

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LINDA CONTRERAS and DEPARTMENT OF THE AIR FORCE,
KANEDA AIR FORCE BASE, Okinawa Japan

*Docket No. 02-979; Submitted on the Record;
Issued February 19, 2003*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether appellant had a loss of wage-earning capacity as of July 1, 1999; and (2) whether appellant sustained a recurrence of disability on or after October 22, 1999 causally related to her employment injury.

On March 2, 1999 appellant, then a 52-year-old temporary cook, filed a claim for injury sustained on February 24, 1999 while in the performance of duty.¹ She stopped work on February 27, 1999 and her claim was accepted by the Office of Workers' Compensation Programs for a dislocation of the right anterior sternoclavicular joint.² Appellant received continuation of pay for the period February 25 to March 14, 1999. She was released to return to light duty with physical restrictions as a cook on March 15, 1999. Appellant used annual leave for the period March 26 to April 9, 1999 and thereafter returned to limited duty, working in the cook position from April 10 to June 28, 1999. She used sick leave from June 28 to July 5, 1999. Her appointment to the cook position expired effective June 30, 1999.

By letter dated May 24, 1999, the employing establishment advised appellant that due to her work restrictions, she was medically disqualified from performing the duties of a cook or food service worker. She was advised that she could apply for disability retirement and, based on her limitations, she would be considered for vacant positions.

¹ On December 19, 1997 appellant received a promotion from a part-time temporary position of food service worker (WG02-04) to full-time temporary cook (WG04-02) not to exceed December 20, 1998. Thereafter, appellant's cook position was extended to March 20, 1999 and again to June 30, 1999.

² Physicians associated with the U.S. Naval Hospital on Okinawa treated appellant. Dr. John Knutson, an orthopedic surgeon, noted appellant was restricted from lifting more than 10 pounds with her right upper extremity and would probably require surgery upon her return to the United States. A June 29, 1999 report noted diagnostic testing revealed post-traumatic degenerative arthritis of the right sternoclavicular joint.

On July 14, 1999 she filed a claim for compensation (CA-7) for wage loss, noting her “downgrade” from the WG04 position of cook to WG02 as a food service worker.

The record reflects, thereafter, appellant was placed in a light-duty position as a telephone operator (WG03), effective August 29, 1999. Appellant worked in this position until October 22, 1999, when she left Japan to return to the United States with her husband.

On November 12, 1999 appellant contacted the Office concerning her claim for wage-loss compensation and requested vocational rehabilitation. By letter of that same date, the Office requested that appellant submit a narrative medical report as to her condition from her treating physician.

By report dated November 23, 1999, Dr. David W. Cruz, a chiropractor, stated that he first treated appellant on November 17, 1999 and related her history of injury. He stated that x-rays were obtained which revealed asymmetry of the clavicular joints, reversal of the normal cervical curve and cervical scoliosis. Dr. Cruz recommended treatment of therapy and manual manipulation three times a week for six to eight weeks. By letter dated January 4, 2000, the Office advised appellant that treatment by a chiropractor for her accepted shoulder condition was not authorized.

By letter dated January 12, 2000, the Office inquired information as to appellant’s employment status and whether her position as a light-duty food service worker was still available. By letter dated January 21, 2000, the employing establishment responded, noting that appellant was medically disqualified from her duties as a temporary cook and as a food service worker. It was noted that appellant was placed as a telephone operator and that the position was still available.

In a report dated January 14, 2000, Dr. Cruz submitted a report of his examination of that date and noted that her diagnoses included cervical subluxation.

Appellant was authorized to see Dr. Patrick J. Padilla, a Board-certified orthopedic surgeon. In a March 20, 2000 report, he reviewed appellant’s history of injury, medical treatment and her complaint of persistent pain in the right anterior sternoclavicular region. Dr. Padilla found a full range of motion with no obvious pain and equal motor strength and diagnosed post-traumatic right sternoclavicular joint osteoarthritis. He stated that appellant sustained a significant injury to her joint due to her employment injury and customary work. Dr. Padilla recommended a course of medication and, if unsuccessful, a partial resection of the joint. He noted that appellant did not desire surgical intervention and noted she might require physical rehabilitation. Dr. Padilla specified work limitations, including lifting no greater than 10 pounds with the right upper extremity, no repetitive tasks and no above-shoulder level activities.

On April 17, 2000 the Office advised appellant that the position of telephone operator with the employing establishment was found suitable to her work capacity and that the position was still available to her. The Office advised appellant that she had 30 days in which to accept

the position or provide reasons for refusing it. Appellant was advised of the penalty provisions of section 8106(c)(2).³

In an undated letter, appellant advised the Office that she left her job in Okinawa, Japan as her husband became ill and his physician recommended a return to the United States.⁴ She noted that she did not qualify for the telephone operator position due to limited skills, but she had taken only a four-hour course in computers. Appellant indicated that she was placed in a training program as a telephone operator, which she left on October 21, 1999 to return to the states.

By decision dated June 2, 2000, the Office denied appellant's claim for a loss of wage-earning capacity, rehabilitative services and monetary compensation. The Office found that appellant's downgrade from the temporary cook position to her prior food service worker position was not due to an inability to perform the duties of the position and, therefore, she did not have a loss of wage-earning capacity. She was employed as a telephone operator effective August 29, 1999, which the Office found she abandoned when she returned to the United States. For this reason, the Office found that she was not entitled to rehabilitation services or monetary compensation. Appellant was advised of her entitlement to continuing medical benefits.

Appellant requested an oral hearing before an Office hearing representative on June 15, 2000. She submitted a May 24, 2000 report from Dr. Padilla, who noted a mildly enlarged sternoclavicular joint on examination with tenderness to deep palpation. Circumlocution of the shoulder revealed some snapping of the scapula. Dr. Padilla repeated appellant's work restrictions and recommended vocational rehabilitation.

A hearing was held on February 28, 2001. In a February 16, 2001 report, Dr. Padilla noted mild gross deformity of the right sternoclavicular joint with tenderness, findings on range of motion, with pain on extremes of motion. He stated that appellant's physical restrictions were permanent unless she underwent surgery.

By decision dated June 14, 2001, an Office hearing representative found that appellant was not entitled to a loss of wage-earning capacity effective July 1, 1999 based on the change from the cook to food service worker position and that appellant was not entitled to wage-loss benefits on or after October 22, 1999. The hearing representative noted that appellant's reduction in grade was due to the expiration of her temporary appointment as a cook effective June 30, 1999 and not due to residuals of the work-related injury. He set aside that part of the June 2, 2000 decision that invoked the penalty provision of section 8106, noting that the Office had not followed appropriate procedures. The hearing representative denied compensation after October 22, 1999, finding that appellant had not established that she sustained a recurrence of disability due to her employment injury.

The Board finds that the case is not in posture for decision.

³ 5 U.S.C. § 8106(c)(2).

⁴ Appellant submitted evidence pertaining to a recommendation her husband undergo cardiac catheterization, a procedure not available at the naval hospital.

Wage-earning capacity is a measure of an employee's ability to earn wages in the open labor market under normal employment conditions, based on consideration of the nature of the employee's injuries and degree of physical impairment, his or her usual employment, age, vocational qualifications and the availability of suitable employment.⁵ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions rather than a makeshift position or other position at retained pay not necessarily reflective of true wage-earning capacity.⁶ Accordingly, the evidence of record must establish that jobs in the position selected for determining wage-earning capacity are reasonably available in the general labor market in the commuting area in which the employee lives. In determining an employee's wage-earning capacity, the Office may not select a make-shift or odd lot position or one not reasonably available on the open labor market.⁷

At the time of injury, appellant was performing duties as a full-time cook in a temporary position not to exceed June 30, 1999. She sustained injury to her sternoclavicular joint and was placed on permanent work restrictions pertaining to lifting and above shoulder work. To the extent the Office determined that appellant is not entitled to a wage-earning capacity based on the change of her employment status from the cook position back to a food service worker effective July 1, 1999, the decision was proper. The medical evidence of record does not establish that the change in appellant's employment from a cook to food service worker was based on her accepted injury or resulting physical restrictions. Rather, the change was due to the expiration of the temporary cook position appointment on June 30, 1999.

However, the record clearly reflects notification by the employing establishment on May 24, 1999 that appellant was found medically disqualified from performing the duties of the cook position in addition to her duties as a food service worker due to restrictions imposed by her employment-related condition. The employing establishment withdrew appellant's light-duty work as a cook and food service worker in the child development center and she was advised that the employing establishment would search for available positions, which would depend upon her particular circumstances. It was recommended that she apply for disability retirement. The case record is not clear as to appellant's work status or duties performed from July 1, 1999, following the expiration of the cook position, to August 29, 1999, when she commenced work as a telephone operator.⁸ While appellant worked in this position until October 22, 1999, she noted that she was placed in a training status as she had only limited experience with computers and a 10th grade education level. In effect, appellant maintains that she lacked the vocational background or training to be a telephone operator. While the employing establishment has described the position as conforming to her work limitations, there is insufficient evidence on which the Board may conclude that the duties of the position were in keeping with the restrictions imposed by her physicians. Moreover, it appears that the telephone

⁵ See 5 U.S.C. § 8115(a); *James A. Birt*, 51 ECAB 291 (2000); *Hattie Drummond*, 39 ECAB 904 (1988).

⁶ See *Stanley B. Plotkin*, 51 ECAB 700 (2000).

⁷ See *Phillip S. Deering*, 47 ECAB 692 (1998); *Steven M. Gourley*, 39 ECAB 413 (1988).

⁸ The record indicates appellant used sick leave June 28 to July 5, 1999.

operator position extended by the employing establishment was specifically tailored to meet appellant's medical restrictions.

The position description of a telephone operator notes the employee is to perform regular or rotating duties providing local and long distance telephone service to all organizations assigned or attached to the Kadena Air Base in Japan. The duties include furnishing directory services, placing morale calls, tracing authorized personnel and using computer software to perform operator functions. Recruitment knowledge and skills are listed as basic computer techniques, telephone techniques, operation of a telephone switchboard and telephone systems, Air Force policies pertaining to switchboard operations and chain of command and placing conference and collect calls. The physical demands are merely listed as usually sedentary work involving some standing and walking to consult directories and manuals.

The Board finds that the position of telephone operator which appellant accepted on August 29, 1999 was specifically tailored to meet her medical restrictions. Following the expiration of her temporary cook position in the child development center on June 30, 1999, it appears that the employing establishment modified a telephone operator position to accommodate her physical restrictions. Appellant contends that she lacked the computer and educational background for the position and that she was maintained in training as an operator for approximately two months prior to her departure from Japan. The position is certainly not clear as to the language and educational requirements necessary to place local and long distance calls within and outside Japan or that appellant had such capabilities. The evidence raises a serious question that the position actually performed by appellant for the two-month period was a makeshift position. It is well established that when the evidence raises a serious question of whether a position actually performed by an employee for a limited time period may have been a makeshift position, the Office cannot use this position as representative of that employee's wage-earning capacity without further investigation.⁹ The case is, therefore, not in posture for decision on appellant's wage-loss entitlement. The case will be remanded to the Office for further development and a decision on appellant's entitlement to wage-loss compensation for the period June 28 to August 29, 1999 and commencing October 22, 1999.

⁹ See *Mary Jo Colvert*, 45 ECAB 575 (1994).

The June 14, 2001 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action in conformance with this decision.

Dated, Washington, DC
February 19, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member