

neck and a headache. She returned to light duty with no heavy lifting. The Office accepted that appellant sustained lumbar and cervical strains.

Appellant filed a second claim for traumatic injury on February 23, 1989 alleging that she strained her neck and shoulder while lowering a stretcher. The Office accepted that she sustained right shoulder strain, for which she underwent arthroscopic surgery, right shoulder synovitis, aggravation of degenerative disc disease of the cervical spine, a herniated nucleus pulposus at C5-6, for which she underwent a discectomy and lumbosacral strain. Appellant returned to work four hours a day on April 1, 1991. She stopped work on August 26, 1991 and received compensation for total disability beginning on that date. The Office entered appellant on the periodic rolls on February 11, 1992 effective November 30, 1991.

On October 18, 1995 the Office authorized appellant to undergo vocational rehabilitation, in the form of a 37-week general office clerical training program, in the hope of obtaining employment in clerical support in a medical office.

Appellant filed a notice of recurrence of disability on February 21, 1996 alleging that on August 30, 1995 she sustained a recurrence of disability due to her employment injuries. By decision dated April 25, 1996, the Office denied appellant's claim for additional medical attention due to her work injuries.

Beginning approximately July 29, 1997, appellant worked as a cashier at Wal-Mart and from August to September 1997 she worked as an order clerk for Dixon Valve. From October to November 1997 she worked as a stock clerk/cashier at Homeplace in Cuyahoga Falls, and beginning in December 1997 she worked as a cashier for B.P. Oil. The Office reduced appellant's compensation payments by her actual earnings to prevent an overpayment of compensation.¹ On February 23, 1998 she began working at Village Discount as a cashier and the Office continued to reduce her compensation benefits based on her actual earnings. Appellant continued working for Village Discount until May 2, 1998.

On March 27, 1998 a certified vocational rehabilitation counselor noted that appellant had the vocational and physical skills to perform the job of medical secretary and medical office receptionist. He noted that she had completed a 37-week course in general office management, that she was also a registered nurse prior to her injury, such that she had a medical background and that the jobs were performed in sufficient numbers so as to make them reasonably available within her commuting area.

By memorandum dated March 31, 1998, the Office rehabilitation specialist concurred with the vocational specialist that appellant had the ability to do the jobs of medical secretary and medical office receptionist and that such jobs were reasonably available. On April 16, 1998 Dr. John M. Sassano, an osteopathic Board-certified family practitioner, opined that appellant was physically capable of performing the jobs designated.

¹ A claimant is not entitled to receipt of temporary total disability benefits and actual earnings for the same time period. See *Lawrence D. Price*, 47 ECAB 120, 121-22 (1995).

On April 30, 1998 the Office issued appellant a notice of proposed reduction of compensation, finding that she had the wage-earning capacity of a medical secretary of \$406.80 per week. The Office found that the actual earnings positions in which appellant engaged did not fairly and reasonably represent her wage-earning capacity as “she obtained employment in positions which paid significantly less than the positions” for which she trained.

On May 8, 1998 appellant accepted a data entry job for Automated Trucking. By letter dated May 18, 1998, appellant disagreed with the Office’s proposal to reduce her compensation to reflect her wage-earning capacity as a medical secretary. She stated that she answered many advertisements for medical receptionist, medical records assistant and medical billing. Appellant claimed that she had not been trained in the uses of CPT and ICD-9 codes and, therefore, she was not qualified to perform the job of medical secretary. She also alleged that she was never trained in shorthand, dictaphone transcription or in maintaining files. Appellant stated that she was unable to obtain a position as a medical secretary.

In a June 16, 1998 report, the Office rehabilitation specialist indicated that appellant needed no extra training in CPT and ICD-9 codes to perform the job of medical secretary and that she was well qualified to perform the job of medical secretary. By decision dated June 25, 1998, the Office finalized the proposed reduction of compensation effective May 25, 1998, finding that appellant had the wage-earning capacity of a medical secretary. The Office did not offer further discussion of her actual earnings.

On a January 3, 1999 Form EN1032 appellant indicated that she continued to work in data entry and was presently earning \$7.00 per hour.

Appellant stopped work on June 7, 1999. By report dated June 7, 1999, her physician, Dr. Jeffrey S. Tharp, an osteopathic Board-certified orthopedic surgeon, diagnosed a herniated disc at C5-6 and C5-6 radiculopathy. On June 16, 1999 the Office advised appellant of the definition of a recurrence of disability and provided her with a Form CA-2a claim for recurrence of disability, explaining that a recurrence of disability was due to a material worsening of her right shoulder and/or cervical condition, which resulted in her total disability from all work. On July 18, 1999 appellant filed a Form CA-2a, notice of recurrence of disability, commencing June 7, 1999 when she stopped work due to a recurrence of her February 23, 1989 employment injury.

On July 22, 1999 Dr. Sassano opined that the conditions, headaches and neck, arm and back pain, from which appellant suffered were related to her cervical disc disease which was related to her 1989 original injury and that her work had been exacerbating her condition. He noted that she stopped work on June 8, 1999 due to a worsening of her symptoms. On August 4, 1999 Dr. Sassano noted that appellant was suffering from headaches and radiculopathy involving her back and legs and he opined that she needed surgery.

By decision dated August 24, 1999, the Office stated: “It is recommended that your claim for recurrent compensation be denied as the medical evidence of record does not support that your work-related neck and/or right arm conditions have materially and spontaneously worsened to the extent that you were totally disabled from your rehabilitation job beginning on June 7, 1999.”

By letter dated September 14, 1999, appellant requested an oral hearing. Also in September 1999, she returned to part-time work as a clerk performing data entry.

On December 15, 1999 the Office hearing representative set aside the August 24, 1999 decision finding that the reports of appellant's treating physicians were sufficient to require further development by the Office regarding the need for cervical surgery.

In a report dated December 12, 1999, Dr. Tharp noted that he had last seen appellant on July 8, 1999, but he opined that her conditions were all a direct result of her 1989 employment injury.

On January 11, 2000 the Office referred appellant, together with a statement of accepted facts, questions to be addressed and the relevant case record, to Dr. Hira Khanna, a Board-certified neurosurgeon. In a January 26, 2000 report, he noted appellant's history of injury in 1986, noted that she was performing data entry and diagnosed a broad-based herniated disc at C5-6 with mild to moderate flattening of the spinal cord and narrowing of the right C5-6 intervertebral disc base. He further diagnosed hypertension, asthma, occipital headaches secondary to cervical spondylosis, right shoulder injury for which she had had surgery, urinary incontinence, heartburn and seizures and he opined that she would probably benefit from surgery. Dr. Khanna completed a Form OWCP-5 work restriction evaluation indicating that appellant could work 8 hours per day with no reaching above the shoulder, no twisting, no kneeling and no pushing, pulling or lifting more than 10 pounds. On January 28, 2000 Dr. Khanna opined that appellant had herniated her cervical disc in the employment incident and that the need for surgery was a direct result of her employment injury.

On February 9, 2000 the Office accepted that appellant sustained an employment-related C5-6 herniated disc and it approved surgery to reduce the herniation.

In a February 15, 2000 letter, Dr. Khanna noted that the record did not indicate why appellant stopped work on June 7, 1999, but he noted that the June 7, 1999 report from Dr. Tharp indicated that appellant's right arm and shoulder pain was increased with activity, especially overhead. He further noted that a magnetic resonance imaging (MRI) scan done on May 5, 1999 demonstrated a disc bulge at C4-5 with mild cord impingement and a large herniation at C5-6 with compression of the spinal cord and foramina encroachment.

In response to the Office's March 10, 2000 request for clarification, on March 15, 2000 Dr. Khanna opined that he did not know of any medical reason for appellant's June 7, 1999 work stoppage.

By letter dated April 20, 2000, the Office advised appellant that there was a conflict in the medical opinion evidence between Dr. Khanna and Dr. Sassano concerning whether or not she sustained a recurrence of total disability commencing June 8, 1999 and it advised that she was being referred to an impartial medical specialist for resolution of the conflict.

On May 2, 2000 the Office referred appellant, together with a statement of accepted facts, questions to be addressed and the relevant case record, to Dr. Peter Poolos, Jr., a Board-certified neurosurgeon, for resolution of the conflict.

By report dated June 19, 2000, Dr. Poolos noted as follows:

“[B]ased on my examination, I could not find any condition that would preclude [appellant] from being able to return to employment as a [r]egistered [n]urse. There are no objective findings of any major or minor neurological complications of her original injury. There is no objective finding that would indicate that the cervical fusion and discectomy in any way benefited [appellant’s] subjective complaints. In fact, her most pertinent statement was ‘I am disappointed that the neck operation did not help my arm pain....’”

Dr. Poolos recommended that appellant undergo an MRI scan with contrast of the cervical spine to determine her employability, since she “offered substantive complaints of nocturnal shaking of the limbs.”

On July 26, 2000 the Office requested an addendum to Dr. Poolos’s report as to whether appellant could return to her date-of-injury job.

On October 30, 2000 the Office rejected appellant’s claim for a schedule award finding that she had not yet reached maximum medical improvement. On that date the Office accepted and approved an open repair of the right rotator cuff tear. Appellant underwent additional surgery on November 28, 2000 a right shoulder arthroscopy with partial debridement, an open decompression with acromioplasty and repair of the chronic rotator cuff tear and a partial excision of the distal clavicle.

In a report dated December 11, 2000, Dr. Poolos noted that he had reviewed the October 24, 2000 MRI scan and noted as follows:

“This film shows a well-healed cervical spine fusion at the C5-6 level. There is no residual compression of the cervical spinal cord. There is no evidence of any spinal cord damage. There is no evidence of any spinal stenosis at this level. Based on my review of this study there is no contraindication to [appellant] functioning in the capacity of registered nurse.”

However, Dr. Poolos further stated: “I cannot issue an opinion on the stability and the ability of the right shoulder to withstand heavy lifting. In my opinion, this was the only true injury this patient suffered at the time of her original injury in 1988 and 1989 and an orthopedic consultant should be contracted to give his opinion concerning any residual effects of this right shoulder injury.”

In a January 22, 2001 report, Dr. Poolos noted: “Within a reasonable degree of medical certainty I do not see any evidence based on my review of my examination and review of the MRI scan of the cervical spine on October 24, 2000 that there has been any material worsening of [appellant’s] accepted cervical condition as of June 1999.”

By decision dated March 1, 2001, the Office rejected appellant’s recurrence claim finding that the weight of the medical evidence was represented by the report from Dr. Poolos, who found that the medical evidence did not establish that beginning June 7, 1999 appellant had a

material or spontaneous worsening of her work-related neck or right arm condition such that she was totally disabled for all work.

Appellant disagreed with the March 1, 2001 decision and on March 9, 2001 requested an oral hearing before an Office hearing representative.

In an April 23, 2001 report, Dr. James P. Bressi, an osteopathic pain management specialist, noted that both appellant's surgeries, the cervical spine fusion in March 1999 and the rotator cuff repair on November 28, 2000, were successes and that she was feeling much better. He opined that the surgical interventions had been absolutely necessary and appropriate and that she was deserving of compensation for lost wages from June 10, 1999 to March 2000 due to her pain and problems with dysfunction.

On May 30, 2001 Dr. Sassano noted that appellant had a low back problem dating from 1986 which flared up with physical therapy. On May 31, 2001 Dr. Sassano opined that appellant's current condition was "an aggravation of her previous injury due to the intensified physical therapy." By decision dated June 28, 2001, the Office advised her that it accepted that she sustained a low back condition as a result of performing authorized physical therapy in November 2000 and accepted the condition of lumbosacral sprain.

An oral hearing was held on April 23, 2002 at which appellant testified that on June 7, 1999 she experienced increased pain in her right arm, low back, neck and head when sitting, standing or walking and that the pain was such that she stopped work and saw Dr. Tharp. She claimed that he did not give her any excused absence slips for work and that she returned to work full time for two weeks in the fall of 1999 and then worked part time until her surgery in March 2000.

By decision dated June 10, 2002, the hearing representative extensively reviewed the case record and found that appellant had not met her burden of proof to modify the previously determined loss of wage-earning capacity. The hearing representative found that none of appellant's treating physicians identified a material change in the nature and extent of her injury-related condition or provided rationale as to why she could not work beginning June 7, 1999. The hearing representative explained that Dr. Poolos's opinion constituted the weight of the medical evidence because it was well rationalized and he was an impartial medical examiner, such that his report was entitled to a special weight.

LEGAL PRECEDENT

The Office procedure manual provides that in cases where a claimant stops work after reemployment, further action may be required depending on whether the rating has been completed at the time the work stoppage occurs. If a formal wage-earning capacity decision has been issued, the rating is left in place unless the claimant requests resumption of compensation for total wage loss. In this instance, the claims examiner must evaluate the request according to the customary criteria for modifying a formal wage-earning capacity determination.²

² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9a (December 1995).

Regarding the modification of a wage-earning capacity determination, the Board and the Office have stated that once the wage-earning capacity of an injured employee is properly determined, it remains undisturbed regardless of actual earnings or lack of earnings. A modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was in fact erroneous.³ The burden of proof is on the party attempting to show the award should be modified.⁴

Section 8115 of the Federal Employees' Compensation Act,⁵ titled "Determination of wage-earning capacity," states in pertinent part:

(1) 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 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.⁷ This principle is premised upon the theory that wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions and is thus, best measured by actual wages earned.⁸

The Board has long recognized that actual earnings are generally the best measure of wage-earning capacity as they more reasonably reflect appellant's employment capacity in the open labor market and constitute a more reliable gauge than a secondary method such as an opinion of a vocational rehabilitation adviser.⁹ In keeping with this principle, the Office must identify a deficiency in appellant's actual earnings before concluding that those earnings do not fairly and reasonably represent wage-earning capacity. Because the Office bears the burden of proof in an initial wage-earning capacity determination, the Office may not simply select either actual earnings or a constructed position as a basis for a wage-earning capacity determination.¹⁰

³ *David L. Scott*, 55 ECAB ____ (Docket No. 03-1822, issued February 20, 2004).

⁴ *Id.*

⁵ 5 U.S.C. § 8115.

⁶ *Id.*

⁷ *Loni J. Cleveland*, 52 ECAB 171, 176 (2000).

⁸ *Id.* at 176-77.

⁹ *Id.* at 177.

¹⁰ *Id.*

In situations where an employee has earned actual wages for a substantial period,¹¹ there is “an affirmative requirement for the Office to determine whether the position in which the employee earns actual wages fairly and reasonably represents his or her wage-earning capacity prior to making any determination regarding the suitability of any other position as a measure of wage-earning capacity.... [A]ctual wages are the preferred measure of wage-earning capacity if they fairly and reasonably represent such capacity.”¹² The Office’s procedure manual provides that the Office “will make every reasonable effort to arrange for employment of a partially disabled claimant” and that “as a last resort, benefits will be reduced on the basis of an estimated earning capacity, based upon a job not actually held by the claimant.”¹³

The Board and the Office have defined criteria to determine whether the position in which an employee has actual earnings fairly and reasonably represents his or her wage-earning capacity. The Office procedure manual states that, if the kind of appointment and tour of duty are not at least equivalent to those of the job held on the date of injury, such as part-time versus full-time, seasonal versus year-round or temporary versus permanent, the position cannot represent the employee’s wage-earning capacity.¹⁴ The Board has stated that a position in which actual wages are earned cannot be used to fairly and reasonably represent an employee’s wage-earning capacity if it is not a position available in the open labor market, if the medical evidence indicates that it is inappropriate or if the employee was able to obtain the position only through a direct job placement search by a vocational rehabilitation service.¹⁵

ANALYSIS

The Office entered appellant on the periodic rolls effective November 30, 1991. She returned to work in the private sector on July 29, 1997. Appellant began working at Village Discount as a cashier on February 23, 1998 continuing through May 2, 1998. At the time of the Office’s notice of proposed reduction of compensation dated April 30, 1998, she had been employed at Village Discount for over sixty days. In the April 30, 1998 notice, the Office found that appellant’s actual earnings as a cashier did not represent her wage-earning capacity as she had “obtained employment in positions which paid significantly less than the positions” for which she trained. The Office determined appellant’s wage-earning capacity by decision dated June 25, 1998, finding that she had the wage-earning capacity of a medical secretary.

Appellant then filed a notice of recurrence of disability on July 18, 1999 alleging a recurrence of total disability on June 7, 1999 due to her February 23, 1989 employment injury.

¹¹ The Office’s procedure manual requires that a claimant work for 60 days prior to determining whether actual earnings fairly and reasonably represent his or her wage-earning capacity. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7c (December 1993).

¹² *Roberta R. Moncrief*, 52 ECAB 418, 419 (2001).

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.3 (June 1996).

¹⁴ *Id.* at Chapter 2.814.7a (July 1997).

¹⁵ *Moncrief*, *supra* note 12 at 419-20.

By decision dated August 24, 1999, the Office denied her claim for recurrence of disability. In a December 15, 1999 decision, the hearing representative remanded appellant's claim for additional development of the medical evidence. By decision dated March 1, 2001, the Office denied her claim for recurrence on or after June 7, 1999. She again requested an oral hearing and by decision dated June 10, 2002, the hearing representative denied modification of the June 25, 1998 wage-earning capacity determination.

As noted previously, in accordance with the Office procedure manual, the hearing representative properly addressed appellant's July 18, 1999 claim for recurrence of disability as a request for modification of the existing wage-earning capacity decision. In this case, the initial decision regarding appellant's wage-earning capacity was erroneous. The Office failed to consider whether her actual earnings in the position of cashier at Village Discount, which she had held for more than 60 days at the time the Office issued the notice of proposed reduction of compensation, fairly and reasonably represented her wage-earning capacity, prior to reaching the decision that appellant's wage-earning capacity was represented by the constructed position of medical secretary. Furthermore, the Office did not apply the appropriate criteria for determining whether her actual earnings fairly and reasonably represented her wage-earning capacity. The Office did not determine whether the actual earnings position included an appointment and tour of duty at least equivalent to those of appellant's date-of-injury position, such as part time versus full time, seasonal versus year-round or temporary versus permanent. Furthermore, the Office did not find that the actual earnings position was unavailable in the open labor market, that the medical evidence indicated that the position was inappropriate or that appellant was able to obtain the position only through a direct job placement search by a vocational rehabilitation service.¹⁶ The Office merely stated that she had "obtained employment in positions which paid significantly less than the positions" for which she trained in the notice of proposed reduction of compensation. The Board has held that an Office assertion that appellant theoretically could earn higher wages in a position different from the one in which she was earning actual wages is not sufficient to establish that her actual wages do not fairly and reasonably represent her wage-earning capacity.¹⁷ The Office should not substitute its opinion as to what appellant's earnings should be, given her qualifications for other employment, but rather focus on whether her actual earnings fairly represent her honest ability to obtain earnings in the labor market.¹⁸ As the Office never identified why appellant's actual earnings did not fairly and reasonably represent her wage-earning capacity, consistent with its own procedures and the Board's previously discussed case law, the Office was precluded from evaluating appellant's wage-earning capacity pursuant to the factors provided in section 8115 of the Act.¹⁹

¹⁶ *Id.*

¹⁷ *Id.*; *Radames Delgado-Serrano*, 47 ECAB 650, 651 (1996).

¹⁸ The Office's regulation also provide that after completing vocational rehabilitation, actual earnings will be used if they fairly and reasonably reflect the earning capacity. 20 C.F.R. § 10.520.

¹⁹ 5 U.S.C. § 8115.

CONCLUSION

The Board finds that the June 25, 1998 wage-earning capacity determination must be reversed as it was erroneous at the time it was issued. The Office failed to consider whether appellant's actual earnings fairly and reasonably represented her wage-earning capacity. Due to the disposition of this issue, the Office must reinstate appellant on the periodic rolls effective May 25, 1998, making any necessary deductions to avoid an overpayment due to her actual earnings. Due to the disposition of this first issue, it is not necessary for the Board to address the second issue of whether appellant has established a recurrence of disability. The burden of proof to reduce appellant's compensation benefits on or after May 25, 1998 remains with the Office as the June 25, 1998 decision is effectively reversed.

ORDER

IT IS HEREBY ORDERED THAT the June 10, 2002 decision of the Office of Workers' Compensation Programs is hereby reversed.

Issued: July 19, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member