U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GABRIELA E. CHRISTIE and DEPARTMENT OF THE AIR FORCE, McGUIRE AIR FORCE BASE, NJ

Docket No. 01-1275; Submitted on the Record;
Issued March 5, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly determined that the position of receptionist represented appellant's wage-earning capacity effective May 1, 2000.

The Office accepted that appellant sustained right lateral epicondylitis in the performance of her duties as a sales store checker, and began payment of compensation for temporary total disability on June 21, 1997, the date appellant resigned her position at the employing establishment.

By decision dated July 26, 1999, the Office reduced appellant's compensation for loss of wage-earning capacity to zero for failure to cooperate with vocational rehabilitation efforts. The Office vacated this decision on January 21, 2000.

On March 27, 2000 the Office issued a notice of proposed reduction of compensation based on appellant's wage-earning capacity in the position of receptionist.

By decision dated May 1, 2000, the Office found that the position of receptionist represented appellant's wage-earning capacity, and reduced appellant's compensation to zero, as the pay rate of a receptionist in appellant's commuting area exceeded the current pay rate of the position appellant held when she was injured.

The Board finds that the Office improperly determined that the position of receptionist fairly and reasonably represented appellant's wage-earning capacity effective May 1, 2000.

An injured employee who is unable to return to the position held at the time of injury but who is not totally disabled for all gainful employment is entitled to compensation computed on

loss of wage-earning capacity.[1] Section 8115 of the Federal Employees' Compensation Act,[2] 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 --
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> (1) the nature of his injury;
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> (2) the degree of physical impairment;
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> (3) his usual employment;
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> (4) his age;
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> (5) his qualifications for other employment;
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> (6) the availability of suitable employment; and
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> (7) other factors or circumstances which may affect his wage-earning capacity in his disabled condition."

Appellant's attending physician, Dr. Scott F. Garberman, indicated in an April 14, 1998 report of appellant's work tolerance limitations that she could perform repetitive movements of her wrists or elbows for 2 hours per day, lift 10 pounds 1 hour per day, push or pull 10 pounds 2 hours per day, and work 8 hours per day. In Dr. Garberman's narrative report dated March 6, 1998, he described findings on physical examination and noted that appellant's right lateral epicondylitis had improved. In a report dated May 13, 1998, Dr. Marc Kahn, to whom the Office referred appellant for a second opinion evaluation, described appellant's findings on physical examination, and concluded:

> "She cannot return to her job requirements. The patient has restrictions with regard to repetitive motion of the right elbow as well as the right wrist. In addition, she will have difficulty doing any lifting greater than five pounds with the right upper extremity and difficulty with overhead work."

In a list of appellant's work tolerance limitations dated May 28, 1998, Dr. Kahn indicated that appellant could work eight hours per day, lift five pounds with her right arm, and perform repetitive movements of the right elbow for four hours per pay, one-half on and one-half off.

These reports are not sufficient to establish that appellant was physically capable of performing the position of receptionist. It is well established that a wage-earning capacity

[1] 5 U.S.C. § 8106(a); *Alfred R. Hafer*, 46 ECAB 553 (1995).

[2] 5 U.S.C. § 8115.

determination must be based on a reasonably current medical evaluation.[3] As the report from appellant's attending physician was over two years old and the report from the Office's referral physician was within one month of being two years old at the time of the Office's determination of appellant's wage-earning capacity, these reports cannot form a valid basis for that determination.[4] In addition, Dr. Kahn indicated that appellant could lift five pounds. The Department of Labor's *Dictionary of Occupational Titles* indicates that the position of receptionist is sedentary and requires occasional lifting up to 10 pounds. The Office has not met its burden of justifying the reduction of appellant's compensation benefits.[5]

The May 1, 2000 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, DC
March 5, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[3] *Carl C. Green, Jr.*, 47 ECAB 737 (1996).

[4] *Keith Hanselman*, 42 ECAB 680 (1991); *Ellen G. Trimmer*, 32 ECAB 1878 (1981).

[5] Once the Office accepts a claim, it has the burden of justifying a subsequent reduction of compensation benefits. *Gregory A. Compton*, 45 ECAB 154 (1993).