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

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| **D.C., Appellant** | ) | |
| **and** | ) | **Docket No. 10-624** |
| | ) | **Issued: January 26, 2011** |
| **DEPARTMENT OF DEFENSE, DECA-WEST, McCLELLAN AIR FORCE BASE, CA, 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
MICHAEL E. GROOM, Alternate Judge

### ***JURISDICTION***

On January 6, 2010 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated December 4, 2009, which denied her request for further merit review of her claim. She also timely appealed the Office's November 24, 2009 wage-earning capacity decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

### ***ISSUES***

The issues are: (1) whether the Office met its burden of proof to reduce appellant's compensation effective November 22, 2009, based on its determination that the constructed position of a telephone sales representative represented her wage-earning capacity; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits under 5 U.S.C. § 8128(a).

## ***FACTUAL HISTORY***

This case has previously been on appeal before the Board.[1] In an August 21, 2007 decision, the Board reversed the Office's January 5 and April 6, 2006 decisions which reduced appellant's compensation based on the constructed position of a telephone sales representative. It found that the Office did not first consider whether her actual earnings as a part-time motivator fairly and reasonably represented her wage-earning capacity. In its February 12, 2009 decision, the Board reversed the Office's February 4, 2008 wage-earning capacity decision as the Office did not provide appellant with a prereduction notice before reducing her compensation effective February 4, 2008. The facts and the history of the claim as contained in the prior decisions are incorporated by reference.

In a March 4, 2009 letter, the Office advised appellant that it had no current medical evidence regarding her claim. It noted that a current report was needed from her attending physician regarding her present condition, the relationship to her 1987 work injury and any limitations due to her accepted injury. In a March 8, 2009 letter, appellant informed the Office that she was unable to provide updated medical information.[2]

On May 8, 2009 the Office received confirmation from a rehabilitation counselor that the 2007 entry level wage information in the Topeka area for a sales representative was $20,900.00 a year or $10.03 per hour. It determined that these wages most closely represented those for a telephone sales representative. On June 10, 2009 the Office received confirmation from the employing establishment that the current hourly wage for a store worker in Barstow, CA, was $17.41 an hour or $17.13 an hour in Topeka, KS.

On July 27, 2009 the Office notified appellant that it proposed to reduce her compensation for wage loss as the medical and factual evidence established that she was no longer totally disabled. Appellant was found partially disabled with the capacity to earn wages as a telephone sales representative, DOT #299.357.014, at the rate of $10.03 an hour or $401.20 per week. The Office found that the weight of the medical evidence rested with the July 23 and December 27, 2002 second opinion reports of Dr. Joseph Huston, a Board-certified orthopedic surgeon, who opined that appellant could work within specified restrictions. It also accorded weight to the July 25, 2002 report of Dr. Sanford Pomerantz, a Board-certified psychiatrist, who concluded that appellant did not have any restrictions related to her accepted emotional condition.[3] Appellant was afforded 30 days to submit additional evidence concerning her capacity to earn wages in the constructed position.

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[1] Docket No. 08-899 (issued February 12, 2009) and Docket No. 06-1238 (issued August 21, 2007). Appellant's claim was accepted for a triangular fibrocartilage tear of the left wrist, subluxation of the distal radioulnar joint and a depressive disorder. She underwent surgery on May 26, 1987.

[2] In a March 9, 2009 telephone call memorandum, appellant reiterated that she could not make a medical appointment. The Office informed appellant that it would schedule her to see a specialist.

[3] The notice listed medical evidence submitted by appellant from 2004 to 2006 that advised she was totally disabled but found that the reports of Dr. Huston and Dr. Pomerantz were the best representation of her work capabilities.

On August 2, 2009 appellant responded, noting that the Office had advised her it was arranging for a specialist to examine her as noted in the April 8, 2009 letter. Appellant informed the Office that she had not improved and still had physical problems.

By decision dated November 3, 2009, the Office reduced appellant's compensation benefits effective November 22, 2009, based on its determination that the position of a full-time telephone sales representative was medically and vocationally suitable and represented her wage-earning capacity. It found a new compensation rate every four weeks of $652.00 beginning on November 22, 2009.

By letter dated November 15, 2009, appellant requested reconsideration. She noted that she was enclosing a report from a Dr. Giroux who evaluated her for severe and debilitating back pain. However, no report was included with appellant's reconsideration request. She noted that the Office had represented that she would be referred for examination but that she had not been apprised of any examination.

On November 24, 2009 the Office amended the November 3, 2009 decision to include applicable cost-of-living adjustments. It noted that appellant's weekly pay rate when injured was $398.40 and that the current pay rate for the job and step when injured was $696.40. The Office found that appellant was capable of earning $401.20 per week, that the adjusted wage-earning capacity per week was $231.07, that the percentage of new wage-earning capacity was 58 percent, that the loss in wage-earning capacity amount per week was $167.33, leaving appellant with a compensation rate of $125.50 per week or $163.00 per week increased by applicable cost-of-living adjustments to $225.50 per week. This resulted in a new compensation rate every four weeks of $902.00 beginning November 22, 2009.

In a December 4, 2009 decision, the Office denied appellant's request for reconsideration finding that the evidence submitted was insufficient to warrant further merit review.

## ***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.[4]

Section 8115(a) of the Federal Employees' Compensation Act,[5] provides 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 wage-earning capacity. Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.[6] 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

[4] *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

[5] 5 U.S.C. § 8115.

[6] *Hubert F. Myatt*, 32 ECAB 1994 (1981); *Lee R. Sires*, 23 ECAB 12 (1971).

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.[7]

The Office must initially determine appellant's medical condition and work restrictions before selecting an appropriate position that reflects his 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.[8] Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.[9]

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

The Office advised appellant on March 4, 2009 that it had no current medical evidence regarding her accepted conditions and noted the need for updated evaluations by her attending physicians. Appellant subsequently noted that her physician did not provide updated information. On April 8, 2009 the Office notified her that it would refer her to a specialist to determine if she continued to have residuals of her accepted conditions. However, prior to any further medical development, the Office proposed to reduce appellant's wage-loss compensation on July 27, 2009 based on the constructed position of a telephone sales representative. It based its determination upon the July 23 and December 27, 2002 reports of Dr. Huston and the July 25, 2002 report of Dr. Pomerantz, both second opinion physicians who provided work restrictions relevant to her accepted physical and emotional conditions. The Board notes that the evidence relied upon by the Office was nearly seven years old. As noted, the Office must base its determination of wage-earning capacity on a reasonably current medical evaluation.[10]

The Board finds that the passage of time lessened the relevance of the 2002 opinions of Drs. Huston and Pomerantz on the nature and extent of her capacity for work in 2009. Because preexisting and injury-related medical conditions and their resulting physical limitations can change over time, due regard to the factors specified in section 8115 of the Act requires a reasonably current medical evaluation.[11] For this reason, the Board finds that the Office did not establish that the constructed position of telephone sales representative was medically suitable based on a reasonably current medical evaluation. The Office did not give due regard to the factors specified in section 8115 of the Act. The Board finds that the Office did not meet its burden of proof to support the reduction of appellant's compensation. The Office's November 24, 2009 decision will be reversed.

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[7] *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

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

[9] *John D. Jackson*, 55 ECAB 465 (2004); *Carl C. Green, Jr.*, 47 ECAB 737, 746 (1996).

[10] *Id. See also Keith Hanselman*, 42 ECAB 680 (1991); *Anthony Pestana*, 39 ECAB 980, 987 (1988); *Ellen G. Trimmer*, 32 ECAB 1878, 1882 (1981).

[11] *See C.G.*, Docket No. 06-727 (issued January 31, 2007); *Brenda J. Johnson*, Docket No. 04-857 (issued November 4, 2004).

On appeal, appellant disagreed with the Office's reduction of compensation. She also submitted new evidence on appeal. The Board is precluded from reviewing new evidence on appeal as its review is limited to the evidence of record before the Office at the time of its final decision.[12]

## ***CONCLUSION***

The Board finds that the Office did not meet its burden of proof to reduce appellant's wage-loss compensation.[13]

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the November 24, 2009 decision of the Office of Workers' Compensation Programs is reversed.

Issued: January 26, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[12] *See* 20 C.F.R. § 501.2(c).

[13] In light of the Board's disposition on the first issue, the second issue is moot.