U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EVA L. DANIEL and DEPARTMENT OF DEFENSE, OFFICE OF THE INSPECTOR GENERAL, Arlington, VA

Docket No. 00-2677; Submitted on the Record; Issued September 21, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant had no loss of wage-earning capacity based on her actual earnings; and (2) whether the Office properly denied appellant's request for reconsideration.

On December 17, 1997 appellant, then a 37-year-old auditor, filed a claim for depression. She attributed her condition to harassment by her supervisors at work, including incidents in which she was berated for her work performance in front of her coworkers. The Office found that appellant had been subjected to verbal abuse in front of her coworkers and therefore had shown the existence of a compensable factor of employment. The Office accepted appellant's claim for depression and began payment of temporary total disability compensation effective February 4, 1998, the date appellant stopped working.

In a September 14, 1998 report, Dr. William J. Levin, a psychologist, stated that appellant was unable to return to her position as an auditor with the employing establishment but could perform work in another setting, doing more challenging work. The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Brian Schulman, a Board-certified psychiatrist, for an examination. In a November 19, 1998 report, Dr. Schulman diagnosed a history of depression that was in remission and a mixed personality disorder with hypersensitive and avoidant personality traits. He commented that appellant would likely show a recrudescence of depressive symptoms if she returned to her previous job position. Dr. Schulman stated that appellant was fit to return to work but recommended that she be reassigned to another department within the employing establishment. He indicated that her work should be relatively uncomplicated and familiar with a transition period to afford her the opportunity to enhance her self-confidence and self-esteem.

In a January 5, 1999 letter, the employing establishment offered appellant a position as an auditor. The employing establishment indicated that appellant would be assigned to the finance and accounting division of the employing establishment but to a different branch with a new supervisor and new coworkers. The employing establishment indicated that the position would

be at the same grade and step she held when she stopped working. In a January 15, 1999 response, appellant rejected the position. She submitted in support of her action a January 14, 1999 report from Dr. Levin who stated that it would be unwise to have appellant return to any position at the employing establishment because of the cumulative, adverse impact of the personnel actions related to her.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Donald Vogel for an examination to resolve the conflict between the reports of Drs. Levin and Schulman. In a February 18, 1999 report, Dr. Vogel stated that appellant was not depressed although she had been depressed in the past. He commented that appellant's continuing to see Dr. Levin once a month was a fine idea. Dr. Vogel stated that appellant was so traumatized by her old job that going back to it, with the old bosses, would be very traumatic and threatening to her. He concluded that appellant could return to work at the employing establishment, with a new supervisor that was supportive.

In a March 15, 1999 letter, the Office informed appellant that it had reviewed the position offered to her and concluded that it was suitable to her work capabilities. The Office gave appellant 30 days to accept the position or provide reasons for refusing. The Office indicated that any reason given for refusing the position would be considered prior to determining whether her reasons for refusing the position were justified. In an April 12, 1999 letter, appellant's attorney stated that appellant refused the position because she would be placed in the same hostile environment. In an April 19, 1999 note, an employing establishment official stated that the job offer made to appellant met the requirement that she not return to work in the same area or with the same supervisors. In an April 27, 1999 letter, the Office informed appellant that it found her reasons for rejecting the position to be unacceptable. She was given 15 days to accept the position or the Office would proceed to a final decision.

In a May 28, 1999 decision, the Office terminated appellant's compensation effective May 22, 1999 for refusal to accept suitable employment.

Appellant's attorney requested a hearing before an Office hearing representative. In a September 7, 1999 decision issued without a hearing, the Office hearing representative found that the medical evidence had not established that appellant had recovered from the accepted employment-related condition. He remanded the case for a *de novo* decision terminating appellant's compensation for refusing suitable work. The hearing representative also directed the Office to seek clarification from Dr. Vogel on his contradictory statements that appellant had recovered from her depression but still required treatment from Dr. Levin.

In a September 17, 1999 letter, the employing establishment informed the Office that appellant had returned to work on June 21, 1999 and continued in a duty and pay status.

In an October 4, 1999 decision, the Office found that appellant's position as an auditor, which she had held for more than 60 days, fairly and reasonably represented her wage-earning capacity. It therefore terminated her compensation because the actual wages she was receiving equaled or exceeded the current wages of the job she held when injured and, as a result, she had no loss of wage-earning capacity.

In a March 15, 2000 letter, appellant's attorney requested reconsideration, contending that the Office had never followed the instructions of the remand. In an August 14, 2000 decision, the Office denied the request for reconsideration on the grounds that appellant's attorney had not submitted new relevant evidence or raised new substantive legal questions in his request for reconsideration.

The Board finds that the Office properly found appellant had no loss of wage-earning capacity.

Under section 8115(a) of the Federal Employees' Compensation Act,[1] wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represented appellant's wage-earning capacity.[2] Generally, wages actually earned are the best measure of wage-earning capacity and, in the absence of evidence that they do not fairly or reasonably represent the injured workers wage-earning capacity, will be accepted as such measure.[3]

In this case, appellant returned to work at the position offered to her by the employing establishment. She returned at the same grade and step she held when she stopped working. Therefore, she was receiving the same pay as the current pay of her former position. For that reason, she had no loss of wage-earning capacity.

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

Section 8128(a) of the Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant. Under 20 C.F.R. § 10.606(b), a claimant may obtain review of the merits of his claim by showing that the Office erroneously applied or interpreted a point of law, advanced a point of law not previously considered by the Office, or submitted relevant and pertinent evidence not previously considered by the Office. Section 10.608(b) provides that 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.[4] 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.[5] Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.[6]

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[1] 5 U.S.C. § 8115(a).

[2] *Thomas Taylor*, 49 ECAB 127 (1997).

[3] *Todd Harrison*, 49 ECAB 571 (1998).

[4] 20 C.F.R. § 10.608(b).

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

[6] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

In this case, appellant's attorney argued that the Office had not carried out the actions specified by the Office hearing representative in his September 7, 1999 decision. However, the decision of the Office hearing representative was based on the conclusion that appellant had refused suitable work. The fact that appellant returned to work on June 21, 1999 rendered the decision of the Office hearing representative moot because she had accepted suitable work. The Office, therefore, was not required to carry out the directives of the Office hearing representative because his decision had been based on facts that had subsequently changed. Appellant's attorney, therefore, did not raise any substantive legal argument that would require the Office to review appellant's case on the merits.

The decisions of the Office of Workers' Compensation Programs dated August 14, 2000 and October 4, 1999 are hereby affirmed.

Dated, Washington, DC
September 21, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member