

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

LORRAINE F. GAINES, Appellant

and

**DEPARTMENT OF THE AIR FORCE, TRAVIS
AIR FORCE BASE, CA, Employer**

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**Docket No. 05-900
Issued: January 23, 2006**

Appearances:
Lorraine F. Gaines, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 9, 2005 appellant filed a timely appeal of January 19, 2005 and October 14, 2004 merit decisions of the Office of Workers' Compensation Programs that reduced her compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether the Office properly reduced appellant's compensation effective October 31, 2004, based on her capacity to earn wages as a medical collection clerk.

FACTUAL HISTORY

On September 12, 1989 appellant, then a 32-year-old hazardous cargo inspector, filed a claim for compensation for a traumatic injury to her right elbow sustained the previous day when she lost her footing and fell. On December 1, 1993 she filed a claim for compensation for an occupational disease of right epicondylitis and right carpal tunnel syndrome aggravated by typing, operating a computer, using a hand-held terminal and writing. On November 28, 1994

appellant filed a claim for compensation for an occupational disease of left carpal tunnel syndrome that she attributed to the same work factors.

The Office accepted that appellant sustained epicondylitis of her right elbow and bilateral carpal tunnel syndrome. On September 20, 1995 she filed a claim for compensation for occupational diseases of bilateral bursitis of the shoulders, and degenerative osteoarthritis of the spine, right leg and cervical vertebrae. Appellant attributed these conditions to wear and tear from her employment. The Office accepted that she sustained a lumbar subluxation. On January 2, 1996 appellant elected to receive workers' compensation benefits in preference to retirement benefits effective January 13, 1995.¹ The Office paid appropriate compensation for temporary total disability beginning that date. In September 1999, appellant underwent carpal tunnel release surgery on her left wrist.

Appellant returned to work at the employing establishment as a medical clerk on July 7, 2000. By decision dated September 11, 2000, the Office found that her actual earnings in this position represented her wage-earning capacity. On November 22, 2000 the Office issued appellant a schedule award for an 11 percent impairment of each arm. She stopped work when the employing establishment was no longer able to accommodate her disability and the Office resumed payment of compensation on April 22, 2001. Appellant underwent a right carpal tunnel release and ulnar nerve decompression on August 30, 2001, authorized by the Office.

In an April 29, 2002 report Dr. James O. Gemmer, appellant's attending Board-certified orthopedic surgeon, stated that her ulnar and median motor function appeared to be intact, that her de Quervain's disease was less symptomatic than before and that she would likely have permanent restrictions of simple grasping and repetitive hand movements up to two hours per day and pushing and lifting up to 10 pounds. Appellant moved to Louisiana and the Office authorized treatment by Dr. William J. Hubbard, a Board-certified orthopedic surgeon. In a December 2, 2002 report he described his treatment of left thoracic pain of insidious onset and bilateral knee degenerative joint disease and stated that he was unable to relate her complaints to any specific work injuries. In a December 19, 2002 report, Dr. Hubbard stated that appellant had reached maximum medical improvement and been sent to a functional capacity evaluation and nerve conduction studies. Nerve conduction studies of her upper extremities by Dr. Paul Kramm, a Board-certified physiatrist and associate of Dr. Hubbard, were obtained on February 13, 2003. They demonstrated no evidence for a neuropathic process, including no recurrence of carpal tunnel syndrome, no ulnar entrapment and no cervical radiculopathy. In a March 25, 2003 report, Dr. Kramm diagnosed widespread regional myofascial pain, ulnar neuropathy, de Quervain's disease and medial epicondylitis and stated that, with negative electromyography, neuropathy was less likely and a composite of myofascial trigger points was more likely a significant pain generator for appellant.

On April 28, 2003 a private rehabilitation counselor under contract with the Office stated that the position of medical collection clerk was reasonably available in appellant's commuting

¹ The Office of Personnel Management approved appellant's application for disability retirement on July 28, 1995.

area at a salary of \$400.00 per week.² The physical demands of this position were described as sedentary, with frequent reaching and handling required.³

In an April 26, 2004 report, Dr. Kramm stated that medication had helped with appellant's lumbar spine pain and that the pain was moving around from her tailbone to her upper back. He diagnosed sacroiliac dysfunction. In a July 27, 2004 report, Dr. Kramm reported that appellant now had bilateral trapezius pain and he diagnosed shoulder/trapezius spasms.

On September 14, 2004 the Office issued a notice of proposed reduction of compensation on the basis that appellant had the capacity to earn wages as a medical collection clerk. The Office found that the April 29, 2002 report of Dr. Gemmer describing permanent work restrictions was the best representation of her work capabilities. The Office allotted appellant 30 days to respond to the proposal to reduce her compensation. By decision dated October 14, 2004, the Office reduced appellant's compensation effective October 31, 2004, based on her capacity to earn wages as a medical collection clerk.

By letter dated October 12, 2004, received by the Office October 15, 2004, appellant submitted an October 12, 2004 report from Dr. Kramm, who stated that she had experienced "chronic pain as a result of her bilateral lateral epicondylitis, right wrist pain and weakness and with moderate neuritis of both upper limbs and that her carpal tunnel surgery resulted in "some improvement in the tingling and numbness, but she never improved to the point where her strength came back." He stated that she was unable to type for long, that she could not do much in the area of repetitive use of her hands and that she needed frequent breaks as her endurance tolerance secondary to the pain was not very good. Dr. Kramm concluded: "Because of the above, I do not see [appellant] as being able to perform the work level as mentioned. Even though it is listed as sedentary, a medical collections clerk does require repetitive upper extremity use from my interpretation of the job description; therefore, I do not believe she would qualify for this [position]."

By decision dated January 19, 2005, the Office found the evidence insufficient to modify the October 14, 2004 decision, finding that Dr. Kramm's October 12, 2004 report supported its position that appellant was partially disabled.

LEGAL PRECEDENT

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.⁴ 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 her wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity or if the employee has no actual earnings, her wage-earning

² Department of Labor, *Dictionary of Occupational Titles* No. 241.357.010.

³ Frequent was defined as an activity existing from one-third to two-thirds of the time.

⁴ *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

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.⁵

When the employee has no actual earnings and the Office bases its determination of his or her wage-earning capacity on a position in the open labor market, the Office has the burden of establishing that the duties of the selected position are within the employee's medical restrictions.⁶ The evidence must also establish that jobs in the position selected for determining the employee's wage-earning capacity are reasonably available in the general labor market in the employee's commuting area.⁷

ANALYSIS

The Office did not establish that the constructed position of medical collection clerk represented appellant's wage-earning capacity as of October 31, 2004, the date it reduced her compensation. The evidence does not establish that the position of medical collection clerk is available in appellant's commuting area. The most recent assessment of the availability of the selected position was done by a rehabilitation counselor on April 28, 2003, 18 months before the Office's decision. This assessment does not reflect the availability of the selected position at the time of the Office's October 14, 2004 determination of appellant's loss of wage-earning capacity.⁸

Further, the medical evidence does not establish that appellant could perform the duties of the selected position of medical collection clerk. The Office relied on the April 29, 2002 report of Dr. Gemmer, her attending physician, as the basis of its October 14, 2004 decision finding that she could perform the duties of the selected position. The report of his does not establish that appellant could perform the duties of the selected position of medical collection clerk. Dr. Gemmer indicated that she could perform simple grasping and repetitive hand motions up to two hours per day. While the categories of work activities in the *Dictionary of Occupational Titles* do not correlate exactly to the restrictions of his report, the category most closely matching these restrictions is "handling." For the position of medical collection clerk, the *Dictionary of Occupational Titles* indicates that handling would be required one-third to two-thirds of the time, which would exceed the two hours of grasping and repetitive hand movements allowed by Dr. Gemmer for an eight-hour day. At best, his restrictions are not clear or equivocal when compared to the physical requirements of the selected position, in which case the Office's procedure manual requires that it obtain further medical evidence as to the nature of the

⁵ 5 U.S.C. § 8115(a).

⁶ *Francisco Bermudez*, 51 ECAB 506 (2000).

⁷ *Phillip S. Deering*, 47 ECAB 692 (1996); *Samuel J. Chavez*, 44 ECAB 431 (1993).

⁸ See *Thomas W. Bell*, 35 ECAB 150 (1983), where the Board found that the Office improperly found that the employee refused suitable work because there was no evidence that the position offered to him in 1978 was still available as of the effective date of the Office's decision in 1982.

recommended restrictions which the Office did not do.⁹ Dr. Kramm, in a report dated October 12, 2004, reviewed the duties of the selected position of medical collection clerk and concluded that appellant could not perform this position due to residuals of her accepted conditions. The medical evidence of record is not sufficient to establish her capacity to perform the duties of the constructed position.

CONCLUSION

The Office did not meet its burden of proof to reduce appellant's compensation based on her capacity to earn wages as a medical collection clerk.

ORDER

IT IS HEREBY ORDERED THAT the January 19, 2005 and October 14, 2004 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: January 23, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(c) (December 1995).