

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

BELINDA G. HILL, Appellant

and

**DEPARTMENT OF THE NAVY, NORFOLK
NAVAL SHIPYARD, Portsmouth, VA, Employer**

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**Docket No. 05-1042
Issued: March 1, 2006**

Appearances:
Belinda G. Hill, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 5, 2005 appellant filed a timely appeal from decisions of the Office of Workers' Compensation Programs dated January 4 and February 22, 2005. 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 reduced appellant's compensation to reflect a capacity to earn wages in the constructed position of computer security specialist.

FACTUAL HISTORY

On March 25, 1998 appellant, then a 37-year-old heavy pipefitter, filed a traumatic injury claim alleging that on March 20, 1998 she injured her right knee in the performance of duty. The Office accepted her claim for a right knee strain and arthroscopic surgery. Appellant filed an occupational disease claim on August 13, 1998, alleging that she sustained an injury to her right knee as a result of factors of employment. The claim was accepted for tendinitis of the right

knee. Appellant was released to work full duty on October 19, 1998 by her treating physician, Dr. Winifred D. Bragg, a Board-certified physiatrist.

The Office authorized repeat arthroscopic surgery, which occurred on March 4, 1999 and expanded appellant's claim to include torn meniscus right knee. She was placed on the periodic rolls.

In an August 20, 1999 report, Dr. Sheldon Cohn, a Board-certified orthopedic surgeon, opined that appellant was unable to return to work as a pipefitter. After examination, he indicated that she experienced "achy medial knee pain" which prevented her from performing everyday activities in a comfortable fashion. Dr. Cohn stated that appellant stood with a "neutral-to-slight varus alignment" and had some medial joint line tenderness. He found her range of motion to be 0 to 120 degrees. Dr. Cohn's impression was that appellant had symptomatic medial compartment arthritis and patellofemoral arthritis. In an unsigned September 14, 1999 report, Dr. Cohn indicated that appellant could return to work with restrictions, including a 15-pound lifting limit, no squatting, crawling, climbing or driving with her right foot. She was also restricted to standing and walking for no more than 30 minutes at a time, for no more than 4 hours per day.

In a duty status report dated November 5, 1999, Dr. Robert S. Neff, a Board-certified orthopedic surgeon, indicated that appellant could return to limited duty, provided that she could not climb, kneel, bend, stoop, twist or drive with her right foot, nor could she lift more than 15 pounds continuously or more than 30 pounds intermittently for more than 4 hours per day or walk or stand for more than 30 minutes at a time.

The Office referred appellant for vocational rehabilitation on November 23, 1999. A number of tests were conducted to determine her ability to perform certain jobs. As a result of the testing and based upon appellant's education, medical restrictions and a labor market survey, the vocational rehabilitation counselor, Edith Edwards, identified two positions that would accommodate appellant's medical restrictions and that were reasonably available in her commuting area, namely computer systems hardware analyst and Microsoft certified systems engineer. The Office approved training for one year to prepare appellant for employment in those capacities. The position description for the above-referenced sedentary positions reflected strength level requirements of no more than 10 pounds, occasionally. Ms. Edwards indicated that starting minimum wages for a computer systems hardware analyst or computer security specialist would be \$27,999.92 per year.

In a duty status report dated February 28, 2000, Dr. Neff indicated that appellant could return to limited duty, eight hours per day, five days per week, provided that she could not climb, kneel, bend, stoop, twist or drive with her right foot, nor could she lift more than 15 pounds continuously or more than 30 pounds intermittently for more than 4 hours per day or walk or stand for more than 30 minutes at a time.

On April 28, 2000 the Office determined that the job duties of computer systems hardware analyst were within the limitations provided by Dr. Cohn on September 14, 1999. The Office advised appellant that she was expected to cooperate fully, so that she could return to

work in the specified job, by partaking in any necessary training, after which the Office would provide 90 days of placement services. The Office determined that she had a wage-earning capacity of \$28,000.00 per year and informed her that, at the end of the rehabilitation program, whether or not appellant was actually employed, the Office would probably reduce her compensation based on that amount.

Appellant completed training and on July 20, 2001 signed a job placement agreement, whereby she agreed to fully cooperate and participate in job search activities related to obtaining a position as a computer systems hardware analyst.

On August 23, 2001 the Office advised appellant that she would receive 90 days of assistance to secure employment as a computer security specialist or computer systems hardware analyst.

The rehabilitation counselor provided job placement services to appellant for 90 days. However, she failed to obtain employment. In a November 30, 2001 report, Ms. Edwards indicated that she was offered a job with Koss Computers, but that she rejected the offer. Ms. Edwards reported that appellant behaved in an unprofessional manner during the interview process.

In a November 14, 2003 report, Dr. Neff indicated that she could work four hours per day in a sedentary capacity, with no walking, minimal standing, no kneeling and no bending or stooping. He opined that appellant's accepted condition had not resolved and stated that x-rays showed progression of traumatic arthritis of both knees, as well as severe medial compartment degenerative joint disease secondary to trauma of the right knee. In a November 13, 2003 work capacity evaluation, Dr. Neff indicated that appellant could walk, stand, grasp, push and pull for 30 minutes at a time. He also stated that she could keyboard, sit, operate a vehicle and reach above her shoulder for four hours per day. In a January 19, 2004 report, Dr. Neff stated that because of appellant's activity and weight, the left knee was "bearing the brunt of the problem at the present time and is severely symptomatic." On October 20, 2004 he provided a Form CA-17, reflecting that she was restricted from climbing, kneeling, bending or stooping or from standing or walking more than 30 minutes at a time, 4 hours per day. She was also prohibited from lifting more than 15 pounds continuously or more than 30 pounds intermittently 4 hours per day or from driving with her right foot, 4 hours per day. Dr. Neff provided no time restrictions for sitting. In a letter dated October 20, 2004 and accompanying work capacity form, Dr. Neff indicated that appellant could return to work eight hours per day. He recommended that she be restricted from bending or twisting; lifting more than 30 pounds occasionally; walking, standing, pulling or pushing for more than 1 hour at a time; or operating a vehicle.

In a December 3, 2004 notice of proposed reduction of compensation, the Office advised appellant that it proposed to reduce her compensation on the grounds that she was no longer totally disabled and had the capacity to earn the wages of a computer security specialist. The Office accepted Dr. Neff's October 20, 2004 report as the best representation of appellant's work capabilities at that time. The Office further determined that the position of computer security specialist was medically and vocationally suitable for her and was reasonably available in the

commuting area. The Office requested that appellant submit additional evidence or argument within 30 days if she disagreed with the proposed action.

In response to the notice of proposed reduction of compensation, appellant submitted a letter dated December 21, 2004 expressing her disagreement, indicating that she could not sit or stand for any period of time. In a December 14, 2004 duty status report, Dr. Neff provided diagnoses of meniscus tear and degenerative arthritis and indicated that appellant was unable to work. In a December 14, 2004 narrative report, Dr. Neff opined that her bilateral knee problems had aggravated and accentuated appellant's preexisting low back arthritis and had rendered her unable "to do any work whatsoever because of the pain." He stated that appellant had a markedly abnormal gait, with tenderness in her low back and marked limitation of motion. Dr. Neff indicated that x-rays showed extensive arthritis in her lumbar spine at L3, L4 and L5; spondylolisthesis of L4 on L5; degenerative disc disease; and arthritis at L3-4, L4-5 and L5-S1. He opined that the arthritis was not work related, but had been aggravated by her severe bilateral knee problems "which are indeed work related."

In a January 4, 2005 decision, the Office reduced appellant's compensation, finding that she was capable of performing the constructed position of computer security specialist. The Office determined that the evidence did not support Dr. Neff's opinion that her bilateral knee problems exacerbated her preexisting low back arthritis. The Office also noted that the record did not contain evidence of a previous back condition and that appellant's claim had been accepted only for a right knee condition.

Appellant submitted a report dated December 17, 2004 from Dr, Winifred D. Bragg, who related her reported history of chronic bilateral knee pain, which altered her gait. Dr. Bragg stated that she had foraminal stenosis that might be contributing to her pain. She further indicated that appellant had a known spondylolisthesis and that her gait had been altered due to knee deformities, "which could be affecting her back as well."

On January 26, 2005 appellant requested reconsideration. She submitted a narrative statement dated January 25, 2005, noting that her only work-related injury was a meniscus tear and degenerative arthritis of the right knee. Appellant alleged that her arthritis of the back was aggravated by the way she walked as a result of compensating for her right knee. She stated that she was unable to perform the duties of the constructed position.

In a January 12, 2005 report, Dr. Neff stated that appellant's significant low back pain did not present itself until December 2004, when her back "flared." He indicated that, after her two right knee surgeries, she progressively developed severe arthritis of the right knee. Dr. Neff explained that, because appellant favored the right knee, the left knee developed arthritis as well and opined that she would not have developed arthritis in the left knee but for her work-related right knee injury. He further stated that she had developed an abnormal gait in both knees which had significantly aggravated the preexisting arthritis. Dr. Neff opined that appellant could not sit for more than one half hour without getting up to walk around, because of her severe back problems.

By decision dated February 22, 2005, the Office denied modification of its January 4, 2005 decision. The Office did not consider restrictions based on appellant's back or left knee condition, in that they developed after the date of her accepted July 10, 1998 injury. Accordingly, the Office found that she was medically able and vocationally prepared to perform the duties of a computer security specialist.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.¹ An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.²

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 or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent the employee's wage-earning capacity or if the employee has no actual wages, the wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the employee's usual employment, age, 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.³

The Office must initially determine appellant's medical condition and work restrictions before selecting an appropriate position that reflects her vocational wage-earning capacity. The Board has stated that the medical evidence upon which the Office relies must provide a detailed description of appellant's condition.⁴ Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.⁵

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case 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 the employee's capabilities with regard to his or her 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

¹ *James B. Christenson*, 47 ECAB 775, 778 (1996); *Patricia A. Keller*, 45 ECAB 278 (1993); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

² 20 C.F.R. §§ 10.402, 10.403 (2002). See *Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

³ 5 U.S.C. § 8115(a); see *Dorothy Lams*, 47 ECAB 584 (1996); *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

⁴ See *William H. Woods*, 51 ECAB 619 (2000); *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

⁵ *Carl C. Green, Jr.*, 47 ECAB 737, 746 (1996).

contact with the state employment service or other applicable service. Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.⁶

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 resulting from both injury-related and preexisting conditions, but not impairments resulting from post injury or subsequently acquired conditions.⁷ 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.

ANALYSIS

The Board has duly reviewed the case record and finds that the Office did not meet its burden of proof in this case to reduce appellant's compensation benefits. This case must be remanded for further development regarding any alleged preexisting and consequential injuries resulting from her accepted right knee condition.

Based upon Dr. Neff's October 20, 2004 report, the Office issued a proposed reduction of compensation on the grounds that appellant had the capacity to earn the wages of a computer security analyst. In his report, Dr. Neff indicated that appellant could return to full-time employment, provided that she was restricted from bending or twisting; lifting more than 30 pounds occasionally; walking, standing, pulling or pushing for more than 1 hour at a time; or operating a vehicle. The Office found that the constructed position of computer security specialist was medically and vocationally suitable for appellant and was reasonably available in the commuting area. Subsequent to the proposed termination, she submitted medical reports in which Dr. Neff opined that appellant had developed consequential injuries rendering her unable to work. In a narrative report dated December 14, 2004, he indicated that her bilateral knee problems had aggravated and accentuated her preexisting low back arthritis and had rendered her unable "to do any work whatsoever because of the pain." Dr. Neff stated that she had a markedly abnormal gait, with tenderness in her low back and marked limitation of motion. He indicated that x-rays showed extensive arthritis in her lumbar spine at L3, L4 and L5; spondylolisthesis of L4 on L5; degenerative disc disease; and arthritis at L3-4, L4-5 and L5-S1. Dr. Neff opined that the arthritis was not work related, but had been aggravated by her severe bilateral knee problems "which are indeed work related." In a December 14, 2004 duty status report, he provided diagnoses of meniscus tear and degenerative arthritis and indicated that appellant was unable to work. On January 4, 2005 refusing to consider her low back and left knee conditions, the Office finalized the reduction of benefits on the grounds that appellant's claim had been accepted for a right knee condition only. The Office also noted that Dr. Neff had not addressed her low back condition until December 2004. The Board finds that the Office

⁶ See *John D. Jackson*, 55 ECAB ___ (Docket No. 03-2281, issued April 8, 2004). See *William H. Woods*, *supra* note 4; *Hattie Drummond*, 39 ECAB 904 (1988); see *Albert C. Shadrick*, 5 ECAB 376 (1953).

⁷ See *John D. Jackson*, *supra* note 6. See also *James Henderson, Jr.*, 51 ECAB 268 (2000).

improperly failed to consider medical evidence addressing the causal relationship between the alleged consequential injuries and her accepted right knee condition.

It is an accepted principal of workers' compensation law that, when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause, which is attributable to the employee's own intentional conduct.⁸ Although her claim was accepted only for a right knee condition, appellant has submitted medical evidence indicating the existence of preexisting and consequential injuries. In a November 14, 2003 report, Dr. Neff opined that her accepted condition had not resolved and stated that x-rays showed progression of traumatic arthritis of both knees, as well as severe medial compartment degenerative joint disease secondary to trauma of the right knee. In a January 19, 2004 report, Dr. Neff stated that, because of appellant's activity and her weight, the left knee was "bearing the brunt of the problem" and was severely symptomatic. He indicated that, after her two right knee surgeries, she progressively developed severe arthritis of the right knee and explained that, because appellant favored the right knee, the left knee developed arthritis as well. Dr. Neff opined that appellant would not have developed arthritis in the left knee, but for her work-related right knee injury. He further stated that she had developed an abnormal gait in both knees, which had significantly aggravated the preexisting arthritis. Dr. Neff's December 14, 2004 report indicated that appellant's bilateral knee problems had aggravated and accentuated her preexisting low back arthritis. Dr. Bragg's December 17, 2004 report also reflected that appellant had a known spondylolisthesis. The record is clear, however, that the Office failed to consider restrictions based on her back or left knee condition.

Stating in its February 22, 2005 decision that "the Office only considers accepted conditions and preexisting conditions," the Office improperly determined that it would not consider restrictions based on appellant's back or left knee condition, as both conditions developed after the July 10, 1998 date of injury. The Board has previously held that in determining a loss of wage-earning capacity where the residuals of an injury prevent an employee from performing her regular duties, the impairments which preexisted the injury, in addition to the injury-related impairments, must be taken into consideration in the selection of a job within her work tolerance. It is only subsequently acquired impairments unrelated to the injury which are excluded from consideration in the determination of work capabilities.⁹ In this case, although appellant developed a left knee condition subsequent to her original date of injury, the evidence of record suggests that the after-acquired condition was causally related to the original injury. Although inconclusive, the record contains evidence reflecting a preexisting back condition.

The Board finds that the Office should have developed the evidence in order to determine whether appellant's back and left knee conditions were preexisting and/or consequential injuries causally related to the accepted right knee injury. The record is unclear as to whether she had a preexisting back condition prior to her employment injury and a consequential left knee condition, which continued to limit her wage-earning capacity. On October 20, 2004 Dr. Neff

⁸ *John R. Fox*, 42 ECAB 193 (1990).

⁹ *James Henderson, Jr.*, 51 ECAB 268 (2000).

found that appellant could work an eight-hour day, taking into consideration her alleged consequential left knee condition. However, he opined on December 14, 2004 that she was unable to work due to arthritis in her lumbar spine. Dr. Neff did not adequately explain the relationship between appellant's current lumbar spine condition and her accepted injury or how the alleged aggravation of her back condition suddenly caused her total disability. As the Office did not develop the medical evidence both relative to appellant's alleged preexisting back condition and left knee condition, the Office did not meet its burden of proof to reduce appellant's compensation benefits. This case will be remanded for further development of the medical evidence.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to justify reduction of appellant's compensation to reflect her capacity to earn wages in the constructed position of computer security specialist.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 22 and January 4, 2005 are set aside and remanded for action consistent with this opinion.

Issued: March 1, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board