

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JANICE J. WISBEY and DEPARTMENT OF THE NAVY,  
NAVAL SUBMARINE BASE BANGOR, Silverdale, Wash.

*Docket No. 97-355; Submitted on the Record;  
Issued February 1, 1999*

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,  
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant had no loss of wage-earning capacity based on her actual earnings in the position of modified automated publishing technician; and (2) whether the Office properly denied appellant's request for reconsideration under 5 U.S.C. § 8128.

On January 24, 1994 appellant filed an occupational disease claim alleging that she sustained carpal tunnel syndrome causally related to factors of her federal employment. The Office accepted appellant's claim for right wrist strain and carpal tunnel syndrome. The Office authorized a right carpal tunnel release which was performed on July 1, 1994 and a right carpal tunnel release and flexor tenosynovectomy which was performed on January 5, 1995.

By decision dated October 18, 1995, the Office determined that the position of modified automated publishing technician fairly and reasonably represented appellant's wage-earning capacity. In a letter dated November 20, 1995, appellant, through her attorney, requested reconsideration and submitted additional evidence. By decision dated January 23, 1996, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant review of the prior decision.

The Board has duly reviewed the case record and finds that the Office properly determined that appellant had no loss of wage-earning capacity based on her actual earnings in the position of modified automated publishing technician.

Section 8115(a) of the Federal Employees' Compensation Act<sup>1</sup> provides that, in determining compensation for partial disability, "the wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity." The Board has stated, "Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing that they do not

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<sup>1</sup> 5 U.S.C. § 8115(a).

fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure."<sup>2</sup>

In the present case, the Office accepted that appellant sustained right-sided carpal tunnel syndrome in the performance of duty. In a report dated January 26, 1995, Dr. Brian P. Wicks, a Board-certified orthopedic surgeon and appellant's attending physician, initially released appellant to return to her regular employment on that date for four hours per day and stated that she could begin working eight hours per day on February 6, 1995. Dr. Wicks further noted that appellant should take 5 to 10 minute breaks for hand exercises and be provided with a trackball device for her left hand. In a note dated February 28, 1995, however, he opined that appellant should remain off work for another month due to tendinitis of the wrist. Dr. Wicks again released appellant to return to work on April 3, 1995 for four hours per day for the first two weeks and with restrictions on standing, walking and climbing stairs for four weeks.

In a report dated April 26, 1995, Dr. Stephen E. Fuhs, a Board-certified orthopedic surgeon, to whom the Office referred appellant for a second opinion examination, noted that appellant was presently employed "on a reasonably continuous basis" and had no further recommendations for treatment other than continued physical therapy. Dr. Fuhs further indicated that appellant had "limitations regarding the right side."

In a follow-up report dated May 24, 1995, Dr. Wicks recommended no further treatment and opined that appellant's condition was fixed and stable. He stated:

"[Appellant] will need to work with her employer to find what level of work allows her to work with minimal symptoms. It is likely that she will improve in terms of her overall comfort with her hand, but it is unlikely that she will ever be completely symptoms free."

In a report dated July 10, 1995, Dr. Lawrence C. Murphy, a Board-certified neurologist, evaluated appellant for complaints of continuing right hand pain and paraesthesias. Dr. Murphy found no objective abnormalities on physical examination other than decreased grip strength which he attributed to pain. He opined, "I feel [appellant] can continue to work on a reasonably continuous basis in her present capacity with the changes in her work station that have already been implemented.

The evidence in this case establishes that appellant's actual earnings as a modified automated publishing technician fairly and reasonably represented her wage-earning capacity. The employing establishment modified her work station in accordance with the recommendations of her attending physician. In April 1995 appellant returned to her regular employment as modified and worked in this position for more than 60 days prior to the Office's wage-earning capacity determination.<sup>3</sup> The evidence does not establish that the position was a make-shift position designed for appellant's particular needs.<sup>4</sup> Further, there is no evidence that the position was seasonal, part time, temporary or that appellant received a lower pay rate than in

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<sup>2</sup> *Floyd A. Gervais*, 40 ECAB 1045 (1989).

<sup>3</sup> Appellant filed a claim for a traumatic injury occurring in September 1995 when she opened a safe at work.

<sup>4</sup> *See James D. Champlain*, 44 ECAB 438 (1993).

her date-of-injury position.<sup>5</sup> There is no medical evidence that appellant is unable to work due to her employment injury. Thus, the Office properly determined that appellant had no loss of wage-earning capacity.

The Board further finds that the Office properly denied appellant's request for reconsideration under section 8128.

The Office has issued regulations regarding its review of decisions under section 8128(a) of the Act. Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his or her claim by written request to the Office identifying the decision and the specific issue(s) within the decision which claimant wishes the Office to reconsider and the reasons why the decision should be changed and by:

“(i) Showing that the Office erroneously applied or interpreted a point of law, or

“(ii) Advancing a point of law or fact not previously considered by the Office, or

“(iii) Submitting relevant and pertinent evidence not previously considered by the Office.”<sup>6</sup>

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.<sup>7</sup> Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.<sup>8</sup> Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.<sup>9</sup>

In the present case, the Office found that appellant's actual wages in her position as modified automated publishing technician fairly and reasonably represented her wage-earning capacity. In support of her request for reconsideration, appellant submitted a form report dated September 20, 1995 from Dr. Peter V. Ciani, Board-certified in family practice, who diagnosed a reaggravation of right carpal tunnel syndrome due to an injury closing a safe door, found that appellant was totally disabled from September 20 to 26, 1995 and opined that appellant could resume her regular employment on September 27, 1995. Appellant further submitted office visit notes from Dr. Ciani dated October 7 and 12, 1995, in which he detailed his treatment of appellant for right shoulder pain and recommended physical therapy. However, Dr. Ciani does not find appellant unable to physically perform the position of modified automated publishing technician due to her accepted employment injury effective October 1995, the date of the Office's wage-earning capacity determination. Thus, his reports are not pertinent to the issue in

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<sup>5</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (July 1997).

<sup>6</sup> 20 C.F.R. § 10.138(b)(1).

<sup>7</sup> See 20 C.F.R. § 10.138(b)(2).

<sup>8</sup> *Daniel Deparini*, 44 ECAB 657 (1993).

<sup>9</sup> *Id.*

the present case, which is whether appellant has shown that the position of modified automated publishing technician did not fairly and reasonably reflect her wage-earning capacity due to her inability to physically perform the position.

Appellant further submitted a pain management evaluation dated November 2, 1995 from Dr. Mary Kay O'Neill. Dr. O'Neill diagnosed carpal tunnel syndrome related to appellant's original employment injury and recommended that she be treated at the pain management clinic. Appellant also submitted a note from Dr. Wicks in which he noted that appellant should use a trackball for work with her right hand. As neither of these reports address the issue of appellant's ability to perform her present position, they are not sufficient to warrant reopening of her claim for review on the merits. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>10</sup>

Appellant further submitted a report dated July 10, 1995 from Dr. Murphy which was already of record. As this evidence duplicated evidence already contained in the case record it does not constitute a basis for reopening appellant's case for merit review under 20 C.F.R. § 10.138.<sup>11</sup>

The decisions of the Office of Worker's Compensation Programs dated January 23, 1996 and October 18, 1995 are hereby affirmed.

Dated, Washington, D.C.  
February 1, 1999

George E. Rivers  
Member

David S. Gerson  
Member

A. Peter Kanjorski  
Alternate Member

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<sup>10</sup> See *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

<sup>11</sup> *Richard L. Ballard*, 44 ECAB 146 (1992).