



## **FACTUAL HISTORY**

This case has previously been before the Board. In an October 9, 2003 decision, the Board set aside the Office's denial of appellant's claim for thoracic outlet syndrome.<sup>2</sup> On return of the record, the Office accepted that appellant sustained thoracic outlet syndrome. In a November 30, 2007 order remanding case, the Board set aside the Office's denial of appellant's recurrence of disability claim.<sup>3</sup> The case was returned to the Office for adjudication of whether a January 26, 1999 wage-earning capacity determination should be modified. The facts of the case, as set forth in the prior decision and order, are incorporated herein by reference.

On March 24, 1997 the Office initially offered appellant the position of modified letter carrier working four hours a day in Colorado Springs, Colorado. On April 17, 1997 Dr. Robert J. Bess, an attending Board-certified orthopedic surgeon, addressed the return of appellant's symptoms following her return to work. He found she could work four hours a day but not at her current location. Dr. Bess recommended that she be assigned to work at Castle Rock, Colorado, approximately a 12-minute drive from her home as opposed to an hour commute to her current work location. On May 9, 1997 he stated that appellant sustained an aggravation of her symptoms due to work and the drive to work.

On May 20, 1997 the employer offered appellant a modified carrier position at four hours a day in Castle Rock, Colorado. The duties included answering the telephone and working on projects within her restrictions. The physical requirements of the position included: intermittent lifting, standing, sitting up to 4 hours; up to 15 minutes of driving at a time; climbing up to 1 hour per day; and occasional intermittent kneeling, pushing/pulling, reaching/working above the shoulder, stooping and bending. On July 11, 1997 Dr. Bess approved the job offer and appellant commenced work.

In a January 26, 1999 decision, the Office issued a loss of wage-earning capacity determination based on appellant's actual earnings as a modified clerk for 20 hours a week effective March 31, 1997. The duties of the position included: answering the telephone and customer complaints, limited filing within her restrictions, checking carrier mail and assigned projects within her restrictions. The physical restrictions included up to four hours per day of intermittent lifting, data entry, standing, walking and sitting, occasional kneeling, carrying, reaching above her shoulder and pushing/pulling. Appellant was limited to 15 minutes of operating a vehicle at a time.<sup>4</sup>

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<sup>2</sup> Docket No. 03-1140 (issued October 9, 2003). On June 25, 1992 appellant, then a 30-year-old letter carrier, injured her back in a motor vehicle accident. The claim was accepted for cervical strain under File No. xxxxxx051. On April 3, 1996 appellant filed a claim for carpal tunnel syndrome which was accepted by the Office under File No. xxxxxx775. Her claim for thoracic outlet syndrome was filed on September 6, 2000 under Office File No. xxxxxx409. The files were combined under File No. xxxxxx775. Appellant resigned on October 22, 2001 and her disability retirement was effective December 1, 2001.

<sup>3</sup> Docket No. 07-1183 (issued November 30, 2007).

<sup>4</sup> Appellant stopped work on July 29, 1999 and filed claims for a recurrence of disability.

On March 23, 2000 Dr. Bess reiterated the diagnoses of bilateral carpal tunnel syndrome. He noted that, despite carpal tunnel surgery, appellant continued to have symptoms. Dr. Bess advised that she was disabled from all work including the modified job she had previously performed. In an April 12, 2000 report, he noted that appellant initially improved following surgery on November 25, 1996 and January 20, 1997 and had returned to modified work in 1997. Appellant developed a recurrence of carpal tunnel syndrome following her reassignment to light-duty work in Colorado Springs. Dr. Bess reiterated that appellant was totally disabled.

In a report dated January 8, 2001, Dr. Louis H. Winkler, III, a second opinion Board-certified orthopedic surgeon, diagnosed bilateral carpal tunnel syndrome, possible mild thoracic outlet syndrome and moderately severe cervical degenerative spondylosis. He found that appellant was not totally disabled due to residuals of her accepted conditions. Appellant could perform the duties of her modified carrier position. Dr. Winkler noted that appellant might have some disability due to her thoracic outlet syndrome, but it was not employment related. In a January 13, 2001 work capacity form, he diagnosed bilateral carpal tunnel syndrome and advised that appellant could work four hours a day within set work restrictions. Dr. Winkler allowed up to one-half hour of reaching and reaching above her shoulder; up to one hour of driving a motor vehicle; no repetitive wrist motion; up to one-half hour pushing, pulling and lifting up to 10 pounds with breaks of 15 minutes every 2 hours.

On July 25, 2002 Dr. Bess reported that appellant's bilateral carpal tunnel syndrome necessitated that she undergo surgery. He reported that she had bilateral grip strength loss, hand pain and numbness. In a July 25, 2002 work capacity form, Dr. Bess diagnosed bilateral carpal tunnel syndrome and that appellant was totally disabled. He noted the possibility that she might be able to work following surgery.

In a February 27, 2004 report, Dr. Gloria Beim, a second opinion Board-certified orthopedic surgeon, diagnosed bilateral carpal tunnel syndrome, bilateral thoracic outlet syndrome, migraine headaches, chronic cervical and trapezius spasms and L5-S1 bilateral spondylolysis and Grade 1 spondylolisthesis. She found that appellant had the capacity to work four hours a day at modified duty given the residuals of her accepted conditions. Appellant would do limited filing within her restrictions, answering telephones and customer complaints and check the carrier computerized forwarding system (CFS) mail. Dr. Beim advised that appellant might not be able to perform all of the intermittent job duties such as lifting 10 to 20 pounds, standing, walking, sitting, operating a vehicle for 15 minutes, data entry and climbing. Appellant was not able to climb, push, carry or reach above the shoulders, but was capable of intermittent walking, standing, sitting and performing data entry. In a March 1, 2004 work capacity form, Dr. Beim diagnosed thoracic outlet syndrome. Appellant could sit up to 45 minutes an hour; walk and stand for 20 minutes an hour; perform up to 1 hour of repetitive wrist and elbow movement spread over the workday with no reaching, reaching above the shoulder, driving a motor vehicle, climbing, pushing, pulling and lifting and 10-minute breaks every hour.

In a July 17, 2008 decision, the Office denied modification of the January 29, 1999 loss of wage-earning capacity determination. It found that the reports of Dr. Winkler and Dr. Beim supported that she could perform modified duty four hours a day or establish that appellant became totally disabled as of July 1999 due to a material change in her accepted condition.

In an August 14, 2008 letter, appellant's counsel requested an oral hearing before an Office hearing representative that was held on January 21, 2009.

In a March 26, 2009 decision, an Office hearing representative affirmed that the January 29, 1999 loss of wage-earning capacity determination should not be modified. She found the evidence did not establish that the job had changed as alleged by appellant or that the accepted conditions had worsened such that she was unable to perform the modified position.

### **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.<sup>5</sup> Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.<sup>6</sup> The Office's procedure manual and Board precedent provide 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.<sup>7</sup> The procedure manual and Board precedent further provide that, under these circumstances, the claims examiner will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity decision.<sup>8</sup>

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>9</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>10</sup>

### **ANALYSIS**

The Office accepted appellant's claims for cervical strain, carpal tunnel syndrome and thoracic outlet syndrome. Appellant underwent a left carpal tunnel release on November 25, 1996 and a right release on January 20, 1997. She seeks modification of the loss of wage-

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<sup>5</sup> *D.M.*, 59 ECAB \_\_\_\_ (Docket No. 07-1230, issued November 13, 2007).

<sup>6</sup> *Katherine T. Kreger*, 55 ECAB 633 (2004).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995). See *Mary E. Marshall*, 56 ECAB 420 (2005).

<sup>8</sup> Federal (FECA) Procedure Manual, *id.* See *Harley Sims, Jr.*, 56 ECAB 320 (2005).

<sup>9</sup> *Stanley B. Plotkin*, 51 ECAB 700 (2000); *Tamra McCauley*, 51 ECAB 375 (2000).

<sup>10</sup> *Harley Sims, Jr.*, *supra* note 8; *Stanley B. Plotkin*, *supra* note 9.

earning capacity determination. Appellant has the burden of proof to establish that modification is warranted.<sup>11</sup>

Appellant has not established that the 1999 wage-earning capacity decision was erroneous. The record reveals that appellant returned to work in a modified carrier position, initially in Colorado Springs, four hours a day on March 21, 1997.<sup>12</sup> On April 18, 1997 Dr. Bess noted that driving to work had exacerbated the carpal tunnel symptoms. He recommended that her duty station be closer to her residence. On May 20, 1997 the employer offered appellant a position as a modified carrier in Castle Rock that she accepted on May 27, 1997. On June 26, 1997 Dr. Bess advised that appellant was able to perform the duties of the position as of July 14, 1997. On July 11, 1997 he reviewed a description of the duties to be performed and physical limitations and approved the modified position. The record reflects that appellant worked at the modified-duty position through 1998 and filed intermittent claims for wage loss. In the January 26, 1999 decision, the Office found that her actual earnings fairly and reasonably represented her wage-earning capacity.

On March 17, 1999 Dr. Bess noted that appellant was working four hours a day. On examination, he noted negative Tinel's and Phalen's tests with no swelling or atrophy of either upper extremity. Dr. Bess obtained additional diagnostic studies in April 1999 and reported that right motor and sensory potentials were normal and left motor testing was normal with a mild sensory latency. On May 6, 1999 he reported that appellant was considering retirement and that her symptoms were unchanged.<sup>13</sup> On June 3, 1999 Dr. Bess reported that appellant was seen for right shoulder complaints. On examination, he found a negative Tinel's and minimal, if any, Phalen's. Dr. Bess advised that range of motion was normal and referred her to physical therapy. Appellant stopped work on July 19, 1999. In a July 29, 1999 letter to the Office of Personnel Management, he stated that he supported her claim for disability retirement.

The evidence of record does not establish error in the original wage-earning capacity determination. At the time the decision was issued in January 1999, appellant had been released for modified duty subject to restrictions specified by Dr. Bess. She had originally returned to work in Colorado Springs but the physician reported that driving exacerbated her symptoms. Based on his recommendation that appellant work closer to home, the employer offered her modified duty in Castle Rock in 1997 that was approved by the attending physician. The record demonstrates that she worked at that location four hours a day for approximately two years until she stopped work on July 19, 1999.

Appellant also contended that the 1999 wage-earning capacity determination should be modified as there was a material change in her accepted conditions.

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<sup>11</sup> Federal (FECA) Procedure Manual, *supra* note 6 at Chapter 2.814.11(b)(1) (October 2005) (if a claimant is seeking modification, she must establish that the original rating was in error or that the injury-related condition has worsened). *L.C.*, 60 ECAB \_\_\_ (Docket No. 08-2271, issued August 6, 2009); *P.C.*, 58 ECAB 405 (2007); *Harley Sims, Jr.*, *supra* note 9.

<sup>12</sup> Dr. Bess released appellant to return to work four hours a day subject to specified limitations. On March 31, 1997 he reviewed the job description and physical limitations for the position.

<sup>13</sup> The record indicates that appellant and her husband moved to Durango, Colorado.

Appellant submitted several treatment records from Dr. Bess, apparently annotated by an unidentified nurse. Return to work forms dated July 29, 1999 and March 2, 2000 from Dr. Bess merely noted that appellant was unable to work until her carpal tunnel symptoms had resolved. The Board notes that the treatment notes of the physician do not provide any clinical findings from examination of appellant or address diagnostic studies obtained. As noted, as recently as April 1999, diagnostic testing had demonstrated that her right side motor and sensory findings were normal and that her left side revealed normal motor strength with a minimal sensory deficit. Dr. Bess did not provide a rationalized medical opinion addressing why appellant became totally disabled in July 1999 due to residuals of her accepted conditions or how there was a material change. Rather, his notes reveal that appellant was planning to retire as early as May 1999. Dr. Bess' brief treatment records do not present a rationalized explanation of how appellant sustained a material change in her accepted condition such that she was rendered unable to perform her modified duties. In a July 25, 2002 work capacity form, he indicated that appellant was currently totally disabled due to her carpal tunnel syndrome, but related that she might be able to return to work with restrictions following surgery. Again, Dr. Bess did not provide a narrative medical opinion complete with reference to diagnostic studies, findings on clinical examination or addressing appellant's activities following her retirement from work in July 1999.

On May 2, 2000 appellant underwent additional diagnostic testing. Nerve conduction studies that date were reported as showing mild to moderate neuropathy on the right side only with the left being minimal by technical criteria. This was reviewed by Dr. Catherine Willner on May 10, 2000 who stated that testing confirmed persistence of mild carpal tunnel on the right with minimal on the left. She obtained a history that appellant stopped work in July 1999 at her surgeon's recommendation that she undergo further surgical release. On examination, Dr. Willner noted that Tinel's sign was negative in both wrists with Phalen's sign resulting in complaint of hand pain and mild tingling. Strength was reported as essentially normal with a little atrophy of the right thenar group. Two-point discrimination was normal bilaterally. Dr. Willner listed an impression of mixed thoracic outlet compression with mild residual median neuropathies, right slightly greater than left. She recommended against any additional carpal tunnel surgery.<sup>14</sup> This evidence does not establish a material change in appellant's condition or address why she became totally disabled from continuing at modified duty in July 1999 when she stopped work.

On January 8, 2001 appellant was examined by Dr. Winkler who provided a history of injury and medical treatment. Dr. Winkler noted the history of bilateral carpal tunnel releases, appellant's postoperative recovery and the diagnosis of thoracic outlet syndrome. Examination of the wrists revealed nontender surgical scars with mild tenderness at the thumb carpometacarpal joints. Two-point discrimination was normal with responses for median and ulnar nerves the same. Appellant complained of discomfort with percussion of the median nerve into her forearms and stated that she could not feel her fingers. Dr. Winkler noted that appellant's carpal tunnel was surgically treated with no postoperative complications and she

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<sup>14</sup> On November 6, 2000 appellant underwent an MRI scan of the brain that was reported as normal. The cervical spine revealed advanced degenerative disc disease at C6-7 with spondylosis and mild degenerative disease at C4-5 and C5-6.

returned to modified duty. He noted that appellant worked closer to her home commencing in July 1997 and held her position for two years. Dr. Winkler advised that appellant's accepted carpal tunnel had been largely relieved by surgery with minimal residual abnormalities, as also noted by Dr. Willner, that were not unexpected. He advised that appellant's complaint of burning in the palm of her hands would not be a symptom associated with carpal tunnel syndrome. Dr. Winkler advised that appellant had partial occlusion of the left brachial artery on elevation of her arm, which was the result of mild thoracic outlet syndrome and noted that another possibility to consider was based on the degenerative abnormalities seen at C6-7. He reiterated that appellant's symptoms on examination were not due to residuals of carpal tunnel nor was there evidence that she experienced objective increased disability due to such residuals. In a January 13, 2001 work capacity form, Dr. Winkler found that appellant was capable of working four hours a day subject to specified work restrictions of up to ½ hour of reaching and reaching above her shoulder; up to 1 hour of driving a motor vehicle; no repetitive wrist motion; up to ½ hour of pushing, pulling and lifting up to 10 pounds and breaks of 15 minutes every 2 hours.

Additional diagnostic testing was performed for Dr. Bess on July 22, 2002. The right and left median distal motor and sensory latencies were in the upper range of normal with median intra-palmar latencies slightly delayed. Right and left ulnar motor and sensory studies were reported normal with no evidence of neurogenic thoracic outlet syndrome found. Compared to the April 6, 1999 study, it was noted that appellant's right carpal tunnel had improved.

In a February 27, 2004 report, Dr. Beim, a second opinion Board-certified orthopedic surgeon, also found that appellant was capable of working a four-hour day at modified duty. She reviewed the duties of the modified job, consisting of limited filing within set restrictions, answering telephones and customer complaints and checking carrier CFS mail. Dr. Beim advised that was limited in lifting 10 to 20 pounds, standing, walking, sitting, operating a vehicle for 15 minutes, data entry and climbing. She also stated that appellant was not able to climb, push, carry or reach above the shoulders although she was capable of intermittent walking, standing, sitting and performing data entry. This evidence does not establish a material change in the accepted condition or that appellant became totally disabled in July 1999 due to residuals of her accepted condition.

The Board finds that appellant has not established that the 1997 wage-earning capacity determination was erroneous. Appellant has not established that she sustained a material change in her accepted condition that caused total disability as of July 19, 1999, the date she stopped work.

### **CONCLUSION**

The Board finds that appellant has not established that modification of the 1997 wage-earning capacity determination is warranted.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 26, 2009 and July 17, 2008 decisions of the Office of Workers' Compensation Programs be affirmed.

Issued: August 12, 2010  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

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