

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BARBARA J. ROSCOE and U.S. POSTAL SERVICE,
POST OFFICE, Cleveland, Ohio

*Docket No. 97-1180; Submitted on the Record;
Issued April 5, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation to reflect her wage-earning capacity as a general clerk.

On August 30, 1993 appellant, then a 39-year-old letter carrier, filed a claim alleging that she was injured when she slipped on a bag of garbage while exiting her postal vehicle, her foot twisted and she lost her balance. The Office accepted the claim for a chip fracture of the left talus with arthroscopic repair and temporary aggravation of degenerative disc disease of the spine. The back condition was consequential to appellant's limping associated with her ankle condition. Appellant also claimed that she injured her left elbow in the employment incident, but this condition was not accepted.

Appellant was off work from August 30 through October 24, 1993. She returned to limited-duty work on October 25, 1993. Appellant went off work again on February 24, 1994 for surgery of her left ankle. Appellant was terminated from the employing establishment in April 1994, as her temporary term expired.

In August 1994, appellant was released to work with restrictions by Dr. Bruce Cohn, a Board-certified orthopedic surgeon and appellant's treating physician. Appellant was subsequently referred for vocational rehabilitation services. As the employing establishment did not wish to reemploy appellant, she received vocational testing, vocational training in a 12-week clerical program, and placement services. Job goals were the positions of general clerk and telephone operator, both sedentary jobs within appellant's restrictions.

Following 12 weeks of job placement assistance, appellant had not obtained employment. On March 15, 1996 the Office issued a proposed notice to reduce compensation. The proposal

notified appellant that she would be rated as a general clerk and that this position was suitable and within her restrictions.¹

By decision dated April 19, 1996, the Office reduced appellant's compensation on the grounds that she had the wage-earning capacity as a general clerk.

Appellant disagreed with the April 19, 1996 decision and requested a hearing.

By decision dated November 7, 1996, an Office hearing representative vacated the decision of April 19, 1996 noting that the issue of whether appellant's temporary aggravation of degenerative disc disease had ceased or was permanent needed to be resolved. Contrary to appellant's assertion, the hearing representative found that appellant did not injure her elbow in the August 30, 1993 employment incident and, thus, her elbow condition was not a medical factor which needed to be considered in whether she could perform the duties of the general clerk position.

The Office referred appellant, together with her case record and a statement of accepted facts, to Dr. Sheldon Kaffen, a Board-certified orthopedic surgeon, for a second opinion examination. In a January 10, 1997 report, Dr. Kaffen noted the history of appellant's injury and appellant's subjective complaints concerning her low back and ankle pain. Examination findings revealed that appellant was significantly overweight. Examination of the left ankle revealed tenderness, but no swelling and full range of motion. Examination of the lumbar spine revealed tenderness and limited range of motion associated with pain complaints. Straight leg raising was negative bilaterally. Neurological examination revealed equal deep tendon reflexes bilaterally. There was no evidence of motor or sensory deficit. Dr. Kaffen concluded by stating that "it is my opinion, based on a reasonably medical certainty, that the aggravation of preexisting lumbar degenerative disc disease has ceased. I would estimate that the aggravation ceased approximately one year ago." He further noted that he reviewed the position description of a general clerk and felt that appellant could perform those duties.

By decision dated January 31, 1997, the Office denied appellant's claim for continuing compensation for temporary aggravation of degenerative disc disease on the basis that the evidence of file supported the fact that the aggravation had ceased. The estimated loss of wage-earning capacity decision of April 19, 1996 was reinstated.

The Board has reviewed the record and finds that the Office properly reduced appellant's compensation in this case.

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-earning capacity is determined with due regard to the nature of his injury, his degree of

¹ The Office erroneously identified the position of an order filler at the rate of \$307.69. The proper calculations for the position of general clerk are found in the computation sheet (Form CA-816) with a rate of \$268.00 per week.

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

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 labor market is made and the principles set forth in *Albert C. Shadrick* applied to determine the percentage of the employee's loss of wage-earning capacity.³

With respect to appellant's physical ability to perform the selected position of general clerk, an August 11, 1994 report from Dr. Cohn established that appellant had recovered sufficiently from her left ankle surgery to enable her to return to full-time limited-duty employment. His report additionally showed that the position of general clerk was within appellant's injury-related work restrictions. In his August 11, 1994 report, Dr. Cohn also stated that the constant limping appellant has been doing since her ankle injury has resulted in further injury to her back. In a November 10, 1994 report, Dr. Robert C. Corn, a Board-certified orthopedic surgeon and second opinion referral physician, opined that appellant's current back condition was related to her left ankle injury. He stated that appellant's low back symptoms have worsened subjectively as her ankle difficulties progressed and that objective evidence of a lumbar radiculopathy now exists where none was present prior to the injury. Dr. Cohn stated on the Office's 5c form, which was attached to his August 11, 1994 report, that "maximum medical improvement should be reached by January 1, 1995" and that "restrictions should apply for approximately 6 months. There are medical factors that need to be considered." As the Office hearing representative concluded that one of these factors was the aggravation of appellant's back condition, the Office hearing representative properly vacated the loss of wage-earning capacity decision and remanded the case for a determination as to whether the aggravation of appellant's degenerative disc had ceased. In his January 10, 1997 report, Dr. Kaffen opined that the aggravation of preexisting lumbar degenerative disc disease had ceased approximately one year ago. Since Dr. Kaffen's report provides reasoning for his opinion that the aggravation of appellant's degenerative disc had ceased, and Dr. Kaffen reviewed the position description of a general clerk and felt appellant was capable of performing such a position, the Board finds that Dr. Kaffen's report represents the weight of the medical evidence. It is noted that Dr. Cohn's August 11, 1994 report stated that maximum improvement should be reached by January 1, 1995. Inasmuch as Dr. Kaffen, in his January 10, 1997 report, concluded that appellant's aggravation ceased approximately one year ago, this is consistent with the time frame of the April 19, 1996 loss of wage-earning capacity decision.

² See *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); see also 5 U.S.C. § 8115(a).

³ 5 ECAB 376 (1953); see also 20 C.F.R. § 10.303.

Although the Office hearing representative noted that appellant testified that she injured her left elbow on August 30, 1993 and that her arm condition prevented her from finding work as a clerk there is no indication of appellant falling or hurting her elbow in the initial medical reports, appellant's CA-1 and her undated narrative statement, and a witness' statement describing the circumstances of appellant's injury. Furthermore, appellant did not seek medical attention for her left elbow until March 1995, 17 months post injury. Moreover, the record is devoid of any evidence linking appellant's alleged elbow condition with the accepted conditions resulting from the August 30, 1993 work incident. Accordingly, the Board finds that the Office properly found that appellant did not injure her left elbow on August 30, 1993.

As noted above, the selected position must also be available in the open market, and match the employee's capabilities with regard to his education, age and prior experience. In the present case, an Office rehabilitation specialist, in a report dated February 7, 1996, recertified that appellant was vocationally qualified for entry level work as a general clerk, and that such positions were reasonably available within appellant's commuting area at a salary of \$280.00 per week. A claims examiner reviewed the physical limitations of the position and found them to be within the work tolerance limitations established by Dr. Cohn in his August 11, 1994 report. Inasmuch as Dr. Kaffen found that the aggravation of appellant's preexisting lumbar degenerative disc disease ceased approximately one year from his January 10, 1997 report, and appellant's elbow condition is unrelated to the accepted injury, the Board finds that the physical limitations of the position are within the work tolerance limitations established by Dr. Cohn in his August 11, 1994 report. Appellant has not submitted any probative evidence refuting the findings of the rehabilitation specialist. The Board accordingly finds that the Office properly determined that appellant's wage-earning capacity was represented by the selected position of general clerk. Appellant's compensation was properly reduced based on a wage-earning capacity of \$268.00 per week in accordance with the *Shadrick* decision. The Board further notes that as the estimated loss of wage-earning capacity decision of April 19, 1996 was reinstated in the Office's decision dated January 31, 1997, the date of January 31, 1997 will reflect the date for appellant's reduction in compensation.

The decisions of the Office of Workers' Compensation Programs dated January 31, 1997, April 17 and November 7, 1996 are affirmed.

Dated, Washington, D.C.
April 5, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member