U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARY ELLA LANKFORD and TENNESSEE VALLEY AUTHORITY, NUCLEAR QUALITY ASSURANCE, Chattanooga, Tenn.

Docket No. 96-2613; Submitted on the Record;
Issued November 13, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether appellant has met her burden of proof in establishing a recurrence of disability on or after October 14, 1994; and (2) whether the Office of Workers' Compensation Programs properly determined appellant's loss of wage-earning capacity beginning February 1, 1995.

Appellant filed a claim on March 5, 1990 alleging that she sustained an injury in the performance of duty. The Office accepted her claim for contusion right shoulder and strain right knee. The Office granted appellant a schedule award for 12 percent permanent impairment of her right knee and a schedule award for 8 percent impairment of her right arm. Appellant resigned from the employing establishment effective October 16, 1994, filed a notice of recurrence of disability and requested wage-loss compensation beginning October 15, 1994. By decision dated February 1, 1995, the Office denied her claim finding that the evidence failed to demonstrate that appellant's accepted injuries resulted in any loss of wage-earning capacity. The Office also found that appellant had not sustained a recurrence of disability. Appellant requested an oral hearing which was denied as untimely. Appellant then requested reconsideration and by decision dated August 13, 1996, the Office denied modification of its February 1, 1995 decision.

The Board has duly reviewed the case on appeal and finds that appellant has not met her burden of proof in establishing that she sustained a recurrence of disability on or after October 16, 1994 causally related to her accepted employment injury.

When an employee, who is disabled from the job she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establish that she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature

and extent of the light-duty requirements.[1] Furthermore, appellant has the burden of establishing by the weight of the substantial, reliable, and probative evidence, a causal relationship between her recurrence of disability commencing October 16, 1994 and her March 5, 1990 employment injury.[2] This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.[3]

In this case, appellant alleged on October 13, 1994 that she would sustain a recurrence of disability on October 14, 1994 as her light-duty position would terminate October 16, 1994. Appellant stated, "Due to current restrictions I am unable to find suitable employment. My employment … is terminating due to an 'at risk' letter and a 'reduction in staff" letter I received…."

The record indicates that on September 15, 1994 the employing establishment provided appellant with written notice of a "potential at-risk status." The employing establishment stated that appellant might be assigned to the Services organization effective April 3, 1995. The employing establishment stated, "During your temporary assignment to the Services organization, you will remain at your current schedule and grade and in the same competitive area and level as your current position until other job opportunities become available." Appellant offered to "voluntarily resign" from the employing establishment on September 13, 1994 effective October 16, 1994.

The employing establishment stated that appellant voluntarily resigned, that although appellant's position had been identified as potentially at risk, there was no reduction-in-force scheduled for her. The employing establishment stated that appellant had the opportunity to be assigned to the Services organization which would continue the same salary and benefits and guaranteed at least one job offer. The employing establishment concluded that appellant was still in her own job and that no change had been scheduled.

Appellant has not established that there was no longer light-duty work available for her on October 16, 1994. Therefore she has not established a change in the nature and extent of her light-duty requirements. Furthermore, the most recent medical reports that appellant's restrictions remained permanent with no significant lifting, pushing or pulling. As appellant has not established a change in the nature or extent of her light-duty job requirements or in her medical restrictions, she has failed to meet her burden of proof in establishing a recurrence of disability.

[1] *Terry R. Hedman*, 38 ECAB 222 (1986).

[2] *Dominic M. DeScala*, 37 ECAB 369, 372 (1986); *Bobby Melton*, 33 ECAB 1305, 1308-09 (1982).

[3] *See Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

The Board further finds that the Office properly determined appellant's loss of wage-earning capacity beginning February 1, 1995.

Section 8115 of the Federal Employees' Compensation Act,[4] provides that the wage-earning capacity of an employee is determined by his actual earnings if his earnings fairly and reasonably represent his wage-earning capacity. The Board has stated that, 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.[5]

In the present case, appellant, a clerk, earning $17,350.00 per annum, returned to work on April 9, 1990 in a light-duty capacity as a clerk at the same pay rate. Appellant continued to performed the duties of this position until June 20, 1990. Appellant returned to work in August 1990 and continued to work until October 16, 1994, the date she resigned. At the time of her resignation, appellant was earning $22,070.00 per annum. As noted above, appellant offered to "voluntarily resign" from the employing establishment on September 13, 1994 effective October 16, 1994. The Office, under its procedures, can make a retroactive determination of wage-earning capacity.[6] The Office's procedure manual provides that if a claimant has worked in the position for at least 60 days, the claims examiner has determined that the employment fairly and reasonably represents the wage-earning capacity and the work stoppage did not occur because of any change in the claimant's injury-related condition affecting ability to work, then a retroactive wage-earning capacity determination may be made.[7] Her pay at this position was the same as her date-of-injury position. There is no evidence that this position is seasonal, temporary, less than full time, make-shift work designed for appellant's particular needs.[8] There is no evidence that appellant stopped performing this position because of a change in her injury-related condition affecting her ability to work. The Board therefore finds that the Office properly determined appellant's wage-earning capacity was represented by her actual earnings as a clerk and that she had no loss of wage-earning capacity and was not entitled to further compensation benefits.

[4] 5 U.S.C. § 8115.

[5] *Elbert Hicks*, 49 ECAB ___ (Docket No. 95-1448, issued January 20, 1998).

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(e) (May 1997).

[7] *Id.*

[8] *Monique L. Love*, 48 ECAB ___ (Docket No. 95-188, issued February 28, 1997).

The decision of the Office of Workers' Compensation Programs dated August 13, 1996 is hereby affirmed.

Dated, Washington, D.C.
November 13, 1998

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member