

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of CONSTANCE YOUNG-FLOWERS and U.S. POSTAL SERVICE,  
POST OFFICE, Baltimore, MD

*Docket No. 98-1012; Submitted on the Record;  
Issued May 23, 2000*

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DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,  
BRADLEY T. KNOTT

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

In the present case, the Office accepted that appellant, then a 29-year-old letter sorting machine operator, sustained a muscle strain of the lumbar spine as a result of an employment injury on June 14, 1985. Appellant stopped working and received payment for total temporary disability.

By decision dated December 11, 1997, the Office determined that appellant had the capacity to perform the position of an "information clerk" and reduced appellant's wage-loss benefits accordingly.

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.<sup>1</sup> Pursuant to 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, 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,

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<sup>1</sup> *Patricia A. Keller*, 45 ECAB 278 (1993).

<sup>2</sup> 5 U.S.C. § 8115(a).

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.<sup>3</sup>

When the Office makes a medical determination of 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.<sup>4</sup> 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.<sup>5</sup>

In the present case, the Office improperly determined that the medical evidence of record established that appellant was physically capable of performing the duties of the selected position of an information clerk. In its December 11, 1997 decision, the Office found that the opinion of Dr. Robert F. Draper, the second opinion physician and a Board-certified orthopedic surgeon, outweighed the opinion of appellant's treating physician, Dr. James C. Murphy, a Board-certified orthopedic surgeon.

Dr. Draper indicated that appellant could lift up to ten pounds three times per hour for four hours and work a total of eight hours per day, but that she should avoid excessive standing, bending, twisting and reaching. The selected position of "information clerk" was within these physical limitations described by Dr. Draper. In contrast to the opinion of Dr. Draper, Dr. Murphy examined appellant on August 12, 1997 and opined that appellant was 100 percent disabled due to her lungs, back, weight and legs. Furthermore, on October 28, 1997 Dr. Murphy opined that appellant continued to have a tremendous amount of back radiation to her hip caused by both her obesity and the nonfusion of her lumbar spine.

The Office determined that Dr. Draper's opinion concerning appellant's physical capabilities outweighed Dr. Murphy's because Dr. Draper conducted a thorough physical examination of the lumbar spine and relied on x-ray evidence in making his assessment. Nevertheless, Dr. Murphy performed extensive and frequent examinations of appellant's lumbar spine in his numerous and regular examinations of appellant from 1985 through 1997. Moreover, Dr. Draper only reviewed one x-ray taken of appellant's spine on October 5, 1993, an x-ray, which Dr. Murphy previously interpreted as showing no significant changes of appellant's psuedoarthritic changes at L5-S1. In addition, Dr. Murphy conducted numerous other objective testing of appellant's lumbar spine in his long history of treating appellant, including reviewing additional x-rays, magnetic resonance imaging, myelograms, computerized axial tomographies and electromyographies. Accordingly, the Office erred in finding that Dr. Draper's findings regarding appellant's physical limitations were better supported by objective medical findings

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<sup>3</sup> See *Dorothy Lams*, 47 ECAB 584 (1996).

<sup>4</sup> See *Dennis D. Owen*, 44 ECAB 475 (1993).

<sup>5</sup> 5 ECAB 376 (1953).

than Dr. Murphy's. The Board finds a conflict in medical opinion between Drs. Draper and Murphy.

Consequently, the Office failed to meet its burden of proof of establishing that appellant was physically capable of performing the duties of the selected position of an information clerk.

The decision of the Office of Workers' Compensation Programs dated December 11, 1997 is hereby reversed.

Dated, Washington, D.C.  
May 23, 2000

George E. Rivers  
Member

Michael E. Groom  
Alternate Member

Bradley T. Knott  
Alternate Member