

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

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**B.M., Appellant**

**and**

**NATIONAL ARCHIVES & RECORDS  
ADMINISTRATION, FEDERAL RECORDS  
CENTER, Dayton, OH, Employer**

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**Docket No. 10-1092  
Issued: April 25, 2011**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
ALEC J. KOROMILAS, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On March 15, 2010 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated February 22, 2010. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> and 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 effective August 30, 2009, based on her capacity to perform the duties of a data entry clerk.

**FACTUAL HISTORY**

Appellant, a 49-year-old archives aid/technician, injured her left knee on October 31, 2002 while descending a flight of stairs. She filed a claim for benefits, which the Office accepted for left

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

knee sprain/strain, torn left medial meniscus, aggravation of preexisting left knee chondromalacia and pes anserine bursitis of the left knee. Appellant was off work until November 7, 2002, when she was released to work with restrictions on climbing and kneeling. She returned to full duty on November 14, 2002 and was intermittently placed on restrictions.<sup>2</sup>

Appellant worked with restrictions until July 13, 2005 when Dr. Brian J. Ceccarelli, an osteopath, performed a partial medial meniscectomy and abrasion chondroplasty of the medial femoral condyle. The procedure was to ameliorate the following conditions: torn meniscus of the left knee; Grade 4 chondromalacia of the patellofemoral joint; and Grade 3 chondromalacia of the medial femoral condyle.

Appellant returned to light duty for three hours a day on October 17, 2005. She began working eight hours a day with restrictions on December 5, 2005. In a treatment note dated July 14, 2006, Dr. Ceccarelli outlined permanent physical restrictions of no kneeling, climbing or crawling.

By letter dated October 12, 2006, the Office asked the employing establishment to address whether it could provide appellant with a permanent light-duty position in accordance with Dr. Ceccarelli's work restrictions. It asked the employing establishment to submit this information by November 12, 2006.

By letter dated October 24, 2007, the employing establishment informed appellant that it no longer had a job available within her physical restrictions. A copy of this letter was forwarded to the Office. Appellant stopped work on November 2, 2007. The Office paid compensation for total disability as of November 5, 2007.

In order to determine whether appellant still had residuals from her accepted conditions, and her capacity for performing gainful employment, the Office referred her to Dr. B. Gregory Fisher, a specialist in orthopedic surgery, for a second opinion examination. In a report dated January 15, 2008, he stated that appellant had residuals from her accepted condition of aggravation of chondromalacia, left knee, which precluded her from performing her date-of-injury job as an archives aid/technician. The job required her to climb ladders and stairs, squat and kneel, activities from which she was restricted. Dr. Fisher opined that appellant could perform sedentary or light duty, so long as she was not required to sit for more than four to six hours or stand for more than one to two hours in an eight-hour period, lift or carry more than 20 pounds, and could avoid bending, stooping, pushing and pulling.

By letter dated May 19, 2008, the Office advised appellant that it was referring her for vocational rehabilitation in order to locate suitable work within Dr. Fisher's work restrictions.

In a report dated July 26, 2008, a vocational rehabilitation counselor summarized his efforts to find vocational training or suitable alternate employment for appellant within her restrictions. The vocational counselor scheduled appellant for a clerical/computer training course. Upon completion of this course, appellant sought employment within her restrictions. In a

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<sup>2</sup> By decision dated December 1, 2003, an Office hearing representative accepted that appellant sustained a recurrence of her accepted knee condition on March 4, 2003.

report dated April 22, 2009, the vocational counselor indicated that appellant had attempted to locate a suitable job within her geographical area but had been rejected by three employing agencies.

By letter dated April 23, 2009, the Office asked Dr. Ceccarelli to submit an updated medical report documenting appellant's current condition. He did not respond to this request.

By letter dated May 27, 2009, the vocational specialist closed appellant's case. He attempted to find a suitable job for appellant; however, after providing job placement assistance for more than 90 days, he was unable to locate a job. He recommended two positions for appellant listed in the Department of Labor's *Dictionary of Occupational Titles (DOT)*, one of which, data entry clerk, DOT #203.582-054, was within her restrictions and reasonably reflected her ability to earn wages.<sup>3</sup>

By notice of proposed reduction dated June 23, 2009, the Office advised appellant of its proposal to reduce her compensation because the factual and medical evidence established that she was no longer totally disabled and that she had the capacity to earn wages as a data entry clerk at the weekly rate of \$395.96 in accordance with the factors outlined in 5 U.S.C. § 8115.<sup>4</sup> It calculated that appellant's compensation rate should be adjusted to \$1,158.00 using the *Shadrick*<sup>5</sup> formula. The Office found that her current adjusted compensation rate, every four-week period, was \$304.86. It stated that the case had been referred to a vocational rehabilitation counselor, who had located a position as a data entry clerk which he found to be suitable for appellant given her work restrictions and was available in appellant's commuting area. The Office allowed appellant 30 days in which to submit any contrary evidence.

By letter dated July 15, 2009, appellant contested the proposed reduction of compensation. She contended that it was not proper for the Office to reduce her compensation given that: (a) the training course she completed provided her with minimal additional skills; and (b) she had unsuccessfully attempted to find work with several employers and employment agencies in the area; and (c) there was no work available to her within her prescribed restrictions in her geographic area.

By decision dated August 28, 2009, the Office reduced her wage-loss compensation, effective August 30, 2009, finding the weight of the medical evidence established she was no longer totally disabled for work due to effects of her October 31, 2002 employment injury. The position of data entry clerk represented her wage-earning capacity.

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<sup>3</sup> The job description stated: "Operates keyboard or other data entry device to enter data into computer or onto magnetic tape or disc for subsequent entry: Enters alphabetic, numeric, or symbolic data from source documents into computer, using data entry device, such as keyboard or optical scanner, and following format displayed on screen. Compares data entered with source documents, or re-enters data in verification format on screen to detect errors. Deletes incorrectly entered data, and reenters correct data. May compile, sort, and verify accuracy of data to be entered. May keep record of work completed."

<sup>4</sup> 5 U.S.C. § 8115.

<sup>5</sup> *Albert C. Shadrick*, 5 ECAB 376 (1953); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2, 814.2 (April 1995).

By letter dated September 5, 2009, appellant's attorney requested an oral hearing, which was held on December 7, 2009.

By decision dated February 22, 2010, an Office hearing representative affirmed the August 28, 2009 decision.

### **LEGAL PRECEDENT**

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of benefits.<sup>6</sup>

Section 8115(a) of the Act,<sup>7</sup> provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity.<sup>8</sup> Generally, wages actually earned are the best measure of a wage-earning capacity, and in the absence of showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such a measure.<sup>9</sup>

If the actual earnings do not fairly and reasonably represent wage-earning capacity or the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, the degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect his wage-earning capacity in his disabled condition.<sup>10</sup>

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injuries and the degree of physical impairment, his or her usual employment, the employee's age and vocational qualifications and the availability of suitable employment.<sup>11</sup> Accordingly, the evidence must establish that jobs in the position selected for determining wage-earning capacity are reasonably available in the general labor market in the commuting area in which the employee lives. In determining an employee's wage-earning capacity, the Office may not select a makeshift or odd-lot position or one not reasonably available on the open labor market.<sup>12</sup>

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<sup>6</sup> *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

<sup>7</sup> 5 U.S.C. § 8115; *see also* 20 C.F.R. § 10.520.

<sup>8</sup> 5 U.S.C. § 8115(a); *Loni J. Cleveland*, 52 ECAB 171, 177 (2000).

<sup>9</sup> *Lottie M. Williams*, 56 ECAB 302 (2005); *see Edward Joseph Hanlon*, 8 ECAB 599 (1956).

<sup>10</sup> *N.J.*, 59 ECAB 171 (2007); *John D. Jackson*, 55 ECAB 465, 471 (2004).

<sup>11</sup> *See Pope D. Cox*, 39 ECAB 143 (1986); 5 U.S.C. § 8115(a).

<sup>12</sup> *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

### ANALYSIS

The Board finds that the Office did not meet its burden to reduce appellant's compensation. There is insufficient medical evidence to support that the selected position of data entry clerk was within appellant's physical limitations. As the Board explained in *Mary A. Henson*,<sup>13</sup> the Office must clarify whether the sedentary position selected is consistent with the employee's work tolerance restrictions, if the evidence suggests that she cannot sit continuously. Dr. Fisher found in his January 15, 2008 report that appellant could work an eight-hour day with restrictions; one of which limited appellant to sitting from four to six hours. Based on Dr. Fisher's report the vocational rehabilitation counselor identified an eight-hour job as a data entry clerk. The position description does not list the required numbers of sitting in the sedentary position. According to the position description, this job would require appellant to operate a keyboard and enter data for the entire eight-hour shift. No other duties or occasional breaks from sustained sitting were listed. Therefore, the duties of the data entry position exceed the restrictions imposed by Dr. Fisher. It is the Office's burden of proof to justify reduction of compensation by identifying a suitable position. The Office did not meet its burden of proof in this case to reduce appellant's compensation benefits. The Board will reverse the February 22, 2010 decision.

### CONCLUSION

The Board finds that the Office failed to meet its burden of proof to reduce appellant's compensation.

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<sup>13</sup> 36 ECAB 565 (1985).

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 22, 2010 decision of the Office of Workers' Compensation Programs is reversed.

Issued: April 25, 2011  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

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