

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CLAUDETTE THOMPSON and U.S. POSTAL SERVICE,
POST OFFICE, Pittsburgh, PA

*Docket No. 00-1968; Submitted on the Record;
Issued February 22, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly determined that the position of telephone solicitor reasonably represented appellant's wage-earning capacity.

On July 11, 1992 appellant, then a 42-year-old postal clerk, filed a notice of traumatic injury claiming that while performing her duties she was hit on the right shoulder by an APC truck. Her claim was accepted for right arm tendinitis and was later expanded to include left shoulder tendinitis. Appellant stopped work on November 3, 1992 and underwent left shoulder surgery on March 5, 1993.

In a report dated September 15, 1993, Dr. F.X. Plunkett, a Board-certified orthopedic surgeon, stated that appellant was able to work a full-time sedentary job but that she could no longer perform her normal duties as a postal clerk. He listed appellant's restrictions as limited lifting, limited use of either hand and a maximum 10-pound weight restriction. Dr. Plunkett noted that she could answer the telephone and do clerical/type work as long as it did not involve repetitive tasks.

In a work capacity evaluation dated September 5, 1997, Dr. Elliot M. Michel, a Board-certified psychiatrist and neurologist, also indicated that appellant could work eight hours per day. Dr. Michel stated that she should limit her activities of lifting, pulling and pushing both arms. He noted that appellant could lift up to 10 pounds with no pushing or pulling and no repetitive motions of the wrist or elbow.

In a functional capacity evaluation dated November 11, 1997, Maureen E. Westland recommended that appellant be placed in a light-duty position with light hand tasks and avoid pushing or pulling with her right upper extremity. She noted that appellant could occasionally lift and or carry 10 pounds and frequently lift negligible weights.

In a report dated October 16, 1998, Donna M. Kulick, a rehabilitation counselor, stated that appellant was qualified and could perform the job of telephone solicitor. Ms. Kulick indicated that this position was within appellant's medical restrictions, within her commuting area, and within her work abilities. She provided a job description for the position of telephone solicitor, which indicated that the position was sedentary with occasional lifting of up to 10 pounds and paid wages of \$340.80 per week. She stated that appellant had been able to learn semi-skilled work in the past through on-the-job training.

In a notice of proposed reduction of compensation dated December 28, 1998, the Office advised appellant that it proposed to reduce her compensation benefits for the reason that she was no longer totally disabled and that she had the capacity to earn the wages of a telephone solicitor at the rate of \$340.80 per week.

By decision dated February 12, 1999, the Office adjusted appellant's compensation benefits effective February 17, 1999 on the grounds that the evidence of record established that she was no longer totally disabled for work due to the effects of her July 11, 1992 employment injury and that she was capable of performing the position of telephone solicitor. The Office stated that the wage-earning capacity determination took into consideration such factors as actual earnings, the employee's disability, training, experience, age and the availability of such work in the area where the employee lived.

By letter dated March 1, 1999, appellant requested an oral hearing. She stated that she was not qualified to perform the duties of a telephone solicitor because she reads and writes at the third and fourth grade level, and "regardless of her physical ability to lift a [tele]phone receiver and speak on a telephone," she would not otherwise qualify for this position. Appellant indicated that she has no experience with this type of work.

At the oral hearing held on September 28, 1999, appellant claimed that she could not perform this job because she had a ninth grade education and a fifth grade reading level. She also stated that she had never held a job where she had read from a script or had contact with the public. By decision dated March 24, 2000, the hearing representative affirmed the Office's February 12, 1999 decision.

The Board finds that the Office properly determined that the position of telephone solicitor reasonably reflected appellant's wage-earning capacity effective February 17, 1999, the date that it reduced her compensation benefits.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of benefits.¹

Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, his wage-

¹ *David W. Green*, 43 ECAB 883 (1992); *Harold S. McGough*, 36 ECAB 332 (1984).

earning capacity is determined with due regard to the nature of his injury, his degree of physical impairment, his usual employment, his age, his 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.² Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.³ The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.⁴

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office or to an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits that employee's capabilities with regard to his physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service.

In this case, the Office received information from several physicians indicating that appellant could work 8 hours per day in a sedentary position with no lifting over 10 pounds. In a report dated October 16, 1998, Ms. Kulick, a rehabilitation counselor, stated that appellant was qualified and could perform the job of telephone solicitor. The *Dictionary of Occupational Titles* (DOT) describes the job requirements as sedentary, (maximum lifting of 10 pounds) the ability to occasionally reach and handle, ability to finger, hear and talk, occasional near acuity, frequent accommodation, moderate noise intensity levels and requires 30 days to 3 months of "on-the-job" training. Appellant claimed that she could not perform the duties of telephone solicitor because she reads and writes at the third and fourth grade level and has never had any experience with this type of work. The Board notes, however, that appellant's rehabilitation counselor indicated that appellant has been able to learn semi-skilled work in the past through on-the-job training. The position of telephone solicitor includes 30 days to 3 months of "on-the-job" training. The position also does not require a certain level of reading proficiency. As the position does not have a requirement for a certain reading level and provides on-the-job training, the Board finds that appellant's contentions are unwarranted.

The Board finds that the Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment and age, and employment qualifications, in determining that the position of caseworker represented appellant's wage-earning capacity.⁵ The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of telephone solicitor and that such a position was reasonably available within the general labor market of appellant's commuting area. Therefore, the Office properly determined that the

² *Pope D. Cox*, 39 ECAB 143, 148 (1988).

³ *Albert L. Poe*, 37 ECAB 684, 690 (1986).

⁴ *Id.*

⁵ *Clayton Varner*, 37 ECAB 248, 256 (1985).

position of telephone solicitor reflected appellant's wage-earning capacity effective February 17, 1999.

The March 24, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
February 22, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member