

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SAYDE L. NEAL and DEPARTMENT OF THE AIR FORCE,
CARSWELL AIR FORCE BASE, Tex.

*Docket No. 97-1202; Submitted on the Record;
Issued January 20, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly determined that the position of medical assistant fairly and reasonably represented appellant's wage-earning capacity effective December 11, 1994, the date it reduced her compensation.

On April 5, 1993 appellant, then a 56-year-old practical nurse filed a notice of traumatic injury and claim, alleging that on April 2, 1993 she injured her right knee while in the performance of duty. Appellant stopped work on April 5, 1993. On June 9, 1993 the Office accepted appellant's claim for right knee loose body with right knee arthroscopy. She received appropriate compensation for temporary total disability.

On March 9, 1994 appellant was referred to a rehabilitation program. Laura Bridges, appellant's rehabilitation counselor, indicated that the positions of medical assistant and appointment clerk were reasonably available and appropriate based on appellant's vocational testing. However, after conducting a labor market survey within appellant's geographical area, she recommended that position of medical assistant for appellant.

In a letter dated October 31, 1994, the Office notified appellant of a proposed reduction in compensation on the grounds that she was no longer totally disabled and had the capacity to earn wages as a medical assistant. In a decision dated December 8, 1994, the Office determined that appellant's wage-earning capacity was \$250.15 per week as represented by the position of medical assistant and adjusted her compensation for total disability to that for partial disability effective December 11, 1994. By letter decision dated January 31, 1995, the Office denied appellant's request for a hearing as untimely filed. In a decision dated March 2, 1995, the Office found that appellant's request for reconsideration was *prima facie* insufficient to warrant merit review of its prior decision. In merit decisions dated December 15, 1995 and January 23, 1997, the Office denied appellant's requests for reconsideration on the grounds that the evidence submitted was not sufficient to warrant modification of the wage-earning capacity determination.

The Board finds that the Office properly determined that the position of medical assistant fairly and reasonably represented appellant's wage-earning capacity effective December 11, 1994, the date it reduced her compensation.¹

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 or 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.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 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*³ decision will result in the percentage of the employee's loss of wage-earning capacity.⁴

In the present case, Ms. Bridges selected the position of medical assistant based on appellant's vocational capabilities and physical requirements and concluded that this position was reasonably available within appellant's geographical area. Appellant contended that this position is not medically suitable as she had preexisting arthritis which prevented her from performing the duties of a medical assistant and that her physician, Dr. Bruce Bollinger, an orthopedic surgeon, has advised her not to work. In determining wage-earning capacity based on a constructed position, the Office must determine whether the position is medically suitable for appellant "taking into consideration medical conditions due to the accepted work-related injury or disease and any preexisting medical conditions. (Medical conditions arising subsequent to the work-related injury or disease will not be considered.)"⁵ Appellant submitted a report dated October 25, 1996 by Dr. Bollinger in which he indicated that appellant had right knee instability and swelling. He noted that appellant had advanced arthritis which was diagnosed by arthroscopic surgery performed on June 25, 1993 and x-rays dated July 26, 1995. Dr. Bollinger reported that appellant's prognosis was guarded due to traumatic arthritis which was caused by her fall at work. He provided restrictions of standing and walking for 15 minutes at a time for 4 hours a day with the balance seated, carrying 10 to 15 pounds and pushing 30 to 40 pounds. As evidenced by Dr. Bollinger's report, appellant's arthritis was not a preexisting condition and was

¹ 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 December 18, 1997, the only decision before the Board is the Office's January 23, 1997 decisions. See 20 C.F.R. §§ 501.2(c), 501.3(d)(2).

² See generally 5 U.S.C. § 8115(a), *The Law of Workers' Compensation* § 57.22 (1989); see also *Bettye F. Wade*, 37 ECAB 556 (1986).

³ 5 ECAB 376 (1953).

⁴ See *Hattie Drummond*, 39 ECAB 904 (1988); *Shadrick*, *supra* note 3.

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(d) (December 1993).

first diagnosed during her arthroscopic surgery after her initial injury in April 1994. Consequently, the Office properly found that medical evidence which addressed appellant's inability to work due to symptoms from her arthritis was not probative. In addition, a review of the record indicates that Dr. Bollinger initially concurred with the medical report of Dr. William E. Blair, a Board-certified orthopedic surgeon and Office referral physician. In his February 11, 1994 report, Dr. Blair diagnosed appellant's status as post-axial rotational injury of the right knee, post arthroscopic debridement and shaving, and post medical meniscectomy. He indicated that appellant could sit continuously for 8 hours a day, could walk and stand intermittently for 4 hours a day, could lift and bend intermittently for 1 hour a day, could lift 10 to 20 pounds and should not squat, climb, kneel or twist. In a report dated March 21, 1994, Dr. Bollinger noted some discomfort in appellant's knee but indicated that appellant could be released for work with restrictions of not walking or standing for more than 30 to 45 minutes at a time for a total of 4 hours a day and not lifting more than 20 to 30 pounds or pushing more than 20 to 40 pounds. The medical assistant position would have required appellant to lift up to 20 pounds and be able to reach, handle, finger, feel, talk, hear and see. Thus, the proposed position was within the restrictions provided by both Drs. Blair and Bollinger. Although Dr. Bollinger subsequently indicated that appellant could not work and reduced her lifting capability to 10 to 15 pounds, he has not provided an explanation for the change in his medical conclusion. In addition, his reports of March 23 and October 25, 1995 and October 25, 1996 all appear to relate appellant's physical limitation to her arthritis and while Dr. Bollinger states that this condition is related to her employment injury, he does not explain why. Thus, there are no rationalized medical reports which indicate that appellant remains totally disabled due to her accepted employment injury or due to a preexisting medical condition and the medical evidence does not establish that the position offered was not medically suitable. The Office properly determined that the position of medical assistant fairly and reasonably represented appellant's wage-earning capacity.

The decision of the Office of Workers' Compensation Programs dated January 23, 1997 is hereby affirmed.

Dated, Washington, D.C.
January 20, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member