

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THERESA B. SALVATORI and DEPARTMENT OF VETERANS AFFAIRS,
Wilkes Barre, PA

*Docket No. 97-2529; Submitted on the Record;
Issued October 21, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined that selected position of "information clerk" represented appellant's wage-earning capacity.

In the present case, the Office accepted that appellant, then a 40-year-old licensed practical nurse, sustained a lumbosacral sprain and precipitation of symptoms from a congenital chronic progressive lumbar spine condition as a result of an employment injury on January 9, 1979. Appellant stopped work and received payment of appropriate compensation benefits. On June 15, 1995 appellant was offered a limited-duty position with the employing establishment as a file clerk. Appellant accepted this position on August 24, 1995. Appellant returned to work in this position on August 28, 1995, however, was not allowed to work in this position by the employing establishment on the grounds that she was medically unable to perform the position.

By decision dated June 11, 1996, the Office determined appellant had the wage-earning capacity to perform the position of "information clerk" and reduced appellant's wage-loss benefits accordingly. The June 11, 1996 wage-earning capacity determination was affirmed by an Office hearing representative's decision dated April 30, 1997.

The Board finds that the Office did not meet its burden of proof to reduce appellant's wage-loss compensation benefits.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.¹ Pursuant to section 8115(a) of the Federal Employees' Compensation Act,² wage-earning capacity is determined by the actual wages received by an

¹ *Patricia A. Keller*, 45 ECAB 278 (1993).

² 5 U.S.C. § 8115(a).

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, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his or her usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect wage-earning capacity in his or her disabled condition.³

When the Office makes a medical determination of partial disability and of specific 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 labor market should be made through contact with the state employment service or other applicable service.⁴ Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.⁵

In the present case, as appellant was found to be medically unfit to perform the duties of the limited-duty file clerk position on August 28, 1995, appellant had no "actual earnings" upon which to base a wage-earning capacity determination. The Office, therefore, proceeded to determine appellant's wage-earning capacity based upon a constructed position. The Office's initial determination was medical in nature as it found that appellant was partially disabled and reviewed the nature of appellant's injury and her degree of physical impairment to determine her work restrictions before proceeding to select a vocationally appropriate position.

The Board has previously held that in determining a loss of wage-earning capacity where the residuals of an injury prevent an employee from performing 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 the employee's work tolerance. It is only subsequently acquired impairments unrelated to the injury which are excluded from consideration in the determination of work capabilities.⁶ The Office has accepted appellant's claim for lumbosacral sprain, with precipitation of symptoms from a congenital and chronic progressive lumbar spine condition. The medical evidence of record substantiates that appellant had preexisting degenerative disc disease at L4-5, with bulging of the disc, compromising congenitally small spinal canal, with epidermal scarring over the nerve roots; chemical diabetes based on glucose tolerance test in 1978; status post hysterectomy of August 1978 and episodes of

³ See *Dorothy Lams*, 47 ECAB 584 (1996).

⁴ See *Dennis D. Owen*, 44 ECAB 475 (1993).

⁵ 5 ECAB 376 (1953).

⁶ *William Ray Fowler*, 31 ECAB 1817 (1980).

thrombophlebitis following D & C of 1978.⁷ The Office hearing representative also noted that appellant had a preexisting left knee condition, with torn cartilage.

The Office referred appellant to Dr. Kenneth W. Gentilezza for an impartial medical examination to determine the degree of appellant's continuing disability, after finding a conflict in the medical opinion evidence between appellant's treating physician, Dr. Joseph N. Demko, who opined that appellant remained totally disabled and the Office's second opinion physicians, Dr. Lynch and Dr. Sgarlat, who opined that appellant could return to work with restrictions. In a report dated March 14, 1995, Dr. Gentilezza concluded that the effects of appellant's January 9, 1979 injury had stabilized, with few objective findings of impairment. Dr. Gentilezza stated however that because appellant had undergone laminectomies, she should only perform light to medium work. The Board finds that Dr. Gentilezza's report is of limited probative value. Dr. Gentilezza noted in his report that he had not reviewed any radiological studies. As the accepted condition in this case was a lumbar condition and as appellant had other significant preexisting lumbar conditions which were also to be evaluated in determining her work capabilities, an opinion regarding the current status of these conditions should have been based upon current radiological studies such as x-ray, magnetic resonance imaging, or computerized tomography scan. Dr. Gentilezza's report is also of limited probative value as it does explain in sufficient detail whether appellant's other preexisting medical conditions would limit her ability to return to work. Appellant's treating physician had opined that appellant's multitude of medical conditions all contributed to cause total disability. Dr. Gentilezza noted on OWCP Form 5-c that appellant's employment-related condition required restrictions of limited kneeling, bending, twisting; as well as restrictions regarding the number of hours of sitting, standing and walking performed per day; and lifting restrictions of up to 10 pounds frequently and 30 pounds occasionally. He also noted that appellant had limitations due to preexisting or nonwork-related conditions of diabetes, carpal tunnel, hypertension and cardiopulmonary disease. Dr. Gentilezza did not clarify, however, whether appellant would be further restricted from work activities due to her preexisting conditions. The record is unclear, therefore, whether appellant could perform any position which was physically within the restrictions Dr. Gentilezza provided, if appellant's preexisting impairments were also evaluated.

Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.⁸ The Board finds that the report of Dr. Gentilezza is not well rationalized as his conclusions regarding the lack of objective findings upon examination were not based upon the review of x-rays, magnetic resonance imaging, or computerized tomography scans. Also as Dr. Gentilezza did not clarify if appellant had additional work restrictions due to her preexisting conditions, his opinion regarding appellant's ability to return to work was not well rationalized.

⁷ The record also indicates that on July 10, 1979 when the Office accepted the claim appellant also had a concurrent condition of hiatal hernia.

⁸ *Harrison Combs, Jr.*, 45 ECAB 716 (1994).

Appellant's treating physicians subsequently submitted reports which indicated that appellant's multiple preexisting medical conditions cause total disability. In a report dated July 24, 1995, Dr. Demko stated that appellant had diabetes mellitus with diabetic neuropathy, hypertensive cardiovascular disease, hiatal hernia, chronic back disorder, carpal tunnel of the left hand, tachycardia and left knee complaints. He concluded that "due to all of the above conditions, the patient is totally and permanently disabled." In a report dated August 21, 1995, Dr. Mark Crukciani reported that appellant had multiple medical complications which caused total disability. He stated that appellant had a chronic disc disease secondary to bilateral laminectomies of the low back, with accompanying spinal stenosis, severe diabetic neuropathy and carpal tunnel syndrome of the left hand. He noted that if appellant returned to work it would be detrimental to her health and possibly dangerous to other employees around her.

Finally, the Board notes that the Office hearing representative in concluding that the selected position was medically suitable stated that, while appellant had multiple medical conditions, the only preexisting medical conditions which would be considered in evaluating appellant's ability to work were allergies and a knee problem and that her other conditions arose after her work injury. The hearing representative's finding in this regard is not supported by the medical evidence.

As the Office did not obtain a rationalized medical opinion from an impartial medical specialist which clarified appellant's ability to work, given her physical limitations from her accepted employment injury as well as from her multiple preexisting conditions, the Office did not meet its burden of proof in this case.

The decision of the Office of Workers' Compensation Programs dated April 30, 1997 is hereby reversed.

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

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member