

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RUTHIE A. SKELLEY and U.S. POSTAL SERVICE,
POST OFFICE, Poulsbo, Wash.

*Docket No. 97-2011; Submitted on the Record;
Issued June 21, 1999*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether appellant met her burden of proof in establishing that she sustained a recurrence of total disability; (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for consideration of the merits on May 15, 1997; and (3) whether Office properly determined appellant's wage-earning capacity based on her actual earnings.

The Board has duly reviewed the case on appeal and finds that appellant failed to meet her burden of proof in establishing that she sustained a recurrence of disability.

Appellant filed a claim and alleged on June 13, 1995 that she injured her left wrist and ankle in the performance of duty. The Office accepted appellants' claim for fracture of the navicular bone left wrist and sprain of the left ankle and authorized compensation from August 17 to September 1, 1995. Appellant filed a notice of recurrence of disability on November 9, 1995 alleging a recurrence of disability causally related to her June 13, 1995 employment injury. The Office accepted appellant's claim for a herniated disc and resultant surgery.

Appellant accepted a limited-duty position of clerk on February 22, 1996. Appellant returned to work on March 4, 1996. Appellant filed a series of claims for compensation indicating that she was only able to work four days a week and was requesting compensation for the fifth day. By decision dated May 3, 1996, the Office denied appellant's claim for intermittent disability. Appellant requested reconsideration on June 27, 1996 and by decision dated October 8, 1996, the Office declined to reopen appellant's claim for consideration of the merits. Appellant requested reconsideration on November 11, 1996 and by decision dated February 11, 1997, the Office denied modification of its May 3, 1996 decision. Appellant again requested reconsideration on April 4, 1997 and by decision dated May 15, 1997, the Office declined to reopen appellant's claim for consideration of the merits. In a separate decision dated

May 15, 1997, the Office determined that appellant's actual earnings as a clerk represented her wage-earning capacity.

When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.¹ Furthermore, appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal relationship between her recurrence of disability commencing March 8, 1996 and her June 13, 1995 employment injury.² This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.³

In this case, appellant's attending physician, Dr. Scott Van Linder, a Board-certified orthopedic surgeon, released appellant to return to work 8 hours a day with restrictions including no repetitive bending, twisting or lifting over 35 pounds. Appellant accepted a position with the employing establishment which complied with those restrictions and returned to work on March 4, 1996. In a note dated March 8, 1996, Dr. Linder stated that appellant should return to work on that date working four days a week. On April 10, 1996 he stated that appellant was working four, nine-hour days and that the fifth day, "seems to do her in and so a month or so ago I did make a formal request that they accept her limited to four days a week." In a report dated May 20, 1996, Dr. Linder stated that working four out of five days was medically necessary "to maintain her present good recovery from spinal surgery and to keep her spine in good health." He noted that appellant would like to work five days a week but that more than two days caused spine aggravation.

In a report dated June 6, 1996, Dr. Linder stated that appellant's examination was unchanged and that there was no evidence of significant deterioration of her condition. He noted, "she believes what would work best for her is five, four and one half hour shifts." Dr. Linder stated that this was reasonable as appellant was working on hard floors all day.

In a report dated September 25, 1996, Dr. Linder stated, "the work itself was fine, but she did not seem to have the tolerance to work the required nine hours and as things shook out, it appears that she can work four and an half hour shifts without any particular aggravation, but when she goes beyond that, she has recurring symptoms." He concluded that appellant's overall condition had not changed.

¹ *Terry R. Hedman*, 38 ECAB 222 (1986).

² *Dominic M. DeScala*, 37 ECAB 369, 372 (1986); *Bobby Melton*, 33 ECAB 1305, 1308-09 (1982).

³ *See Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

Dr. Linder's reports are not sufficient to establish a change in the nature and extent of appellant's accepted employment injuries. In fact he indicated that appellant's condition had not changed. Dr. Linder indicated that appellant's condition was stable and that she was not capable of working her light-duty position as originally defined because working beyond four hours a day caused recurring symptoms.

The Office referred appellant for a second opinion evaluation with Dr. Patrick St. Pierre, an orthopedic surgeon. In a report dated June 25, 1996, Dr. St. Pierre noted appellant's history of injury and performed a physical examination. He found no objective findings to support that appellant was unable to work 5 days and 40 hours a week. Dr. St. Pierre stated, "I found no evidence that she should not be able to complete a 40-hour work week with the job description that was provided and with the caveat that she be allowed to have extended breaks to stretch and do her back exercises."

The medical evidence in the record does not establish that appellant sustained a recurrence of disability due to the change in the nature and extent of her employment-related condition. Dr. Linder indicated that appellant's condition had not changed and that he limited her work hours in order to prevent recurring symptoms. Dr. St. Pierre found that appellant was capable of working 40 hours a week in her limited-duty position. As there is no medical evidence establishing a change in the nature or extent of appellant's employment-related condition or disability, she has failed to meet her burden of proof in establishing a recurrence of disability.

The Board further finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for consideration of the merits on May 15, 1997.

Appellant requested reconsideration of the Office's denial of recurrence of disability on April 4, 1997. By decision dated May 15, 1997, the Office refused to reopen appellant's claim for consideration of the merits.

Section 10.138(b)(1) of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.⁴ Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.⁵

In support of her request for reconsideration, appellant submitted additional medical evidence from Dr. Linder. On April 23, 1997 Dr. Linder completed a form report and diagnosed herniated disc. He indicated with a checkmark "yes" that appellant's current condition was due to her employment injury. Dr. Linder recommended that appellant work five hours a day with restrictions. He also completed a work restriction evaluation and indicated that appellant should

⁴ 20 C.F.R. § 10.138(b)(1).

⁵ 20 C.F.R. § 10.138(b)(2).

limit stress to the lumbar spine especially repetitive bending, stooping, twisting or lifting in excess of 35 pounds.

These reports are not sufficient to require the Office to reopen appellant's claim for consideration of the merits as the reports are not relevant to the issue for which the Office denied appellant's claim. The Office denied appellant's claim as she failed to submit rationalized medical opinion evidence establishing a change in the nature and extent of her employment-related condition such that she could not perform the light-duty work in accordance with her physician's original restrictions. Dr. Linder's reports did not offer any additional reasoning regarding why appellant could not perform her light-duty position for eight hours a day and did not describe a change in the nature and extent of her employment-related condition. As appellant failed to submit relevant new evidence, the Office properly denied her request for reconsideration.

Appellant's attorney also reviewed the medical evidence and argued that the Office had not properly considered the medical evidence of record. The Board finds that these arguments are not sufficient to establish that the Office erroneously applied or interpreted a point of law; or to advance a point of law or a fact not previously considered by the Office. Appellant's interpretation of the medical evidence is not sufficient to require the Office to reopen her claim for consideration of the merits.

As appellant neither submitted relevant new evidence nor argument, the Office properly refused to reopen her claim for consideration of the merits.

The Board further finds that the Office improperly determined appellant's wage-earning capacity based on her actual earnings.

Section 8115 of the Federal Employees' Compensation Act,⁶ titled "determination of wage-earning capacity," states in pertinent part: "In determining compensation for partial disability, ... the wage-earning capacity of an employee is determined by his actual earnings if his earnings fairly and reasonably represent his wage-earning capacity." Generally, wages actually earned are the best measure of a wage-earning capacity, and in the absence of evidence showing they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.⁷

In the present case, appellant returned to work as a modified clerk (rehabilitation assignment) on March 4, 1996. She began working less than 40 hours a week on March 8, 1996. Beginning in June 1996 appellant worked five days a week four and one-half hours a day. On May 15, 1997 the Office issued its decision finding that this position represented her wage-earning capacity and that appellant had no loss of wage-earning capacity based on her actual earnings.

⁶ 5 U.S.C. § 8115.

⁷ *Elbert Hicks*, 49 ECAB ____ (Docket No. 95-1448, issued January 20, 1998).

With regard to actions by the Office after a claimant has been reemployed, the Office's procedure manual provides in pertinent part as follows:

“(1) *After the claimant has been working for 60 days*, the [claims examiner] will determine whether the claimant's actual earnings fairly and reasonably represent his or her [wage-earning capacity.]”⁸ (Emphasis in the original.)

In the present case, appellant returned to work on March 4, 1996 but stopped working 40 hours a week on March 8, 1996. She did not work full time for the minimum 60-day period before the Office made a determination that her reemployment as a clerk fairly and reasonably represented her wage-earning capacity. Therefore, the Office's May 15, 1997 decision was improper and must be set aside.⁹

The decisions of the Office of Workers' Compensation Programs dated May 15, 1997 and February 11, 1997 pertaining to appellant's alleged recurrence of disability are hereby affirmed. The May 15, 1997 wage-earning capacity determination is hereby reversed.

Dated, Washington, D.C.
June 21, 1999

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.1814.7(c) (December 1993).

⁹ *Corlissia L. Sims (Smith)*; 46 ECAB 172, 179 (1994).