

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

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| JEAN A. PARDO, Appellant | |) | |
| | |) | |
| and | |) | Docket No. 05-57 |
| | |) | Issued: May 11, 2005 |
| DEPARTMENT OF TRANSPORTATION, | |) | |
| FEDERAL AVIATION ADMINISTRATION, | |) | |
| FLIGHT STANDARDS DISTRICT OFFICE, | |) | |
| Van Nuys, CA, Employer | |) | |

Appearances:
Jean A. Pardo, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member

JURISDICTION

On October 4, 2004 appellant filed a timely appeal of an August 9, 2004 merit decision of the Office of Workers' Compensation Programs that denied modification of the Office's September 11, 2003 determination of her wage-earning capacity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether the Office properly determined appellant's wage-earning capacity based on her capability of performing the position of change person (nongaming).

FACTUAL HISTORY

On December 17, 1990 appellant, then a 59-year-old aviation clerk, filed a claim for compensation for a traumatic injury to her right wrist and arm sustained that day when she tripped and fell over telephone wires. She stopped work on December 17, 1990.

The Office accepted that appellant sustained a right wrist sprain and began payment of compensation for temporary total disability. On August 27, 1991 she returned to modified duty at the employing establishment, answering no more than 20 telephone calls a day using a headset and greeting visitors. On August 13, 1992 the Office issued appellant a schedule award for an 11 percent loss of use, of her right arm.

On September 21, 1992 appellant filed a claim for compensation for disability beginning October 3, 1992 on the basis that the employing establishment removed her from her modified position on October 2, 1992 due to physical inability to perform her position. The Office resumed payment of compensation for temporary total disability effective October 3, 1992.

On September 1, 1994 appellant advised the Office that she had moved to Las Vegas, Nevada. On January 17, 1996 the Office approved her request to be examined by Dr. Reynold L. Rimoldi, a Board-certified orthopedic surgeon, in that city. In an April 2, 1996 report, he concluded that appellant's symptoms of right wrist pain, worsened with repetitive gripping and grasping and forceful use of the arm, were secondary to her December 17, 1990 employment injury and that she could perform one hour of typing and no repetitive gripping, grasping or forceful use of her right arm. In a December 11, 1996 report, based on an examination that day, Dr. Rimoldi reiterated these limitations of "no repetitive gripping, grasping or forceful use of her injured extremity. Typing can be done for a limited time period of one hour straight with a half hour work break." In a December 24, 1996, letter, the Office asked Dr. Rimoldi to complete its work restriction evaluation form. On January 22, 1997 the Office received this form, signed by Dr. Rimoldi but not dated, indicating that appellant could sit, walk or stand 8 hours, lift 10 to 20 pounds 5 hours a day and reach above her shoulder. The form also indicated that she had hand restrictions with regard to pushing and pulling and fine manipulation, but not for simple grasping.

By letter dated April 26, 1998, the employing establishment advised the Office that "there are no positions available at this time to accommodate [appellant] due to lack of staffing and funding throughout the Federal Aviation Administration, Western Pacific Region." Through a vocational consultant the Office unsuccessfully attempted to place her in the position of change person.

On June 18, 2003 the Office issued a proposal to reduce appellant's compensation based on her capability to earn wages as a change person (nongaming). In a July 7, 2003 letter, appellant disagreed with the proposal, stating that she was 72 years old, partially disabled and had vision problems.

By decision dated September 11, 2003, the Office reduced appellant's compensation on the basis of her capability to earn wages as a change person (nongaming). By letter dated July 27, 2004, she requested reconsideration, contending that her vision problems prevented her from earning wages as a change person (nongaming). She submitted a report from her optometrist.

By decision dated August 9, 2004, the Office found that the additional evidence did not warrant modification of its prior decision.

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.¹ 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 his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, his degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment, and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.² It is well established that a wage-earning capacity determination must be based on a detailed current description of appellant's disabled condition and ability to perform work.³

ANALYSIS

The medical reports of appellant's work tolerance limitations that were the basis of the Office's September 11, 2003 decision that appellant was capable of performing the position of change person (nongaming) was the undated work restriction evaluation from Dr. Rimoldi that the Office received on January 22, 1997 and his narrative report dated December 11, 1996. The case record contains no more recent medical report describing her disabled condition and her ability to work. The Board finds that the Office did not meet its burden of proof to reduce appellant's compensation, due to its reliance on work tolerance limitations that were over six and one-half years old at the time of the Office's decision reducing her compensation. Thus, the Board finds that this January 1997 report cannot be relied upon to show appellant's ability to work in September 2003.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to reduce appellant's compensation.

¹ *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

² 5 U.S.C. § 8115(a).

³ *Keith Hanselman*, 42 ECAB 680 (1991); *Anthony Pestana*, 39 ECAB 980 (1988).

ORDER

IT IS HEREBY ORDERED THAT the August 9, 2004 decision of the Office of Workers' Compensation Programs is reversed.

Issued: May 11, 2005
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member