

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

M.S., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Eau Claire, WI, Employer)

**Docket No. 08-686
Issued: August 1, 2008**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 31, 2007 appellant timely appealed the December 12, 2007 nonmerit decision of the Office of Workers' Compensation Programs, which denied her request for reconsideration, and an April 3, 2007 wage-earning capacity determination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of this claim.

ISSUES

The issues are: (1) whether appellant's actual earnings as a modified clerk effective May 27, 2003, fairly and reasonably represent her wage-earning capacity; and (2) whether the Office properly denied appellant's November 14, 2007 request for reconsideration under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

Appellant, a 58-year-old retired letter carrier, has an accepted occupational disease claim for permanent aggravation of degenerative joint disease of the right hip, bursitis of the right hip, and osteoarthritis of the left hip, which arose on or about February 18, 1999. She had

arthroscopic surgery on her right hip in January 2001, then a right total hip arthroplasty in June 2002, followed by a left total hip arthroplasty in February 2003.¹ The Office authorized each surgical procedure and appellant received appropriate wage-loss compensation.

On May 27, 2003 appellant returned to work as a modified clerk, with no loss in pay. She received a written job offer on June 17, 2003, which she signed and accepted that same day. The position involved answering the telephone, filing, organizing and other office duties within her restrictions. A desk and chair were provided and appellant was expected to perform some box distribution while seated. She was also required to assist with rural route evening check in. The job description noted physical restrictions of no standing and minimal walking. Appellant was also prohibited from climbing, bending, kneeling and squatting. Additionally, there was a lifting limitation of five pounds. At the time, appellant's physical restrictions included one-half hour of walking, three hours of reaching above shoulder, and a five-pound limitation on lifting and carrying. She was also precluded from standing, climbing, kneeling, bending, stooping, twisting, pulling, pushing, driving and operating machinery. The modified clerk position was in keeping with appellant's physical limitations as identified by her surgeon, Dr. David H. Palmer, a Board-certified orthopedic surgeon, on April 28, 2003.

The Office accepted a brief period of temporary total disability beginning September 23, 2003. Appellant resumed her duties as a modified clerk in October 2003. Dr. Palmer eased some of her physical restrictions on October 2, 2003.² The employing establishment subsequently amended appellant's modified clerk position to reflect her increased tolerance levels. Appellant was also given the additional responsibility of delivering express mail two hours per day. On January 7, 2004 Dr. Palmer again decreased some of appellant's physical restrictions. Most notably, appellant was permitted to stand and walk up to four hours a day, drive up to three hours and lift up to 10 pounds intermittently. She continued to work as a modified clerk until she voluntarily retired on February 29, 2004. The Office of Personnel Management paid appellant a regular (nondisability) retirement annuity beginning March 1, 2004.

Appellant underwent another right hip arthroscopic procedure on July 28, 2006, which the Office approved. Following surgery, she participated in a six-week course of physical therapy and was released from treatment on November 29, 2006.

In a decision dated April 3, 2007, the Office determined that appellant's actual earnings as a modified clerk fairly and reasonably represented her wage-earning capacity. Because there

¹ Appellant also has an accepted claim (File No. 10-2018063) for disc herniations of the lumbar (L4-5) and thoracic (T11-12) spine, which arose on or about December 31, 2002. She underwent a lumbar laminectomy and discectomy on January 21, 2003.

² Dr. Palmer increased appellant's standing tolerance from zero to two hours. He similarly increased appellant's walking tolerance from ½ to 2 hours. Appellant was also allowed to drive for two hours, push/pull for one hour and bend/stoop for one-half hour.

was no loss in earnings, appellant was not entitled to wage-loss compensation following her May 27, 2003 return to limited-duty work.³

On November 14, 2007 appellant requested reconsideration. The request was accompanied by a copy of an Office letter dated February 7, 2001 advising appellant that she had been approved for wage-loss compensation for the period January 22 to 26, 2001. In a decision dated December 12, 2007, the Office denied appellant's request for reconsideration.

LEGAL PRECEDENT -- ISSUE 1

A wage-earning capacity determination is a finding that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages.⁴ Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.⁵ An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.⁶ Actual wages earned is generally the best measure of wage-earning capacity.⁷ In the absence of evidence showing that actual earnings do not fairly and reasonably represent the injured employee's wage-earning capacity, such earnings must be accepted as representative of the individual's wage-earning capacity.⁸ A determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity should be made only after an employee has worked in a given position for more than 60 days.⁹

³ The Office originally issued the wage-earning capacity determination on March 5, 2007. However, this decision referenced only a "left hip condition." Appellant subsequently advised the Office that her claim had also been accepted for a right hip condition. The Office, therefore, amended the initial determination on April 3, 2007 to correctly reflect appellant's accepted "bilateral hip condition."

⁴ 5 U.S.C. § 8115(a) (2000); see *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

⁵ See *Katherine T. Kreger*, 55 ECAB 633, 635 (2004). Modification of a wage-earning capacity determination is unwarranted 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 erroneous. *Tamra McCauley*, 51 ECAB 375, 377 (2000). The burden of proof is on the party seeking modification. *Id.*

⁶ 20 C.F.R. §§ 10.402, 10.403 (2008); see *Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

⁷ *Hayden C. Ross*, 55 ECAB 455, 460 (2004).

⁸ *Id.* If the actual earnings do not fairly and reasonably represent the employee's wage-earning capacity or if the employee has no actual wages, the wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the employee's usual employment, age, qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect the employee's wage-earning capacity in his or her disabled condition. 5 U.S.C. § 8115(a).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (July 1997).

ANALYSIS -- ISSUE 1

Appellant's modified clerk position was in keeping with her work restrictions as described by Dr. Palmer. Prior to her voluntary retirement in February 2004, she had worked as a modified clerk for more than 60 days. Appellant had been earning wages equal to or greater than the wages she earned in her date-of-injury position of letter carrier. Factors to be considered in determining if a position fairly and reasonably represents the injured employee's wage-earning capacity include: (1) whether the kind of appointment and tour of duty are at least equivalent to those of the date-of-injury job; (2) whether the job is part-time or sporadic in nature; (3) whether the job is seasonal in an area where year-round employment is available; and (4) whether the job is temporary where the claimant's previous job was permanent.¹⁰ Appellant's modified clerk position was not part-time, sporadic, seasonal or temporary. She worked essentially the same tour of duty and appointment, but under a different job classification code. Accordingly, the Board finds that appellant's actual earnings as a modified clerk fairly and reasonably represent her wage-earning capacity.

LEGAL PRECEDENT -- ISSUE 2

The Office has the discretion to reopen a case for review on the merits.¹¹ Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that the application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.¹² Section 10.608(b) provides that, when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.¹³

ANALYSIS -- ISSUE 2

Appellant's November 14, 2007 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, she did not advance a relevant legal argument not previously considered by the Office. Therefore, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).¹⁴ She also failed to satisfy the third requirement under section 10.606(b)(2). Appellant did not submit any relevant and pertinent new evidence with her November 14, 2007 request for reconsideration. The Office's February 7, 2001 letter awarding wage-loss compensation for the period January 22 to

¹⁰ *Id.*

¹¹ 5 U.S.C. § 8128(a).

¹² 20 C.F.R. § 10.606(b)(2).

¹³ 20 C.F.R. § 10.608(b).

¹⁴ 20 C.F.R. § 10.606(b)(2)(i) and (ii).

26, 2001 is not particularly relevant to a determination of appellant's wage-earning capacity as of May 27, 2003. Furthermore, this letter was already part of the record. This evidence does not constitute relevant and pertinent new evidence not previously considered by the Office.¹⁵ Consequently, appellant is not entitled to a review of the merits based on the third requirement under section 10.606(b)(2).¹⁶ As appellant was not entitled to a review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(2), the Office properly denied the November 14, 2007 request for reconsideration.

CONCLUSION

Appellant's actual earnings as a modified clerk fairly and reasonably represent her wage-earning capacity. The Board further finds that the Office properly denied appellant's November 14, 2007 request for reconsideration.¹⁷

ORDER

IT IS HEREBY ORDERED THAT the December 12 and April 3, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 1, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁵ Submitting additional evidence that repeats or duplicates information already in the record does not constitute a basis for reopening a claim. *James W. Scott*, 55 ECAB 606, 608 n.4 (2004).

¹⁶ 20 C.F.R. § 10.606(b)(2)(iii).

¹⁷ Appellant's November 14, 2007 filing also fails to demonstrate a basis for modifying the April 3, 2007 wage-earning capacity determination. She does not allege a material change in the nature and extent of her injury-related condition. Appellant also does not claim to have been retrained or otherwise vocationally rehabilitated. As our review of the April 3, 2007 decision indicates, there is no basis upon which to conclude that the original wage-earning capacity determination was erroneous.