

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

RITA M. RAGER, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Elkton, KY, Employer**

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**Docket No. 04-1763
Issued: November 1, 2004**

Appearances:
Rita M. Rager, pro se
Office of the Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On July 6, 2004 appellant filed a timely appeal of an Office of Workers' Compensation Programs' decision dated April 29, 2004, denying merit review of an April 8, 2004 decision that the selected position of employment interviewer represented her wage-earning capacity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction to review the merits of the claim.

ISSUES

The issues are: (1) whether the Office properly determined that the selected position of employment interviewer represented appellant's wage-earning capacity; (2) whether the Office properly determined that appellant's request for reconsideration was insufficient to warrant merit review of the claim.

FACTUAL HISTORY

On March 5, 2001 appellant, then a 48-year-old rural carrier, filed a traumatic injury claim for continuation of pay/compensation (Form CA-1), alleging that on March 1, 2001 she

felt a sharp pain in her neck and shoulder when she lifted a tray of mail. The Office accepted the claim for a neck sprain and cervical radiculopathy. Appellant stopped working and the Office referred her for vocational rehabilitation.

Appellant's attending orthopedic surgeon, Dr. W. Cooper Beazley, provided work restrictions in a July 31, 2001 report that included a 25-pound lifting restriction. Dr. Beazley indicated that appellant could work light duty in accord with the stated restrictions. He completed a work restriction evaluation (Form OWCP-5c) dated July 31, 2001.

Pursuant to vocational rehabilitation services appellant received funds to complete her bachelor's degree. An Office rehabilitation specialist reported in a March 4, 2004 memorandum that appellant had completed her degree and was qualified for positions in human resources. The specialist identified the position of employment interviewer (Department of Labor's *Dictionary of Occupational Titles* No. 166.267-010) as vocationally suitable and reasonably available in appellant's commuting area. With respect to wages, the rehabilitation specialist noted entry level wages in the area and opined that appellant was capable of earning \$11.00 per hour in the position.

By letter dated March 5, 2004, the Office notified appellant that it proposed to reduce her compensation on the grounds that she was capable of earning \$440.00 per week as an employment interviewer. The Office indicated that the July 31, 2001 report from Dr. Beazley represented appellant's work restrictions and he reported that appellant could work light duty. Appellant was advised that if she disagreed with the proposal she should respond in writing within 30 days. She responded in a March 17, 2004 that her condition had changed since 2001 and she needed a follow-up examination to establish her current restrictions.

In a decision dated April 8, 2004, the Office reduced appellant's compensation effective April 20, 2004 to reflect her wage-earning capacity as an employment interviewer with wages of \$440.00 per week. Appellant requested reconsideration on April 13, 2004; she submitted an April 20, 2004 report from Dr. Beazley noting that appellant complained of recurrent pain in the neck, left shoulder and arm. By decision dated April 29, 2004, the Office determined that appellant's request for reconsideration was insufficient to warrant merit review of the claim.

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 in such benefits.¹

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 wage-earning capacity. 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 degree of physical impairment, her usual employment, her age, her qualifications for other employment, the

¹ *Carla Letcher*, 46 ECAB 452 (1995).

availability of suitable employment, and other factors and 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 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 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 labor market should be made through contact with the state employment service or other applicable service.³ 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.⁴

ANALYSIS

The Office determined that the selected position was medically suitable on the grounds that Dr. Beazley's July 31, 2001 report established that appellant could work light duty. The notice of proposed reduction of compensation was dated March 5, 2004, and the reduction of compensation was effective April 20, 2004. Therefore Dr. Beazley's report was issued nearly three years prior to the determination that the selected position of employment interviewer represented appellant's wage-earning capacity. The July 31, 2001 report does not provide probative evidence of appellant's current work restrictions, and the Office did not attempt to secure a current medical report in this case. The Board notes that it is well established that a wage-earning capacity determination must be based on a reasonably current medical evaluation.⁵ The Office cannot properly determine appellant's wage-earning capacity without a detailed current description of her condition and ability to perform work.⁶

Here the Office failed to secure a current medical report that establishes appellant's current ability to work as an employment interviewer. The Office has the burden of proof when reducing appellant's compensation on the grounds that a selected position represents her wage-earning capacity. The Board finds that the Office did not meet its burden of proof in this case.⁷

² See *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); see also 5 U.S.C. § 8115(a).

³ See *Dennis D. Owen*, 44 ECAB 475 (1993).

⁴ 5 ECAB 376 (1953); see also 20 C.F.R. § 10.303.

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

⁶ See *Anthony Pestana*, 39 ECAB 980 (1988); *Samuel J. Russo*, 28 ECAB 43 (1976) (medical reports submitted two years prior to the wage-earning capacity determination were not sufficient to establish appellant's current work capacity).

⁷ In view of the Board's findings, the denial of reconsideration issue will not be addressed.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to establish that the selected position of employment interviewer represented appellant's wage-earning capacity because the Office relied on medical evidence that was not current.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 8, 2004 is reversed.

Issued: November 1, 2004
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member