

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

S.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Fresno, CA, Employer**

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**Docket No. 08-745
Issued: September 4, 2008**

Appearances:

*Zedie E. Ramage, Jr., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 3, 2008 appellant filed a timely appeal from the January 4, 2007 merit decision of the Office of Workers' Compensation Programs' hearing representative, which affirmed a reduction of her compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.

ISSUE

The issue is whether the Office properly reduced appellant's compensation to reflect the capacity to earn wages as an information clerk.

FACTUAL HISTORY

On August 22, 2000 appellant, then a 48-year-old clerk, filed an occupational disease claim alleging that she developed various medical conditions in the performance of duty. The Office accepted her claim for cervical strain, chronic in nature, with disc disease at C6-7, as well as bilateral wrist tendinitis and carpal tunnel syndrome. Appellant received compensation for temporary total disability on the periodic rolls.

A conflict arose between the treating physician, who reported that appellant could work four hours a day with restrictions, and an Office second opinion physician, who reported she could work eight hours a day with restrictions. To resolve the conflict, the Office referred appellant, together with the case record and a statement of accepted facts, to Dr. Kuldeep S. Sidhu, a Board-certified orthopedic surgeon, for an impartial medical evaluation. Dr. Sidhu examined appellant on September 23, 2004 and reported that she could work eight hours a day with restrictions in a sedentary position.

Because the weight of the medical evidence established that appellant was no longer totally disabled for all work, but was instead partially disabled with specific restrictions, the Office referred the case to a rehabilitation counselor. When job placement efforts failed, the rehabilitation counselor found, based on the medically determinable residuals of the injury, and taking into consideration all significant preexisting impairments and pertinent nonmedical factors, that appellant was able to perform the sedentary job of information clerk.¹ The rehabilitation counselor reported that appellant had the transferable skills to meet the specific vocational preparation for the job. She confirmed through the state employment service that the job was being performed in sufficient numbers so as to make it reasonably available to appellant full time and within her commuting area. The rehabilitation counselor also determined from a labor market survey that the position paid \$270.00 a week.

On August 17, 2005 the Office notified appellant that it proposed to reduce her compensation for total disability because she had the capacity to earn wages as an information clerk. It asked her to submit any additional evidence or argument within 30 days. The Office received a copy of a progress report previously of record from the treating physician.

In a decision dated September 19, 2005, the Office reduced appellant's compensation for wage loss to reflect a capacity to earn wages as an information clerk. It found that the position was medically and vocationally suitable and fairly and reasonably represented appellant's wage-earning capacity.

Appellant requested an oral hearing before an Office hearing representative and submitted additional progress reports from her treating physician.

In a decision dated January 4, 2007, the Office hearing representative affirmed the reduction of appellant's compensation for wage loss.

LEGAL PRECEDENT

Section 8115(a) of the Federal Employees' Compensation Act provides that in determining compensation for partial disability, the wage-earning capacity of an employee is determined by her actual earnings, if her actual earnings fairly and reasonably represent her

¹ The Department of Labor's *Dictionary of Occupational Titles* describes the job: "Answers inquiries from persons entering establishment: Provides information regarding activities conducted at establishment, and location of departments, offices, and employees within organization. Informs customer of location of store merchandise in retail establishment. Provides information concerning services, such as laundry and valet services, in hotel. Receives and answers requests for information from company officials and employees. May call employees or officials to information desk to answer inquiries. May keep record of questions asked."

wage-earning capacity. If the actual earnings of the employee do not fairly and reasonably represent her wage-earning capacity or if the employee has no actual earnings, her wage-earning capacity as appears reasonable under the circumstances is determined with due regard to the nature of her injury, the degree of physical impairment, her usual employment, her age, her qualifications for other employment, the availability of suitable employment, and other factors or circumstances which may affect her wage-earning capacity in her disabled condition.²

When the Office makes a medical determination of partial disability and of the 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, *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits the employee's capabilities in light of 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 contact with the state employment service or other applicable service. Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.³

If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.⁴ When there exist opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁵

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.⁶

ANALYSIS

Appellant received wage-loss compensation on the basis that she was totally disabled for work. But the medical evidence found that she was only partially disabled. Both her treating physician and an Office second opinion physician agreed she could return to work with restrictions. Their disagreement was over how many hours she could work each day. The Office properly referred appellant to Dr. Sidhu, a Board-certified orthopedic surgeon, for an impartial medical evaluation to resolve the matter. Dr. Sidhu's opinion that appellant could work eight hours a day with restrictions in a sedentary position is entitled to special weight. It establishes the extent of appellant's partial disability and her specific restrictions. The additional progress reports from the treating physician, who was on one side of the conflict Dr. Sidhu resolved, do

² 5 U.S.C. § 8115(a).

³ *Hattie Drummond*, 39 ECAB 904 (1988); see *Albert C. Shadrick*, 5 ECAB 376 (1953).

⁴ 5 U.S.C. § 8123(a).

⁵ *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

⁶ *Harold S. McGough*, 36 ECAB 332 (1984).

not mention Dr. Sidhu's evaluation. They do not shift the weight of the evidence or require the Office to further develop the record.⁷

With her partial disability established, the Office properly referred appellant to an Office rehabilitation counselor, who identified the position of information clerk as vocationally and medically suitable. The position was sedentary, as Dr. Sidhu recommended, and required little more than answering questions and providing information. The state employment service verified that this job was reasonably available to appellant within her commuting area, and a labor market survey established a weekly pay rate of \$270.00.

The Board finds that the Office properly reduced appellant's compensation to reflect her capacity to earn wages as an information clerk. The Office followed standard procedures and gave due regard to applicable factors. As the Office has met its burden of proof to justify the reduction of appellant's compensation, the Board will affirm the hearing representative's January 4, 2007 decision.

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation to reflect her capacity to earn wages as an information clerk.

ORDER

IT IS HEREBY ORDERED THAT the January 4, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 4, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

⁷ See *John M. Tornello*, 35 ECAB 234 (1983).