

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of BETTY J. RICHARDSON and U.S. POSTAL SERVICE,  
POST OFFICE, Philadelphia, PA

*Docket No. 03-386; Submitted on the Record;  
Issued August 1, 2003*

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DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,  
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation based on its determination that the selected position of information clerk represented appellant's wage-earning capacity.

On October 29, 1984 appellant, then a 40-year-old clerk, filed a traumatic injury claim (Form CA-1), alleging that she injured her right hip on October 28, 1984, while picking up a tray of mail.<sup>1</sup> The Office accepted the claim for a sprain of the right hip joint and a herniated disc at L5. Appellant stopped work on October 30, 1984 and has not returned.<sup>2</sup> She was placed on the automatic rolls for temporary disability by letter dated November 28, 1989.

On April 30, 1999 the Office referred appellant to Dr. Bong S. Lee, a Board-certified orthopedic surgeon, to resolve the conflict in the medical evidence between Dr. Andrew J. Collier, Jr., a second opinion Board-certified orthopedic surgeon, and Dr. Barbara G. Frieman, an attending Board-certified orthopedic surgeon, regarding the cause and extent of her impairment.

In a report dated May 24, 1999, Dr. Lee diagnosed low back pain syndrome due to degenerative discogenic disease. He opined appellant's accepted L5-S1 herniated disc with right leg symptomatology and right hip sprain had "resolved with very minimal residuals at this time." Dr. Lee concluded that appellant was capable of working eight hours a day with restrictions on

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<sup>1</sup> This was assigned claim number A03-98094. Appellant filed an occupational disease claim (Form CA-2) on January 4, 1987 alleging that, on April 25, 1985, she first realized that her bone spur in her lower back was employment related. This was assigned claim number A03-119528.

<sup>2</sup> The employing establishment removed appellant from its service effective May 15, 1987 for dishonest conduct. Dr. Pedro P. Polakoff, II, an attending Board-certified neurological surgeon, released appellant to work with restrictions in a January 27, 1986 report. Appellant filed an occupational disease claim (Form CA-2) on January 4, 1987 alleging that her small disc or bone spur in her back were problems that were employment related.

walking, sitting, standing, reaching, twisting, pushing, pulling, lifting and climbing. He stated that she should have a 15-minute break every 2 hours.

On July 20, 1999 the Office referred appellant for vocational rehabilitation based upon the report of Dr. Lee, the impartial medical examiner.

On August 1, 2000 the Office issued a notice of proposed reduction of compensation based upon appellant's ability to perform the selected position of information clerk.

In a decision dated October 6, 2000, the Office finalized reduction of appellant's compensation based upon its determination that the position of information clerk represented her wage-earning capacity.

By decision dated March 16, 2001 and finalized on March 19, 2001, the hearing representative affirmed the Office's determination that the position of information clerk represented appellant's wage-earning capacity. However, the hearing representative set aside the finding that appellant had the ability to earn \$334.00 weekly. In setting aside the weekly wage determination, the hearing representative noted that the starting wage for an information clerk was \$5.15 an hour or \$206.00 a week.

On March 24, 2001 appellant's counsel filed an appeal with the Board.

On March 26, 2001 the hearing representative modified his decision to reflect that appellant's loss of wage-earning capacity was \$206.00 a week and that such a payment should continue until further development by the Office as instructed in the March 19, 2001 decision.

On March 26, 2001 appellant's counsel requested withdrawal of his March 24, 2001 appeal and a refiling of the appeal so that the Board's jurisdiction would include the March 26, 2001 decision.

On October 10, 2002 the Board issued a decision remanding the case because the case record was incomplete.<sup>3</sup> The Board noted that the March 26, 2001 decision by the hearing representative was missing.

In a decision dated November 25, 2002, the Office finalized the reduction of appellant's compensation effective October 8, 2000, based upon its determination that the position of information clerk represented appellant's wage-earning capacity. The Office determined that appellant was capable of earning \$206.00 a week.

The Board finds that the Office improperly reduced appellant's compensation based on its determination that the selected position of information clerk represented her wage-earning capacity

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>4</sup> Pursuant to section 8115(a) of the Federal Employees'

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<sup>3</sup> Docket No. 01-1150.

<sup>4</sup> *Patricia A. Keller*, 45 ECAB 278 (1993).

Compensation Act,<sup>5</sup> wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her 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 or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his or her usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect wage-earning capacity in his or her disabled condition.<sup>6</sup>

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 the selection of a position, listed in the Department of Labor, *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.<sup>7</sup> 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.<sup>8</sup>

To resolve the conflict, the Office referred appellant to Dr. Lee, a Board-certified orthopedic surgeon. The Office provided him the case record and a statement of accepted facts so he could base his opinion on a proper background. Dr. Lee diagnosed low back pain syndrome due to degenerative discogenic disease and explained that appellant's accepted work-related condition had "resolved with very minimal residuals at this time." He concluded that appellant was capable of working an 8-hour day with restrictions and a 15-minute break every 2 hours.

In determining an employee's wage-earning capacity based on a position deemed suitable but not actually held, the Office must consider the degree of physical impairment, including impairments resulting from both injury-related and preexisting conditions but not impairments resulting from postinjury or subsequently acquired conditions.<sup>9</sup> Any incapacity to perform the duties of an information clerk resulting from subsequently acquired conditions is immaterial to the loss of wage-earning capacity that can be attributed to the accepted employment injury and for which appellant may receive compensation.

The initial question presented is whether the Office properly determined that the selected position was medically suitable. In this case, the medical evidence on which the Office relies is a narrative report dated May 24, 1999 provided by the impartial medical examiner, Dr. Lee.

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<sup>5</sup> 5 U.S.C. § 8115(a).

<sup>6</sup> See *Dorothy Lams*, 47 ECAB 584 (1996).

<sup>7</sup> See *Dennis D. Owen*, 44 ECAB 475 (1993).

<sup>8</sup> 5 ECAB 376 (1953).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8.a (December 1993).

Initially, the Board notes that he failed to consider whether appellant had any disability due to her preexisting conditions of obesity, degenerative changes at L-5 and diabetes. In his report, the physician concluded that appellant had no disability due to her accepted employment injury, but provided no opinion as to whether there was any disability due to her preexisting conditions. In determining a loss of wage-earning capacity where the residuals of an injury prevent an employee from performing her regular duties, the impairments which preexisted the injury, in addition to the injury-related impairment, must be taken into consideration in the selection of a job within her work tolerance.<sup>10</sup> Furthermore, in addition to failing to consider whether there was any disability due to her preexisting condition, Dr. Lee's report was well over a year old at the time the position was selected. Due to this lack of contemporaneous medical evidence establishing that appellant was physically able to perform the duties of the selected position and the failure to address whether there was any disability due to appellant's preexisting impairments, the Office did not properly consider all the relevant evidence in basing appellant's wage-earning capacity on the information technology position and it improperly adjusted appellant's compensation.

The decision dated November 25, 2002 of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC  
August 1, 2003

Alec J. Koromilas  
Chairman

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

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<sup>10</sup> *Harold S. McGough*, 36 ECAB 332 (1984).