

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TOMMIE VALDERRAMA and U.S. POSTAL SERVICE,
MAIN POST OFFICE, Allen, Tex.

*Docket No. 97-1122; Submitted on the Record;
Issued March 16, 1999*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits, effective January 22, 1996, based on its determination that appellant's actual earnings in the limited-duty position of clerk transitional fairly and reasonably represented appellant's wage-earning capacity.

The Board has duly reviewed the case record in the present appeal and finds that the Office properly terminated appellant's compensation benefits, effective January 22, 1996, based on its determination that appellant's actual earnings in the limited-duty position of clerk transitional fairly and reasonably represented appellant's wage-earning capacity.

On May 22, 1995 appellant then a transitional employee distribution clerk, filed a traumatic injury claim (Form CA-1) alleging that on that date, she fractured her right wrist when she slipped while pushing an "APC" cart. Appellant stopped work on May 23, 1995.

By letter dated June 23, 1995, the Office accepted appellant's claim for a fractured right wrist and authorized an arthrogram. Subsequently, the Office expanded the acceptance of appellant's claim for right chronic subacromial and ceracohumeral shoulder impingement, and to include authorization for right wrist arthroscopy and cyst excision, and surgery for acromioplasty.

By letter dated December 19, 1995, the employing establishment offered appellant the position of modified distribution clerk. On December 22, 1995 appellant accepted the offered position. Her employment was effective on January 22, 1996. Appellant was terminated by the employing establishment based on a reduction-in-force effective June 30, 1996.¹

By decision dated December 4, 1996, the Office terminated appellant's compensation on the grounds that her position of a limited-duty clerk transitional fairly and reasonably

¹ Appellant's grievance regarding her termination was denied by the employing establishment on September 20, 1996.

represented her wage-earning capacity. In an accompanying memorandum, the Office found that appellant had demonstrated the ability to work in her position for over 90 days and that it was assumed that she would have continued to work had her appointment not ended.²

Once the Office accepts a claim and pays compensation, as here, it has the burden to justify termination or modification of compensation benefits.³ Pursuant to section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual earnings received by an employee if the earnings fairly and reasonably represent her wage-earning capacity.⁴ The Board has stated that "[g]enerally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure."⁵

The Office's procedures indicate that, after a claimant has returned to work for 60 days, a determination will be made as to whether the actual earnings fairly and reasonably represented the claimant's wage-earning capacity.⁶

Based on the medical release by Dr. H. Lynn Rodgers, a Board-certified orthopedic surgeon and appellant's treating physician, who opined that appellant could constantly lift up to 11 pounds, frequently lift up to 21 pounds and occasionally lift up to 42 pounds, appellant returned to limited-duty work in the position of modified distribution clerk on January 22, 1996. There is no rationalized medical evidence of record establishing that appellant's employment-related conditions prevented her from performing the duties of a modified distribution clerk.

In a February 8, 1996 medical report, Dr. Rodgers indicated appellant's complaints regarding pain in her shoulder and her belief that further work needed to be done on her hand. She stated that she did not think anything would be gained by performing surgery on appellant's shoulder. Dr. Rodgers indicated her recommendation concerning appellant's medical treatment and that appellant continue to work.

The February 12 and April 11, 1996 medical treatment notes of Dr. Earl R. Lund, a Board-certified orthopedic surgeon, revealed a discussion regarding surgery on appellant's hand. In his June 13, 1996 medical treatment notes, Dr. Lund indicated that appellant continued to have pain and discomfort in and about the sternal coastal area, and in her wrist although appellant did not desire any proximal row carpectomy or wrist fusion. He did not address whether appellant was unable to perform the duties of her limited-duty position.

² Subsequent to its December 4, 1996 decision, the Office received additional factual and medical evidence. The Board, however, cannot consider evidence that was not before the Office at the time of the final decision; *see* 20 C.F.R. § 501.2(c)(1).

³ *Harold S. McGough*, 36 ECAB 332 (1984).

⁴ 5 U.S.C. § 8115(a).

⁵ *Gregory A. Compton*, 45 ECAB 154 (1993); *Clarence D. Ross*, 42 ECAB 556 (1991); *Floyd A. Gervais*, 40 ECAB 1045, 1048 (1989); *Hubert F. Myatt*, 32 ECAB 1994 (1981); *Lee R. Sires*, 23 ECAB 12 (1971).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993).

In his August 29, 1996 medical report, Dr. Rodgers noted the termination of appellant's employment, and appellant's complaints regarding her shoulder and medical treatment. She stated that a coracohumeral decompression with resection of the lateral coracoid may give appellant quite a bite of relief and make it possible for her to return to work without restriction at some point.

Dr. Rodgers' September 5, 1996 medical report revealed her recommendation that appellant undergo open decompression of the coracohumeral space and subacromial space. In response to the Office's December 4, 1996 letter requesting that he provide a diagnosis for appellant's shoulder condition, she stated in an October 24, 1996 medical report that appellant's condition was work related and that it continued to worsen. Dr. Rodgers further stated that appellant could do light-duty work until the Office provided authorization for the surgery.

Inasmuch as there is no medical evidence of record establishing that appellant was totally disabled from work due to any residuals of her May 22, 1995 employment injury, the Office properly terminated appellant's compensation benefits, effective January 22, 1996, based on appellant's actual earnings in the limited-duty position of modified distribution clerk.⁷

The December 4, 1996 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.
March 16, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

⁷ See *Albert L. Poe*, 37 ECAB 684, 689 (1986).