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

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| **D.C., Appellant** | ) | |
| **and** | ) | **Docket No. 06-1238** |
| | ) | **Issued: August 21, 2007** |
| **DEPARTMENT OF DEFENSE, DECA-WEST REGION, McCLELLAN AIR FORCE BASE, CA, Employer** | ) | |

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

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On May 1, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decisions dated January 5 and April 6, 2006, which denied modification of the Office's March 23, 2004 wage-earning capacity determination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

### ***ISSUES***

The issues are: (1) whether the Office met its burden of proof in reducing appellant's compensation based on its determination that the constructed position of a telephone sales representative represented her wage-earning capacity effective April 17, 2004; and (2) whether the Office properly denied modification of appellant's loss of wage-earning capacity determination.

### ***FACTUAL HISTORY***

On January 5, 1987 appellant, then a 32-year-old store worker, injured her left wrist at work. The Office accepted her claim for triangular fibrocartilage tear of the left wrist,

subluxation of the distal radio-ulnar joint and depressive disorder.[1] On April 29, 1987 appellant filed a traumatic injury claim for a left wrist injury which the Office accepted for a left wrist strain. She was working full time at the time of this incident.[2] Appellant missed work intermittently from January 1 through May 21, 1987. She had a left wrist arthroscopy on May 22, 1987 and excision of the triangle fibrocartilage and synovectomy on May 26, 1987. Appellant did not return to work and received appropriate compensation benefits.

By letters dated June 26, 2002, the Office referred appellant for a second opinion evaluation by Dr. Joseph Huston, a Board-certified orthopedic surgeon, and Dr. Sanford Pomerantz, a Board-certified psychiatrist and neurologist.

In a July 25, 2002 report, Dr. Pomerantz diagnosed depression, personality disorder with histrionic traits, a left arm injury and multiple sclerosis in remission and advised that there were no clear external stressors. He opined that appellant's emotional condition was due to her employment injury in that "her focus has been on the unsuccessful treatment of her injury which she can blame as a reason for her change in life style of being physically active to one with some physical limitations." Dr. Pomerantz noted that she did not objectively show any major limitations in her activities of daily living and that the "actual physical injury did not aggravate the underlying emotional condition." He added that there was "no incentive to resolve or reduce the aggravation because of secondary financial gain so that the condition will remain permanent." Dr. Pomerantz opined that appellant's emotional condition did not prevent her from working.

In a July 23, 2002 report, Dr. Huston reviewed appellant's history and noted subjective complaints of pain and numbness in the left arm. Appellant had grip and pinch weakness in the left hand and arm; recurrent subluxation of her distal radial ulnar joint and mild limitation of her left wrist range of motion. Dr. Huston opined that appellant could not work due to anxiety and panic attacks but that, regarding the left arm, she could perform very light work not requiring much active use of the arm. He stated that appellant could work four hours a day and could return to eight hours a day in about six months. Dr. Huston listed limitations of sitting for four hours; walking or standing for two hours; reaching, reaching above the shoulder and twisting for one hour; operating a motor vehicle for two hours; repetitive movements of the wrists and elbow for one hour; pushing and pulling up to 10 pounds with the left arm for one hour; and lifting of up to 3 pounds for one hour; and no climbing. He noted that appellant's panic attacks should be considered in identifying a position. In a December 27, 2002 supplemental report and work capacity evaluation, Dr. Huston agreed with Dr. Pomerantz that appellant could work eight hours daily with restrictions on reaching above the shoulder for one hour; operating a motor vehicle for two hours; engaging in repetitive wrist and elbow movements for two hours; pushing and pulling up to 10 pounds with the left arm for two hours; and lifting up to 3 pounds for two hours.

On December 9, 2002 the Office referred appellant to a vocational rehabilitation counselor, as the employing establishment was unable to make a job offer.

[1] In 1975 appellant had a nonwork-related injury to her right shoulder and both wrists when she fell off a boat onto rocks. She also has nonwork-related multiple sclerosis.

[2] This was under File No. 130825906. The Office combined this with the present claim.

In a June 25, 2003 prescription, Dr. C.R. Daluz, a Board-certified psychiatrist and treating physician, opined that appellant was unable to seek employment due to her panic attacks, depression and ongoing medical problems.

By letter dated October 3, 2003, the Office advised appellant that the position of a telephone sales representative was within her medical limitations. Appellant was further advised that Dr. Daluz's June 25, 2003 statement was unrationalized and insufficient to outweigh the reports of the second opinion physicians, Drs. Huston and Pomerantz. The Office advised her that her compensation would likely be reduced at the end of the rehabilitation program. On October 27, 2003 the employing establishment confirmed appellant's hourly pay rate. On December 17, 2003 the Office requested that Dr. Daluz provide information regarding appellant's work-related depression. On December 19, 2003 the Office informed appellant that the positions of a bank teller and of a telephone sales representative were suitable and within her medical limitations. The Office noted the commencement of vocational rehabilitation and advised that a local labor market survey showed that she would have the ability to earn wages of $18,720.00 or $20,800.00 per year at the end of the rehabilitation program, whether she was actually employed or not, and her compensation would likely be reduced.

In a January 27, 2004 report, Dr. Daluz noted that appellant might find gainful employment painful as she would have to "risk exposing her learning disability and the embarrassment that the inability to use her left hand through no obvious or visible cause is apparent." He opined that, if appellant was provided with treatment to deal with her emotional issues, she might be able to return to the workforce.

Appellant obtained part-time employment for 16 hours per week on February 17, 2004 at Curves, a fitness center, at the rate of $6.50 per hour. On April 30, 2004 the Office noted that appellant had completed 60 days of successful work.

Through contact with the vocational counselor, the Office found that the constructed position of a full-time telephone sales representative reasonably represented appellant's wage-earning capacity. In a July 15, 2003 job classification report, the vocational counselor identified a telephone sales representative position listed in the Department of Labor, *Dictionary of Occupational Titles* (DOT) No. 299.357-014, and provided information about the position including its availability and pay ranges within appellant's commuting area, as confirmed by state officials. He determined that this position was in accord with appellant's medical restrictions, background, education and experience. The counselor noted that no prior experience was required and that appellant had an Associate in Arts (AA) degree. He documented a reasonable labor market for a telephone sales representative position and noted that it was available in sufficient numbers so as to make it reasonably available within appellant's commuting area with wages from $9.00 to $10.00 per hour. The counselor also provided a job description for the position which was comprised of sedentary requirements related to soliciting orders for merchandise or service over the telephone, answering questions about products and maintaining records of sales or services.

On February 20, 2004 the Office notified appellant that it proposed to reduce her wage-loss compensation as the medical and factual evidence established that she was only partially

disabled and had the capacity to earn wages as a telephone sales representative at the rate of $360.00 per week.

By letter dated February 26, 2004, appellant alleged that she was seeking jobs as identified in the Office's February 20, 2004 letter; however, her current position had no set hours or benefits and only paid her $6.50 per hour, with a possible commission.

By decision dated March 23, 2004, the Office reduced appellant's compensation based on her ability to work as a full-time telephone sales representative which was found to be medically and vocationally suitable. The Office noted that appellant's part-time position had no bearing on her ability to earn wages as a telephone sales representative, nor did it support that she was unable to work full time as a telephone sales representative.

Appellant requested a hearing, which was held on November 5, 2004. By decision dated January 11, 2005, the Office hearing representative affirmed the March 23, 2004 decision.[3]

In an April 8, 2005 telephone call memorandum, appellant indicated that she had injured her back in her private-sector position and was unable to work. On November 17, 2005 appellant asked that the Office modify the loss of wage-earning capacity decision because she could not work. By letter dated November 18, 2005, the Office advised appellant of the criteria necessary to modify a formal loss of wage-earning capacity decision and requested that she submit such evidence within 30 days. In a November 27, 2005 letter, appellant alleged that her emotional condition had worsened. In a December 11, 2005 letter, although one physician released her to work because her condition was preexisting, she was only able to work 18 hours since she was released to work. Appellant also alleged that the original rating was in error.

By decision dated January 5, 2006, the Office denied modification of the March 23, 2004 loss of wage-earning capacity decision.

In a January 25, 2005 report, Dr. Daluz noted that appellant tripped on December 6, 2004 while working in her part-time position. She noted that, while appellant returned to work, her pain prevented her from performing certain duties. Dr. Daluz advised that appellant eventually quit her part-time position as she was "more or less bedridden due to the pain." She opined that the post-traumatic symptoms had recurred and the "tripping incident rekindled her previous trauma and reinforced her feelings of hopelessness and helplessness."

On February 3, 2006 appellant requested reconsideration. The Office received physical therapy reports and a December 6, 2004 emergency room report from Dr. Donald T. Mead, Board-certified in occupational medicine, diagnosing back strain that disabled appellant for two days. In another December 6, 2004 report, Laurel Vogton, a physician of unknown specialty, diagnosed low back strain with radiculopathy and recommended that appellant return to limited duty on December 15, 2004. On December 20, 2004 Dr. Mead diagnosed a compression fracture of the lumbar spine. A January 4, 2005 magnetic resonance imaging (MRI) scan report from Dr. Curtis P. Schworm, a Board-certified diagnostic radiologist, showed degeneration at L4-5

[3] The Office hearing representative found that, although appellant had located a part-time motivator telephone sales position, she was working part time while the evidence established that she could work full time.

and L5-S1. In a March 13, 2006 letter, appellant alleged that the December 6, 2004 incident aggravated her preexisting back condition and worsened her emotional condition.

In reports from January 18 to April 5, 2005, Dr. Michael L. Smith, a Board-certified internist, prescribed restrictions and placed appellant off work during work conditioning. On June 21, 2005 he noted that January 2003 and January 2005 MRI scans showed degeneration at L5-S1 at L4-5. Dr. Smith advised that he saw appellant in January 2005 for back and leg complaints, which appellant related to her trip at work in December 2004. He noted that the degenerative changes from 2003 to 2005 were "generally the same" and opined that it "would seem that she aggravated an underlying preexisting condition."[4] The Office also received copies of diagnostic reports dated November 16, 1999, January 9 and 17, 2003 and December 2004. In a September 29, 2005 report, Dr. Christopher Wilson, a Board-certified orthopedic surgeon, noted appellant's history and advised that appellant had preexisting lower back and extremity symptoms prior to her December 6, 2004 employment injury and opined that "causation would relate to preexisting degenerative changes and not to the events of [December 6, 2004]." He opined that "the assignment of any permanent physical limitations would have no relationship to her described injury of December 2004."

In an April 6, 2006 decision, the Office denied modification of its prior decision.

## ***LEGAL PRECEDENT -- ISSUE 1***

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[5]

Section 8115(a) of the Federal Employees' Compensation Act,[6] provides in determining compensation for partial disability, the wage-earning capacity of an employee is determined by her actual earnings if her actual earnings fairly and reasonably represent her 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] If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, her wage-earning capacity is determined with due regard to the nature of her injury, her degree of physical impairment, her usual employment, her age, her qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect her wage-earning capacity in his disabled condition.[8] Wage-earning capacity is a

[4] Dr. Smith further indicated that he would consider the December aggravation a new injury.

[5] *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984). *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

[6] 5 U.S.C. § 8115.

[7] *Hubert F. Myatt*, 32 ECAB 1994 (1981); *Lee R. Sires*, 23 ECAB 12 (1971).

[8] *See Pope D. Cox*, *supra* note 5; 5 U.S.C. § 8115(a).

measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[9]

## ***ANALYSIS -- ISSUE 1***

The record reflects that, prior to reducing appellant's compensation based on a finding that the constructed telephone sales representative represented her wage-earning capacity, appellant was employed as a part-time motivator for Curves, a fitness facility, for approximately 16 hours per week and earned $6.50 per hour as of February 17, 2004. The Office, however, did not rely on the actual wages of this employment. Rather, the Office, as noted, determined appellant's wage-earning capacity as of April 17, 2004 in a constructed position of a full-time telephone sales representative. It is well established that, if a claimant has actual earnings, the Office cannot use a selected position unless it makes a proper determination that actual earnings do not fairly and reasonably represent wage-earning capacity.[10]

The Board finds that the Office did not determine whether appellant's actual earnings as a part-time motivator fairly and reasonably represented her wage-earning capacity.

Office procedures provide:

> "When an employee cannot return to the date-of-injury job because of disability due to work-related injury or disease, but does return to alternative employment with an actual wage loss, the [claims examiner] must determine whether the earnings in the alternative employment fairly and reasonably represent the employee's [wage-earning capacity]. Following is an outline of actions to be taken by the [claims examiner] when a partially disabled claimant returns to alternative work:
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> > a. *Factors Considered*. To determine whether the claimant's work fairly and reasonably represents his or her [wage-earning capacity], the [claims examiner] should consider whether the kind of appointment and tour of duty (see FECA PM 2-0900.3) are at least equivalent to those of the job held on date of injury. Unless they are, the [claims examiner] may not consider the work suitable.
> >
> > For instance, reemployment of a temporary or casual worker in another temporary or casual (USPS) position is proper, as long as it will last at least 90 days, and reemployment of a term or transitional (USPS) worker

[9] *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

[10] *See Daniel Renard*, 51 ECAB 466 (2000).

> in another term or transitional position is likewise acceptable. However, the reemployment may not be considered suitable when:
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> > (1) *The job is part time* (unless the claimant was a part-time worker at the time of injury) or sporadic in nature;
> >
> > (2) *The job is seasonal* in an area where year-round employment is available. If an employee obtains seasonal work voluntarily in an area where year-round work is generally performed, the [claims examiner] should carefully determine whether such work is truly representative of the claimant's [wage-earning capacity]; or
> >
> > (3) *The job is temporary* where the claimant's previous job was permanent."[11]

In addition, the procedures note:

> "*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]. If so, a formal decision should be issued no later than 90 days after the date of return to work. If not, the [claims examiner] should proceed with a constructed [loss of wage-earning capacity] by asking the RS to identify two suitable jobs and applying the factors set forth under 5 U.S.C. [§] 8115(a)…."[12]

In this case, on March 23, 2004, the Office issued a decision and determined appellant's wage-earning capacity based on the constructed position of a full-time telephone sales representative. However, the Office did not consider appellant's part-time position as a motivator, which she began on February 17, 2004. Before utilizing the constructed position, the Office should have waited the required 60 days and then determined whether appellant's actual earnings in the part-time motivator position fairly and reasonably represented her wage-earning capacity. If not, then the claims examiner could have proceeded with the constructed position.

As the Office did not properly consider whether appellant's actual earnings as a motivator fairly and reasonably represented her wage-earning capacity, the Office did not meet its burden of proof in reducing appellant's compensation based on its determination that the constructed position of a telephone sales representative represented her wage-earning capacity effective February 20, 2004.[13]

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

[12] *Id*. at 2.814.7(c)(1).

[13] In light of the Board's disposition on the first issue, the second issue is moot.

## ***CONCLUSION***

The Board finds that the Office did not meet its burden of proof in reducing appellant's compensation based on the constructed position of a telephone sales representative effective February 20, 2004.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the April 6 and January 5, 2006 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: August 21, 2007
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board