

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

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**DENISE LATOUR, Appellant**

**and**

**U.S. POSTAL SERVICE, Pittsburgh Bulk Mail  
Center, Warrendale, PA, Employer**

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**Docket No. 06-6  
Issued: April 17, 2006**

*Appearances:*  
*John Latour, for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

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

**JURISDICTION**

On September 30, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated June 23, 2005 in which an Office hearing representative affirmed a November 8, 2004 decision which reduced her compensation benefits based on appellant's capacity to earn wages in the constructed position of billing clerk. Pursuant to 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 met its burden of proof to reduce appellant's compensation benefits based on her capacity to earn wages as a billing clerk.

**FACTUAL HISTORY**

On May 26, 2001 appellant, then a 41-year-old casual sorter, filed a traumatic injury claim alleging that she injured her back and left lower extremity that day while lifting a heavy parcel. A magnetic resonance imaging (MRI) scan performed on June 14, 2001 demonstrated left posterior and posterolateral disc herniation at L4-5 and mild spinal stenosis at L3-4, due to a combination of broad-based disc bulge and facet hypertrophy with degenerative changes at

L5-S1 but no significant stenosis. Appellant came under the care of Dr. Thomas D. Kramer, a Board-certified orthopedic surgeon. On August 13, 2001 the Office accepted that she sustained an employment-related lumbar herniated disc. The Office authorized surgery which was performed on August 28, 2001 by Dr. Kramer. Appellant was placed on the periodic rolls and did not return to work. She was terminated by the employing establishment on December 31, 2001.

In February 2002, appellant was referred to Timothy Whitford, M.A., for vocational rehabilitation. A program with training as a medical billing clerk and in medical transcription training was approved. On July 22, 2002 Dr. Kramer approved job descriptions for both billing clerk and medical secretary. In a work capacity evaluation dated April 7, 2003 he advised that maximum medical improvement had been reached, that appellant could work 8 hours a day with restrictions of 4 hours of sitting, 4 hours of standing, 1 hour of twisting, 1 hour of operating a motor vehicle at work and 2 hours a day of pushing, pulling, lifting, squatting, kneeling, climbing with a 21- to 50-pound weight restriction and breaks as needed. She completed her studies in August 2003 and appellant's vocational rehabilitation status was changed to placement.

In a July 15, 2003 treatment note, Dr. Kramer advised that appellant experienced "a pop" in her back while coughing which caused back pain and spasm in her left rib cage. Physical examination revealed tenderness over the left side of her left lower lumbar spine and negative straight leg raising. Neurological examination was unchanged. Dr. Kramer diagnosed probable lumbar strain and recommended physical therapy. On August 26, 2003 he noted tenderness and active spasm on examination. An MRI scan performed on August 29, 2003 demonstrated post-surgical changes with epidural fibrosis surrounding the L5 nerve root and disc bulges at T11-12, L3-4 and L5-S1. In a September 9, 2003 treatment note, Dr. Kramer advised that the MRI scan demonstrated an annular tear at L4-5. In an October 21, 2003 treatment note, he advised that appellant's physical examination was unchanged and recommended follow-up in two months.

Appellant underwent chiropractic treatment from September 11 to December 12, 2003. By report dated October 6, 2003, Dr. Mark R. LoDico, Board-certified in anesthesiology, noted evaluating her for pain management. Physical examination of the spine revealed generalized rigidity to the parathoracic region and slight tenderness to the bilateral lower lumbar iliac crest area. The diagnosis was lumbar and thoracic spinal pain, MRI scan findings of lumbar herniated disc and fibrosis of the left L5 nerve root. In a note dated December 16, 2003, Dr. Kramer advised that appellant continued to have low back complaints. Physical examination was unchanged and he recommended continued chiropractic treatment and follow-up as needed.

As appellant was unable to secure employment, in August 2004, Mr. Whitford identified the positions of medical secretary, telephone solicitor and billing clerk as within her sedentary strength category. He noted that the positions conformed with her work restrictions and were reasonably available on the local labor market. By letter dated October 4, 2004, the Office proposed to reduce appellant's wage-loss compensation benefits based on her capacity to earn

wages as a billing clerk.<sup>1</sup> The Office advised her that, if she disagreed with the proposed reduction, she should submit additional evidence or argument within 30 days. In a response dated October 20, 2004, appellant disagreed with the proposed reduction, contending that she had been unable to secure employment and it would be a hardship for her benefits to be reduced. By decision dated November 8, 2004, the Office reduced her wage-loss benefits, effective November 28, 2004, based on her capacity to earn wages as a billing clerk. On December 2, 2004 appellant, through her representative, requested a review of the written record. By decision dated June 23, 2005, an Office hearing representative affirmed the November 8, 2004 decision.

### **LEGAL PRECEDENT**

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.<sup>2</sup> An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.<sup>3</sup>

Section 8115 of the Federal Employees' Compensation Act<sup>4</sup> and Office regulations provide that, 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 the employee has no actual earnings, the wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the usual employment, the age, the qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect the wage-earning capacity in the disabled condition.<sup>5</sup>

The Office must initially determine a claimant's medical condition and work restrictions before selecting an appropriate position that reflects his or her wage-earning capacity. The medical evidence upon which the Office relies must provide a detailed description of the condition.<sup>6</sup> Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.<sup>7</sup>

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<sup>1</sup> Section 214.362-042 of the *Dictionary of Occupational Titles* (DOT) provides that the position of billing clerk requires sedentary strength, and it is described as a position in which a variety of billing duties are performed. *United States Department of Labor, Dictionary of Occupational Titles*, 4<sup>th</sup> ed. rev. 1991.

<sup>2</sup> *James M. Frasher*, 53 ECAB 794 (2002).

<sup>3</sup> 20 C.F.R. §§ 10.402, 10.403; *John D. Jackson*, 55 ECAB \_\_\_\_ (Docket No. 03-2281, issued April 8, 2004).

<sup>4</sup> 5 U.S.C. §§ 8101-8193.

<sup>5</sup> 5 U.S.C. § 8115; 20 C.F.R. § 10.520; *John D. Jackson*, *supra* note 3.

<sup>6</sup> *William H. Woods*, 51 ECAB 619 (2000).

<sup>7</sup> *John D. Jackson*, *supra* note 3.

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office 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 that 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 open labor market should be made through contact with the state employment service or other applicable service.<sup>8</sup> Finally, application of the principles set forth in *Albert C. Shadrick*<sup>9</sup> will result in the percentage of the employee's loss of wage-earning capacity.<sup>10</sup>

In determining an employee's wage-earning capacity based on a position deemed suitable, but not actually held, the Office must consider the degree of physical impairment, including impairment, results from both injury related and preexisting conditions, but not impairments resulting from post injury or subsequently acquired conditions. Any incapacity to perform the duties of the selected position resulting from subsequently acquired conditions is immaterial to the loss of wage-earning capacity that can be attributed to the accepted employment injury and for which appellant may receive compensation.<sup>11</sup>

### ANALYSIS

The medical evidence consists of reports provided by appellant's attending orthopedist, Dr. Kramer, and established that she was no longer totally disabled. The Office referred her for vocational rehabilitation counseling in February 2002. Appellant underwent training as a billing clerk and medical secretary, which she completed in August 2003. Because she was unable to secure employment, the vocational rehabilitation counselor identified three positions that he felt fit her work capabilities and restrictions. The Office determined that she had the capacity to earn wages as a billing clerk, based on an April 7, 2003 work capacity evaluation provided by Dr. Kramer.

The Board finds that the Office met its burden of proof in reducing appellant's wage-loss benefits based on her capacity to earn wages as a billing clerk. The relevant medical evidence consists of the April 7, 2003 work capacity evaluation in which Dr. Kramer advised that she could work 8 hours a day within restrictions to her physical activities and a 21- to 50-pound weight restriction. He reviewed several position descriptions, including that of billing clerk and approved the positions within the work tolerance limitations. While appellant disagreed with the proposed reduction, the record does not contain any contemporaneous medical evidence to indicate that she was incapable of performing the duties of the selected position of billing clerk.

In an August 11, 2004 report, the Office rehabilitation counselor determined that appellant was able to perform the position of billing clerk. He provided a job description,

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<sup>8</sup> *James M. Frasher, supra note 2.*

<sup>9</sup> 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.403.

<sup>10</sup> *James M. Frasher, supra note 2.*

<sup>11</sup> *John D. Jackson, supra note 3.*

advised that the position was sedentary with occasional lifting of 10 pounds, which was within her medical restrictions, noted that appellant had completed a one-year training program for the position, that it was available in sufficient numbers so as to make it reasonably available within her commuting area and that the wage of the position was \$368.00 to \$460.00 per week.

The Board finds that the Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment and age and employment qualifications, in determining that the position of billing clerk represented her wage-earning capacity.<sup>12</sup> The weight of the evidence of record establishes that she had the requisite physical ability, skill and experience to perform the position of billing clerk and that such a position was reasonably available within the general labor market of appellant's commuting area. The Office, therefore, properly determined that the position of billing clerk reflected her wage-earning capacity and using the *Shadrick* formula,<sup>13</sup> properly reduced her compensation effective November 28, 2004.<sup>14</sup>

### **CONCLUSION**

The Board finds that the Office met its burden of proof in reducing appellant's wage-earning capacity based on her ability to earn wages in the constructed position of billing clerk.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated June 23, 2005 be affirmed.

Issued: April 17, 2006  
Washington, DC

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

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

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<sup>12</sup> *James M. Frasher, supra* note 2.

<sup>13</sup> *Supra* note 9.

<sup>14</sup> *James Smith*, 53 ECAB 188 (2001).