

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DELLA C. CILLO and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Perry Point, MD

*Docket No. 00-2338; Submitted on the Record;
Issued August 24, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined appellant's loss of wage-earning capacity effective May 18, 2000.

On July 20, 1989 appellant, then a 35-year-old registered nurse, filed a traumatic injury claim (Form CA-1) alleging that she injured her left arm on July 19, 1989 while assisting another nurse to lift a patient.¹ The Office accepted the claim for left wrist sprain. In a letter dated August 6, 1998, the Office expanded the claim to include cervical herniation at C5-6 and mild lumbar myofascial syndrome.²

Appellant filed a notice of recurrence of total disability commencing August 16, 1989, due to her accepted July 19, 1989 employment injury, which was accepted by the Office.

On November 13, 1991 appellant filed a traumatic injury claim alleging that she felt pain in her mid-back, which radiated into her left arm while lifting a patient from a geriatric chair and bed.³ The Office accepted the claim for left shoulder strain and lumbosacral strain.⁴ Appellant stopped work on November 15, 1991 and returned to light-duty work eight hours per day for three days per week on March 16, 1992. Appellant stopped work on September 7, 1993 and returned to work on November 1, 1993. The employing establishment provided appellant with

¹ This was assigned claim number A25-347637.

² On November 6, 1998 the Office combined appellant's two claims with A25-397065 doubled into A25-347637.

³ This was assigned claim number A25-397065. On the back of the form appellant indicated that she worked 10-hour shifts 4 days per week or a 40-hour week. Appellant also filed a recurrence claim for this same date due to her accepted July 19, 1989 employment injury.

⁴ By letter dated February 3, 1993, appellant requested that her status be changed to part-time employee from full-time employee. Effective March 7, 1993, the employing establishment changed appellant's status to that of a part-time employee.

light duty until August 15, 1997, when her employment was terminated. Subsequently, the termination was rescinded and appellant was placed in a leave-without-pay status until returning to work on March 27, 1999.

In an attending physician's report (Form CA-20) Dr. Vincent M. Osteria, appellant's attending Board-certified orthopedic surgeon, indicated that appellant was able to return to light-duty work on March 28, 1999.

In a report dated July 12, 1999, Dr. Osteria noted that appellant's neck was aggravated by the duties of a telephone operator and restricted her to three hours of sitting per day and working eight hours per day for three days. In a duty status report (Form CA-17) dated August 9, 1999, he indicated that appellant could only work part time for eight hours per day for three days with restrictions.

On March 27, 1999 appellant returned to full-time work as a telephone operator working 40 hours per week at an hourly rate of \$9.58, which was reduced to 24 hours per week on July 14, 1999 based upon her physician's report.

On October 25, 1999 appellant was reassigned to the position of nurse, which conformed to restrictions indicated by her physician, which include sedentary work, comfortable chair, no lifting or carry over five pounds. The position was part time up to 24 hours per week with an annual salary of \$48,749.00.

By decision dated May 18, 2000, the Office advised appellant that a determination had been made that the position of nurse (modified), which was effective October 25, 1999, fairly and reasonably represented her wage-earning capacity. The Office also advised appellant that she was not entitled to any further compensation benefits inasmuch as her actual wages met or exceeded the wages of the job she held when injured and, therefore, she was no longer disabled for wage loss.

The Board finds that the Office improperly determined that the position of nurse (modified) and reasonably represented appellant's wage-earning capacity.

Once the Office has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.⁵ In the instant case, the Office has failed to meet its burden.

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...."⁶ Generally, wages actually earned are the best measure of wage-earning

⁵ *Gewin C. Hawkins*, 52 ECAB ____ (Docket No. 99-798, issued January 29, 2001); *Alice J. Tysinger*, 51 ECAB ____ (Docket No. 98-2423, issued August 29, 2000).

⁶ *Loni J. Cleveland*, 52 ECAB ____ (Docket No. 99-82, issued December 15, 2000); *George E. Williams*, 44 ECAB 530, 533 (1993).

capacity and in the absence of evidence showing they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.⁷

Appellant returned to work in a part-time, limited-duty capacity as a nurse (modified) on October 25, 1999. While appellant held the position of nurse for approximately seven months, this fact alone is insufficient to establish that the position represents her wage-earning capacity. In concluding that the position of nurse (modified) represented appellant's wage-earning capacity, the Office neglected to consider that the position was a part-time position. Inasmuch as appellant's date-of-injury position was both full time and permanent the Office erred in concluding that her part-time position as a nurse (modified) fairly and reasonably represented her wage-earning capacity.⁸ The Office also erred in concluding that appellant sustained no wage loss in light of her ability to earn annual wages of \$48,749.00 as a nurse (modified). The Office's determination that appellant had wages of \$48,749.00 per year as a nurse (modified) was based on the erroneous conclusion that she worked or had worked part time in her position on the date of her injury. Furthermore, the Office decision makes a conclusory statement that appellant's new position meets or exceeds the wages she would have earned in her date-of-injury position. The Office erred in finding that the part-time position of nurse (modified) fairly and reasonably represented appellant's wage-earning capacity.

The May 18, 2000 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC
August 24, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

⁷ 5 U.S.C. § 8115(a); *Loni J. Cleveland*, *supra* note 6.

⁸ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a)(1), (3) (July 1997); *Ronald Litzler*, 51 ECAB ____ (Docket No. 99-35, issued July 14, 2000).