

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

**SCOSTIA R. HIGGINS (NEE MOORE),
Appellant**

and

**DEPARTMENT OF AGRICULTURE, FOOD,
SAFETY & INSPECTION SERVICE,
Minneapolis, MN, Employer**

**Docket No. 03-2276
Issued: May 9, 2005**

Appearances:
Scostia R. Higgins (nee Moore), pro se
Miriam D. Ozur, Esq., for the Director

Oral Argument April 6, 2005

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On September 24, 2003 appellant timely filed an appeal from a merit decision of the Office of Workers' Compensation Programs dated June 17, 2003, denying her request for modification of a July 30, 2002 decision, which found that the constructed position of case-worker 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 met its burden of proof in reducing appellant's compensation based on its determination that the constructed position of case-worker represented her wage-earning capacity.

FACTUAL HISTORY

On November 21, 1996 appellant, a 33-year-old food inspector, filed an occupational disease claim alleging that her carpal tunnel syndrome was employment related. The Office

accepted the claim for bilateral carpal tunnel syndrome, which was later expanded to include left ulnar nerve neuropathy. By letter dated July 7, 1998, she started receiving compensation for total disability on the periodic rolls.¹

Appellant's attending Board-certified orthopedic surgeon, Dr. D. Keith Granger, completed a work restriction evaluation (Form OWCP-5c) dated September 29, 1998. He indicated that appellant was capable of working eight hours per day with a 10-pound lifting restriction and no repetitive movement of the upper extremities.

On December 2, 1998 appellant was referred to vocational rehabilitation services by the Office. Pursuant to vocational rehabilitation services she received funds to complete a bachelor's degree in psychology. An Office rehabilitation specialist reported in a February 15, 2001 status report, that appellant completed her degree in December 2000 and was qualified for entry level positions such as a caseworker and group worker. The specialist identified the positions of family caseworker (Department of Labor's *Dictionary of Occupational Titles* No. 195.107-018), social group caseworker (Department of Labor's *Dictionary of Occupational Titles* No. 195.107-022) and group worker (Department of Labor's *Dictionary of Occupational Titles* No. 195.164-010), vocationally suitable and reasonably available in appellant's commuting area. With respect to wages, the rehabilitation specialist noted entry level wages in the area and opined that appellant was capable of earning weekly wages of \$346.15 to \$423.08.

A November 12, 2001 work capacity evaluation by Daniel R. Peters, a physical therapist, for Dr. Granger, indicated that appellant was capable of working eight hours per day with medium physical demands and Dr. Granger agreed with this assessment.

By letter dated February 6, 2002, the Office notified appellant that it proposed to reduce her compensation on the grounds that she was capable of earning \$346.15 per week as a caseworker. The Office indicated that the November 12, 2001 functional capacity evaluation requested by Dr. Granger represented appellant's work restrictions and reported that she was capable of working at a medium level for eight hours. She was advised that, if she disagreed with the proposal she should respond in writing within 30 days. The notice was returned to the Office on March 6, 2002 as appellant had closed her post office box and had not provided a forwarding address.

In a decision dated March 13, 2002, the Office reduced appellant's compensation effective March 23, 2002 to reflect her wage-earning capacity as a caseworker with wages of \$346.15 per week.

Appellant requested reconsideration in a letter dated April 9, 2002.

In a decision dated June 17, 2002, the Office rescinded the June 13, 2002 decision reducing appellant's compensation on the grounds that she had not received the notice of proposed compensation. The Office also advised her that a new notice of proposed reduction of compensation would be issued.

¹ On January 2, 1999 the Office of Personnel Management approved appellant's disability retirement.

By letter dated June 17, 2002, the Office notified appellant that it proposed to reduce her compensation on the grounds that she was capable of earning \$346.15 per week as a caseworker. The Office indicated that the November 12, 2001 functional capacity evaluation requested by Dr. Granger represented appellant's work restrictions and that he reported that she was capable of working at a medium level for eight hours. She was advised that if she disagreed with the proposal she should respond in writing within 30 days. Appellant did not respond within the allotted time.

In a decision dated July 30, 2002, the Office reduced appellant's compensation effective August 10, 2002 to reflect her wage-earning capacity as a caseworker with wages of \$346.15 per week.

Subsequent to the July 30, 2002 decision, the Office received reports from Southern Bone & Joint Sports Medicine and Rehabilitation dated June 25 and 27, July 22 and 30, 2002 and a June 25, 2002 evaluation by Danny Peters, physical therapist.

In a letter dated October 4, 2002, appellant filed an appeal with the Board on the reduction of her compensation on the same day.²

In a letter dated November 13, 2002, appellant requested reconsideration before the Office and submitted an October 23, 2002 nerve conduction velocity report, treatment notes dated July 11, 2001 to November 7, 2002 by Dr. Granger in support of her request and request for authorization of surgery for revision ulnar nerve release, which was scheduled for December 2, 2002.

The October 23, 2002 nerve conduction evaluation indicated that appellant had "continued right ulnar neuropathy at the elbow, worse than on May 21, 2001" and "interval improvement in right carpal tunnel syndrome compared with May 21, 2002."

In his November 7, 2002 treatment notes, Dr. Granger stated that he did not "think there will be any changes in any of [appellant's] previous restrictions than have already been identified on the previous functional capacity evaluation, nor any change in the impairment rating."

On February 13, 2003 the Board granted appellant's request to withdraw her appeal by an order dismissing her appeal.³

In a decision dated June 17, 2003, the Office denied appellant's request for modification of the July 30, 2002 wage-earning capacity decision.

² This was docketed as No. 03-114.

³ Docket No. 03-114 (issued February 13, 2003).

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.⁴

Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent 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, her wage-earning capacity is determined with due regard to the nature of her injury, her degree of physical impairment, her usual employment, her age, her qualifications for other employment, the availability of suitable employment and other factors and circumstances, which may affect her wage-earning capacity in her disabled condition.⁵ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.⁶ The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.⁷

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 or to an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits that employee's capabilities with regard to her physical limitation, education, age and prior experience.⁸ 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.⁹

ANALYSIS

The Office determined that the selected position of caseworker was medically suitable based upon the November 12, 2001 functional capacity evaluation by Dr. Granger demonstrating that appellant could work medium-duty work. The notice of proposed reduction of compensation was dated June 17, 2002 and the reduction of compensation was effective August 10, 2002.

In the present case, the Board finds that appellant did not submit evidence showing that the Office's July 30, 2002 wage-earning capacity determination was erroneous. The Office adjusted her compensation effective August 10, 2002, on the grounds that she was capable of

⁴ *Cary S. Brenner*, 55 ECAB ____ (Docket No. 04-1117, issued September 30, 2004).

⁵ *See John E. Cannon*, 55 ECAB ____ (Docket No. 03-347, issued June 24, 2004); 5 U.S.C. § 8115(a).

⁶ *David L. Scott*, 55 ECAB ____ (Docket No. 03-1822, issued February 20, 2004).

⁷ *Id.*

⁸ *John E. Cannon*, 55 ECAB ____ (Docket No. 03-347, issued June 24, 2004).

⁹ *John D. Jackson*, 55 ECAB ____ (Docket No. 03-2281, issued April 8, 2004).

performing the selected position of caseworker. An attending physician, Dr. Granger, provided a September 29, 1998 work restriction report in which he advised that appellant could perform light-duty work with no repetitive activity with the upper extremities and restricted lifting to 10 pounds. In a November 12, 2001 work capacity evaluation, he found that appellant was not totally disabled and could work eight hours per day with medium physical demands.

Appellant's vocational rehabilitation counselor determined that she was able to perform the position of caseworker and that state employment services showed the position was available in sufficient numbers so as to make it reasonably available within her commuting area. The Office rehabilitation specialist advised that she had received funding to complete her bachelor's degree in psychology in December 2000 and was qualified for entry level positions such as caseworker.

The Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment, age and employment qualifications, in determining that the case worker position represented her wage-earning capacity.¹⁰ The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the caseworker position and that such a position was reasonably available within the general labor market of her commuting area. The Board finds that the Office, therefore, properly based her wage-earning capacity, effective August 10, 2002, on the caseworker and the burden shifted to her to show that the award should be modified.¹¹

In this case, appellant submitted an October 23, 2002 nerve conduction study and treatment notes for the period July 11, 2001 to November 7, 2002 by Dr. Granger in support of her claim that her wage-earning capacity should be modified. Neither the October 23, 2002 nerve conduction study, nor the treatment notes by Dr. Granger show a material worsening in her condition or her restrictions. In his November 7, 2002 treatment notes, Dr. Granger opined that there was no change in appellant's work restrictions. She, therefore, did not show that there had been a material change in the nature and extent of her employment-related condition, that she had been retrained or otherwise vocationally rehabilitated or that the original wage-earning capacity was erroneous. The Board finds, therefore, that appellant did not meet her burden to show that the July 30, 2002 wage-earning capacity determination should be modified.¹²

CONCLUSION

The Board finds that the Office properly determined that the position of caseworker reflects appellant's wage-earning capacity effective August 10, 2002, the date it reduced her compensation benefits and that she failed to meet her burden of proof to demonstrate that modification of the wage-earning capacity determination was warranted.

¹⁰ *Loni J. Cleveland*, 52 ECAB 171 (2000).

¹¹ *Elsie L. Price*, 54 ECAB ____ (Docket No. 02-755, issued July 23, 2003); *Stanley B. Plotkin*, 51 ECAB 700 (2000).

¹² *Stanley B. Plotkin*, *supra* note 11.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 17, 2003 is affirmed.

Issued: May 9, 2005
Washington, DC

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member