

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROCHELLE JONES and DEPARTMENT OF HEALTH & HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION, Baltimore, MD

*Docket No. 99-1782; Submitted on the Record;
Issued September 20, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation to reflect her wage-earning capacity as a telephone solicitor.

The Office accepted that appellant sustained bilateral carpal tunnel syndrome causally related to her federal employment as a computer assistant. By letter dated April 10, 1998, the Office notified appellant that it proposed to reduce her compensation to reflect her wage-earning capacity as a telephone solicitor. In a decision dated March 24, 1999, the Office reduced appellant's compensation based on her wage-earning capacity in the selected position of telephone solicitor. On April 16, 1999 the Office issued a "revised" ... decision vacated the earlier decision but again reduced appellant's compensation based on wage-earning capacity as a telephone solicitor.¹

The Board finds that the Office did not meet its burden of proof in reducing appellant's compensation.

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 in such benefits.² Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his 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 wage-earning capacity is determined with due regard to the nature of his

¹ The memorandum accompanying the March 24, 1999 decision stated that appellant did not present argument in response to the notice of proposed reduction; the April 16, 1999 decision acknowledges and discusses evidence submitted by appellant in June 1998.

² *Carla Letcher*, 46 ECAB 452 (1995).

injury, his degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his wage-earning capacity in his 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

The Office made a determination that appellant was medically capable of performing the selected position of telephone solicitor. The Office found that the weight of the evidence with respect to appellant's work restrictions was represented by a December 19, 1995 report from Dr. Antoni Goral, an orthopedic surgeon, serving as a second opinion physician. The Board notes that it is well established that a wage-earning capacity determination must be based on a reasonably current medical evaluation.⁶ The Office cannot properly determine appellant's wage-earning capacity without a detailed current description of her condition and ability to perform work.⁷

The report of Dr. Goral was prepared more than three years before the wage-earning capacity determination in this case. It cannot be considered reasonably current and, therefore, cannot be used to determine that the selected position was medically suitable.⁸ Dr. Goral did submit subsequent reports when he examined appellant as an attending physician. In his April 30, 1998 report, Dr. Goral stated that he would not make comment on work capacity until electromyogram/nerve conduction velocity (EMG/NCV) studies were performed. Dr. Goral stated in a May 13, 1998 report that vocational rehabilitation might be appropriate, or a gradual reinstatement to the workplace at two to four hours per day. He did not comment on the telephone solicitor position or provide a detailed description of appellant's work restrictions.

³ See *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); see also 5 U.S.C. § 8115(a).

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

⁵ 5 ECAB 376 (1953); see also 20 C.F.R. § 10.403.

⁶ *Carl C. Green, Jr.*, 47 ECAB 737, 746 (1996).

⁷ See *Anthony Pestana*, 39 ECAB 980 (1988); *Samuel J. Russo*, 28 ECAB 43 (1976) (medical reports submitted two years prior to the wage-earning capacity determination were not sufficient to establish appellant's current work capacity).

⁸ The statement by Dr. Goral in the December 19, 1995 report appellant's that restrictions were "permanent" indicates only that Dr. Goral believed appellant's condition was not going to improve; it does not preclude a worsening of the condition or in any way obviate the need for a current medical report.

The record in this case does not contain a medical opinion that appellant could perform the duties of the telephone solicitor position or a detailed current description of appellant's work capacity that is sufficient to support a finding of medical suitability for the selected position. Therefore, the Board finds that the Office did not meet its burden of proof in reducing appellant's compensation.

The decision of the Office of Workers' Compensation Programs dated April 16, 1999 is reversed.

Dated, Washington, DC
September 20, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member