

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ARVELLA A. MANSAW and DEPARTMENT OF DEFENSE,
DEFENSE FINANCE ACCOUNTING SERVICE, Kansas City, Mo.

*Docket No. 96-2145; Submitted on the Record;
Issued April 27, 1998*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly determined that the part-time position of collection clerk fairly and reasonably represented appellant's wage-earning capacity effective March 11, 1994, the date it reduced her compensation benefits.

On April 24, 1987 appellant, then a 47-year-old management analyst, injured her back while packing files for relocation. Appellant stopped work on April 30, 1987. The Office initially accepted appellant's claim for acute lumbar strain and later accepted her claim for herniated disc at L4-5 and a discectomy of August 12, 1987.¹ Appellant returned to work on May 1, 1987 but stopped work when she reinjured her back. She returned to limited-duty work again on May 26, 1987. On August 7, 1987 appellant stopped work and on August 12, 1987 appellant underwent discectomy and foramenotomy surgery. Appellant received appropriate compensation. From November 3 to 19, 1987 appellant underwent a work-hardening program. Appellant was hospitalized from November 19 to 25, 1987 due to hypertension and atherosclerotic heart disease with angina. Appellant participated in an Office rehabilitation program beginning February 25, 1988 and returned to work for four hours a day beginning April 4, 1988.

On October 7, 1988 appellant filed another traumatic injury claim for injury to her lower back when she slipped and fell to the floor while attempting to sit in a chair. The Office accepted appellant's claim for lumbosacral strain. Appellant returned to work for four hours a day on January 4, 1989. After further development of the medical evidence, the Office determined that appellant was temporarily totally disabled beginning July 25, 1989.

¹ Appellant had a prior work-related injury to her back on December 4, 1985 when she slipped and fell on a wet floor at work. Her claim was accepted for acute lumbar strain.

Rehabilitation efforts continued throughout appellant's period of temporary total disability. On July 25, 1990 appellant's rehabilitation counselor, David Greimann, recommended that the Office proceed with a loss of wage-earning capacity rating as appellant had not followed through with employer contacts for employment as a collection clerk.

In a letter dated February 3, 1992, the Office notified appellant of a proposed reduction in compensation on the grounds that she was no longer disabled and had the capacity to earn wages as a collection clerk. The Office attached a report by the rehabilitation counselor dated July 31, 1990, and a medical report dated July 15, 1991 by Dr. L.F. Glaser, a Board-certified orthopedic surgeon and appellant's treating physician.² Dr. Glaser diagnosed the following conditions: surgical post-laminectomy with persistent back and left leg pain, spondylolisthesis, first degree L5-6 and transitional L6 lumbar vertebra. On a work restriction form he indicated that appellant could work four hours a day with restrictions of sitting continuously for four hours, walking, lifting, bending, and squatting intermittently for four hours, no climbing and kneeling, and intermittent twisting and standing.

In a decision dated March 12, 1992, the Office determined that appellant's wage-earning capacity was \$78.38 per week as represented by a part-time position as a collection clerk and adjusted her compensation benefits from that of total disability to that of partial disability effective April 5, 1992.

In a letter dated April 8, 1992, appellant requested a review of the written record. In a decision dated July 15, 1992, an Office hearing representative reversed the Office's March 12, 1992 decision on the grounds that although the Office properly determined that the position of collection clerk, *Dictionary of Occupational Titles* (DOT) 214-357-010, was within appellant's work limitations, it had not determined if the job was reasonably available in her commuting area. Consequently, appellant's compensation was reinstated at a full temporary total disability rate retroactive to April 5, 1992, less previously paid compensation.

On remand the Office requested that the rehabilitation specialist obtain specific information concerning whether the designated position was available as a part-time position in appellant's commuting area. In reports dated March 8, 1993 and March 2, 1994 Marianne K. Lumpe, a rehabilitation counselor, reported that a labor market survey for appellant's commuting area revealed that collection agencies completed their work telephonically, the job described in DOT Number 241.357-010 as a collection clerk covered all possible tasks that might be performed if appellant was hired and the employers listing full-time job openings indicated that the jobs might have to be broken into part-time jobs as it was difficult to hire for full-time collections. Ms. Lumpe concluded that the job was being performed in sufficient numbers so as to make it reasonably available to appellant within her commuting area.

The Office also requested that Dr. Glaser provide them with an opinion regarding whether appellant would be capable of performing the position of collection clerk. In a report dated April 12, 1993, Dr. Glaser indicated that he had reviewed the suggested position which

² Dr. Glaser was originally an Office referral physician who performed a second opinion examination. However, appellant requested that Dr. Glaser be made her treating physician shortly after that examination.

was sedentary in nature and did not require lifting over 10 pounds. He noted that he was well acquainted with appellant's current orthopedic status, and she could physically do the job of a collection clerk.

In a letter dated January 7, 1994, the Office again proposed a reduction in appellant's compensation on the grounds that she was no longer totally disabled and had the capacity to do the work of a collection clerk, a position readily available within appellant's commuting area, based on the report of Dr. Glaser.

In response to the letter of proposed reduction in compensation, appellant submitted a report dated February 7, 1994 by Dr. Thomas B. McKeel, a Board-certified internist, who noted that appellant was under his care for coronary artery disease, peptic acid disease and hypertension. She also submitted a report by Venda R. Johnson, a vocational rehabilitation specialist, who indicated that the collector's job would be physically outside appellant's restrictions because it would require twisting and bending while driving, her back condition would affect her concentration and her heart condition would be aggravated due to the stressful nature of the position. In a report dated January 25, 1994, Dr. Glaser reiterated that appellant was capable of performing the position of collection clerk. In a report and a letter dated February 1, 1994, Dr. Lizbeth D. Sussman, a Board-certified neurologist, diagnosed apparent S1 radiculopathy which caused persistent back pain and indicated that appellant was not capable of performing any work where she would have to sit for more than 20 to 30 minutes at a time. In a report dated February 22, 1994, Dr. Sussman reiterated that appellant could not sit for more than 30 minutes at time as it would exacerbate her back pain.

In a decision dated March 11, 1994, the Office determined that appellant's wage-earning capacity was \$88.83 per week as represented by the part-time position of collection clerk and adjusted her compensation from that of total disability to that of partial disability effective March 6, 1994.

By letter dated March 25, 1995, appellant requested an oral hearing before an Office hearing representative. Subsequently, appellant submitted additional medical evidence, including a report dated March 18, 1994 by Dr. Sussman in which she indicated that appellant had radiological evidence of radiculopathy which caused chronic low back pain and precluded prolonged sitting and which cannot be relieved by standing to ease the discomfort.

At her hearing on October 28, 1994, appellant submitted a personal affidavit and affidavits from family and friends generally asserting that appellant continued to experience pain and attesting to her physical deterioration since the employment injury. Appellant submitted a report dated March 6, 1992 by V. Leanne Hjertstedt, a psychologist, who noted that appellant was in constant pain, suffered from depression and was totally disabled from even a sedentary position due to her substantial medical problems. Appellant also submitted a medical report dated October 6, 1994 by Dr. Sussman, who diagnosed degenerative disease of the lumbar spine with persistent pain and consequent problems with bending, sitting, and standing and resubmitted previous reports by Dr. Sussman. The Office hearing representative kept the record open for 45 days and subsequent to the hearing, appellant submitted a report dated November 2, 1994 by Dr. Sussman in which she essentially reiterated her conclusions from her October 6, 1994 report.

In a decision dated January 4, 1994, the Office hearing representative found that the Office properly reduced appellant's compensation benefits after determining that her wage-earning capacity was \$110.00 per week as represented by a part-time position of a collection clerk for which appellant had the vocational and physical qualifications and which was reasonably available on a part-time basis within appellant's commuting area.

On June 23, 1995 appellant filed a request for reconsideration and submitted additional evidence she believed was supportive of her position. She submitted a new report by a vocational expert, Michael J. Dreiling, who opined that based on the reports by Drs. McKeel and Sussman he doubted that appellant would be able to perform any work in a competitive labor market. Appellant also submitted a report dated April 17, 1995 by Dr. Sussman who stated that based on her review of the job description for collection clerk, DOT 214-357-010, appellant could not work in this position due to moderately severe stenosis at the L4-5 level of the spine, scarring at level L4-5 of the extra dural space and a small herniation of the L4-5 disc. In a report dated May 8, 1995, Dr. McKeel also indicated that appellant suffered from chronic back pain which was disabling and concurred with Dr. Sussman's opinion that appellant could not work as a collection clerk.

In a letter dated September 14, 1995, the Office declared a conflict in the medical report evidence and referred appellant to Dr. Richard Whitehead, a Board-certified orthopedic surgeon for an impartial medical examination. In a report dated October 10, 1995, Dr. Whitehead diagnosed low back pain and left lower extremity pain associated with spinal stenosis which was secondary to spondylolisthesis at L5-6 and bulging disc at L4-5. He reported that appellant could perform the job of collection clerk either for 8 hours a day if she was permitted to be off her feet for 10 minutes each hour in a lounge type chair or for 4 hours each day albeit with some pain.

In a decision dated December 7, 1995, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted with her request for reconsideration created a conflict which an impartial medical examiner had resolved by concluding that appellant was capable of working either part time with pain or full time with certain restrictions. Thus, the Office reaffirmed its prior decision reducing appellant's compensation.

Appellant filed a second request for reconsideration and submitted a new report by Dr. Lizbeth D. Cravens (formerly Sussman). Dr. Sussman-Cravens³ reiterated her conclusion that appellant could not work four hours a day as a collection clerk.

In a merit decision dated May 21, 1996, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was not sufficient to establish modification of the prior decisions.

³ While a review of the record indicates that Dr. Cravens does not use a hyphenated version of her name as appears above, for clarity the Board will refer to her as Dr. Sussman-Cravens in this decision.

The Board finds that the Office improperly determined that the position of collection clerk fairly and reasonably represented appellant's wage-earning capacity effective March 6, 1994, the date it reduced her compensation.⁴

Once the Office accepts a claim, it has the burden of proving that the disability ceased or lessened in order to justify termination or modification of compensation. Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injuries and the degree of physical impairment, his or her usual employment, the employee's age and vocational qualifications and the availability of suitable employment.⁵ When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case 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 market, that fits the employee's capabilities with regard to his or her physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open market should be made through contact with the state employment service or other applicable services. Finally, application of the principles set forth in the *Alfred C. Shadrick*⁶ decision will result in the percentage of the employee's loss of wage-earning capacity.⁷

In the present case, the Office ultimately relied on the opinion of Dr. Whitehead, as an impartial medical examiner, to conclude that appellant had the capacity to perform the work of a collection clerk part time. Section 8123(a) of the Act⁸ states that if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination. The Office had declared a conflict presumably between the opinions of Dr. Glaser and Dr. Sussman-Cravens. However, Dr. Glaser was appellant's treating physician at the time he rendered the opinion utilized by the Office to declare a conflict. While it is true the Office requested that Dr. Glaser render an opinion as to the residuals of appellant's employment injury and he indicated in his July 1991 report that appellant could work part time as collection clerk, at that time Dr. Glaser was appellant's designated physician of record. Thus, the Office's request for information concerning whether appellant was capable of performing the work of the suggested position is the same as any such request of an attending physician, in any similar incidence, despite Dr. Glaser's past status as an Office referral physician in this case. Additionally, it is noted that a review of the record reveals that as late as April 11, 1994, the

⁴ The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal. As appellant filed her appeal with the Board on June 26, 1996, the only decisions before the Board are the Office's May 21, 1996 and December 7, 1995 decisions. See 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

⁵ See generally 5 U.S.C. § 8115(a), *The Law of Workmen's Compensation* § 57.22 (1989); see also *Betty F. Wade*, 37 ECAB 556 (1986).

⁶ 5 ECAB 376 (1953).

⁷ See *Hattie Drummond*, 39 ECAB 904 (1988); *Shadrick*, *supra* note 3.

⁸ 5 U.S.C. § 8123(a).

Office denied appellant's request to have her attending physician changed to Dr. Sussman-Cravens and indicated that Dr. Glaser was her attending physician. Accordingly, the Office improperly declared a conflict in the medical opinion evidence when the physicians involved were all appellant's physicians. Thus, the report by Dr. Whitehead is not entitled to special weight as the report of an impartial specialist. Rather, his report constitutes a second opinion examination by an Office referral physician based on the facts of this case. Thus, there is an unresolved conflict between the medical report evidence of Dr. Whitehead, an Office referral physician, and that of Drs. Sussman-Cravens and McKeel, appellant's treating physicians, regarding whether appellant is capable of performing the work of a collection clerk part time. Because there is an unresolved conflict, the Office has not met its burden of proof in reducing appellant's compensation based on its determination that that her wage-earning capacity was fairly and reasonably represented by the part-time position of collection clerk.

The decisions of the Office of Workers' Compensation Programs dated May 21, 1996 and December 7, 1995, are hereby reversed.

Dated, Washington, D.C.
April 27, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member