

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**MARCIA JONES, Appellant**

**and**

**DEPARTMENT OF THE ARMY, SIERRA  
ARMY DEPOT, Herlong, CA, Employer**

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**Docket No. 04-1131  
Issued: July 21, 2004**

*Appearances:*  
*Marcia Jones, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chairman  
DAVID S. GERSON, Alternate Member  
WILLIE T.C. THOMAS, Alternate Member

**JURISDICTION**

On March 24, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated March 10, 2004, reducing her compensation benefits based on her capacity to earn wages in the constructed position of receptionist. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

This issue is whether the Office met its burden of proof to reduce appellant's compensation benefits based on her capacity to earn wages in the constructed position of receptionist.

**FACTUAL HISTORY**

This is the fifth appeal in this case, in which appellant's employment-related injury resulted in the accepted conditions of contusion and strain of the right shoulder, paracervical regions and right leg as well as musculoligamentous strain of the right shoulder and contused

spine with bulging disc at L4-5.<sup>1</sup> The Board issued a decision on March 4, 2003 finding that the Office properly denied her request for surgery due to a cervical condition.<sup>2</sup> In decisions dated March 20, 1989<sup>3</sup> and August 7, 1991,<sup>4</sup> the Board found that the Office failed to meet its burden of proof to terminate appellant's compensation benefits. In its October 19, 1998 decision,<sup>5</sup> the Board found that the Office failed to meet its burden of proof to reduce appellant's compensation benefits based on her ability to earn wages as a hotel clerk. The facts and the circumstances of the case as set out in the Board's prior decisions are incorporated herein by reference.

Following the Board's 1998 decision regarding appellant's wage-earning capacity additional medical evidence was introduced regarding her work abilities. In a report dated December 17, 1999, Dr. Jeff B. Chung, a Board-certified physiatrist, found that appellant could perform sedentary work eight hours a day. In a report dated January 21, 2000, appellant's attending physician, Dr. Thomas Dorrell, Jr., a Board-certified family practitioner, indicated that appellant's ability to return to work was "unknown." In a letter dated January 14, 2002, the Office asked that he describe appellant's work restrictions. Dr. Dorrell stated that he was not qualified to do so and recommended that the Office refer appellant to "physical medicine and rehabilitation" for an accurate response.

The Office initially referred appellant for vocational rehabilitation services on February 28, 1995. On May 18, 2000 the Office noted that the employing establishment did not have a suitable job offer for appellant. The Office authorized further vocational rehabilitation services for training and placement of appellant in a general clerical or receptionist position.

The Office authorized a functional capacity evaluation on February 19, 2002. By letter dated February 19, 2002, appellant's vocational rehabilitation counselor requested that she submit to a physical capacity evaluation and then an examination by Dr. Eric Roberts, a Board-certified physiatrist. The vocational rehabilitation counselor provided Dr. Roberts with appellant's medical records and a list of questions.

Appellant underwent a physical capacity evaluation on March 5 and 6, 2002. Dr. Roberts completed a report dated March 12, 2002 reviewing her physical capacity evaluation and listing his findings on examination. He noted appellant's history of injury on June 10, 1982 and diagnosed protruding cervical disc disease, lumbar protruding disc disease, right carpal tunnel syndrome with history of recurrent bilateral carpal tunnel syndrome, cervical radiculopathy of the right upper extremity, muscle spasm, obesity, neck pain, muscle tension headaches, low back pain, thoracic pain, bilateral hip pain and right bicipital tendinitis. He stated: "After evaluating [appellant's] records and functional capacity evaluation as well as the job descriptions, she

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<sup>1</sup> Appellant sustained her injuries as a result of an employment-related horseback riding accident during which her horse fell upon her.

<sup>2</sup> Docket No. 02-154 (issued March 4, 2003).

<sup>3</sup> Docket No. 88-1913 (issued March 20, 1989).

<sup>4</sup> Docket No. 91-858 (issued August 7, 1991).

<sup>5</sup> Docket No. 98-1000 (issued October 19, 1998).

cannot do work either as a general office clerk or as a receptionist. She cannot do this as described by the DOT [*Dictionary of Occupational Titles*] descriptions.” Dr. Roberts opined that appellant could work eight hours a day in a sedentary position. He noted that sedentary work, including lifting 10 pounds maximum and involved a certain amount of walking and standing. He stated:

“In addition to the problems that [appellant] is having with her cervical radiculopathy and carpal tunnel syndrome, the patient also needs to avoid repetitive movements of the wrists as well as her upper extremities. It is also concern that, if the patient is right when she takes enough pain medications to control her pain, she tends to be light-headed or dizzy. [She] also needs to change positions every 10 [to] 20 minutes.”

In a letter dated May 8, 2003, the Office requested that appellant provide additional medical evidence from her attending physician. In a report dated May 21, 2003, Dr. Benjamin Blair, a Board-certified orthopedic surgeon, diagnosed degenerative disc disease and associated spinal stenosis of the lumbar spine. He completed a work restriction evaluation noting that he had not reviewed the positions in question and indicating that appellant could work eight hours a day with restrictions. Dr. Blair indicated that appellant could sit, walk, stand and reach each for four hours a day. He further found that she should push and pull up to 25 pounds for 4 hours a day. Dr. Blair concluded that appellant could not squat or kneel, that she could climb for one hour a day and that she needed four breaks a day of five minutes duration. He also indicated that appellant could reach above the shoulder for two hours, twist for one half hour and operate a motor vehicle for two hours a day including her commute. Finally, Dr. Blair indicated that appellant could bend or stoop for 20 minutes a day.

As appellant was unable to secure employment, vocational rehabilitation services were closed effective February 26, 2003. In the final report dated March 19, 2002, the rehabilitation counselor identified the positions of general office clerk and receptionist as within the light to sedentary category and within appellant’s work restrictions. She found these positions were reasonably available on the local labor market.

The Office proposed to reduce appellant’s compensation benefits in a letter dated January 29, 2004. The Office found that she had the capacity to earn wages as a receptionist. The Office advised appellant that, if she disagreed, she should submit additional evidence or argument within 30 days.

In response to the notice of proposed reduction of compensation, appellant submitted a narrative statement dated February 17, 2004. She alleged that there were no openings available within her qualifications and work restrictions. Appellant further stated that the openings did not offer a pay rate commensurate with that determined by the Office and that there were no receptionist positions reasonably available within her commuting area.

By decision dated March 10, 2004, the Office reduced appellant’s compensation benefits effective March 20, 2004, based on her capacity to earn wages as a receptionist.

## LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.<sup>6</sup> After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.<sup>7</sup>

Section 8115 of the Federal Employees' Compensation Act<sup>8</sup> and the Office regulation<sup>9</sup> provide that wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity or the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, the degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect his wage-earning capacity in his disabled condition.<sup>10</sup>

The Office must initially determine appellant's medical condition and work restrictions before selecting an appropriate position that reflects her wage-earning capacity. The Board has stated that the medical evidence upon which the Office relies must provide a detailed description of her condition.<sup>11</sup> Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.<sup>12</sup>

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office for selection of a position listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open market, that fits that employee's capabilities with regard to his physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in *Albert C. Shadrick*<sup>13</sup> will result in the percentage

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<sup>6</sup> *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

<sup>7</sup> *Id.*

<sup>8</sup> 5 U.S.C. §§ 8101-8193, 8115.

<sup>9</sup> 20 C.F.R. § 10.520.

<sup>10</sup> *John D. Jackson*, 55 ECAB \_\_\_\_ (Docket No. 03-2281, issued April 8, 2004).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> 5 ECAB 376 (1953).

of the employee's loss of wage-earning capacity. The basic range of compensation paid under the Act is 66 2/3 percent of the injured employee's monthly pay.<sup>14</sup>

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 result from both injury related and preexisting conditions, but not impairments resulting from post injury or subsequently acquired conditions. Any incapacity to perform the duties of the selected position 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.<sup>15</sup>

### ANALYSIS

In this case, the medical evidence established that appellant was no longer totally disabled and the Office referred her for vocational rehabilitation counseling beginning in 1995. Following an unsuccessful attempt to reduce her compensation benefits based on a finding that she had the capacity to earn wages in the constructed position of hotel clerk, the Office authorized additional training for appellant's placement as a clerk or receptionist on May 18, 2000.

However, the vocational rehabilitation counselor brought to the Office's attention a report dated January 21, 2000 from appellant's attending physician, Dr. Dorrell, a Board-certified family practitioner, indicating that she was totally disabled. The Office then authorized a functional capacity evaluation as recommended by Dr. Dorrell. The vocational rehabilitation counselor referred appellant, copies of the position description for clerk and receptionist, and questions to Dr. Roberts, a Board-certified physiatrist, for review of the functional capacity evaluation and determination of appellant's ability to work. He provided extensive findings on physical examination, reviewed the requirements of the selected positions and concluded that appellant could not perform the duties of either a general clerk or a receptionist. Dr. Roberts stated that she was capable of performing sedentary work, but noted that the selected positions were not within her sedentary work abilities.

The Office requested additional medical information from appellant, who submitted a report dated May 21, 2003 from Dr. Blair, a Board-certified orthopedic surgeon. He completed a work restriction evaluation listing appellant's work abilities. Dr. Blair indicated that appellant could work eight hours a day with restrictions. These limitations included a restriction of no more than four hours a day of sitting, walking, standing or reaching.

The position ultimately selected by the Office, that of receptionist, requires frequent reaching, defined as up to two thirds of an eight-hour day. Dr. Roberts found that appellant could not perform the duties of a receptionist in his March 12, 2002 report. On May 21, 2003 Dr. Blair did not review the selected positions, but limited appellant's reaching to four hours a day rather than up to six hours required by the selected position of receptionist. There is no

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<sup>14</sup> *Karen L. Lonon-Jones*, 50 ECAB 293, 297 (1999).

<sup>15</sup> *John D. Jackson*, *supra* note 10.

recent medical evidence in the record supporting that appellant is capable of performing the duties required for the selected position of receptionist. While Dr. Chung, a Board-certified physiatrist, completed a report on December 17, 1999 finding that appellant could perform sedentary work eight hours a day, he did not specifically address the physical requirements of a receptionist and did not provide specific work limitations. Furthermore, the Board has held that a wage-earning capacity determination must be made on a reasonably current medical evaluation.<sup>16</sup> As Dr. Chung's report was more than four years old at the time of the Office's March 10, 2004 decision, it is not reasonably current. Therefore, the Office failed to meet its burden of proof in establishing that the position of receptionist represented appellant's wage-earning capacity and failed to properly reduce her compensation benefits.

### **CONCLUSION**

The Board finds that the Office failed to meet its burden of proof in reducing appellant's wage-earning capacity based on her ability to earn wages in the constructed position of receptionist as there is no recent medical evidence supporting the Office's finding that appellant can physically perform the duties of this position.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the March 10, 2004 decision of the Office of Workers' Compensation Programs is hereby reversed.

Issued: July 21, 2004  
Washington, DC

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

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<sup>16</sup> The Board has held that reasonably current medical evidence is generally less than two years old. *See Keith Hanselman*, 42 ECAB 680, 687 (1991); *Anthony Pestana* 39 ECAB 980, 985 (1988); *Ellen G. Trimmer*, 32 ECAB 1878, 1882 (1981); *Samuel J. Russo*, 28 ECAB 43, 47 (1976).