



## **FACTUAL HISTORY**

On August 10, 1995 appellant, then a 32-year-old clerk, sustained an injury in the performance of duty, while she was bent over an all-purpose container, someone threw a parcel that hit the top of her head. The Office accepted her claim for cervical strain and cervical herniated nucleus pulposus (HNP).<sup>2</sup>

Appellant returned to part-time limited duty as a modified flat sorter. On May 8, 1998 the Office determined that her actual wages in this position fairly and reasonably represented her wage-earning capacity. It paid compensation for her remaining loss of wage-earning capacity.

A July 27, 2001 MRI scan showed a large posterior osteophyte at the inferior margin of C5 projecting into the canal and producing mild-to-moderate spinal stenosis, obliterating the cerebrospinal fluid signal anterior to the cord and displacing the cord posteriorly. The cord did not appear to be significantly compressed in the anterior-posterior plane and the osteophyte did not extend laterally into the intervertebral foramina. There was a small disc bulge associated with the osteophyte with no evidence of disc herniation or protrusion.

A September 14, 2004 MRI scan showed partial degeneration of the fifth intervertebral disc with a three-to-four millimeter protrusion into the neural canal slightly lateralized to the right and appearing to slightly compress the anterior surface of the spinal cord. It appeared to encroach upon the right C5-6 intervertebral foramen and suggested involvement of the right C5-6 nerve root.

Dr. Ronnie D. Shade, the attending Board-certified orthopedic surgeon, reported on September 14, 2007 that the level of cervical spine pain was about the same as the last office visit. He indicated that appellant was capable of limited duty.

Appellant stopped work on December 20, 2007 and did not return.

On January 16, 2008 Dr. Shade reported that appellant's cervical spine pain was about the same as the last office visit. He again indicated that she was capable of limited duty. Dr. Shade did not mention her work stoppage on December 20, 2007.

On January 24, 2008 Dr. Shade noted that appellant had been off work since December 20, 2007: "Incapacitated and unable to work due to neck and low back pain." He stated that her cervical spine pain level was about the same as the last office visit. Dr. Shade noted that appellant was requesting workers' compensation disability. He then reported her work status as "off work."

On December 3, 2008 appellant filed a claim alleging that she sustained a recurrence of total disability on December 20, 2007 as a result of her 1995 work injury. She stated that she was now always in pain and had shooting pains in her back, neck and arms. "The pain has gotten worse and I just feel tired all the time."

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<sup>2</sup> An October 27, 1995 magnetic resonance imaging (MRI) scan showed an osteophyte and a C5-6 disc protrusion.

Appellant submitted an October 6, 2008 report from Dr. Candace M. Martin, a psychiatrist, who diagnosed major depressive disorder, recurrent and severe and anxiety disorder, not otherwise specified. Dr. Martin offered her clinical opinion that these conditions were a result of the chronic pain causally related to the 1995 work injury.

The Office denied appellant's recurrence claim on January 13, 2009. It found that the medical evidence did not provide a rationalized explanation of why her limited duty was no longer suitable. The Office found no evidence that appellant's work duties had increased and no evidence of any change in her cervical spine that would cause an increase in disability. It noted that Dr. Martin's report was probative in establishing an emotional condition brought about from the effects of the work injury. The Office indicated that it was accepting appellant's claim for anxiety state, unspecified.

At a May 7, 2009 oral hearing before an Office hearing representative, appellant advised that she was not claiming vocational rehabilitation or that the prior wage-earning capacity determination was in error. Appellant explained that she was seeking modification of the prior determination because she had an actual worsening of her injury-related condition.

A June 11, 2009 MRI scan showed a three-to-four millimeter posterior marginal osteophytic ridge at the C5-6 level mildly indenting the spinal cord resulting in a mild degree of central canal stenosis. Mildly reduced innerspace widths were associated.

On June 12, 2009 a specialist in physical medicine diagnosed cervical radiculopathy/myelopathy with no nerve conduction velocity evidence of generalized peripheral neuropathy or other entrapments. He noted increased insertional activity and active acute denervation mostly in the C5-6 distribution with a clinical suggestion of cervical cord myelopathy, which he correlated with possible stenosis around C5-6.

In a decision dated July 14, 2009, the Office hearing representative found that appellant did not meet her burden to show that the May 8, 1998 wage-earning capacity determination should be modified. She found that the medical evidence was insufficient to establish a material change in the nature and extent of appellant's accepted work injuries.

### **LEGAL PRECEDENT**

Section 8115(a) of the Federal Employees' Compensation Act provides that in determining compensation for partial disability, the wage-earning capacity of an employee is determined by her actual earnings, if actual earnings fairly and reasonably represent her wage-earning capacity. If the actual earnings of the employee do not fairly and reasonably represent her wage-earning capacity or if the employee has no actual earnings, her wage-earning capacity as appears reasonable under the circumstances is determined with due regard to the nature of her injury, the degree of physical impairment, her usual employment, her age, her qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect her wage-earning capacity in her disabled condition.<sup>3</sup>

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<sup>3</sup> 5 U.S.C. § 8115(a).

Once the Office issues a formal decision on wage-earning capacity, the rating should be left in place until the claimant requests resumption of compensation for total wage loss for more than a limited period of disability, in which instance the Office will need to evaluate the request according to the customary criteria for modifying a formal wage-earning capacity determination.<sup>4</sup>

Modification of a wage-earning capacity 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. The burden of proof is on the party attempting to show modification of the award.<sup>5</sup>

### ANALYSIS

As appellant explained at her May 7, 2009 oral hearing before the Office hearing representative, she is seeking modification of the Office's May 8, 1998 wage-earning capacity determination based on a material change in the nature and extent of the injury-related condition. The Office had determined that her actual wages in a modified limited-duty assignment fairly and reasonably represented her wage-earning capacity. Appellant stopped work completely on December 20, 2007 and did not return. She, therefore, bears the burden to establish that a material change in the nature and extent of the injury-related condition rendered her totally incapable of performing her part-time limited-duty assignment.

There is no convincing medical evidence of a material change in the nature and extent of the injury-related condition leading up to or contemporaneous with appellant's work stoppage on December 20, 2007. Dr. Shade, the attending orthopedic surgeon, did not report a material change at the C5-6 level. He consistently reported that appellant's pain level was about the same as the last office and that her work status was limited duty. Indeed, Dr. Shade reported this on January 16, 2008, after appellant had been off work about a month.

It was only on January 24, 2008, after appellant mentioned that she had been off work since December 20, 2007 and was requesting workers' compensation for disability, that Dr. Shade noted she was incapacitated and unable to work due to neck and low back pain. Even then, it was unclear whether Dr. Shade was giving his orthopedic assessment or merely repeating appellant's complaint that she could not work due to pain. He continued to report that her cervical spine pain level was about the same as the last office visit.

The record contains diagnostic test reports through the years, but no medical report explaining how they demonstrated a material change in appellant's injury-related C5-6 disc condition. The June 11, 2009 MRI scan showed a three-to-four millimeter posterior marginal osteophytic ridge at the C5-6 level mildly indenting the spinal cord resulting in a mild degree of central canal stenosis. The July 27, 2001 MRI scan also showed a large posterior osteophyte at the inferior margin of C5 projecting into the canal and producing mild-to-moderate spinal stenosis, obliterating the cerebrospinal fluid signal anterior to the cord and displacing the cord

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<sup>4</sup> *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sharon C. Clement*, 55 ECAB 552 (2004).

<sup>5</sup> *Daniel J. Boesen*, 38 ECAB 556 (1987).

posteriorly. Without some comparative analysis of these studies by a qualified physician, it is difficult to find that there has been a material change in the C5-6 disc sufficient to totally incapacitate appellant from her part-time limited-duty assignment. Dr. Shade's treatment notes do not make this clear.

The Board finds that appellant has not met her burden of proof to show that a modification of the Office's prior wage-earning capacity determination is warranted. The Board will, therefore, affirm the Office's July 14, 2009 decision. Appellant will continue to receive compensation for her previously determined loss of wage-earning capacity.

**CONCLUSION**

The Board finds that appellant has not met her burden to show that a material change in the nature and extent of the injury-related condition warrants modification of the Office's May 8, 1998 wage-earning capacity determination.

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 14, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 16, 2010  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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