



carpal tunnel syndrome under OWCP File No. xxxxxx395, which has been combined with the present case file.

Appellant worked intermittently until she returned to work full time in a modified clerk position on March 27, 2008. The employing establishment indicated that appellant's pay rate was \$1,116.48 per week.

By decision dated July 16, 2008, the Office determined that appellant's wage-earning capacity was represented by actual earnings in the modified position. Its computations indicated that the current pay rate for the date-of-injury position, with night differential and Sunday premium, was \$1,144.18 per week. As appellant's actual earnings were \$1,116.48 weekly, there was a two percent loss of wage-earning capacity.

On December 19, 2008 the Office received claims for compensation (Form CA-7) and time analysis forms (Form CA-7a) indicating that appellant had stopped working on November 4, 2008. Appellant submitted reports from Dr. Roy Durrett, an anesthesiologist. In a report dated November 4, 2008, Dr. Durrett stated that appellant continued to complain of low back pain radiating into the right leg. He provided results on examination and diagnosed postlaminectomy syndrome. In a November 18, 2008 report, Dr. Durrett diagnosed "postlaminectomy syndrome with chronic intractable pain -- worsening pain and spasm triggered by current activities. I do not feel [appellant] can do much squatting or bending which I have told her in the past as have her other doctors but it is currently required of her." He indicated that appellant should be off work for two weeks. In a December 2, 2008 report, Dr. Durrett stated that appellant should remain off work for a few more weeks and should refrain from bending or lifting when she did return. In a report dated January 29, 2009, he indicated that a computerized tomography (CT) scan had shown "no new obvious changes or pathology."

By decision dated April 2, 2009, the Office denied modification of the wage-earning capacity determination.

### **LEGAL PRECEDENT**

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>1</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>2</sup>

### **ANALYSIS**

The Office issued a wage-earning capacity determination dated July 16, 2008 based on actual earnings in a modified clerk position. Appellant did not offer any argument that the July 16, 2008 determination was erroneous. Generally, wages actually earned are the best

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<sup>1</sup> *Sue A. Sedgwick*, 45 ECAB 211 (1993).

<sup>2</sup> *Id.*

measure of a wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.<sup>3</sup> Appellant had been working in the position more than 60 days and the employing establishment indicated it was a permanent position.<sup>4</sup> The Office determines appellant's wage-earning capacity using her actual earnings and the current pay rate for the job held at the time of injury.<sup>5</sup> There was no evidence that the wage-earning capacity determination was in violation of Office procedures or was otherwise erroneous.

The issue of vocational rehabilitation or retraining was not raised and is not relevant in this case. The remaining issue is whether appellant has established a material change in the nature and extent of the employment-related condition. In this case, the Board finds that the medical evidence does not establish a material change. Dr. Durrett reported on November 4, 2008 that appellant continued to have back pain and, in his November 18, 2008 report, he referred to worsening pain and spasm triggered by current activities. In the January 29, 2009 report, Dr. Durrett indicated that a CT scan had been done to see if a cause could be determined for appellant's complaints of pain, but he indicated that no new changes or pathology were found. The medical reports of record do not establish a material change in an employment-related condition on or after November 4, 2008 sufficient to warrant modification of the wage-earning capacity determination. Dr. Durrett does not opine that appellant's postlaminectomy syndrome had undergone a material change, or provide medical rationale to support such an opinion.

On appeal, appellant states that the pain increased after her return to full-time work and her physician told her it was nerve damage that would not show on diagnostic tests, but this issue is a medical issue that must be resolved by medical evidence, and the Board notes that Dr. Durrett stated in his January 29, 2009 report there were no nerves with any obvious compression. As noted above, the party attempting to modify a wage-earning capacity determination has the burden of proof. The Board finds that appellant did not meet her burden of proof in this case.

### **CONCLUSION**

The Board finds that appellant did not establish that the July 16, 2008 wage-earning capacity determination should be modified.

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<sup>3</sup> *Dennis E. Maddy*, 47 ECAB 259 (1995).

<sup>4</sup> Office procedures require that the claimant must have been working for 60 days and if her date-of-injury job was permanent, the wage-earning capacity determination must be based on a permanent position. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (July 1997).

<sup>5</sup> 20 C.F.R. § 10.403; *Albert C. Shadrick*, 5 ECAB 376 (1953).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated April 2, 2009 is affirmed.

Issued: April 2, 2010  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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