

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of IDA LEE MASON and DEPARTMENT OF THE TREASURY,  
INTERNAL REVENUE SERVICE, Detroit, Mich.

*Docket No. 96-2114; Submitted on the Record;  
Issued July 15, 1998*

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,  
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in reducing appellant's compensation based on her wage-earning capacity in the selected position of case aide.

On December 1, 1993 appellant, then a 48-year-old tax examining aide on detail, filed a notice of occupational disease, claiming that her carpal tunnel syndrome was caused by her previous work as a computer operator, starting in 1983. The Office accepted bilateral carpal tunnel syndrome and right carpal tunnel release, which was done on September 4, 1991, based on the medical report of Dr. Silas Cardwell, Board-certified in internal medicine.

Appellant stopped work on June 8, 1994. The Office paid appropriate disability compensation and referred appellant for vocational rehabilitation. On August 22, 1995 appellant elected disability compensation. On October 9, 1995 she changed her mind and chose disability retirement benefits. The rehabilitation counselor closed appellant's case.

On November 17, 1995 the Office issued a notice of proposed reduction of compensation on the grounds that appellant was partially disabled and had the capacity to earn wages as a case aide at the rate of \$400.00 per week. The Office allowed appellant 30 days in which to submit evidence if she disagreed with the proposed reduction.

Appellant submitted a December 6, 1995 report from Dr. Carl E. Palffy, Board-certified in internal medicine, who stated that it was "unlikely" that appellant could perform the physical requirements of the case aide position because of her "clinically quite severe" carpal tunnel syndrome. He noted that appellant was not able to write at all with her right hand. He added that appellant could probably perform some type of job but it would involve no writing and no significant answering of the telephones or use of the arms for lifting or manipulating heavy objects. Dr. Palffy concluded that expecting appellant to take a position as case aide was "unrealistic" because she did not have the physical ability to do the tasks involved.

On December 19, 1995 the Office adjusted appellant's disability compensation to \$330.54 every four weeks, based on its calculation that she had a 70 percent wage-earning capacity as a case aide. The Office noted that Dr. Palffy's medical opinion was insufficient to support appellant's inability to do the work of a case aide because Dr. Shin Young Kang, a Board-certified orthopedic surgeon, stated in his March 26, 1995 report that appellant was capable of using both hands with some restrictions.

On April 9, 1996 appellant requested reconsideration on the grounds that her condition had worsened since July 1995, and submitted an electromyogram and nerve conduction study dated December 18, 1995 as well as a May 2, 1996 report from Dr. Assadollah Mazhari, Board-certified in neurological surgery, to whom Dr. Palffy had referred appellant.

On June 17, 1996 the Office denied appellant's request on the grounds that the evidence submitted in support of reconsideration was irrelevant and therefore insufficient to warrant review of the prior decision. The Office noted that Dr. Mazhari's report failed to address whether appellant was capable of doing the case aide position selected by the rehabilitation counselor. The Office added that Dr. Mazhari did not assess whether appellant could work at all and provided no opinion on the causal relationship between the need for hand surgery and employment factors.<sup>1</sup>

The Board finds that the Office improperly reduced appellant's disability compensation on the grounds that she had a 70 percent wage-earning capacity.

Under the Federal Employees' Compensation Act,<sup>2</sup> once the Office has accepted a claim and paid compensation benefits, it has the burden of proof to establish that an employee's disability has ceased or lessened, thus justifying termination or modification of those benefits.<sup>3</sup> An injured employee who is unable to return to the position held at the time of injury or to earn equivalent wages but who is not totally disabled for all gainful employment is entitled to compensation computed on the loss of wage-earning capacity.<sup>4</sup>

Wage-earning capacity is the measure of the employee's ability to earn wages in the open labor market under normal employment conditions.<sup>5</sup> Section 8106(a)<sup>6</sup> of the Act provides for compensation for the loss of wage-earning capacity during an employee's disability by paying

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<sup>1</sup> On June 17, 1996 the Office asked Dr. Mazhari to provide additional information regarding his recommendation that appellant have surgery on both hands to relieve carpal tunnel syndrome. The Office noted that appellant last worked on June 8, 1994 and requested a reasoned medical opinion on the relationship between the recommended surgery and factors of appellant's employment as a computer operator.

<sup>2</sup> 5 U.S.C. §§ 8101-8193 (1974).

<sup>3</sup> *James B. Christenson*, 47 ECAB \_\_\_\_ (Docket No. 95-1106, issued September 5, 1996); *Wilson L. Clow, Jr.*, 44 ECAB 157, 170 (1992).

<sup>4</sup> 20 C.F.R. § 10.303(a); *Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

<sup>5</sup> *Dennis D. Owen*, 44 ECAB 475, 479 (1993); *Hattie Drummond*, 39 ECAB 904, 907 (1988).

<sup>6</sup> 5 U.S.C. § 8106(a).

the difference between his monthly pay and his monthly wage-earning capacity after the beginning of the partial disability.<sup>7</sup>

Section 8115 provides that the wage-earning capacity of an employee is determined by his actual earnings if these fairly and reasonably represent his or her wage-earning capacity.<sup>8</sup> If the actual earnings do not fairly and reasonably represent the employee's wage-earning capacity, or if the employee has no actual wages, wage-earning capacity is determined by considering the nature of the injury, the degree of physical impairment, the employee's usual employment, age, and qualifications for other employment, the availability of suitable employment, and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.<sup>9</sup> A job in the position selected for determining wage-earning capacity must be reasonably available in the general labor market in the commuting area in which the employee lives.<sup>10</sup>

In this case, the rehabilitation counselor identified the position of case aide as within the physical restrictions imposed by Dr. Kang, appellant's treating physician, and certified the availability of the job within appellant's commuting area. The case aide position was classified as light duty, with maximum lifting of 20 pounds, the ability to talk and hear, and occasional reaching, handling, fingering, and feeling. The duties included helping applicants fill out forms, describing the agency's services and procedures, interviewing individuals to compile histories, gathering information to determine eligibility, keeping records, participating in staff meetings, counseling clients, escorting the elderly and children, and assisting in surveys.

Dr. Kang stated in a March 26, 1995 report that he had reviewed the February 8, 1995 functional capacity evaluation of appellant and met with the rehabilitation counselor. Dr. Kang concluded that appellant "should be able to use both hands to some extent, although some restriction will be required." Dr. Kang suggested light-duty work, with no repetitive use of the extremities.

However, the record does not indicate that Dr. Kang specifically reviewed the job description of case aide, as identified by the rehabilitation counselor. Dr. Palffy, on the other hand, did review the job description and concluded that appellant would not be able to perform the required tasks because of her severe carpal tunnel syndrome.

In assessing medical evidence, the Board will consider all the factors that contribute to an opinion's probative worth, including the physician's specialty and qualifications, the

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<sup>7</sup> An employee's wage-earning capacity in terms of percentage is obtained by dividing the pay rate of the selected position by the current pay rate for the date-of-injury job; the wage-earning capacity in terms of dollars is computed by multiplying the pay rate for compensation purposes, as defined at 20 C.F.R. § 10.5(a)(20), by the percentage of wage-earning capacity and subtracting the result from the pay rate for compensation purposes to obtain the employee's loss of wage-earning capacity. 20 C.F.R. § 10.303(b).

<sup>8</sup> 5 U.S.C. § 8115(a); *Lawrence D. Price*, 47 ECAB \_\_\_\_ (Docket No. 93-2007, issued October 4, 1995).

<sup>9</sup> *Mary Jo Colvert*, 45 ECAB 575, 579 (1994); *Samuel J. Chavez*, 44 ECAB 431, 436 (1993).

<sup>10</sup> *Barbara J. Hines*, 37 ECAB 445, 450 (1986).

comprehensive character of the evaluation, and the persuasive strength of the medical rationale.<sup>11</sup> The number of physicians supporting one position or another is not controlling; the weight of such evidence is determined by its reliability, its probative value, and its convincing quality.<sup>12</sup> Thus, the determination of probative value will depend on the opportunity for, and thoroughness of, the physical examination; the accuracy and completeness of the physician's knowledge of the facts and medical history; the care and skill of the physician's analysis, and the medical rationale expressed in support of the physician's opinion.<sup>13</sup>

Here, Dr. Kang's opinion is couched in general terms—appellant should be able to use both hands to some extent, although some restrictions would be required. Dr. Kang did not indicate what restrictions were necessary and did not address specific job duties such as writing reports or answering the telephone.

Noting Dr. Kang's opinion that appellant could use her hands, Dr. Palffy found that appellant had difficulty writing her name when he examined her on December 6, 1995. He concluded that appellant should avoid significant answering of the telephone and should have special equipment for that duty. Further, while the report of Dr. Mazhari, also a Board-certified specialist, failed to address the issue of whether appellant is capable of performing the physical requirements of the case aide position, the diagnostic studies he performed in December 1995 indicated a worsening of appellant's carpal tunnel syndrome.

The Board finds that the medical report of Dr. Kang is insufficient to meet the Office's burden of proof in reducing appellant's compensation. Therefore, the Board will reverse the Office's determination of loss of wage-earning capacity based on the case aide position.

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<sup>11</sup> Federal (FECA) Procedure Manual, Part 2, Claims -- *Developing and Evaluating Medical Evidence*, Chapter 2.810.11(1) (April 1993).

<sup>12</sup> *Connie Johns*, 44 ECAB 560, 570 (1993).

<sup>13</sup> *Melvina Jackson*, 38 ECAB 443, 449 (1987).

The June 17, 1996 and December 19, 1995 decisions of the Office of Workers' Compensation Programs are reversed.

Dated, Washington, D.C.  
July 15, 1998

George E. Rivers  
Member

David S. Gerson  
Member

Bradley T. Knott  
Alternate Member