U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DOROTHY JETT and DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Covington, KY

Docket No. 99-297; Submitted on the Record;
Issued January 29, 2001

DECISION and ORDER

Before MICHAEL E. GROOM, A. PETER KANJORSKI,
VALERIE D. EVANS-HARRELL

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation on the grounds that the position of a throw out clerk represented her wage-earning capacity.

On February 20, 1981 appellant, then a 32-year-old office worker, filed a notice of traumatic injury and claim for compensation alleging that she injured her back in the performance of duty. The Office accepted the claim for a lumbar strain, sacroiliitis and L5 radiculopathy with a bulging disc. Appellant received appropriate compensation for wage loss. She sustained a recurrence of disability on July 12, 1988 and received compensation for wage loss on the periodic rolls for temporary total disability effective July 2, 1989.

Appellant came under the care of Dr. Michael A. Grefer, an orthopedist, for treatment of her work and nonwork-related conditions. A cervical magnetic resonance imaging (MRI) scan performed on June 29, 1990 revealed spinal stenosis at C6-7 and diffuse posterior disc herniation. A lumbar MRI scan performed on June 29, 1990 also showed a central disc herniation at L5-S1 and a pinched nerve in the right lower extremity. Dr. Grefer prescribed a series of medication, moist heat, home exercise, epidural steroid injections, cervical traction, a TENS unit and physical therapy to reduce appellant's back-related symptoms. He also recommended a laminectomy at L5-S1 which was approved by the Office.

On April 24, 1995 in order to ascertain appellant's capacity for work, the Office requested that Dr. Grefer provide a comprehensive medical report and answer specific questions with respect to appellant's back condition. In response to the request, Dr. Grefer sent copies of his treatment notes indicating that appellant was being treated for a variety of medical problems, including degenerative disc disease and possible carpal tunnel syndrome.

In an August 21, 1995 treatment note, Dr. Grefer reported:

> "She is still in pain and having continued problems. This pain is in the back and both of her legs. She is getting real burning in both of her legs. She does n[o]t want to consider surgery. She still has the disc problem with probable radiculopathies. It is basically subacute right now. There is no job she is planning on going back to. I think a sedentary type of position with frequent changes of position is what we would have in mind."

The Office referred appellant for a second opinion evaluation with Dr. Gregory Fisher, a Board-certified orthopedic specialist. In his report dated October 12, 1995, Dr. Fisher noted that appellant suffered from a "chronic muscle/ligament strain over the low back area secondary to her accident at work on February 20, 1981." Dr. Fisher noted physical findings and discussed appellant's medical and work histories. He stated that he agreed with the treatment plan prescribed by appellant's treating physician. Dr. Fisher opined that appellant was totally disabled from her date-of-injury job. He found, however, that appellant was physically capable of performing sedentary work on a part-time basis for 5 hours per day with "no bending, stooping, twisting, reaching or lifting items over 10 pounds [since] these activities would only aggravate her back condition."

In a work evaluation form dated October 12, 1995, Dr. Fisher reported that appellant could perform no bending, stooping, twisting or lifting over 10 pounds. He noted that appellant could perform repetitive motions of the wrist and elbow, and that there were no limitations regarding the fine motor movements of the upper extremities. He opined that appellant could work four to five hours per day in sedentary work, "sit down only -- hands only."

In a report dated March 1, 1996, Dr Grefer noted that he had not seen appellant since August 21, 1995 at which time she was given anti-inflammatory medication for tightness in her back. He noted that the only recourse left for appellant was to have surgery but that she refused to undergo surgery unless the pain became totally unbearable. He stated that appellant had preexisting degenerative disc disease that was dormant until appellant's work injury. He opined that appellant was at maximum medical improvement and opined that appellant could perform sedentary work with frequent changes of position and no lifting, bending, stooping, squatting or climbing."

Based on the reports of Drs. Fisher and Grefer, the Office referred appellant for vocational rehabilitation services. When efforts to place appellant with her previous employer failed, a rehabilitation specialist identified the positions of a throw-out clerk, a credit card clerk, and a general office clerk as being consistent with appellant's educational background and work experience.

In a report dated March 17, 1996, Cherylanne Norwood, the rehabilitation specialist, noted that the position of throw-out clerk was sedentary in nature and required lifting up to 10 pounds. She also noted that appellant would be required to perform frequent reaching and handling with occasional fingering involved with the job, but no climbing, balancing, stooping, kneeling, crouching, crawling or feeling. Ms. Norwood confirmed that the job of throw-out clerk

was reasonably available as a full-time or part-time position in appellant's commuting area following contact with the state employment agency in Cincinnati, Ohio.

As defined in the Department of Labor's, *Dictionary of Occupational Titles*, a throw-out clerk (DOT 241.367-030) has the following job description:

> "Processes records of department store transactions which cannot be applied to customers accounts by routine procedures in order that charges, cash payments, and refunds may be recorded, collected, or credited: Reviews and talks to sales-audit, charge-account authorization, and collection personnel to identify missing information or compare signatures on sales or credit slips. Telephones or writes to customers for additional information. Corrects or adds information to customer accounts as necessary. Mails dunning correspondence to customers in arrears on their charge accounts…."

On October 10, 1996 the Office issued a notice of proposed reduction of compensation advising appellant that the factual and medical evidence of record indicated that she had the capacity to earn wages in the position of a throw-out clerk at the rate of $10.25 per hour, 25 hours per week. Appellant was given 30 days to submit additional evidence or argument if she disagreed with the Office's finding.

In an October 25, 1996 letter, appellant's counsel argued that because appellant was required to wear a brace, as prescribed by Dr. Grefer, she was unable to do any work.

In a decision dated November 13, 1996, the Office reduced appellant's compensation on the grounds that the medical evidence of record established that she was no longer totally disabled for work. The Office computed appellant's wage-earning capacity based on the selected position of a throw-out clerk.

On December 19, 1996 appellant requested a hearing.

Appellant subsequently submitted a September 26, 1997 treatment note from Dr. Grefer that stated: "I will allow her to do the sedentary job with no lifting over 10 pounds. She says she does n[o]t feel like she can do it but I do n[o]t see any reason why she cannot with the limitations at this time. She does n[o]t have to do a lot of stooping, squatting etc., I told her we will keep an eye on things."

In a September 4, 1998 decision, finalized September 8, 1998, an Office hearing representative affirmed the Office's November 13, 1996 decision reducing appellant's compensation to reflect her wage-earning capacity as a throw-out clerk.

The Board finds that the Office properly reduced appellant's wage-loss compensation.

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 of benefits.[1]

Under section 8115(a) of the Federal Employees' Compensation Act,[2] wage-earning capacity is determined by the actual wages received by an employee if such earnings fairly and reasonably represent wage-earning capacity. If the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect wage-earning capacity in the employee's disabled condition.[3] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[4] Where vocational rehabilitation is unsuccessful, the rehabilitation counselor will prepare a final report, which lists two or three jobs which are medically and vocationally suitable for the employee and proceed with information from a labor market survey to determine the availability and wage rate of the position.[5]

The Office procedures pertaining to vocational rehabilitation services emphasize returning partially disabled employees to suitable employment.[6] If the employment injury prevents the injured worker from returning to the job held at the time of injury, vocational rehabilitation services are provided to assist the employee in placement with the previous employer in a modified position or, if not feasible, developing an alternative plan based on vocational testing which may include medical rehabilitation, training and/or placement services.[7]

In a report dated March 17, 1996, Ms. Norwood the rehabilitation specialist confirmed that appellant was able to perform the position of a throw-out clerk, and that the position was available in sufficient numbers so as to make it reasonably available within appellant's commuting area as a full-time or part-time position. The rehabilitation specialist also determined the minimum weekly wage of the position and found that appellant was capable of earning $10.25 per hour, 25 hours per week. She provided a job description for the position of throw-out

[1] *James B. Christenson*, 47 ECAB 775 (1996); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

[2] 5 U.S.C. § 8115(a).

[3] *See Richard Alexander*, 48 ECAB 432 (1997); *Pope D. Cox*, 39 ECAB 143 (1988).

[4] *Id*.

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.813.2 (December 1993).

[6] *Id*.

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.813.6(b) (November 1996).

clerk and confirmed that the job was sedentary and consistent with appellant's medical restrictions. Appellant's counsel argues on appeal that the job of throw-out clerk is inconsistent with appellant's medical restrictions because it requires frequent reaching. The Board, however, finds that appellant is capable of performing the job of a throw-out clerk since Dr. Fisher, the Office referral physician, specifically opined that appellant could perform repetitive motions of the wrist and elbow and could perform reaching activities so long as she was not required to lift more than 10 pounds. Dr. Fisher further stated that appellant was not limited with regard to the fine motor movements of her upper extremities. Likewise, Dr. Grefer did not place any restrictions on appellant's reaching capabilities, noting only that she should perform only sedentary work.

Appellant's counsel argues on appeal that the rehabilitation specialist erroneously failed to provide the specific name of the person contacted with the state employment agency in confirming the availability of the position of throw-out clerk in appellant's commuting area. Although the name of the person is not listed in the March 17, 1996 report, the rehabilitation specialist confirmed that she contacted the state employment office in Cincinnati to confirm the availability of the selected position. The Board does not consider the rehabilitation specialist's report to be so incomplete on this issue as to warrant rejection of the wage-earning capacity determination. The Office's federal procedure manual provides that the rehabilitation specialist is an expert in the field of vocational rehabilitation and that the Office claims examiner may rely on his or her opinion as to whether the job is reasonably available and vocationally suitable.[8] As applied to this case, Ms Norwood, a specialist in the field of vocational rehabilitation, has confirmed that in formulating the throw-out clerk position, she consulted with the state employment office in Cincinnati as to the position's availability.

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 throw-out clerk represented appellant's wage-earning capacity.[9] Because the weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of throw-out clerk and that such a position was reasonably available within the general labor market of appellant's commuting area, the Board concludes that the Office properly determined that the position of a throw-out clerk reflected appellant's wage-earning capacity.[10]

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8 (b)(2) (December 1995).

[9] *See Sylvia Bridcut*, 48 ECAB 162 (1996); *Clayton Varner*, 37 ECAB 248 (1985).

[10] Although appellant contends that she is unable to work due to various medical conditions, including possible carpal tunnel syndrome, she submitted no corroborating medical report stating that she was unable to perform the duties of a throw-out clerk. Moreover, the Office is not required to consider medical conditions arising subsequent to the work-related injury or disease in determining whether a position constitutes an employee's wage-earning capacity. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(b) (December 1995).

The decision of the Office of Workers' Compensation Programs dated September 4, 1998, finalized September 8, 1998, is hereby affirmed.

Dated, Washington, DC
January 29, 2001

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

Valerie D. Evans-Harrell
Alternate Member