



## **FACTUAL HISTORY**

This case has previously been before the Board on multiple occasions.<sup>2</sup> The facts as presented in the prior Board decisions are incorporated herein by reference. The relevant facts are as follows.

Appellant, then a 64-year-old office automation clerk (secretary), sustained a left knee injury on December 15, 1995 when she stumbled down a flight of stairs. Subsequently, OWCP accepted her claim for left knee strain and left lateral meniscus tear. Appellant returned to work in a light-duty capacity on January 21, 1997, accepted a permanent light-duty position as an office automation clerk on May 30, 1997, and worked in this position from June 22 to August 22, 1997.

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

By decision dated November 17, 1997, OWCP 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, it 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.

Appellant requested reconsideration of the wage-earning capacity determination on February 20, 1998. OWCP denied modification of the wage-earning capacity determination on March 20, 1998.<sup>3</sup>

Appellant continued to request modification of the wage-earning capacity determination.<sup>4</sup>

On March 2, 1999 appellant appealed to the Board. On July 3, 2000 the Board reviewed appellant's wage-earning capacity determination and affirmed OWCP's finding that the office automation clerk position that appellant held until her August 22, 1997 resignation fairly and

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<sup>2</sup> Docket No. 99-1407 (issued July 3, 2000); Docket No. 00-2653 (issued May 10, 2001); Docket No. 02-1154 (issued January 31, 2003); Docket No. 03-2127 (issued November 18, 2003); Docket No. 04-1689 (issued December 9, 2004); Docket No. 06-0721 (issued November 29, 2006); Docket No. 07-1388 (issued January 25, 2008); Docket No. 08-1141 (issued September 22, 2008); Docket No. 10-503 (issued May 12, 2010); and Docket No. 11-1037 (issued December 16, 2011).

<sup>3</sup> OWCP also received a claim for schedule award on February 10, 1998. Appellant was granted a schedule award for two percent permanent impairment of the left lower extremity on September 8, 1998.

<sup>4</sup> On September 19, 1998 OWCP received appellant's request for modification of the loss of wage-earning capacity and schedule award decisions. It denied this request on September 28, 1998. Appellant again requested reconsideration on October 24, 1998, OWCP denied this request in a nonmerit decision on February 11, 1999.

reasonably represented her wage-earning capacity.<sup>5</sup> In this decision the Board found that appellant returned to work in a light-duty capacity on January 21 and on May 30, 1997 she accepted a permanent light-duty position as an office automation clerk with no decrease in pay. Appellant performed the duties of office automation clerk from June 22 through August 22, 1997. Her performance of this position in excess of 60 days was persuasive evidence that the position represented her wage-earning capacity. Appellant did not resume her duties as an office automation clerk following her August 1997 surgery because of her voluntary resignation, not due to residuals of her accepted employment injury or surgery.<sup>6</sup>

On January 23, 2002 appellant filed a request for reconsideration with OWCP. By decision dated March 20, 2002, OWCP found that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error. Appellant appealed to the Board. By decision dated January 31, 2003, the Board remanded the case to OWCP finding that appellant's request for modification of the wage-earning capacity determination was timely filed.<sup>7</sup> On remand OWCP reviewed modification of the wage-earning capacity decision on April 17, 2003. Appellant again requested reconsideration on April 23, 2003. OWCP again denied modification on July 25, 2003.

Appellant again appealed to the Board. By decision dated November 18, 2003, the Board affirmed OWCP's July 25, 2003 decision denying modification of the November 17, 1997 wage-earning capacity determination.<sup>8</sup>

OWCP continued to receive appellant's requests for reconsideration, which were reviewed by the Board.<sup>9</sup> Following the Board's November 29, 2006 remand OWCP again denied modification of the wage-earning capacity decision on March 8, 2007. Appellant filed an appeal to the Board on April 25, 2007. By decision dated January 25, 2008, the Board found that appellant had not met the requirements for modification of the wage-earning capacity determination.<sup>10</sup>

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<sup>5</sup> Docket No. 99-1407 (issued July 3, 2000).

<sup>6</sup> On August 1, 2000 OWCP granted appellant a schedule award for an additional five percent permanent impairment of her left lower extremity. Appellant appealed to the Board. In a decision dated May 10, 2001, the Board affirmed OWCP's August 1, 2000 schedule award. Docket No. 00-2653 (issued May 10, 2001).

<sup>7</sup> Docket No. 02-1154 (issued January 31, 2003).

<sup>8</sup> Docket No. 03-2127 (issued November 18, 2003).

<sup>9</sup> On April 8, 2004 appellant requested reconsideration. OWCP denied appellant's request for merit review by decision dated June 9, 2004. Appellant filed an appeal with the Board on June 24, 2004. By decision dated December 9, 2004 (Docket No. 04-1689), the Board found that OWCP properly denied appellant's request for review of the merits of her claim. On August 25, and 31, 2005 appellant again requested reconsideration. By decision dated November 8, 2005, OWCP denied appellant's request for reconsideration noting that appellant was requesting reconsideration of a Board decision. By order dated November 29, 2006, the Board remanded the case to OWCP finding that appellant had filed a proper request for reconsideration and submitted evidence in support of her requests. Docket No. 06-0721 (issued November 29, 2006).

<sup>10</sup> Docket No. 07-1388 (issued January 25, 2008).

On February 1, 2008 appellant requested reconsideration and argued that she did not voluntarily resign her position on August 22, 1997. OWCP denied appellant's request for reconsideration on February 21, 2008. In a decision dated September 22, 2008, the Board found that OWCP properly denied appellant's February 1, 2008 request for reconsideration.<sup>11</sup> The Board noted that appellant had argued on more than one occasion that her August 22, 1997 resignation was either unintentional or coerced, but appellant's allegations were not supported by any evidence of record.<sup>12</sup>

Appellant continued to request reconsideration by OWCP. By decision dated March 12, 2014, OWCP reviewed appellant's November 20, 2013 request for reconsideration and denied modification of the wage-earning capacity decision of November 17, 1997.<sup>13</sup>

Appellant again requested reconsideration on May 28, 2014. OWCP subsequently denied modification of the November 17, 1997 wage-earning capacity decision on January 5, 2015. It received a request for reconsideration on February 4, 2015 and denied modification of the wage-earning capacity determination again on June 22, 2015. Appellant again requested reconsideration on June 24, 2015 for which OWCP denied modification on September 12, 2015.

On November 23, 2015 appellant filed a request for reconsideration of OWCP's September 22, 2015 decision. With her request, she submitted a three-page narrative statement, noting that she had severe pain in both legs. Appellant also submitted a document regarding the rights of disability annuitants and an excerpt from a Merit Systems Protection Board decision.

On February 1, 2016 OWCP received a report dated August 31, 1997, wherein Dr. Wendell I. Wyatt, a retired physician, noted that appellant had volatile blood pressure, and stated that appellant should seek a job without tremendous stress.

Appellant submitted another three-page statement on January 23, 2016. She claimed that the Office of Personnel Management (OPM) had mailed her information regarding disability annuitants indicating that she did not have to go back to work. Appellant noted that she had a separate claim for hypertension under OWCP File No. xxxxxx056.

By decision dated February 22, 2016, OWCP reviewed the merits of appellant's claim and denied modification of the November 17, 1997 wage-earning capacity decision. It noted that

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<sup>11</sup> Docket No. 08-1141 (issued September 22, 2008).

<sup>12</sup> On May 12, 2010 the Board dismissed an appeal docketed as No. 10-0503 as inadvertently docketed. On April 11, 2011 appellant filed an appeal from a March 3, 2011 information letter. By order dated December 16, 2011, the Board dismissed the appeal docketed as No. 11-1037 as the case record did not contain a final decision over which the Board could exercise jurisdiction.

<sup>13</sup> On December 12, 2012 OWCP denied appellant claim for a schedule award. On the same date, it reviewed the merits of appellant's claim and denied a modification of the wage-earning capacity decision of November 17, 1997. By decision dated December 11, 2013, a hearing representative vacated OWCP's December 12, 2012 decision regarding a schedule award and remanded the case for further development of the medical evidence. On February 25, 2014 OWCP granted appellant a schedule award for an additional three percent permanent loss of use of the left lower extremity, for a total of 10 percent total impairment.

it had no jurisdiction over an alleged wrongful termination and the submitted evidence did not support modification of the November 17, 1997 decision.

On March 14, 2016 appellant again requested reconsideration. With her request, she alleged that the position held on August 22, 1997, which she stated she left to have surgery, was not limited or light duty. Appellant further stated that she had been wrongfully terminated. She reiterated that her injury resulted in permanent impairment.

By decision dated June 7, 2016, OWCP reviewed the merits of appellant's claim and denied modification of the November 17, 1997 wage-earning capacity decision. It again found that appellant's narrative statement was not sufficient to modify the November 17, 1997 wage-earning capacity decision and noted that it had no jurisdiction over an alleged wrongful termination.

### **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, represent a claimant's ability to earn wages. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.<sup>14</sup>

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless it meets the requirements for modification.<sup>15</sup> OWCP procedures at section 2.1501 contain provisions regarding the modification of a formal loss of wage-earning capacity.<sup>16</sup> The relevant part provides that a formal loss of wage-earning capacity will be modified when: (1) the original rating was in error; (2) the claimant's medical condition has materially changed; or (3) the claimant has been vocationally rehabilitated.<sup>17</sup>

The burden of proof is on the party attempting to show modification.<sup>18</sup> There is no time limit for appellant to submit a request for modification of a wage-earning capacity determination.<sup>19</sup>

### **ANALYSIS**

The Board finds that appellant has not met any of the requirements for modification of OWCP's November 17, 1997 loss of wage-earning capacity determination.

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<sup>14</sup> *Katherine T. Kreger*, 55 ECAB 633 (2004).

<sup>15</sup> *Sue A. Sedwick*, 45 ECAB 211 (1993); *see also J.H.*, Docket No. 16-0314 (issued May 12, 2016).

<sup>16</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Wage-Earning Capacity*, Chapter 2.1501 (June 2013).

<sup>17</sup> *Id.* at § 2.1501.3(a).

<sup>18</sup> *Darletha Coleman*, 55 ECAB 143 (2003).

<sup>19</sup> *W.W.*, Docket No. 09-1934 (issued February 24, 2010); *Gary L. Moreland*, 54 ECAB 638 (2003).

Appellant has not submitted any evidence to establish that the original wage-earning capacity determination should be modified. The evidence appellant submitted to OWCP with her requests for reconsideration dated January 23 and March 14, 2016 did not support that the original rating was in error, that appellant's medical condition had materially changed, or that appellant had been otherwise vocationally rehabilitated.

Appellant submitted narrative statements in which she alleged that the wage-earning capacity determination was erroneous because she had been wrongfully terminated on August 22, 1997. The Board however found in its July 3, 2000 decision that appellant had not returned to work following August 22, 1997 because she had voluntarily resigned in August 1997. The Board again reviewed this argument in its decision dated September 2, 2008 and found that while appellant continued to argue that her August 22, 1997 resignation was unintentional or coerced, her allegations were not supported by the evidence of record. Appellant also alleged that she received information from OPM regarding disability annuities which suggested that she did not have to return to work. Whether or not appellant qualifies for an OPM disability annuity has no bearing on the issue of whether the 1997 wage-earning capacity determination was issued in error. The burden of proof is on appellant to substantiate her allegations and to establish that the wage-earning capacity determination was issued in error.<sup>20</sup> Appellant has not met her burden of proof to establish that her actual earnings from June 22, to August 22, 1999 did not fairly and reasonably represent her wage-earning capacity.

OWCP also received Dr. Wyatt's August 1, 1997 report wherein he related that appellant had volatile blood pressure and that appellant should seek a job without tremendous stress. As Dr. Wyatt provided no discussion of the duties of the modified office automation clerk position on which the loss of wage-earning capacity determination was made, his report is of limited probative value and insufficient to establish modification of the loss of wage-earning capacity determination.<sup>21</sup> This report does not substantiate that hypertension was an accepted condition which prevented appellant from performing the duties of an office automation clerk.

The Board also finds that there is no evidence of record establishing that appellant's accepted medical conditions changed such that she could no longer perform the duties of her wage-earning capacity position, nor does she argue that she has been retrained or otherwise vocationally rehabilitated.<sup>22</sup>

Accordingly, appellant did not submit sufficient evidence to warrant modification of the November 17, 1997 wage-earning capacity determination. OWCP, therefore, properly denied modification of the November 17, 1997 wage-earning capacity determination.

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<sup>20</sup> *Supra* note 18.

<sup>21</sup> *See J.H.*, Docket No. 16-0314 (issued May 12, 2016).

<sup>22</sup> *See B.S.*, Docket No. 14-1506 (issued November 3, 2014).

**CONCLUSION**

The Board finds that appellant has failed to establish modification of the November 17, 1997 wage-earning capacity determination.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 7 and February 22, 2016 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: March 24, 2017  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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