

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of KYU KELLY and U.S. POSTAL SERVICE,  
POST OFFICE, Las Cruces, NM

*Docket No. 99-1636; Submitted on the Record;  
Issued October 4, 2000*

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DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,  
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly determined appellant's loss of wage-earning capacity for the period beginning February 18, 1997.

The Office accepted that appellant sustained carpal tunnel syndrome in the performance of her duties as a machine distribution clerk. The Office paid appellant compensation for temporary total disability from April 18, 1989 until she returned to work as a manual distribution clerk on June 5, 1989. Appellant again stopped work on July 21, 1989 and the Office resumed payment of compensation for temporary total disability. On November 27, 1989 appellant underwent a right carpal tunnel release.

By decision dated February 18, 1997, the Office terminated appellant's compensation effective that date on the basis that the medical evidence established that she had recovered from her employment-related condition. Appellant requested reconsideration, and the Office, by decision dated December 10, 1997, vacated its February 18, 1997 decision on the basis that the physician to whom it referred appellant to resolve a conflict of medical opinion was not Board-certified.

On February 5, 1998 the Office referred appellant to Dr. Michael Polsky, a Board-certified neurologist, to resolve a conflict of medical opinion on the question of whether her employment-related condition had resolved. In a report dated March 3, 1998, Dr. Polsky diagnosed "History of carpal tunnel syndrome, presently without electrical abnormalities but with positive carpal tunnel Tinel's signs bilaterally." Dr. Polsky stated, "I do n[o]t see anything wrong with giving her a trial of work as a postal distribution clerk where she would be using mainly her left arm, sparing the right arm as much as possible." In work tolerance limitations dated March 3, 1998, Dr. Polsky indicated that appellant could perform repetitive movements of the right wrist for 5 to 10 minutes, and that she could not perform any reaching with her right arm. In response to an Office request for clarification of his report, Dr. Polsky stated in an

April 29, 1998 report that he did not firmly believe appellant had carpal tunnel syndrome, but that symptoms of carpal tunnel syndrome could recur without an apparent provocative cause.

By decision dated August 6, 1998, the Office reduced appellant's compensation based upon a finding that her position as a self-employed accounting service business owner/operator fairly and reasonably represented her wage-earning capacity, and that she was able to earn \$400.00 per week in this position. Appellant requested reconsideration, and the Office, by decision dated February 11, 1999, found that appellant's position as a self-employed accounting service business owner fairly and reasonably represented her wage-earning capacity.

Section 8115 of the Federal Employees' Compensation Act,<sup>1</sup> titled "Determination of wage-earning capacity" states in pertinent part:

"In determining compensation for partial disability.... If the actual earnings of the employee do not 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."

The Board finds that the Office improperly determined appellant's loss of wage-earning capacity for the period beginning February 18, 1997.

In its decisions dated February 11, 1999 and August 6, 1998, the Office stated that appellant's position as a self-employed accounting service business owner fairly and reasonably represented her wage-earning capacity. The Office, however, did not use appellant's earnings in this position, which appellant had occupied since December 1994, as the basis of her wage-earning capacity. Instead, the Office used the amount appellant estimated it would have cost her to hire someone to perform her position, \$10.00 per hour. Even though an Office rehabilitation specialist indicated that \$10.00 per hour was in the range of salaries for the position of office

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<sup>1</sup> 5 U.S.C. § 8115.

manager or administrative assistant and that these positions were available in appellant's commuting area, the Office's decision was erroneous.<sup>2</sup>

Under section 8115 of the Act, wage-earning capacity must be determined either by using actual earnings or by selecting an available position in the open labor market that the claimant is physically and occupationally able to perform. The Office cannot make a wage-earning determination based on what another person would have earned if he or she had worked the hours that the claimant did in his or her actual position.<sup>3</sup> Although the Office's decisions in the present case purported to use appellant's actual earnings as the basis of her wage-earning capacity beginning February 18, 1997, appellant's actual earnings, as reflected by her income tax return from 1997, appear less than the \$400.00 per week used by the Office.

The decisions of the Office of Workers' Compensation Programs dated February 11, 1999 and August 6, 1998 are reversed.

Dated, Washington, DC  
October 4, 2000

David S. Gerson  
Member

Michael E. Groom  
Alternate Member

Priscilla Anne Schwab  
Alternate Member

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<sup>2</sup> See *Phillip D. Queen*, 35 ECAB 573 (1984) (the Board found that the Office's use of the amount it would have cost for the employee to hire someone to perform his self-employed position "arbitrary" and inappropriate for determining his wage-earning capacity).

<sup>3</sup> *Clifford C. Larson*, 39 ECAB 554 (1988).