based on the wage-earning capacity determination, and it remains undisturbed until modified. The Board finds that the Office should have considered the issue of modification of the wage-earning capacity determination.

### **CONCLUSION**

The Board finds that appellant's claim for compensation raised the issue of whether a modification of the January 20, 1993 wage-earning decision was warranted, and the case must be remanded for a proper decision on the issue presented.

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<sup>3</sup> *Sue A. Sedgwick*, 45 ECAB 211 (1993).

<sup>4</sup> *Id.*

<sup>5</sup> See *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sharon C. Clement*, *supra* note 1. The Board notes that consideration of the modification issue does not preclude the Office from acceptance of a limited period of employment-related disability, without a formal modification of the wage-earning capacity determination. *Id.* at n.10, slip op. at 5; Cf. *Elsie L. Price*, 54 ECAB 734 (2003) (acceptance of disability for an extended period was sufficient to establish that modification of the wage-earning capacity determination was warranted).

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 27, 2008 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision of the Board.

Issued: October 15, 2008  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board