

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DIANE F. HAYES and DEPARTMENT OF HEALTH & HUMAN SERVICES,
NATIONAL INSTITUTE OF HEALTH, Bethesda, MD

*Docket No. 98-1608; Submitted on the Record;
Issued May 22, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant could perform the duties of a telephone answering service and, therefore, had a 53 percent loss of wage-earning capacity.

On August 17, 1993 appellant, then a 37-year-old food service worker, was transferring boxes of frozen food from one truck to another when she developed pain in the upper and lower portions of her back. She stopped working effective August 19, 1993. The Office accepted her claim for lumbar sprain and cervical strain and began payment of temporary total disability compensation as of October 22, 1993, after appellant had exhausted her leave. Appellant returned to light-duty work on October 3, 1994 but stopped working April 11, 1995. The Office resumed payment of temporary total disability compensation.

In an April 23, 1997 decision, the Office found that appellant could perform the duties of a telephone answering service and, therefore, had a 53 percent loss of wage-earning capacity. The Office reissued the decision on June 6, 1997 after reviewing additional medical evidence submitted by appellant that had been overlooked by the Office. In a June 17, 1997 letter, appellant requested reconsideration. In an August 11, 1997 merit decision, the Office denied appellant's request for modification of the June 6, 1997 decision. In a September 13, 1997 letter, appellant again requested reconsideration. In a December 2, 1997 merit decision, the Office again denied appellant's request for modification.

The Board finds that the case is not in posture for decision.

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the 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.¹ Accordingly, the evidence must establish that jobs in the position selected for determining wage-earning capacity are reasonably available in the general labor market in the commuting area in which the employee lives. In determining an employee's wage-earning capacity, the Office may not select a makeshift or odd lot position or one not reasonably available on the open labor market.²

The Office selected the position of telephone answering service as a position reflecting appellant's wage-earning capacity.³ The position is sedentary, requiring the ability to occasionally lift up to 10 pounds and to constantly reach, handle, finger, talk and hear. The Office indicated that the vocational preparation for the position was 30 days to 3 months. The state employment commission indicated that the job was performed in sufficient numbers so as to make reasonably available within appellant's community area.

In an August 19, 1993 report, Dr. Charles H. Emich, a Board-certified orthopedic surgeon, indicated that previous computerized axial tomography (CAT) scans had shown appellant had degenerative disc disease at L4-5 and L5-S1. He gave a history of appellant's August 17, 1993 employment injury and diagnosed chronic lumbosacral strain. An electromyogram (EMG) and nerve conduction studies showed a right S1 radiculopathy and a left S1 nerve root irritation. A lumbar myelogram and a CAT scan of the lumbar spine were normal. A CAT scan of the cervical spine showed a herniated C3-4 disc and a cervical spondylosis at C3-4 and C4-5. In subsequent progress reports Dr. Rida N. Azer, a Board-certified orthopedic surgeon, indicated that appellant had continued cervical and lumbar pain. By September 8, 1995, Dr. Azer was stating that appellant could not return to her former position.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Vincent Desiderio, a Board-certified orthopedic surgeon, for an examination and second opinion. In an October 4, 1995 report, Dr. Desiderio diagnosed chronic lumbar and cervical strain. He commented that appellant's radiculopathy had resolved. He indicated that appellant's major problem appeared to be her lower back, which prevented her from any prolonged standing or heavy work. Dr. Desiderio related her condition to the employment injury. He stated appellant could return to light work with no lifting over five pounds, no prolonged stooping, bending, or twisting and the opportunity to sit and stand intermittently every half hour. In an accompanying work restriction evaluation form Dr. Desiderio stated appellant could lift up to 10 pounds.

In a February 2, 1996 report, Dr. Azer stated that appellant should permanently avoid bending, stooping, kneeling, squatting, pushing, pulling, lifting over 10 pounds, prolonged standing and prolonged walking. In a March 21, 1997 report, Dr. Azer stated that he had reviewed the position description for telephone answering service and concluded that appellant could perform the duties of the position if she could sit for two hours a day. In a June 16, 1997 report, Dr. Azer stated that an EMG and nerve conduction studies performed on June 11, 1997

¹ See generally, 5 U.S.C. § 8115(a); A. Larson *The Law of Workmen's Compensation* § 57.22 (1989).

² *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

³ *Dictionary of Occupational Titles*, DOT No. 235.662-026.

appellant had bilateral C5 radiculopathy and bilateral S1 radiculopathy. He concluded appellant could not perform the duties of telephone answering service because it involved prolonged standing and repetitive movements of the hands, which appellant could not perform. Dr. Azer stated appellant was permanently, totally disabled.

Dr. Desiderio gave differing work restrictions, particularly on appellant's limitation on lifting, giving it as either 5 pounds or 10 pounds. As the position requires the ability to lift up to 10 pounds, appellant's lifting restrictions are crucial to determining whether appellant could perform the duties of a telephone answering service. Dr. Desiderio indicated that appellant could perform a job that allowed her to change position every half hour and could work eight hours a day. Dr. Azer concluded, however, that appellant could sit only two hours a day. He stated that, as appellant could not perform any prolonged sitting, she could not perform the duties of the selected position. There exists, therefore, a conflict in the medical evidence. The case must, therefore, be remanded for referral of appellant to an appropriate impartial medical specialist for an examination, description of her work restrictions and opinion on whether she could perform the duties of a telephone answering service. After further development as it may find necessary the Office should issue a *de novo* decision.

The decisions of the Office of Workers' Compensation Programs, dated December 2, August 11 and June 6, 1997, are hereby set aside and the case remanded for further development as set forth in this decision.

Dated, Washington, D.C.
May 22, 2000

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member