

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MARION E. MAHONEY and DEPARTMENT OF VETERANS AFFAIRS,  
MEDICAL CENTER, Minneapolis, MN

*Docket No. 98-1040; Submitted on the Record;  
Issued November 23, 1999*

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DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly reduced appellant's compensation, effective April 27, 1997, based on her ability to perform the duties of the selected position of office nurse; and (2) whether the Office properly denied appellant's request for a hearing.

On November 10, 1992 appellant, then a 55-year-old registered nurse who was working eight hours per day, four days per week, sustained an employment-related fracture of the right thumb and on September 14, 1994 the Office had authorized excision of a dorsal osteophyte of the thumb. She stopped work on November 11, 1992 and returned at various intervals but has not worked since June 15, 1995. She was initially assigned to a rehabilitation nurse, and referred to vocational rehabilitation August 14, 1995.

On June 10, 1996 Kathleen Marr, a rehabilitation counselor, completed a labor market survey and determined that the position of office nurse, based on the Department of Labor's *Dictionary of Occupational Titles*, fit appellant's capabilities. By letter dated March 21, 1997, the Office advised appellant that it proposed to reduce her compensation on the grounds that she was no longer totally disabled due to residuals of the employment injury and could perform the duties of the selected position, office nurse. The Office noted that the medical evidence of record demonstrated that she could perform the selected position and advised that if she disagreed with its proposed action, she should submit contrary evidence or argument within 30 days. Hearing nothing further from appellant, by decision dated April 29, 1997, the Office finalized the reduction of her compensation, effective April 27, 1997, based on her capacity to earn wages as an office nurse. The Office determined that the position fairly and reasonably represented appellant's wage-earning capacity and found that it was available in her commuting area.

On May 9 and August 10, 1997, appellant requested reconsideration and, by decision dated September 3, 1997, the Office denied the request on the grounds that she neither raised

substantive legal questions nor submitted new and relevant medical evidence. On October 7, 1997 appellant requested a hearing. In a November 11, 1997 decision, an Office hearing representative denied the request. On December 5, 1997 a second request for a hearing was made by appellant which was denied on January 12, 1998. The instant appeal follows.

The Board finds that the Office did not meet its burden of proof to reduce appellant's compensation, effective April 27, 1997, based on her ability to perform the duties of the selected position of office nurse.

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.<sup>1</sup> Under section 8115(a) of the Federal Employees' Compensation Act,<sup>2</sup> wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, wage-earning capacity is determined with due regard to the nature of injury, degree of physical impairment, usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect the employee's wage-earning capacity in his or her disabled condition.

In this case, the medical reports on which the Office relied in determining appellant's wage-earning capacity are insufficient to establish that she is capable of performing the selected position of office nurse. The Office relied upon the reports of Dr. Robert W. Shepley, a Board-certified orthopedic surgeon. Initially, the Board notes that the Office stated that Dr. Shepley submitted a June 21, 1995 report. The record reflects, however, that Dr. Ann Van Heest, a Board-certified orthopedic surgeon, submitted an attending physician's report dated June 21, 1995 in which she advised that appellant could return to work but was permanently limited in pinch function of the right thumb due to the employment injury. In a July 2, 1996 report, Dr. Shepley noted that appellant is right-handed and advised that appellant had two options regarding the thumb: to either markedly restrict activities so that she did not need to use the thumb or consider a surgical fusion to make the thumb more functional. He opined that if she were to undergo the fusion procedure, she could then perform some nursing activities except for fine manipulation of the thumb. The record does not indicate that appellant underwent the fusion procedure.

The job description for office nurse contained in the *Dictionary of Occupational Titles* states:

“Cares for and treats patients in medical office, as directed by physician: Prepares patient for and assists with examinations. Administers injections and medications, dresses wounds and incisions, interprets physician's instructions to patients, assists with emergency and minor surgery and performs related tasks as

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<sup>1</sup> *Dorothy Lams*, 47 ECAB 584 (1996).

<sup>2</sup> 5 U.S.C. §§ 8101-8193.

directed. Maintains records of vital statistics and other pertinent data of patient. Cleans and sterilizes instruments and equipment and maintains stock of supplies. May conduct specified laboratory tests. May record and develop electrocardiograms. May act as receptionist, perform secretarial duties and prepare monthly statements.”

The Board finds that the Office has not established that the position of office nurse is within the restrictions prescribed by Drs. Van Heest and Shepley. Dr. Van Heest advised that appellant had no pinch function of the right thumb and Dr. Shepley advised that only if appellant underwent a fusion procedure, could she perform nursing duties. She could not otherwise use the thumb. It was thus error for the Office to reduce appellant’s wage-loss compensation benefits on the basis of her ability to perform the duties of that position.

As the Office’s decision concerning appellant’s loss of wage-earning capacity is reversed, the second issue regarding the Office’s denial of appellant’s hearing requests are moot.

The decision of the Office of Workers’ Compensation Programs dated January 12, 1998 and November 12, 1997 are hereby set aside and the decisions dated September 3 and April 29, 1997 are reversed.

Dated, Washington, D.C.  
November 23, 1999

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member