

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARILYN McALEXANDER and DEPARTMENT OF AGRICULTURE,
FOREST SERVICE, WILLAMETTE NATIONAL FOREST, Eugene, OR

*Docket No. 97-2263; Submitted on the Record;
Issued July 21, 1999*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation benefits effective June 5, 1997 based on its determination that the selected position of receptionist represented her wage-earning capacity.

The Board has duly reviewed the case on appeal and finds that the Office improperly reduced appellant's compensation benefits.

Appellant filed a claim on May 11, 1992 alleging that she developed pain and numbness in her right hand due to factors of her federal employment. The Office accepted appellant's claim for aggravation of right ulnar neuropathy and authorized an ulnar nerve transposition on October 16, 1992 as well as a medial epiconylectomy on October 29, 1993. Appellant resigned from the employing establishment effective November 15, 1993 and the Office entered her on the periodic rolls on November 3, 1994. The Office proposed to reduce appellant's compensation benefits based on her capacity to earn wages as a receptionist on January 16, 1997 and by decision dated June 5, 1997, reduced appellant's compensation.

Once the Office has determined that an employee is totally disabled as a result of an employment injury, it has the burden of justifying a subsequent reduction of compensation. If the employee's disability is no longer total but is partial, appellant is only entitled to the loss of her wage-earning capacity.¹

In its June 5, 1997 decision, the Office informed appellant that it was adjusting her wage-loss compensation as she was no longer totally disabled and was capable of performing the position of receptionist in accordance with 5 U.S.C. § 8115.

¹ *Anthony W. Warden*, 40 ECAB 168, 181-82 (1988).

Section 8106 of the Federal Employees' Compensation Act provides that a claimant may be paid 66 percent of the difference between his monthly pay and his monthly wage-earning capacity after the beginning of partial disability.² With regard to section 8115(a), this section of the Act provides that 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 the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, the degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect his wage-earning capacity in his disabled condition.³

In the instant case, the Office determined that appellant was no longer totally disabled based on the reports of her attending physician, Dr. Brick A. Lantz, a Board-certified orthopedic surgeon. He last examined appellant in July 1994. At that point Dr. Lantz agreed with the work restrictions provided by the second opinion physician. The Office provided him with proposed position descriptions and asked that he provide his opinion regarding appellant's capacity to work on September 24, 1996. The Office stated, "If you need to evaluate [appellant] before responding to the above, please contact her for an appointment."

In his report dated October 7, 1996, Dr. Lantz noted that he had received the position descriptions and stated that he had not examined appellant since July 1994. Dr. Lantz stated, "Most likely her symptoms and exam[ination] are unchanged." He concluded that appellant could perform the duties of the offered jobs.

The Board finds that Dr. Lantz's October 7, 1996 report is not sufficient to meet the Office's burden of proof in establishing that appellant can perform the duties of the constructed position of receptionist. The Board has held that the weight is accorded medical evidence based on its reliability, probative value and convincing quality. The opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion are factors which enter in to this evaluation.⁴

Although Dr. Lantz is appellant's attending physician, he had not examined appellant for more than two years and his report is couched in speculative terms noting that "most likely" appellant's condition remained the same. His conclusions are not based on a contemporaneous examination of appellant and consideration of her current employment-related conditions and disability, but instead rely on a physical capacity evaluation performed by a physical therapist on August 2, 1994. As Dr. Lantz's report lacks convincing quality, a thorough contemporaneous examination and medical rationale in support of his opinion that appellant can currently perform the duties of a receptionist, his report is not sufficient to meet the Office's burden of proof.

² 5 U.S.C. § 8106.

³ *Pope D. Cox*, 39 ECAB 143, 148 (1988).

⁴ *Cleopatra McDougal-Saddler*, 47 ECAB 480, 488 (1996).

The decision of the Office of Workers' Compensation Programs dated June 5, 1997 is hereby reversed.

Dated, Washington, D.C.
July 21, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member