U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

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In the Matter of CARRIE K. MAY and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION HOSPITAL, Denver, Colo.

*Docket No. 96-2198; Submitted on the Record;*
*Issued August 11, 1998*

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DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation to reflect her wage-earning capacity, based upon her ability to perform the position of receptionist.

Appellant's claim was accepted for lumbosacral strain and a herniated nucleus pulposus at L4-5, for which she underwent surgery on February 22, 1989. Appellant received compensation benefits on the periodic roll intermittently, and returned to limited duty with the employing establishment on several occasions, but on September 21, 1991 the employing establishment terminated appellant as they no longer had a limited-duty position that was compatible with her work restrictions. Appellant was again paid compensation on the periodic roll.

On August 3, 1992 appellant was referred to a rehabilitation counselor for assessment of her ability to return to work. Appellant's treating physician, Dr. John R. Graham, a Board-certified internist, released her to at least four hours of light-duty work per day to start, with a gradual increase in working hours as tolerated. Efforts were begun to return appellant to her former employer but the employing establishment's work in unskilled occupations was all medium-duty work requiring lifting up to 50 pounds, and appellant had no transferrable skills to be reemployed within the employing establishment. The employing establishment indicated that if appellant acquired the necessary typing and word processing skills, she would have an excellent chance of being rehired. It was recommended that appellant undergo an 18-month training program through the Emily Griffith Opportunity School to become qualified for a position as a secretary.

Near the end of the training period the rehabilitation counselor began providing appellant with listings of job leads that were available in the Denver metropolitan area. In June 1994 appellant graduated from the Emily Griffith Opportunity School in a training program that

emphasized word processing and secretarial/receptionist skills. Appellant also completed her GED training and testing and was awarded her high school equivalency diploma.

The employing establishment was contacted, but the personnel office advised the rehabilitation counselor that appellant had been officially separated from their rolls. Thereafter efforts were directed towards job placement in the private sector through a job training program or by direct placement. The rehabilitation counselor continued to provide appellant with job leads, however, the rehabilitation reports revealed that appellant did not respond or apply for many of the leads provided. The rehabilitation counselor reported that appellant was offered jobs by at least two employers, but that appellant turned these positions down for a variety of reasons including problems with commuting/travel distance, low wages and lack of benefits.

Dr. Graham released appellant to full-time work in a light-duty capacity including lifting up to 10 pounds on an occasional basis, and walking, sitting, standing and bending on an intermittent basis throughout a full workday. A March 21, 1995 OWCP-5 completed by Dr. Graham indicated that appellant was capable of full-time sedentary employment.

In a December 27, 1994 report, the rehabilitation counselor consulted the *Dictionary of Occupational Titles* and noted that the jobs of receptionist and general office clerk were considered sedentary, with the opportunity to change postural positions as frequently as desired throughout the workday. The counselor noted that this work was considered semi-skilled work for which appellant was qualified. The counselor reported that the average starting pay for a receptionist, based upon labor market research and statistics in appellant's geographic area was $6.06 per hour. This equated with an average weekly wage of $242.40 for 40 hours per week. The counselor noted that these jobs were readily available within a reasonable commuting area in reasonable numbers, numbering approximately 7,000. The counselor further noted that Katson Brothers had offered appellant a position as a receptionist at $6.00 per hour but that appellant had turned them down because they did not pay enough and it was too far to drive. The counselor noted that the company was 14 miles from appellant's home. The counselor indicated that he was closing appellant's file because he had given her over 125 referrals, and that appellant had turned at least two jobs down for various reasons concerning distance, wages and benefits.

The Office then determined that appellant's vocational and aptitude tests indicated that she was capable of being successfully employed in a secretarial/clerical-related job. The Office applied the *Shadrick* formula and calculated appellant's loss of wage-earning capacity.

On July 11, 1995 appellant was notified of a proposed reduction of compensation on the basis that total injury-related disability had ceased, and that she was capable of earning wages as a receptionist at the rate of $242.40 per week. She was given 30 days within which to submit comments, evidence or argument showing cause why the Office should not reduce her compensation.

By letter dated August 4, 1995, appellant responded, arguing that she believed she should be reemployed with the government in her former position, but that the building management would not allow her back due to retaliation for discrimination suits she filed. Appellant also argued that she was not treated fairly because, after working for the government for 22 years and

11 months, and being entitled to 6 weeks of vacation and 13 sick days per year, she should at least be given the option to work for companies that had such benefits. Appellant complained that the rehabilitation counselor did not provide her with federal government employment opportunities, and she requested a new rehabilitation counselor who would attend job interviews with her. Appellant stated that she desired a government job.

On October 4, 1995 the Office adjusted appellant's compensation to reflect her wage-earning capacity as a receptionist. The Office advised appellant that her desire to return to work for the government did not constitute a valid argument to dispute that she had the capacity to earn wages in the position of receptionist, such that the position fairly and reasonably represented her capacity to earn wages. The Office calculated that appellant was entitled to $786.00 in compensation every 28 days.

On October 20, 1995 the Office issued appellant another notice of proposed reduction of compensation explaining that the October 4, 1995 decision used an incorrect pay rate in calculating the amount of compensation due her. The Office explained that her rate of pay when injured had been incorrectly entered when the *Shadrick* formula was calculated, resulting in an incorrect compensation dollar amount. The Office indicated that appellant was correctly entitled to $707.00 in compensation per every 28 days based upon her loss of wage-earning capacity.

Appellant responded on November 15, 1995 stating that she did not agree, and she claimed that on the first of the year she would try to volunteer for a company for 30 days with the stipulation that if there was a position soon after, she would be hired.

By decision dated November 21, 1995, the Office modified the October 4, 1995 reduction taking into account appellant's correct rate of pay when injured, and reduced appellant's compensation effective November 12, 1995 finding that the position of receptionist fairly and reasonably represented her wage-earning capacity.

The Board finds that the Office properly reduced appellant's compensation to reflect her wage-earning capacity, based upon her ability to perform the position of receptionist.

Wage-earning capacity is a measure of an 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.[1]

The Office's procedures governing cases where the wage-earning capacity is to be determined based upon a selected position, where vocational rehabilitation did not succeed, provide that a report must be prepared summarizing why rehabilitation was unsuccessful and identifying two or three jobs which are medically and vocationally suitable for the claimant. The report must include job numbers and descriptions from the *Dictionary of Occupational Titles*, the duties and physical requirements of each job, pay ranges in the relevant geographical area, and a statement regarding job availability. These procedures provide that the positions listed may be

[1] *Dennis D. Owen*, 44 ECAB 475 (1993).

those in which placement was attempted and also provide that the lack of current job openings does not equate to a finding that the position was not performed in sufficient numbers to be considered reasonably available. The procedures provide that the rehabilitation counselor's expertise may be relied upon as to whether a job is vocationally suitable and reasonably available.[2]

In the instant case, the rehabilitation counselor's December 27, 1994 report discussed the selected positions of receptionist and general office clerk as being appropriate for appellant physically and vocationally; it stated that he had referred her to over 125 job opportunities and that she had had at least two job offers which she turned down for reasons dealing with minimum travel, wages and benefits, and it indicated that these jobs were abounding in the local area.

By notice dated July 11, 1995, appellant was provided with proper notice of the proposed reduction in compensation, and on August 4, 1995 she responded arguing that she should be entitled to a government job and that she deserved benefits. Appellant's arguments were considered by the Office, which was not persuaded that its proposal was in error, and finalized the modification of compensation October 4, 1995. Thereafter it corrected a misentry in its calculations and reissued a notice of proposed reduction on October 20, 1995. Appellant again responded, merely arguing that she did not agree. On November 21, 1995 the Office finalized its corrected modification in compensation to make allowance for appellant's loss of wage-earning capacity.

The Board finds that the evidence of record amply supports the Office's conclusion that the position of receptionist fairly and reasonably represented appellant's wage-earning capacity. Appellant received her GED and completed two years of training in word processing and typing in a rehabilitation effort by the Office. This supports that appellant has been vocationally prepared for the semi-skilled position of receptionist. Further, the physical requirements of the position are sedentary with no lifting over 10 pounds, which is in accordance with Dr. Graham's work restrictions. Therefore, this position is physically suitable to appellant's partially disabled condition. Additionally, appellant was given 125 job leads for such positions and was actually offered at least two jobs in the capacity of receptionist, providing proof that the positions are amply available in appellant's area and that appellant is qualified for such positions.

The Board notes that appellant's reasons for turning these offered positions down had nothing to do with her vocational or medical qualifications, but instead had to do with job convenience and benefits. This is even further evidence that these positions were suitable for appellant and fairly and reasonably represented her wage-earning capacity. The Board also notes that the fact that appellant rejected offered positions, or the fact that she desired only positions

[2] *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

with the federal government, do not constitute supportable reasons to consider the position of receptionist unsuitable.[3]

As the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from known facts.[4] The Board finds that there was no such abuse here.

Accordingly, the decision of the Office of Workers' Compensation Programs dated November 21, 1995 is hereby affirmed.

Dated, Washington, D.C.
August 11, 1998

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[3] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.5(c) (July 1997).

[4] *Daniel J. Perea*, 42 ECAB 214 (1990).