

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

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| K.M., Appellant                       | ) |                                  |
|                                       | ) |                                  |
| and                                   | ) | <b>Docket No. 09-2311</b>        |
|                                       | ) | <b>Issued: September 1, 2010</b> |
| DEPARTMENT OF HOMELAND SECURITY,      | ) |                                  |
| TRANSPORTATION SECURITY               | ) |                                  |
| ADMINISTRATION, Lubbock, TX, Employer | ) |                                  |
|                                       | ) |                                  |

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On September 17, 2009 appellant filed a timely appeal of July 28 and August 28, 2009 Office of Workers' Compensation Programs' merit decisions. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

**ISSUES**

The issues are: (1) whether the Office properly reduced appellant's compensation benefits based on her capacity to earn wages as an accounting clerk; (2) whether appellant received an overpayment of compensation in the amount of \$3,986.35 for the period April 15 through July 4, 2009; (3) whether appellant was at fault in the creation of the overpayment such that waiver cannot be considered; and (4) whether the Office properly determined to recover the overpayment by requesting a lump-sum payment.

**FACTUAL HISTORY**

On September 23, 2003 appellant, then a 46-year-old transportation security screener, filed a traumatic injury claim alleging on that date she developed shortness of breath, chest pain, congestion and a sore throat due to exposure to Sprayway glass cleaner in the performance of

duty. The Office accepted appellant's claim for chemical pneumonitis and bronchitis. Appellant's physician, Dr. Craig Barker, a Board-certified family practitioner, released her to return to four hours of work on January 23, 2004. Appellant returned to work on January 26, 2004. Her supervisor took her off work on February 24, 2004 pending clarification of her work restrictions. The Office entered appellant on the periodic rolls on April 6, 2004.

Dr. Kenneth Nugent, a Board-certified pulmonologist, examined appellant on January 13, 2004 finding that she had persistent lung inflammation and diagnosed reactive airway dysfunction syndrome. He stated that appellant needed to avoid perfumes, smoking and cleaning agents.

Dr. Barker examined appellant on October 23, 2007 and again diagnosed pneumonitis due to inhalation of oils and essences. Appellant reported shortness of breath and headaches. Dr. Barker opined that her condition was worsening. On December 28, 2007 he noted that appellant experienced an asthma attack on Christmas day and had a significant headache the following day. Dr. Barker diagnosed wheezing and pneumonitis.

On December 5, 2007 the Office referred appellant for a second opinion evaluation with Dr. Venessa Holland, a Board-certified pulmonologist. In a report dated January 18, 2008, Dr. Holland noted appellant's employment exposure and found that appellant had a mild restrictive defect on pulmonary function studies dated January 18, 2008. She diagnosed reactive airway dysfunction syndrome as a result of the employment exposure. Dr. Holland opined that appellant could work where the exposure to chemicals was limited with no risk of perfumes, candles or other respiratory irritants, gases or fumes, sprays, dust or temperature extremes. She completed a work capacity evaluation on March 24, 2008 and stated that appellant could work eight hours a day with restrictions on exposure to temperature extremes, airborne particles and gases or fumes.

On June 27, 2008 Dr. Barker reviewed the opinion that appellant could return to work wearing a respiratory mask and disagreed noting that appellant had a severe sensitivity to perfume. He stated that appellant began to wheeze when seated next to another patient wearing perfume. Appellant required treatment and prior to treatment had audible wheezing and truncating sentences due to dyspnea. Dr. Barker opined that appellant's occupational asthma was not conducive to return to work at the employing establishment even with a mask. He noted that appellant required several medications for daily activities as well as extended time to rest after exposures.

The Office referred appellant for vocational rehabilitation services on July 21, 2008. Appellant completed two years of college in business management courses and received a computer accounting certificate in 1990. The vocational rehabilitation counselor found that appellant had transferable skills as a general office clerk, accounting clerk or billing clerk. The vocational rehabilitation counselor recommended that appellant seek a position with on-the-job-training due to the length of time since appellant had used these skills. Appellant underwent clerical testing at Goodwill Industries and demonstrated intermediate computer skills.

On November 4, 2008 the Office authorized 90 days of job placement assistance. It informed appellant that her compensation would be reduced based on a wage-earning capacity of \$25,428.00 per year if she had not gained employment at the end of the 90-day period.

Appellant was to seek positions as a general office clerk earning \$355.00 per week, billing clerk earning \$400.00 per week or an accounting clerk earning \$489.00 per week.

Appellant underwent pulmonary function tests on October 22, 2008 which were normal. Dr. Nugent examined appellant on November 26, 2008 and diagnosed reactive airway dysfunction syndrome as well as underlying cardiovascular disease of pulmonary hypertension related to sleep apnea. In a report dated December 2, 2008, Dr. Barker opined that appellant could not maintain employment with her pulmonary issues. On January 14, 2009 he stated that appellant's employment injury resulted in intermittently severe reactive airway disease and opined that she could not maintain employment. Dr. Barker noted that appellant had not located employment within her severe ventilation restrictions and opined that she would not be able to control the environment outside of work to stay healthy enough to hold a job. He recommended disability retirement.

Appellant accepted a job as an insurance sales representative beginning on February 9, 2009. The Office advised her that a job which paid by commission only would result in a rating based on the constructed position selected by the vocational rehabilitation counselor. In a report dated February 28, 2009, the vocational rehabilitation counselor determined that appellant was capable of working as an accounting clerk earning \$13.75 per hour.

On March 12, 2009 the Office proposed to reduce appellant's compensation based on her capacity to earn wages in the constructed position of an accounting clerk with earnings of \$489.00 per week. By decision dated April 15, 2009, it finalized the proposed reduction of compensation finding that the position of accounting clerk fairly and reasonable represented her wage-earning capacity. The Office found that appellant was entitled to receive compensation in the amount of \$227.48 every four weeks beginning April 16, 2009.

Appellant telephoned the Office on June 4, 2009 and informed the Office that it had failed to reduce her compensation payments following the wage-earning capacity determination.

On July 28, 2009 the Office notified appellant of the preliminary determination that she had received an overpayment in the amount of \$3,986.35 for the period April 15 through July 4, 2009 because her compensation should have been reduced effective April 15, 2009 to reflect her wage-earning capacity. It indicated that appellant received compensation in the amount of \$5,247.64 and was only entitled to compensation in the amount of \$1,261.29 resulting in an overpayment of \$3,986.35. The Office found that appellant was at fault in the creation of the overpayment because she accepted a payment which she knew or should have known was incorrect.

Appellant requested a telephonic conference and completed an overpayment recovery questionnaire on August 8, 2009. The record indicates that a claims examiner spoke to appellant on August 26, 2009 and reviewed her expenses. By decision dated August 28, 2009, the Office

finalized the July 28, 2009 preliminary decision and instructed appellant to forward a check in the amount of \$3,986.35.<sup>1</sup>

### **LEGAL PRECEDENT -- ISSUE 1**

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.<sup>2</sup> Section 8115 of the Federal Employees' Compensation Act<sup>3</sup> provides that wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent her wage-earning capacity. Office procedures provide guidelines for determining wage-earning capacity based on actual earnings. In determining whether the claimant's work fairly and reasonably represents his or her wage-earning capacity, it should consider whether the kind of appointment and tour of duty are at least equivalent to those of the job held on date of injury. Unless they are, the Office may not consider the work suitable.<sup>4</sup> If the actual earnings do not fairly and reasonably represent wage-earning capacity, or the employee has no actual earnings, her wage-earning capacity 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.<sup>5</sup>

### **ANALYSIS -- ISSUE 1**

The record reflects that, prior to reducing appellant's compensation based on a finding that the constructed position of accounting clerk represented her wage-earning capacity, appellant was employed as an insurance sales representative with earnings based on commission beginning February 9, 2009. The Office, however, did not rely on the actual wages of this employment in reaching a loss of wage-earning capacity determination. Rather, it, as noted, determined appellant's wage-earning capacity based on the constructed position of accounting clerk. It is well established that, if a claimant has actual earnings, the Office cannot use a selected position unless it makes a proper determination that actual earnings do not fairly and reasonably represent wage-earning capacity.<sup>6</sup> The Board finds that the Office did not determine whether appellant's actual earnings as an insurance sales representative fairly and reasonably

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<sup>1</sup> The Office issued a decision on November 23, 2009 addressing the \$3,986.35 overpayment for the period April 15 through July 4, 2009 and the finding of fault. As these issues were being considered by the Board on appeal, the Office did not have jurisdiction to issue this decision. The Board and the Office may not simultaneously have jurisdiction over the same case. Because the Office must review its prior decision in order to determine whether appellant submitted additional pertinent new and relevant evidence, it may not issue a decision regarding the same issue on appeal before the Board. It therefore did not have the authority to issue its November 23, 2009 decision and the decision is null and void. *Arlonia B. Taylor*, 44 ECAB 591, 597 (1993).

<sup>2</sup> *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

<sup>3</sup> 5 U.S.C. §§ 8101-8193, 8115.

<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (July 1997).

<sup>5</sup> *Harley Sims, Jr.*, 56 ECAB 320 (2005).

<sup>6</sup> See *Daniel Renard*, 51 ECAB 466 (2000); *D.C.*, Docket No. 06-1238 (issued August 21, 2007).

represented her wage-earning capacity. Before utilizing the constructed position, the Office should have waited the required 60 days and then determined whether appellant's actual earnings in the insurance sales representative position fairly and reasonably represented her wage-earning capacity. If not, then the claims examiner should have discussed the reasons this position was not representative of appellant's wage-earning capacity and then proceeded with the constructed position.

As the Office did not properly consider whether appellant's actual earnings as an insurance sales representative fairly and reasonably represented her wage-earning capacity, the Office did not meet its burden of proof in reducing appellant's compensation based on its determination that the constructed position of accounting clerk represented her wage-earning capacity effective April 15, 2009.<sup>7</sup>

### **CONCLUSION**

The Board finds that the Office did not meet its burden of proof in reducing appellant's compensation based on the constructed position of accounting clerk effective April 15, 2009.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the August 28 and July 28, 2009 decisions of Office of Workers' Compensation Programs are reversed.

Issued: September 1, 2010  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>7</sup> Due to the Board's disposition of this issue, the overpayment, fault and recovery issues are moot and will not be addressed in this decision.