

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

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**L.W., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Tulsa, OK, Employer**

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**Docket No. 07-1648  
Issued: February 12, 2009**

*Appearances:*  
*Appellant, pro se*  
*No appearance, for the Director*

Oral Argument January 8, 2009

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On June 4, 2007 appellant filed a timely appeal from the March 30, 2007 merit decision of the Office of Workers' Compensation Programs, which denied modification of her wage-earning capacity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.

**ISSUE**

The issue is whether appellant has met her burden to establish a modification of the Office's February 21, 2003 loss of wage-earning capacity determination.

**FACTUAL HISTORY**

On June 11, 1982 appellant, then a 29-year-old distribution clerk machine operator, filed a claim alleging that she sustained a bilateral carpal tunnel injury in the performance of duty. The Office accepted her claim for temporary aggravation of preexisting carpal tunnel syndrome and aggravation of thoracic outlet syndrome. Appellant received compensation for wage loss.

Following a recurrence of disability on November 20, 1987, appellant returned to work on November 23, 1998 in a part-time limited-duty capacity as a modified distribution clerk. By decision dated February 21, 2003, the Office found that appellant's actual earnings in the November 23, 1998 part-time modified position, with weekly earnings of \$541.48, fairly and reasonably represented her capacity to earn wages effective March 23, 1999. An Office hearing representative affirmed the February 21, 2003 wage-earning capacity determination. On appeal, the Board affirmed the Office hearing representative's decision.<sup>1</sup> Appellant received compensation on the periodic rolls for a partial loss of wage-earning capacity.

On September 20, 2006 appellant filed a claim alleging that she sustained a recurrence of total disability beginning July 24, 2006:

"When I found out Randy Cameron was going to be the supervisor of the operation I worked on, I started developing headaches, stomach problems, and aches in places I had not had pain. And I no longer had control over my neurological pain in arms. I have had these conversion problems before, 1988, 2002, March 11, 2005 was the incident with Randy Cameron and Lois Oxley that made me feel trapped."

To support her claim, appellant submitted reports from her psychiatrist, Dr. Mark A. Kelley, who wrote the following on a July 24, 2006 disability slip: "[Appellant] is disabled from her current work assignment starting today. This disability will continue from now for a length of time that is not able to be determined."

On September 11, 2006 Dr. Kelley reported that the effects of appellant's work injury persisted to the point of disabling her:

"Her on-the-job injury was the change in her work setting in which her supervisor, who she could work well with, suddenly was no longer going to be her supervisor and Mr. Cameron, who she has had problems with previously, specifically two years ago, was announced to be her supervisor. In my opinion she will not be able to return to work under the supervision of Mr. Cameron. I anticipate the employee could return to work within a week of determination of her receiving an assignment in a position with the supervisors and coworkers who she was comfortable with."

On November 1, 2006 Dr. Kelley added:

"[Appellant] did have exacerbation of symptoms regarding [Borderline Personality Disorder] with finding herself in distressing circumstances by suddenly finding Mr. Randy Cameron becoming her immediate boss with her supervisor, Janice Cooper, moving to a different position. This change in her working circumstances was so distressing for her she was not able to work. This disability was manifested with a variety of symptoms of anxiety, belief that she was being deliberately treated badly with paranoid features, having both anxiety

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<sup>1</sup> Docket No. 04-1001 (issued February 3, 2005).

symptoms and psychotic symptoms, with difficulty with properly evaluating reality. These symptoms included psychophysiological symptoms and conversion symptoms in which physical complaints emerged in response to the mental distress she experienced. Currently [appellant] has developed physical symptoms particularly involved in the digestive track of nausea, vomiting, diarrhea and abdominal discomfort.”

Dr. Michael Karathanos, appellant’s neurologist, reported on September 12, 2006 that the effects of appellant’s work injury had not ceased at that time: “The effects of work injury that are persistent do limit the patient’s activities and these limitation have been noted on the claimant’s list of work limitations and restrictions.” On December 13, 2006 Dr. Karathanos stated: “I see in one of Dr. Kelley’s reports that [appellant] currently could not return to work, and it is obvious that his restrictions override mine.”

In a decision dated March 30, 2007, the Office reviewed the merits of appellant’s claim and denied modification of the wage-earning capacity. It found that appellant failed to establish that the accepted work injury had materially worsened such that the formal wage-earning capacity determination should be modified. The Office noted that Dr. Karathanos indicated from a physical standpoint that appellant was capable of continuing in her former accommodated position. It also noted that Dr. Kelley referred to at least two work events that appeared to have precipitated disability for work. The Office stated: “These events have been specific, are not connected to the accepted work factors in the instant case, and are currently being pursued in separate workers’ compensation case files.”

### **LEGAL PRECEDENT**

Section 8102(a) of the Federal Employees’ Compensation Act provides compensation for the disability of an employee resulting from personal injury sustained in the performance of duty.<sup>2</sup> Section 8106(a) provides in pertinent part as follows:

“If the disability is partial, the United States shall pay the employee during the disability monthly monetary compensation equal to  $66\frac{2}{3}$  percent of the difference between his monthly pay and his monthly wage-earning capacity after the beginning of the partial disability, which is known as his basic compensation for partial disability.”<sup>3</sup>

In determining compensation for partial disability, the wage-earning capacity of an employee is determined by the employee’s actual earnings if the employee’s actual earnings fairly and reasonably represent his or her wage-earning capacity.”<sup>4</sup> Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing

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<sup>2</sup> 5 U.S.C. § 8102(a).

<sup>3</sup> *Id.* at § 8106(a).

<sup>4</sup> *Id.* at § 8115(a).

that they do not fairly and reasonably represent the injured employee's wage-earning capacity must be accepted as such measure.<sup>5</sup>

Once the loss of wage-earning capacity 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. The burden of proof is on the party attempting to show modification of the award.<sup>6</sup>

If the Office issues a formal decision on loss of wage-earning capacity, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss, in which instance the Office will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity determination.<sup>7</sup>

### ANALYSIS

When the Office made its February 21, 2003 determination of appellant's wage-earning capacity, it found that appellant was not totally disabled for all work. It found that she did have some capacity to earn wages, as she demonstrated by earning actual wages in her part-time position as a modified distribution clerk. The Office found that the 1982 bilateral carpal tunnel injury had left her with some incapacity to earn the same wages she was earning in 1982. It paid appellant periodic compensation for the partial loss of wage-earning capacity caused by her 1982 employment injury.

When appellant filed her September 20, 2006 claim alleging that she sustained a recurrence of total disability beginning July 24, 2006, the Office adjudicated whether its February 21, 2003 determination of wage-earning capacity should be modified. It reviewed the medical evidence to determine whether there was a material change in the nature and extent of appellant's 1982 bilateral carpal tunnel syndrome such that she could no longer earn wages in her modified position beginning July 24, 2006.

Appellant did not submit a medical opinion from her neurologist, Dr. Karathanos, explaining how the injury she sustained in 1982 had materially worsened or how she was unable to continue working in her modified position beginning July 24, 2006 due to her 1982 employment injury. Dr. Karathanos continued appellant's previous work restrictions, at least until he saw a report from the psychiatrist, Dr. Kelley. At that point, Dr. Karathanos deferred to Dr. Kelley's judgment on appellant's ability to return to work.

Dr. Kelley did not attribute appellant's work stoppage on July 24, 2006 to a material worsening of the bilateral carpal tunnel injury she sustained in 1982. Rather, he addressed several psychological traumas, one on March 11, 2005, when appellant says Mr. Cameron

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<sup>5</sup> *Don J. Mazurek*, 46 ECAB 447 (1995).

<sup>6</sup> *Daniel J. Boesen*, 38 ECAB 556 (1987).

<sup>7</sup> *Katherine T. Kreger*, 55 ECAB 633 (2004); *Sharon C. Clement*, 55 ECAB 552 (2004).

confronted her, and another on or about July 24, 2006, when appellant learned that Mr. Cameron was going to be her immediate supervisor. It was the distress from these psychological traumas, Dr. Kelley explained, that totally disabled appellant for work on July 24, 2006.

This evidence does not establish a basis for the Office to modify its February 21, 2003 determination of wage-earning capacity. The evidence did not show that appellant physically was unable to continue working in her modified position because of a material change in the nature and extent of the bilateral carpal tunnel injury she sustained in 1982. Indeed, appellant insists that physically she could have returned to work July 25, 2006. She was simply unable to work under Mr. Cameron from an emotional standpoint. The psychiatric evidence tends to show that appellant stopped work because of her emotional reaction to the incidents on March 11, 2005 and on or about July 24, 2006.

Because the alleged psychological trauma was not a proper basis for modifying the Office's February 21, 2003 determination of wage-earning capacity based on the 1982 physical injury, the Board will affirm the Office's March 30, 2007 decision. The February 21, 2003 determination remains in place and continues to entitle appellant to the compensation she was receiving for the partial loss of wage-earning capacity caused by her 1982 carpal tunnel injury.<sup>8</sup>

### **CONCLUSION**

The Board finds that appellant has not met her burden to establish a modification of the Office's February 21, 2003 loss of wage-earning capacity determination.

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<sup>8</sup> The issue of whether appellant sustained a new injury, an emotional injury, on March 11, 2005 or July 24, 2006 is before the Board in other appeals. See OWCP File No. xxxxxx532, which is before the Board in Docket No. 08-2038; see also OWCP File No. xxxxxx508, which is before the Board in Docket No. 08-1034.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 30, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 12, 2009  
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