

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of KAY L. MATHIESEN and U.S. POSTAL SERVICE,  
POST OFFICE, Eugene, OR

*Docket No. 01-195; Submitted on the Record;  
Issued September 18, 2002*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly found that appellant was entitled to disability compensation from February 12, 1992 through June 13, 1996 based on her capacity to perform the duties of a cashier II.

On March 17, 1981 appellant, a 32-year-old letter carrier, injured her left ankle in the performance of duty. She filed a claim for benefits on March 21, 1981, which the Office accepted for sprained left ankle. The Office expanded its acceptance to include the condition of left foot neuroma and authorized four surgical procedures on appellant's left ankle. The Office paid appellant compensation for temporary total disability.

On January 12, 1982 appellant resigned from the employing establishment, at which time she began working in a family-owned bakery business.

On February 12, 1992 appellant filed a claim for recurrence of disability, alleging that she was unable to continue working at gainful employment due to residuals from her 1981 employment injury.

On February 24, 1992 the Office referred appellant to a panel of medical consultants in order to determine whether she was capable of performing suitable employment.

In a report dated March 11, 1992, Dr. James C. Dineen, an orthopedist, noted appellant's complaints of constant pain in her left leg and left foot, but concluded that the record contained minimal objective evidence of abnormalities. Dr. Dineen completed a work restriction evaluation on April 20, 1992 in which he outlined the following restrictions: lifting not exceeding 20 to 50 pounds, for no more than 6 hours; walking not exceeding 6 hours; kneeling more than 3 hours; standing more than 6 hours.

Appellant submitted an April 14, 1992 report from Dr. Edward A. Heusch, an osteopath, who stated that appellant had developed a low back pain resulting from an inverted gait, caused by her accepted left foot condition.

By decision dated October 27, 1992, the Office denied appellant's claim for recurrence of disability. The Office found that the panel of physicians who examined appellant on March 11, 1992 represented the weight of the medical evidence.

By letter dated November 10, 1992, appellant requested reconsideration.

By decision dated November 23, 1992, the Office denied reconsideration.

By letter dated November 19, 1993, appellant requested reconsideration.

By decision dated December 7, 1993, the Office set aside the previous Office decisions. The Office noted that the claims examiner had improperly contacted Dr. Dineen by telephone and that his opinion that appellant was capable of working an eight-hour job with minimal restrictions was, therefore, invalid. The Office also noted that Dr. Heusch's opinion regarding a consequential low back injury had not been considered or adjudicated. The Office, therefore, remanded for further development of the medical evidence<sup>1</sup> and requested appellant to provide full details on her employment history subsequent to her January 12, 1982 resignation from the employing establishment and to obtain documentation of such history from the Social Security Administration.

On June 14, 1996 appellant filed a claim for continuing compensation beginning June 14, 1996 and continuing, which the Office accepted on July 23, 1996. She continued to submit claims based on continuing compensation for her disability, which the Office continued to pay until May 10, 1997, at which time she accepted reemployment as a general clerk with the employing establishment.

By letter to the Office dated July 14, 1998, appellant noted that the Office, in its December 8, 1993 decision, had set aside the previous Office decision denying compensation based on loss of wages commencing in February 1990, but had not made a specific determination regarding whether she was entitled to either partial or total disability and for what periods. Appellant, therefore, requested a determination as to whether she was entitled to compensation for wage loss beginning in 1992 and continuing, up until the Office began paying her temporary total disability compensation in June 1996. Appellant submitted a Form CA-8, requesting continuing compensation through June 13, 1996.

In an inter-Office memorandum dated May 10, 1999, the Office recommended referring appellant's medical and employment records to a vocational rehabilitation specialist, in order to obtain information regarding cashier/counter sales positions in the Portland area as of February 1992. The Office stated that, once it obtained this information, it would then compare

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<sup>1</sup> By letter dated December 8, 1993, the Office asked Dr. Heusch to provide additional information regarding his opinion that appellant developed a consequential back condition resulting from his accepted left foot condition. Dr. Heusch did not respond to this letter.

it to the February 1992 salary for letter carrier, level five, in order to determine her wage-earning capacity from February 12, 1992 through June 13, 1996.

By letter dated May 12, 1999, the Office asked the vocational specialist to provide labor market information in order to determine appellant's ability to perform modified employment from February 12, 1992 through June 13, 1996. The Office stated that appellant's only work restrictions at the time were that she was unable to work for prolonged periods, but that she had demonstrated she was capable of performing such activity, in light of the jobs she actually worked at that time.

Appellant provided information regarding her work history from 1992 through 1996, stating that she had been employed at Nature's Fresh Food Store as a deli worker preparing sandwiches and selling food from February 1991 through March 1992; as a sales clerk for Yard Birds, a landscaping company, from approximately September 1994 through March 1996; and as a self-employed domestic housecleaner from October 1995 through March 1996, for approximately four hours a day, five days a week.<sup>2</sup>

By letter to the Office dated May 14, 1999, the employing establishment, in response to an inquiry from the Office, stated that the pay rate for a city carrier, level five, in February 1992 was \$28,187.00, which, when adjusted for cost-of-living increases, amounted to \$30,912.00.

By letter to the Office dated July 1, 1999, a vocational rehabilitation specialist, relying on the work restrictions outlined by Dr. Dineen determined that appellant could work as a cashier II and that the average annual salary for cashiers in 1992 was \$14,223.00, which, when adjusted for inflation, amounted to \$16,300.00 in 1997. The vocational specialist, relying on information provided by the Oregon Employment Department, stated that the positions of cashier and counter clerk were performed in sufficient numbers between 1992 and 1996 so as to be considered reasonably available in the labor market. The vocational counselor recommended several positions located by the vocational counselor, including that of cashier II, which, he determined, reasonably reflected appellant's ability to earn wages.<sup>3</sup>

By decision dated August 31, 1999, the Office found that appellant was entitled to compensation for disability from February 12, 1992 through June 13, 1996. The Office, relying on the information provided by the vocational counselor, determined that the evidence of record showed appellant was capable of working part time in February 1992 at the position of cashier II, which represented her wage-earning capacity. The Office stated that the case had been referred to a vocational rehabilitation counselor, who had located a position as cashier II which

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<sup>2</sup> Information obtained from the Social Security Administration indicates that appellant worked at Nature Fresh in 1992, earning a total of \$874.83; \$648.00 in 1995 and \$48.00 in 1996. It also indicated that appellant worked at Yard Birds in 1992, earning a total of \$152.07; \$3,417.58 in 1993; and \$834.00 in 1994.

<sup>3</sup> The job description indicated appellant would engage in work typical of a cashier, including receiving cash from customers or employees in payment for goods or services and recording amounts received. In addition, the job would require appellant to compute the bill, itemize lists and tickets showing the amount due, using an adding machine or a cash register. The physical requirements involved exerting force up to 20 pounds occasionally, or up to 10 pounds frequently, or negligible force constantly and might involve significant standing, walking, pushing and pulling.

he found to be suitable for appellant given her work restrictions and was available in appellant's geographical area.

By letter dated September 14, 1999, appellant requested an oral hearing, which was held on April 26, 2000.

By decision dated September 25, 2000, an Office hearing representative affirmed the August 31, 1999 Office decision.

The Board finds that the Office did not meet its burden of proof in finding that appellant was entitled to disability compensation from February 12, 1992 through June 13, 1996 due to the effects of her March 17, 1981 employment injury.

In its August 31, 1999 decision, the Office relied on the vocational specialist's finding that the position of cashier II was suitable for appellant based on the restrictions outlined by Dr. Dineen in his April 20, 1992 work restriction evaluation. This report, however, was determined to be invalid by the Office in its December 7, 1993 decision due to improper telephone contact between Dr. Dineen and the claims examiner.<sup>4</sup> Dr. Dineen's report was the only medical evidence of record pertaining to appellant's work capacity at the time of the Office's decision. Thus, the Office erred in finding that the cashier II position was suitable for appellant, as its determination was based on invalidated medical evidence.

Accordingly, the Board finds that the medical evidence does not establish that the position was within appellant's physical limitations. The Office did not meet its burden of proof in this case.<sup>5</sup> Therefore, the Office's August 31, 1999 decision finding that appellant was capable of performing suitable work based on her ability to perform the cashier II position and that she was, therefore, only entitled to disability compensation from February 13, 1992 through June 14, 1996, is set aside.

The Board notes that the records provided by the Social Security Administration demonstrate that appellant was capable of performing gainful employment during the aforementioned period and that appellant's wage-earning capacity could, therefore, be based on actual wages. The Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2, 814.7 (December 1993) states:

"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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<sup>4</sup> See *Carlton L. Owens*, 36 ECAB 608 (1985).

<sup>5</sup> *Barbara R. Bryant*, 47 ECAB 715 (1996).

a. Factors Considered. To determine whether the work obtained by the claimant fairly and reasonably represents his or her wage-earning capacity, the claims examiner should consider such factors as whether:

- (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."

In addition, the FECA manual states:

"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 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)."

"Retroactive Determinations. Where the Office learns that the claimant has returned to alternative work more than 60 days after the fact, the claims examiner may consider a retroactive loss wage-earning compensation determination. Such a determination may be appropriate where an investigation reveals that a claimant held private employment and had earnings, which were not reported to Office.... A retroactive decision may be made if:

- (1) [Appellant] has worked in the position for at least 60 days;
- (2) The [claims examiner] has determined that the employment fairly and reasonably represents the [wage-earning capacity] (an assessment of suitability need not be made); and
- (3) The work stoppage did not occur because of any change in the claimant's injury-related condition affecting ability to work."

In this case, appellant's employment records, as documented by the Social Security Administration, indicated that she earned \$874.83 from Nature Fresh in 1992, \$152.07 from Yard Birds in 1992 and \$3,417.58 from Yard Birds in 1993. Appellant herself stated that she worked as a self-employed domestic housecleaner from October 1995 through March 1996, for approximately four hours per day, five days per week. These records, which show that appellant

returned to alternative employment subsequent to February 1992, provide a basis for a determination as to whether the earnings in the alternative employment fairly and reasonably represent her employee's wage-earning capacity.

Therefore, the case is remanded to the Office for a determination as to whether appellant's wage-earning capacity between February 12, 1992 and June 13, 1996 should be based on her actual wages during that period. After such development of the case record as the Office deems necessary, a *de novo* decision shall be issued.

The September 25, 2000 decision of the Office of Workers' Compensation Programs is hereby set aside and the case remanded for further action consistent with this decision of the Board.

Dated, Washington, DC  
September 18, 2002

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member