

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DELIA M. BIBBS and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS AFFAIRS MEDICAL CENTER, Cleveland, Ohio

*Docket No. 97-1246; Submitted on the Record;
Issued May 14, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly determined that the position of telephone solicitor represented appellant's wage-earning capacity effective February 2, 1997.

On February 10, 1972 appellant, a nurse, filed a claim for an injury to her left foot and left knee when she slipped and fell on some ice. The Office accepted her claim as a no-time-lost case. The Office further accepted that appellant sustained internal derangement of the left knee joint, a torn medial meniscus and degenerative arthritis of the left knee following an injury on March 1973. The Office authorized an arthrotomy and medial meniscectomy of the left knee which was performed on October 14, 1974. Appellant stopped work in June 1974 and did not return.

In a report dated November 1, 1993, Dr. Faissad B. Zahrawi, a Board-certified orthopedic surgeon and appellant's attending physician, diagnosed residual poliomyelitis (polio) and severe degenerative arthritis of the left knee and lumbar spine. He recommended a total knee replacement and stated:

“[Appellant] is definitely disabled and cannot return to work. I believe that her knee is a major reason why she is disabled and it is related to her initial injury. If a person loses one knee they can still ambulate as a normal individual, but having [appellant] lose a knee, because of her residual polio, is like her losing both knees.”

In a report dated January 4, 1995, Dr. Zahrawi stated that x-rays revealed “degenerative arthritis, most likely post-traumatic of her left knee,” discussed her progressive incapacitation due to her knee problems and requested that the Office authorize a total left knee replacement.

By letter dated April 17, 1995, the Office referred appellant, together with the case record and a statement of accepted facts, to Dr. Sheldon Kaffen, a Board-certified orthopedic surgeon, for a second opinion evaluation.

In a report dated May 3, 1995, Dr. Kaffen discussed appellant's history of injury, treatment received and listed findings on physical examination. He stated that appellant's claim had been accepted only for internal derangement of the left knee and a tear of the medial meniscus of the left knee and that consequently her severe osteoarthritis of the left knee was not work related. He stated:

"It is my opinion that [appellant] is not *solely* disabled due to the work[-]related injury. [Emphasis in the original.] [She] is totally disabled due to the severe osteoarthritis of her left knee in combination with her other problems of remote polio involving her right lower extremity, obesity and diabetes. A total left knee replacement has been recommended by her treating physician. This surgery is indicated, however since her claim has not been allowed for arthritis of the left knee, the contemplated surgery is not due to the March 1973 or February 1972 injuries."

In an accompanying work restriction evaluation (OWCP-5) Dr. Kaffen found that appellant could not work.

In a supplemental report dated July 10, 1995, Dr. Kaffen noted that appellant had preexisting severe degenerative arthritis at the time of her October 1974 arthrotomy and opined that appellant's work injuries "caused a tear of the medial meniscus which was previously in a state of degeneration due to the osteoarthritis." He found that her current condition was not related to her employment injuries.

In a supplemental report dated October 3, 1995, Dr. Kaffen found that appellant could not perform her regular employment duties due to severe degenerative arthritis of the left knee.

The Office found that a conflict existed between Dr. Kaffen and Dr. Zahrawi regarding whether appellant required a total knee replacement due to her accepted employment injuries and consequently referred her, together with the case record and a statement of accepted facts, to Dr. Richard S. Kaufman, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated February 27, 1996, Dr. Kaufman listed findings on examination and discussed the results of objective tests. He diagnosed a torn medial meniscus, status post medial meniscectomy of the left knee and traumatic arthritis of the left knee secondary to the medial meniscectomy. He stated:

"...[I]t is my opinion that the claimant's current condition is a direct result of the injury described in the [s]tatement of [a]ccepted [f]acts. Her normal obesity would predispose her to arthritis, but it is my opinion that the medial meniscectomy was the direct result of the severe changes which have occurred in her left knee. The loss of the meniscus would aggravate and accelerate the

already preexisting arthritic changes. A total knee replacement would be a reasonable procedure to do for [her]and would allow her to ambulate much better.... The procedure would be necessitated by the traumatic arthritis related to her work injury.”

Dr. Kaufman found that appellant “could conceivably perform job duties which did not require standing or walking but only sitting.” In a work restriction evaluation dated March 27, 1996, he indicated that appellant could work sitting without standing or walking.

In a supplemental report dated May 31, 1996, Dr. Kaufman stated that appellant could perform full-time employment at a job which only required sitting.

On August 7, 1996 the Office referred appellant to vocational rehabilitation. In a report dated November 6, 1996, the rehabilitation counselor noted that appellant had been admitted to the hospital for kidney dialysis due to kidney failure and that she had serious eye problems. She identified the positions of telephone solicitor, appointment clerk and customer order clerk as available in the commuting area and within appellant’s capabilities. She attached job classifications from the Department of Labor’s *Dictionary of Occupational Titles* for the identified positions.

In a letter dated December 12, 1996, 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 telephone solicitor. By decision dated January 22, 1997, the Office finalized its wage-earning capacity determination.¹

The Board finds that the Office improperly determined that the position of telephone solicitor represented appellant’s wage-earning capacity effective February 2, 1997.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of benefits.² Under section 8115(a) of the Federal Employees’ Compensation Act,³ wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent her wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or the employee has no actual earnings, her wage-earning capacity is determined with due regard to the nature of the

¹ Appellant requested reconsideration, which the Office denied by decision dated March 10, 1997. Appellant however, filed her appeal before the Board on February 26, 1997. It is well established that the Board and the Office may not have concurrent jurisdiction over the same issue in the same case and therefore the Office’s March 10, 1997 decision is null and void. *Russell E. Lerman*, 43 ECAB 770 (1992); *Douglas E. Billings*, 41 ECAB 880 (1990).

² *David W. Green*, 43 ECAB 883 (1992); *Harold S. McGough*, 36 ECAB 332 (1984).

³ 5 U.S.C. §§ 8101-8193.

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.⁴

After the Office makes a medical determination of partial disability and of special 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 labor market should be made through contact with the state employment services or other applicable services. Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.⁵

The Office based its finding that appellant had the physical capacity to perform the position of telephone solicitor on the findings of Dr. Kaufman, to whom the Office referred appellant for an impartial medical examination. Section 8123(a) of the Act states that if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.⁶ However, the Board notes that at the time of the Office's referral of appellant to Dr. Kaufman, the medical evidence did not contain a conflict regarding whether appellant could perform employment. Dr. Zahrawi opined that appellant was totally disabled due to her employment-related knee injury. Dr. Kaffen found that appellant was totally disabled due to severe osteoarthritis of the left knee and problems associated with polio, obesity and diabetes. While Dr. Kaffen found that appellant's disability due to her severe osteoarthritis was not employment related, the Act's Nonfatal Summary indicated that the accepted conditions resulting from appellant's employment injury included degenerative arthritis of the left knee. The statement of accepted facts provided to Dr. Kaffen indicated that the degenerative arthritis was not a work-related condition. As it appears that the statement of accepted facts did not accurately reflect the medical conditions accepted by the Office as related to appellant's employment injury, the opinion of Dr. Kaffen is not based upon a complete and accurate factual background and is of limited probative value.

The Board further notes that Dr. Kaffen made no finding regarding whether appellant could perform employment in view of her preexisting impairments. In determining a loss of wage-earning capacity where the residuals of an injury prevent an employee from performing his or her regular duties, the impairments which preexisted the injury, in addition to the injury-related impairments, must be taken into consideration in the selection of a job within his or her work tolerance. It is only subsequently acquired impairments unrelated to the injury which are excluded from consideration in the determination of the employee's work capabilities.⁷ In this

⁴ *Samuel J. Chavez*, 44 ECAB 431 (1993).

⁵ *Albert C. Shadrick*, 5 ECAB 376 (1953).

⁶ 5 U.S.C. § 8123(a).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.3 (June 1996).

case, the evidence shows that appellant had numerous medical conditions preexisting her employment injury, including residuals of polio, which must be considered in determining her wage-earning capacity. Dr. Kaffen's opinion, therefore, did not create a conflict with appellant's attending physician as he did not base his opinion on an accurate statement of accepted facts and did not address the relevant issue of whether appellant could perform employment in view of her injury-related impairment and any preexisting impairments.

As at the time of the Office's referral of the case to Dr. Kaufman a conflict in the medical opinion evidence did not exist, his opinion is not entitled to special weight as the report of an impartial specialist. Rather, Dr. Kaufman's report constitutes a second opinion examination by an Office referral physician. He found that appellant could perform sedentary employment. Thus, the record currently contains an unresolved conflict between the opinion of appellant's attending physician and Dr. Kaufman regarding whether appellant is capable of performing employment. As there is an unresolved conflict, the Office has not met its burden of proof in reducing appellant's compensation based on its determination that the position of telephone solicitor represented her wage-earning capacity.

The decision of the Office of Workers' Compensation Programs dated January 22, 1997 is reversed.

Dated, Washington, D.C.
May 14, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member