U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BARABRA B. FLORES and DEPARTMENT OF HEALTH & HUMAN SERVICES, FOOD & DRUG ADMINISTRATION, Denver, CO

Docket No. 98-1167; Submitted on the Record;
Issued October 27, 2000

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
VALERIE D. EVANS-HARRELL

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof in reducing appellant's monetary compensation; and (2) whether the Office properly denied appellant's request for reconsideration on the merits under 5 U.S.C. § 8128.

On September 23, 1992 appellant, then a 47-year-old microbiologist, filed a notice of occupational disease and claim for compensation alleging that she injured her right elbow and wrist in the performance of duty.[1] The Office accepted the claim for right carpal tunnel syndrome, right radial tunnel syndrome and adhesive capsulitis of the right shoulder. Appellant was placed on the periodic rolls and received continuing compensation benefits. She has not worked since September 28, 1992.

Appellant was initially treated by her family physician, Dr. Duane A. Claassen. In a CA-20 attending physician's report, he diagnosed arm pain and numbness for which he prescribed physical therapy. Dr. Claassen later referred appellant for treatment with Dr. Christopher Wilson, a Board-certified orthopedic surgeon, beginning August 12, 1992. Dr. Wilson subsequently diagnosed that appellant suffered from right carpal tunnel syndrome, right radial tunnel syndrome and adhesive capsulitis of the right shoulder.

The record indicates that appellant was offered a light-duty job as a mail and file clerk, which was approved by Dr. Wilson in May 1993.

In a report dated May13, 1993, Dr. Wilson noted that appellant had been very upset that he had approved her for a return to work. Dr. Wilson indicated that he had tried to explain to appellant that the job offer provided by the employing establishment was within appellant's

[1] Appellant noted that she felt an onset of pain in her right elbow and wrist after cutting several sandwiches in preparation for a lab test on June 10, 1992 and that the pain got progressively worse over the following weeks.

medical restrictions, but that she had told him she would not be returning to his office for further care.

In a report dated April 29, 1993, Dr. William Keener, an Office referral physician and a Board-certified orthopedic surgeon, opined that appellant was still suffering from residuals of her work-related injury, but he considered her to be capable of working eight hours per day.

Appellant subsequently refused the job offer and submitted a report from Dr. Lynn Parry, a Board-certified neurologist. Dr. Parry stated that appellant was unable to perform the duties listed on the job description. According to Dr. Parry, the opinion provided by Dr. Wilson that appellant could return to work was rendered after considering only appellant's carpal tunnel syndrome and shoulder conditions. He felt that appellant's disability should be considered with respect to "those aspects of her injury, which are proximal to the elbow."

In a report, Dr. Claassen also opined that appellant could not return to work.

In a decision dated June 28, 1993, the Office terminated appellant's compensation on the grounds that she refused an offer of suitable work.

In an April 5, 1994 decision, however, an Office hearing representative vacated the Office's June 28, 1993 decision and remanded the case for an impartial medical evaluation based on a conflict in the medical evidence between Drs. Claassen, Parry, Wilson and Keener.

On remand, the Office referred appellant along with a copy of the medical record and a statement of accepted facts, to Dr. Michael Gordon, a Board-certified orthopedic surgeon, for an impartial medical evaluation. In a report dated August 4, 1996, Dr. Gordon refused to render an opinion regarding appellant's capacity for work.

Although the Office addressed additional questions to Dr. Gordon he never responded to the Office's request that he resolve the conflict in the medical evidence. The Office, therefore, referred appellant for a second impartial medical evaluation with Dr. Eric Britton on December 22, 1994. Dr. Britton was also provided a copy of the medical record and a statement of accepted facts. He opined that while appellant could not return to her full duties as a microbiologist, she was capable of performing the job offered to her as a mail and file clerk.

After receipt of Dr. Briton's report, the Office contacted the employing establishment to see if the position was still available but an employing establishment representative indicated that it was not. The file was then referred for vocational rehabilitation.

On July 2, 1996 an Office rehabilitation counselor prepared a rehabilitation plan and labor market survey, identifying several jobs that were consistent with appellant's educational qualifications, vocational status and her physical capabilities, including the position of a faculty member of a college or university for which the annual salary was listed as $26,000.00. It was further noted that the jobs were available to the injured worker within her labor market.

In a July 14, 1996 letter, appellant refused to participate in the placement plan that was coordinated for her.

The Office issued a notice of proposed reduction of compensation on August 23, 1996. The notice contained the description and requirements of the selected position of a faculty member, college, university, or junior college, *Dictionary of Occupational Titles* (DOT) #090.277-010, as well as memorandum explaining the computation of the proposed reduction of compensation. Appellant was afforded 30 days to submit additional evidence or argument.

Appellant next submitted a September 10, 1996 report by Dr. Parry, which stated that appellant suffered from cumulative trauma, including the disorders of carpal tunnel syndrome, ulnar nerve compression neuropathy, radial tunnel syndrome, thoracic outlet syndrome and cervical strain. Dr. Parry advised that appellant was not able to return to work even in a modified position.

In a September 19, 1996 report, Dr. Parry noted that appellant suffered from fibromyalgia that it was infeasible for her to return to work until that condition improved. She specifically opined that appellant could not work as a faculty member given her diagnosis of cumulative repetitive motion trauma in the upper extremities and shoulders.[2]

In a decision dated January 6, 1997, the Office reduced appellant's compensation effective January 5. 1997, on the basis that the position of a college or university faculty member was deemed to fairly and reasonably represent appellant's wage-earning capacity.

Appellant requested a review of the written record on February 5, 1997.

In an April 30, 1997 decision, an Office hearing representative affirmed the Office's January 6, 1997 decision.

On October 23, 1997 appellant requested reconsideration. She submitted three narrative letters dated October 15, 1997, July 1 and 9, 1997, along with a nine-page statement entitled Attachment A.

In a December 17, 1997 decision, the Office denied appellant's request for reconsideration on the merits.

The Board finds that the Office properly reduced appellant's monetary compensation.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[3]

The Office in its January 6, 1997 decision, indicated that it had made a wage-earning capacity determination under 5 U.S.C. §§ 8106 and 8115 and had adjusted appellant's compensation based on her capacity to earn wages as a faculty member. In the memorandum

[2] In a decision dated May 29, 1996, the Office refused to expand acceptance of appellant's claim to include the diagnoses of cumulative trauma disorder or fibromyalgia. Thus, the evidence submitted by appellant was not relevant or sufficient to show just cause why the Office should not have proceeded with it's wage-earning capacity determination.

[3] *Betty F. Wade*, 37 ECAB 556 (1986).

accompanying that decision, the Office noted that appellant had refused to sign and participate in a plan tailored for her rehabilitation.

With regard to section 8115(a), this section of the Federal Employees' Compensation Act provides 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, 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.[4] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[5] The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.[6]

When the Office makes a medical determination of partial disability and specific work restrictions, it may refer the employee to a vocational rehabilitation counselor authorized by the Office for the selection of a position listed in the Department of Labor's DOT or otherwise available in the open labor market that fits that employee's capabilities with regard to his 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.

In the present case, Dr. Britton an impartial medical specialist approved appellant for a return to work; however, the employing establishment did not have a position available for her. The Office referred appellant for rehabilitation but appellant refused to participate in a plan developed for her to obtain employment. In accordance with proper procedure, the rehabilitation counselor subsequently prepared a report identifying three jobs that appellant was qualified for and that were reasonably available in her commuting area. The job listing of faculty member of a junior college or university was found by the Office to be within appellant's physical capabilities as was selected as the basis for its wage-earning capacity determination. The Office then properly notified appellant that it intended to reduce his compensation based on the selected position of faculty member.[7]

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

[4] *Pope D. Cox*, 39 ECAB 143 (1988). *See* 5 U.S.C. 8115(a).

[5] *Albert P. Poe*, 37 ECAB 684 (1986).

[6] *Id*.

[7] Office procedures provide that a claimant be given a 30-day prereduction notice of a wage-earning capacity determination involving a selected position before a final decision determining the employee's wage-earning capacity is issued. *See David W. Green*, 43 ECAB 883 (1992); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.813.13(d) (September 1989).

employment qualifications, in determining that the position of faculty member represented appellant's wage-earning capacity.[8] The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of faculty member and that such a position was reasonably available within the general labor market of appellant's commuting area. Therefore, the Office properly determined that the position of faculty member reflected appellant's wage-earning capacity effective January 5, 1997.[9]

The Board further finds that the Office properly denied appellant's request for reconsideration of the merits of her claim.

Section 8128(a) of the Act vests the Office with the discretionary authority to determine whether it will review an award for or against compensation.[10] The regulations provide that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.[11] When an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.[12] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[13] Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.[14] Where a claimant fails to submit relevant evidence not previously of record or advance legal contentions not previously considered, it is a matter of discretion on the part of the Office to reopen a case for further consideration under section 8128 of the Act.[15]

The Board finds that appellant failed to show that the Office erroneously applied or interpreted a point of law. She did not advance on reconsideration, a point of law or a fact not previously considered by the Office; and she did not submit relevant and pertinent evidence to warrant a merit review. Because appellant did not satisfy the requirements of section 8128, the Office properly denied her request for reconsideration.

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[8] *See Clayton Varner*, 37 ECAB 248 (1985).

[9] 20 C.F.R. § 10.124(f) provides that, under 5 U.S.C. § 8104(a) the Office may direct a permanently disabled employee to undergo vocational rehabilitation. If an employee without good cause fails or refuses to apply for, undergo, participate in, or continue participation in a vocational rehabilitation effort when so directed, the Office will under 5 U.S.C. § 8113(b), reduce prospectively the employee's monetary compensation based on what would probably have been the employee's wage-earning capacity had there not been such failure or refusal.

[10] 5 U.S.C. § 8128; *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[11] 20 C.F.R. § 10.138(b)(1).

[12] 20 C.F.R. § 10.138(b)(2).

[13] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

[14] *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

[15] *Gloria Scarpelli-Norman*, 41 ECAB 815 (1990); *Joseph W. Baxter*, 36 ECAB 228 (1984).

The decisions of the Office of Workers' Compensation Programs dated December 17 and April 30, 1997 are hereby affirmed.

Dated, Washington, DC
October 27, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Valerie D. Evans-Harrell
Alternate Member