

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SALLY W. HUANG COGAN and U.S. POSTAL SERVICE,
SOUTH JACKSON AVENUE POST OFFICE, San Jose, CA

*Docket No. 97-2627; Submitted on the Record;
Issued November 1, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation to zero effective July 17, 1997 on the grounds that she had no loss of wage-earning capacity based on her actual earnings as a modified distribution clerk.

The Office accepted that on or before June 19, 1995, appellant, then a 44-year-old distribution clerk, sustained a low back strain and bilateral rotator cuff tendinitis with impingement.¹ Appellant's regular duties as a distribution clerk included continuous standing and walking, lifting sacks of mail and parcels weighing up to 70 pounds, stretching and reaching. Appellant was off work from June 26 to July 3, 1995, had intermittent absences in January, April and June 1996, worked part-time from April to May 24, 1996 and then continued on full-time light duty.² She received appropriate compensation benefits on the daily rolls.

In a June 21, 1995 slip, Dr. Wen-Tsang Ku, an attending internist, stated that appellant had "skeletomuscular pain in the shoulder" and "should not work more than eight hours a day." Dr. Ku held appellant off work from December 6 to 9, 1995, January 5 to 11, 1996 and June 26 through July 3, 1996 due to "skelemuscular pain syndrome and low back pain syndrome."³ Dr. Ku submitted periodic progress reports recommending limited duty due to the low back and bilateral shoulder conditions.

¹ In a July 12, 1995 statement, appellant also alleged an emotional stress condition. Although advised by the Office of the additional evidence needed to establish this aspect of her claim, appellant did not submit such evidence.

² Dr. Wen-Tsang Ku, an attending internist, approved an offered light-duty position as of May 31, 1996, with lifting, standing and walking up to three hours intermittently, stooping, bending, twisting and climbing up to one hour intermittently, lifting up to three hours intermittently and not more than ten pounds, sitting up to two hours intermittently, and no driving or carrying. Appellant accepted the offered position on June 1, 1996.

³ Dr. Ku recommended four weeks of physical therapy in December 1995 and January 1996.

In an April 1, 1996 report, Dr. Ku diagnosed "shoulder and low back pain syndrome" and held appellant off work from April 3 to 9, 1996, followed by a return to work for four hours per day for eight weeks. In an April 8, 1996 duty status report, Dr. Ku limited sitting to one hour per day and other activities to a maximum of three hours per day, one hour continuously.⁴

The record indicates that appellant returned to full-time, limited-duty work as of May 31, 1996.⁵

In a February 10, 1997 duty status report, Dr. Ku limited appellant to lifting no more than 10 pounds up to 3 hours per day, sitting for not more than 1 hour continuously up to 4 hours per day, standing and walking for no more than 30 minutes continuously for up to 3½ hours per day, bending, stooping, twisting, pulling and reaching above the shoulder no more than 1 hour per day.

Based on Dr. Ku's February 10, 1997 restrictions on March 24, 1997, the employing establishment offered appellant a light-duty, full-time position as a modified clerk, with duties of casing letter mail and small parcels, preparing mail for dispatch, processing money orders, acting as "lobby director," selling stamps, assisting with clerical duties, preparing second notices of delivery for certified mail and answering the telephone. The position required lifting up to 10 pounds, standing and walking up to 3½ hours intermittently or 30 minutes continuously, bending, twisting, stooping and reaching above the shoulder 1 hour intermittently with no lifting over 1 pound. On April 11, 1997 Dr. Ku reviewed the offered position and found that it was within appellant's medical restrictions.

Appellant accepted the modified clerk position on April 10, 1997 with an annual salary of \$34,551.00 as of March 24, 1997. As of April 10, 1997, the current annual pay rate for appellant's date-of-injury position as a Grade 5, Step F distribution clerk was \$34,292.00.

By decision dated July 17, 1997, the Office reduced appellant's compensation to zero based on her actual earnings for 60 days as a modified distribution clerk beginning April 10, 1997. The Office found that appellant had no wage loss as her salary as a modified clerk exceeded that of her date-of-injury position. The Office further found that the modified-clerk position fairly and reasonably represented appellant's wage-earning capacity."

The Board finds that the Office properly reduced appellant's compensation to zero effective July 17, 1997 on the grounds that she had no loss of wage-earning capacity based on her actual earnings as a modified distribution clerk.

⁴ In a May 1, 1996 report, Dr. Mark Sajjadi, an orthopedic surgeon consulting to the employing establishment, performed a fitness-for-duty examination and diagnosed "tendinitis of the long head of the biceps, bilaterally" and a lumbosacral strain. Dr. Sajjadi attributed the diagnosed conditions to appellant's throwing parcels at work. In an attached May 2, 1996 work restriction evaluation, Dr. Sajjadi recommended full-time limited-duty work, with lifting up to 10 pounds.

⁵ The Office authorized appellant to work with a nurse rehabilitation specialist in August 1996. The rehabilitation effort was closed on October 31, 1996 as appellant had returned to full-time, limited-duty work as of May 31, 1996, and had been working for more than 60 days.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.⁶ In this case, the Office accepted that appellant sustained occupational conditions of a low back strain and bilateral shoulder tendinitis with impingement. Appellant's internist, Dr. Ku, found appellant to be partially disabled and restricted her to limited duty due to the accepted conditions.

Section 8115 of the Federal Employees' Compensation Act, titled "Determination of wage-earning capacity," states in pertinent part: "In determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings if his earnings fairly and reasonably represent his wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity as appears reasonable under the circumstances is determined with due regard to --

- "(1) the nature of his injury;
- (2) the degree of physical impairment;
- (3) his usual employment;
- (4) his age;
- (5) his qualifications for other employment;
- (6) the availability of suitable employment; and
- (7) other factors or circumstances which may affect his wage-earning capacity in his disabled condition."⁷

Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.⁸ As applied to this case, on March 24, 1997, the employing establishment offered appellant a light duty, full-time position as a modified clerk, with duties within restrictions provided on February 10, 1997 by Dr. Ku who also approved the offered position on April 11, 1997.

Appellant accepted the modified clerk position on April 10, 1997 with an annual salary of \$34,551.00 as of March 24, 1997, \$259.00 per year more than the current annual pay rate of \$34,292.00 for her date-of-injury position. Also, appellant performed the limited-duty position from April 10, 1997 through June 1997 and continuing. Appellant's performance of this position for 60 days is persuasive evidence, absent evidence to the contrary, that it represents her wage-

⁶ *James R. Verhine*, 47 ECAB 460 (1996); *Bettye F. Wade*, 37 ECAB 556 (1986); *Ella M. Garner*, 36 ECAB 238 (1984).

⁷ 5 U.S.C. § 8115.

⁸ *Daycon C. Hogue*, 39 ECAB 1162 (1988).

earning capacity. There is no evidence that this position is seasonal, temporary, less than full-time, or make-shift work designed for appellant's particular needs.⁹

Therefore, the Board finds that the Office properly reduced appellant's compensation benefits in its July 17, 1997 decision, on the grounds that she had no loss of wage-earning capacity.¹⁰

The decision of the Office of Workers' Compensation Programs dated July 17, 1997 is hereby affirmed.¹¹

Dated, Washington, D.C.

November 1, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

Michael E. Groom
Alternate Member

⁹ *Elbert Hicks*, 49 ECAB ____ (Docket No. 95-1448, issued January 20, 1998).

¹⁰ *Monique L. Love*, 48 ECAB ____ (Docket No. 95-188, issued February 28, 1997).

¹¹ On appeal, appellant alleged that the modified-clerk position was not within her physical limitations; and submitted new evidence. However, the Board may not consider evidence for the first time on appeal that was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.(2)(c).