

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARIETTA K. HARRIS and U.S. POSTAL SERVICE,
POST OFFICE, Akron, OH

*Docket No. 00-507; Submitted on the Record;
Issued August 29, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that the modified general clerk position, which appellant performed, fairly and reasonably represented her wage-earning capacity; and (2) whether the Office properly terminated appellant's entitlement to compensation benefits for her accepted January 26, 1996 acute lumbar strain and aggravation of degenerative disc disease at L1-3.

On January 26, 1996 appellant, then a 45-year-old modified distribution clerk,¹ filed a claim for traumatic injury alleging that on that date she sustained injuries to her right knee when she slipped and fell while in the performance of duty. On February 22, 1996 the Office initially accepted appellant's claim for internal derangement of the right knee, right lateral meniscus tear and right knee arthroscopy, under claim number A9-0412014. On August 14, 1996 the Office expanded its acceptance to include acute lumbosacral strain and aggravation of degenerative disc disease at L1-3. Appellant stopped work on January 26, 1996.

In a report dated December 27, 1996, Dr. H.A. Pinsky, an osteopath, treating appellant for her knee condition, stated that appellant continued to complain of knee pain, stiffness and instability, but she had reached maximum medical improvement with respect to her knee condition. He further noted that appellant was continuing to have back problems. In a report dated October 21, 1997, Dr. Mark. L. Allen, a Board-certified anesthesiologist and appellant's treating physician for her back condition, stated that appellant continued to suffer from severe low back pain with escalating symptoms and decreasing functionality and was becoming more and more disabled, as well as increasingly depressed, due to her chronic pain. The physician noted that appellant urgently required repeat magnetic resonance imaging scan, a repeat surgical evaluation, aggressive physical therapy and a psychological evaluation and would be unable to return to work without approval of this treatment plan.

¹ There is a notation in the record that prior to her January 26, 1996 injury, appellant was working in a rehabilitation position as a consequence of a prior claim, number A9-230792.

At the request of the Office, on November 11, 1997 appellant was seen by Dr. Charles J. Paquelet, a Board-certified orthopedic surgeon, for a second opinion examination. In his report, Dr. Paquelet opined that all of appellant's complaints were directly related to her January 26, 1996 injury, but that as examination showed no employment-related structural or neuromuscular deficit of the spine or either lower limb, appellant could return to work in her usual capacity. He further noted that as her extensive symptomatic care had had little effect in changing her condition, treatment should be discontinued.

Following the receipt of Dr. Paquelet's report, the Office found that a conflict in medical opinion existed between Drs. Allen and Paquelet, requiring further medical development of the claim.

To resolve the conflict in medical opinion evidence between Drs. Paquelet and Allen, the Office referred appellant, along with a statement of accepted facts and copies of the relevant medical evidence of record, to an impartial medical specialist, Dr. Alan H. Wilde, a Board-certified orthopedic surgeon. In his report dated January 2, 1998, Dr. Wilde opined that appellant's back condition was preexisting and was not caused by the January 1996 employment accident and that she could return to work four hours a day. In a supplemental report dated February 25, 1998, he clarified that the four hour a day work restriction was based on appellant's residual knee condition. Upon receipt of Dr. Wilde's reports on March 30, 1998 the Office terminated appellant's compensation benefits for her back injury, on the grounds that the medical evidence established that appellant had recovered from the effects of her January 26, 1996 accepted lumbosacral strains and aggravation of degenerative disc disease. Appellant requested an oral hearing before an Office representative.

By letter dated April 1, 1998, the employing establishment offered appellant a position as a modified general clerk, four hours a day. Appellant accepted the position on April 20, 1998 and returned to work four hours a day on April 27, 1998.

In a decision dated September 3, 1998, the Office hearing representative found that the Office failed to follow correct procedure in terminating appellant's compensation benefits for her back condition without first giving proper notice and further found that Dr. Wilde's opinion required further clarification and medical rationale. Therefore, the case was remanded for further medical development.

On remand, the Office forwarded an updated statement of accepted facts and additional questions for clarification to Dr. Wilde for further comment. In his supplemental opinion dated September 30, 1998, Dr. Wilde opined that all of appellant's current back symptoms were due to the normal progression of her preexisting degenerative disc disease and that the employment-related aggravation of her condition had ceased.

Upon receipt of Dr. Wilde's supplemental report on November 6, 1998 the Office issued a Notice of Proposed Termination of Compensation on the grounds that the medical evidence established that appellant had recovered from the effects of her January 26, 1996 accepted back condition.

In a decision dated November 25, 1998, the Office noted that appellant had been working successfully, 4 hours a day, for at least 60 days and, therefore, found that, effective December 9, 1998, the part-time modified general clerk position, with wages \$363.76 per week, fairly and reasonably represented appellant's wage-earning capacity.²

In a decision dated December 9, 1998, the Office terminated appellant's entitlement to compensation benefits for her back condition effective that date.

By letter received December 14, 1998, appellant informed the Office that on August 17, 1998 her back had given out completely and she had stopped work. Appellant further stated that she had filed an additional claim for this condition, which had been approved by the Office under claim number A9-0443619.

By letter dated January 6, 1999, appellant requested an oral hearing before an Office representative with respect to claim number A9-0412014. In a letter decision dated April 20, 1999, the Office denied appellant's request for an oral hearing with respect to the November 25, 1998 wage-earning capacity decision, finding that her request was not timely filed and that the issue could be equally well addressed by requesting reconsideration. The Office further informed that her case would be scheduled for a hearing, as requested, with respect to the Office's December 9, 1998 decision, terminating appellant's entitlement to compensation for her January 26, 1996 back condition.

Following the hearing, in a decision dated August 18, 1999, an Office representative affirmed the Office's prior decision terminating appellant's entitlement to compensation benefits for her January 26, 1996 accepted back condition, on the grounds that appellant had no employment-related residuals of this condition.

The Board has duly reviewed the record in the present appeal and finds that this case must be reversed.

With respect to the Office's November 25, 1998 decision, finding that the modified general clerk position, which appellant performed, fairly and reasonably represented her wage-earning capacity, the Board notes that section 8115(a) of the Federal Employees' Compensation Act provides that in determining compensation for partial disability, "the wage-earning capacity of an employee is determined by her actual earnings if her earnings fairly and reasonably represent her wage-earning capacity."³ While appellant did return to work in a part-time modified capacity on April 27, 1998, the Board notes that the facts of this case indicate that on August 17, 1998 appellant again sustained a back injury, which was accepted by the Office on October 28, 1998 for acute low back strain and temporary aggravation of degenerative disc disease under claim number A9-0443619. Thus, prior to the issuance of the Office's

² The Office applied the formula for determining loss of wage-earning capacity based on actual earnings, which was developed in *Albert C. Shadrick*, 5 ECAB 376 (1953) and codified by regulation at 20 C.F.R. § 10.303. Section (b) of this regulation provides that wage-earning capacity in terms of percentage is obtained by dividing the employee's earnings by the "current pay rate," which means current salary or pay rate for the job held at the time of injury; *see also Robin Bogue*, 46 ECAB 488 (1995).

³ 5 U.S.C. § 8115(a).

November 25, 1998 wage-earning capacity decision, which the Office noted was effective December 6, 1998, appellant had already stopped work due to an accepted employment-related back condition and was again receiving appropriate compensation benefits from the Office. The Board notes that the Office may perform a retroactive wage-earning determination if appellant worked in the position for at least 60 days, the earnings fairly and reasonably represented wage-earning capacity and the work stoppage was not due to the employment injury.⁴ While appellant did return to work for more than 60 days, the record does not establish whether or not appellant was forced to discontinue work due to accepted employment-related condition. Thus, the Office has not established the basis for its loss of wage-earning capacity determination. The November 25, 1998 decision must be reversed.⁵

With respect to whether the Office properly terminated appellant's entitlement to compensation benefits for her accepted January 26, 1996 acute lumbar strain and aggravation of degenerative disc disease at L1-3, the Board finds that the Office has not met its burden of proof.

The facts in this case indicate that subsequent to the acceptance of appellant's August 17, 1998 back injury claim, number A9-0443619, on January 11, 1999 the Office properly contemplated doubling this claim file with appellant's January 26, 1996 back injury claim, number A9-0412014, the subject of the instant appeal.⁶ This was in accord with Office procedures in effect at the time of the August 18, 1999 decision, which indicate that cases should be doubled when a new injury is reported for an employee who previously filed an injury claim for a similar condition and further provides that cases should be doubled as soon as the need to do so becomes apparent.⁷ For reasons unknown, however, while the two claim files were physically combined, the Office failed to formally double the claims and proceeded to develop the two claims separately. As the Office did not associate the new back claim with appellant's prior claim, the Board finds that the Office has presented insufficient evidence and rationale in its August 18, 1999 decision, to meet its burden to terminate appellant's benefits.

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(e) (May 1997).

⁵ *Id.* As the Office's November 25, 1998 decision is reversed, the question of whether the Office properly denied appellant's request for an oral hearing on the issues contained in that decision is moot.

⁶ In addition to the Office's January 11, 1999 notation, the record contains an unnumbered memorandum dated October 22, 1999, confirming that the case files should be doubled under master claim number A9-0412014.

⁷ FECA Bulletin No. 97-10 (issued February 15, 1997) regarding case doubling. The Board notes that in February 2000 FECA Bulletin 97-10 was incorporated into the Office Procedure Manual; *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *File Maintenance and Management*, Chapter 2.400.8(c)(1) (February 2000).

The August 18, 1999 and November 25, 1998 decisions of the Office of Workers' Compensation Programs are reversed.

Dated, Washington, DC
August 29, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member