

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JANICE E. PEOPLES and U.S. POSTAL SERVICE,
PROCESSING & DISTRIBUTION CENTER, Nashville, TN

*Docket No. 99-2144; Submitted on the Record;
Issued May 18, 2001*

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 that appellant had no loss of wage-earning capacity based on her performance of the position of modified custodian.

On July 16, 1994 appellant, then a 45-year-old custodian, filed a claim for an injury to her left hand sustained that date when her hand was crushed between a cart and a dumpster. The Office accepted that appellant sustained a laceration of the left hand and reflex sympathetic dystrophy of the left upper extremity as a result of the July 16, 1994 employment incident.

By decision dated March 6, 1996, the Office terminated appellant's compensation on the grounds that appellant refused an offer of suitable employment. This decision was reversed by an Office hearing representative in an August 2, 1996 decision and compensation for temporary total disability was reinstated.

Appellant returned to work on October 27, 1997 to a full-time position as a modified custodian. From October 31 to December 18, 1997 appellant worked four hours a day; she stopped work on December 18, 1997 and returned to work on February 2, 1998. By decision dated February 17, 1998, the Office found that the evidence failed to establish disability for work from October 31, 1997 to February 2, 1998. This decision was affirmed by an Office hearing representative in a February 1, 1999 decision.

By decision dated March 11, 1999, the Office found that appellant's position as a modified custodian at the employing establishment fairly and reasonably represented her wage-earning capacity. The Office terminated appellant's compensation effective February 2, 1998 on the grounds that she had no loss of wage-earning capacity after that date.

Section 8115 of the Federal Employees' Compensation Act,¹ titled "Determination of Wage-Earning Capacity," states in pertinent part: "In determining compensation for partial disability ... the wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity." Generally, wages actually earned are the best measure of a wage-earning 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.²

The Board finds that the Office properly determined that the position of modified custodian fairly and reasonably represented appellant's wage-earning capacity.

At the time of the Office's March 11, 1999 decision, appellant had performed the position of modified custodian for more than one year. The duties of this position -- answering telephones, taking messages and performing other clerical duties within her restrictions -- were reviewed by an impartial medical specialist, Dr. John W. Lamb, a Board-certified orthopedic surgeon. He concluded in a June 18, 1997 report: "I do not believe there is any reason why [appellant] should not be able to answer the [tele]phone, take messages and do general office work almost exclusively with her right arm. She may be unable to sit or stand constantly, but I would not anticipate any major problem with a general clerical position."

The work tolerance limitations prescribed by Dr. Lamb -- very limited use of the left arm, no constant sitting or standing, and no lifting more than 20 pounds with the right arm -- are not exceeded by the physical requirements of the position of modified custodian -- maximum lifting of 10 pounds with the right arm, intermittent sitting and standing at the employee's discretion and no use of the left hand or arm.

Appellant's attending physician, Dr. Benjamin W. Johnson, a Board-certified anesthesiologist, stated in an October 27, 1997 report that it was "appropriate for [appellant] to try to perform the light janitorial duties as recommended as long as her left upper extremity and shoulder girdle are not involved in the process."

Dr. Johnson later raised some concerns about the chair used to appellant and about appellant cradling the telephone between her neck and shoulder. By early April 1998, the Office provided appellant a chair with adjustable arms and a backrest and a headset for answering the telephone.

Dr. Johnson also raised concerns about the change in appellant's work schedule, effective April 4, 1998, from night to day shift, and from Saturday and Sunday off to Thursday and Sunday. In a report dated June 29, 1998, Dr. Johnson requested that appellant "be allowed to have two days off on the weekend so that she may recover from her work-related duties in regard to her performance of her job responsibilities." In a report dated August 19, 1998, Dr. Johnson recommended that appellant work weekdays because they were busier than weekends and that would distract her from her pain.

¹ 5 U.S.C. § 8115.

² *Hubert F. Myatt*, 32 ECAB 1994 (1981); *Lee R. Sires*, 23 ECAB 12 (1971).

These reports do not establish that the position of modified custodian with Thursdays and Sundays off does not fairly and reasonably represent appellant's wage-earning capacity, in light of appellant's performance of this position with this schedule continuously for more than 10 months at the time of the Office's March 11, 1999 decision.

The Board further finds that the Office used incorrect pay rate figures in computing appellant's loss of wage-earning capacity.

Section 10.403(d) states in pertinent part: "The employee's wage-earning capacity in terms of percentage is computed by dividing the employee's earnings by the current pay rate."³ Current pay rate is defined in section 10.403(c) as "the salary or wages for the job held at the time of injury at the time of the determination."⁴ In determining that appellant had no loss of wage-earning capacity, the Office compared appellant's earnings on February 2, 1998, \$668.44 a week, not with the current pay rate of the job appellant held when injured, but rather with the pay rate of that job on the date of her July 16, 1994 injury. The case will be remanded to the Office for proper calculation of appellant's pay rate.

The decision of the Office of Workers' Compensation Programs dated March 11, 1999 is affirmed in part and set aside in part, and the case is remanded to the Office for action consistent with this decision.

Dated, Washington, DC
May 18, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member

³ 20 C.F.R. § 10.403(d).

⁴ 20 C.F.R. § 10.403(c).