U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ERMA F. BROWN and DEPARTMENT OF HEALTH & HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION, Kansas City, MO

Docket No. 03-1312; Submitted on the Record;
Issued December 10, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly reduced appellant's compensation to reflect her capacity to earn wages in the constructed position of part-time receptionist; and (2) whether the Office properly denied merit review on February 19, 2003.

On December 16, 1987 appellant, then a 46-year-old claims examiner slipped on a patch of ice outside a federal building and fell on her buttocks. The Office initially accepted low back strain, which was later revised to aggravation of a preexisting low back degenerative disc disease as a result of the employment injury.[1] Appellant stopped work after the injury but was released to four to six hours per day on January 19, 1988. Appellant stopped work on May 25, 1988 and did not return.

In a second opinion examination dated August 26, 1996, Dr. Ronald Zipper, an osteopath and Board-certified orthopedic surgeon, reviewed appellant's employment history, her complaints of lower extremity pain, and outlined his extensive findings on examination. Dr. Zipper concluded that, as a result of the 1987 employment injury, appellant had an exacerbation of her spinal stenosis and radiculitis to the left lower extremity and had some moderate to marked loss of range of motion in the lumbar spine. He opined however that appellant was back to her pre-injury baseline status and released appellant to work for four hours per day with specified restrictions.

The Office referred appellant for vocational rehabilitation. Appellant was not initially cooperative with rehabilitation efforts and after she refused a full-time position offered by an employer and moved out of state, she was warned by the Office of the penalty of obstruction.

[1] Appellant had a nonwork-related history of low back pain beginning in the 1980s when she reported pain when standing and walking and was later diagnosed with degenerative joint disease, facet arthropathy at L3-4, bulging disc at L3-4 and spondylolithesis. The record also reflects that appellant has a history of obesity.

Although appellant ultimately participated in the vocational rehabilitation process, she never obtained employment.

Appellant's rehabilitation counselor determined on April 18, 2000 that appellant could perform the position of receptionist, Dictionary of Occupational Titles No. 237.367-038 and that appellant's prior experience working in an office setting provided the necessary job skills for successful performance of the position. The duties of the receptionist position include receiving calls at the establishment, determining the nature of business and directing calls to their destination. Other duties include taking messages, arranging appointments, typing memorandums, correspondence and other short documents. The Office rehabilitation counselor reported that the position of receptionist was being performed in sufficient numbers so as to make it reasonably available to appellant within her commuting area. The rehabilitation counselor noted that her source of information was the job service of the State Employee Service Agency. She further confirmed that the position was performed full time at a weekly wage of $137.50.[2]

The Office thereafter determined following an independent medical examination that appellant was qualified to perform the office duties of receptionist based on prior work experience on a full-time basis and that the position was medically suitable.

On August 16, 2001 the Office reduced appellant's compensation on the grounds that the position of receptionist fairly and reasonably represented her wage-earning capacity. Following a hearing held at appellant's request, an Office hearing representative determined on October 2, 2002 that the evidence did not support that she was capable of full-time work as a receptionist and reversed the August 16, 2001 decision. Appellant's benefits for temporary total disability were reinstated effective September 9, 2001.

The Office reviewed the record and thereafter issued appellant a notice of proposed reduction of compensation on December 2, 2002. The Office determined that the position of part-time receptionist was medically and vocationally suitable for appellant and fairly and reasonably represented her wage-earning capacity. The Office relied on the April 18, 2000 rehabilitation report containing the selected position information and availability determination, which was updated on April 17, 2001. The Office further based its proposed reduction of compensation on the August 26, 1996 medical opinion of Dr. Zipper, the second opinion examiner.

In a decision dated January 3, 2003, the Office determined that the weight of the medical evidence established that a position of receptionist was medically suitable for appellant for four hours per day five days per week, available in her commuting area for $137.50 per week and fairly represented her wage-earning capacity. The Office reduced appellant's compensation benefits effective December 29, 2002.

In a letter received February 4, 2003, appellant requested reconsideration and submitted additional medical evidence. In a decision dated February 19, 2003, the Office denied

[2] A memorandum of record dated April 17, 2001 indicated that the selected position information previously submitted was still sufficient at that time to complete a loss of wage-earning capacity determination.

appellant's request for reconsideration on the grounds that the evidence was repetitious and duplicative of that already in the record and therefore insufficient to warrant a merit review.

The Board has duly reviewed the case record and finds that the Office did not meet its burden of proof in this case.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury, it has the burden of justifying a subsequent reduction of compensation benefits.[3]

Under section 8115(a) of the Federal Employees' Compensation Act,[4] wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represented wage-earning capacity or if the employee had 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.[5] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[6] The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area where the employee lives.[7] 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.[8]

Based on appellant's work experience, an Office rehabilitation specialist identified the constructed job of receptionist as being reasonably available in her commuting area and capable with her education and skills. The Office reviewed the selected position and found that it was consistent with appellant's work restrictions and modified appellant's compensation payments of December 29, 2002 to reflect that she had the capacity to earn wages as a receptionist for four hours per day five days per week.

Regarding reasonable availability of the selected position, the Board has previously noted that where there is probative evidence of record regarding reasonable availability, such as from a state employment agency, this evidence will not be contradicted by evidence as to a lack of current referrals for the selected position.[9] In the instant case, however, there is no probative

[3] *Gregory A. Compton*, 45 ECAB 154 (1993).

[4] 5 U.S.C. § 8115(a).

[5] *See Richard Alexander*, 480 ECAB 432 (1997); *Pope D. Cox*, 39 ECAB 143 (1988).

[6] *Id.*

[7] *Rosa M. Garcia*, 49 ECAB 272 (1998).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.814.8 (December 1993).

[9] *Carla Letcher*, 46 ECAB 452 (1995).

evidence establishing that the selected receptionist position was reasonably available within appellant's geographical area on a part-time basis. The evidence relied upon by the Office is the statement made by the rehabilitation specialist that the receptionist position was being performed in sufficient numbers. While the rehabilitation specialist cited her source as the "[j]ob [s]ervice" of the Employment Service Agency, the rehabilitation specialist did not state the number of part-time receptionist positions being performed in appellant's geographical area and the report did not contain information regarding such availability from a labor market survey. The Board is therefore unable to review the finding that a part-time position was being performed in reasonable numbers. In the absence of probative evidence establishing that the position of part-time receptionist was reasonably available in appellant's commuting area, the Office failed to demonstrate that it gave due regard to the "availability of suitable employment" as required by 5 U.S.C. § 8115.

The Board also finds that the medical evidence of record is not sufficient to meet the Office's burden of proof.

In this case, the Office hearing representative reversed the district Office decision dated August 16, 2001 finding that the Office failed to establish that the receptionist position was medically suitable for appellant for eight hours per day. The Office thereafter made a medical determination that appellant had returned to her preinjury baseline and could return to work four hours per day with restrictions, based on the August 26, 1996 opinion of the second opinion examiner Dr. Zipper. This report is not sufficient to establish that appellant was physically capable of performing the position of receptionist. It is well established that a wage-earning capacity determination must be based on a reasonably current medical evaluation.[10] As the report from the second opinion examiner was over six years old, this report cannot form a valid basis for that determination.

The Office did not meet its burden of proof to establish that the position of receptionist reflected appellant's wage-earning capacity and thus the Office improperly reduced appellant's compensation benefits.[11]

[10] *Carl C. Green, Jr.*, 47 ECAB 737 (1996).

[11] As this is the disposition of the loss of wage-earning capacity decision, the February 19, 2003 decision becomes moot.

The decision of the Office of Workers' Compensation Programs dated January 3, 2003 is reversed.

Dated, Washington, DC
December 10, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member