

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

CAROLYN J. LIKELY, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Grand Rapids, MI, Employer**

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**Docket No. 03-2249
Issued: May 4, 2004**

Appearances
Allan J. Shapiro, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On September 10, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated August 16, 2003, finding that her actual earnings in the position of modified clerk fairly and reasonably represented her wage-earning capacity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly determined that appellant's actual earnings in the position of modified clerk fairly and reasonably reflected her wage-earning capacity.

FACTUAL HISTORY

On March 15, 2001 appellant, then a 35-year-old causal employee working under a 90-day contract, filed an occupational disease claim alleging that her federal duties caused her to sustain a left knee condition. She stated that she was not certain of the time or date of the injury,

but she became aware that the pain in her knee was work related on January 19, 2001. Appellant worked 24 hours a week. She stated that as a causal clerk her responsibilities included unloading mailbags and pushing carts that could weigh as much as 2,000 pounds. In support of her claim, appellant submitted an April 3, 2001 report from Dr. Timothy Lenters, an orthopedic surgeon, who stated that he had seen her several times in the past for knee pain and that a magnetic resonance imaging (MRI) scan and x-rays revealed chondromalacia of the left medial patella. He added that appellant presented in severe pain, especially when she climbed stairs or bent the knee.

In an April 30, 2001 decision, the Office accepted the claim for left patellar chondromalacia and surgery was authorized. On May 11, 2001 appellant underwent a left knee arthroscopy and chondroplasty performed by Dr. Melissa Stephens. She received total temporary disability benefits. In a July 17, 2001 report, Dr. Stephens stated that appellant presented in pain and walked with a cane. On examination she found pain on palpation of the medial patella, but full flexion with no crepitus and no catching on the underside of her knee. Dr. Stephens reported no medial or lateral joint line tenderness and no instability to varus/valgus or Lachman testing. She referred appellant to physical therapy.

In an October 26, 2001 report, appellant's treating nurse stated that she attended an October 8, 2001 medical appointment with appellant, and was told by Dr. Stephens that her repaired left knee was as strong as her right and she could do anything she wanted to, including returning to work and practicing karate, though appellant would experience pain.¹ According to the nurse, the work limitations Dr. Stephens prescribed included minimal climbing of stairs, no lifting over 20 pounds and no kneeling.²

In a December 21, 2001 report, Dr. Charles F. Xeller, a Board-certified orthopedist and Office referral physician, stated that appellant presented with a cane and an antalgic gait with complaints of left knee pain in the joint line, not the patellofemoral area and occasionally giving way of the knee. He found no muscle atrophy, effusion or swelling around the knee. Dr. Xeller stated that appellant would only squat 30 degrees on her left knee. In a January 23, 2002 supplemental report, he stated that a recent MRI scan revealed significant improvement in her knee in the area of the chondromalacia over the medial facet of the patella and the edema, seen in the subchondral bone was almost completely resolved. Dr. Xeller stated that there was some resolution of the chondromalacia and no frank cartilage tear was seen. He concluded that appellant could work eight hours a day but should limit her standing and walking to four hours or less and she should wear a brace.

In a May 11, 2002 letter, the employing establishment offered appellant a limited-duty job repairing damaged mail consistent with her medical restrictions. The job offer was for a causal position, *i.e.*, lasting 90 days, 24 hours a week. In a May 15, 2002 report, Dr. Stephens stated that appellant presented with complaints of left knee pain that were exaggerated. On physical examination she found 0 to 135 degrees of motion. There was mild crepitus with

¹ Appellant's 90-day contract had expired so she did not have a job with the employing establishment.

² There is no October 8, 2001 report from Dr. Stephens in the record.

patellar motion with medial joint line tenderness and a positive grind. There was no effusion or instability to varus/valgus, Lachman or pivot shifting. Dr. Stephens indicated that appellant could return to work in a sedentary position with walking limited to 25 feet at a time and that she was scheduling an MRI scan to explore the basis of appellant's knee pain.

A note in the record indicates that appellant returned to work on May 11, 2002, but did not work after May 23, 2002 due to nonwork-related health concerns. In a June 20, 2002 letter, the employing establishment informed appellant that she must provide medical documentation for her unscheduled absence from work or she could be terminated under the terms of casual employees. In a July 11, 2002 report, Dr. Stephens stated that she had no medical basis to limit appellant to walking 25 feet other than appellant's complaints of pain. She reviewed MRI scan reports and did not find any significant meniscal tear. Dr. Stephens' new medical restrictions included sitting up to 5½ hours a day, no squatting or kneeling, standing and walking up to 2½ hours and a 10-pound lifting restriction. She also referred appellant to a pain management clinic.

On July 12, 2002 appellant was terminated for failing to provide medical documentation for unscheduled absences. The record indicates that her termination was later vacated when appropriate work was located, but appellant did not return although she was paid for the 90-day assignment.

In a July 18, 2002 decision, the Office terminated appellant's wage-loss compensation as her actual earnings were the same salary as she was earning at the time of her injury.

Appellant requested a hearing. The record contains an April 8, 2003 report from Dr. Perry Greene, an orthopedic surgeon and Office referral physician, who stated that appellant presented with pain in her knee generalized around the front. He noted that she also stated that, if she walks more than a half block she gets popping in both knees and she complains of a shoulder problem due to her use of a cane. On examination Dr. Greene found appellant's left knee to have some tenderness in the patella with superior and inferior pressure, but not on medial or lateral pressure. He indicated that her knee was stable medially, laterally, anteriorly and posteriorly with no crepitation and no subpatellar tenderness, though appellant is tender throughout the four quadrants of the patella and she had some discomfort stressing her in the anterior drawer sign. Dr. Greene found no abnormal fluid and concluded that the way appellant complains, goes to the emergency room, relies on outside help for support and continues to have pain out of proportion to her diagnosis that she was falling under the entity of chronic pain syndrome and he recommended that she have a psychological evaluation.

At the May 27, 2003 hearing, appellant, through her representative, argued that after her 90-day assignment expired she should have been returned to the periodic rolls, that the job was not suitable work and that only under a reduction-in-force could the employing establishment terminate an injured worker.

In an August 16, 2003 decision, the hearing representative affirmed the Office decision to terminate appellant's wage-loss compensation finding that she no longer had any wage-loss compensation after her second 90-day term expired.

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.³ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁴

Section 8115(a) of the Federal Employees' Compensation Act provides that the "wage-earning capacity of an employee is determined by [her] actual earnings if [her] actual earnings fairly and reasonably represent [her] wage-earning capacity."⁵ The Board has stated: "Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure."⁶

Office procedure provides that a determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity should be made after an employee has been working in a given position for more than 60 days.⁷

ANALYSIS

The Board finds that the Office improperly determined that the position of modified clerk fairly and reasonably reflected appellant's wage-earning capacity. Office procedures require that an employee work in the selected position for at least 60 days before a wage-earning capacity analysis is performed. In the present case, although appellant was paid for a full 90 days, she did not actually work in the modified clerk position for 60 days before the Office performed its wage-earning determination.

The record shows that appellant worked in the modified position from May 11 to 23, 2002 and she was terminated on July 12, 2002 for failure to provide medical documentation for her absences. Ultimately, appellant was reinstated, but she never returned to work, but was compensated for the time missed. The wage-earning analysis was performed on July 18, 2002. As appellant did not work in the position for the 60 days required before a wage-earning analysis may be performed, the Office improperly found that her actual earnings in the position of modified clerk fairly and reasonably represented her wage-earning capacity.

³ *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

⁴ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁵ 5 U.S.C. § 8115(a).

⁶ *Floyd A. Gervais*, 40 ECAB 1045, 1048 (1989); *Clyde Price*, 32 ECAB 1932, 1934 (1981).

⁷ *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7c (December 1993).

CONCLUSION

The Office improperly determined that the position of modified clerk fairly and reasonably represented her wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the August 16, 2003 decision of the Office of Workers' Compensation Programs is reversed.

Issued: May 4, 2004

Dated, Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member