U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARY ANN D. DALGO and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Biloxi, MS

Docket No. 03-1977; Submitted on the Record;
Issued December 3, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant's actual earnings as a program manager fairly and reasonably represented her wage-earning capacity; and (2) whether the Office properly denied appellant's request for a review of her case on the merits under section 8128(a) of the Federal Employees' Compensation Act.

The Office accepted that, on or before July 1991, appellant, then a 40-year-old GS-5, step 10 medical administrative clerk, sustained cervical and left supraspinatus sprains and fibromyalgia in the performance of duty due to working in a confined space for nine days. Her duties were modified and ergonomic changes made to her work station. Appellant lost intermittent time from work in 1991. She voluntarily transferred to a Veterans Administration office in Memphis, Tennessee in 1992 and to San Francisco in 1995 to work as a program manager.

As of 1998, appellant was working as a program manager at an employing establishment medical center in San Francisco. Based on limitations prescribed by Dr. Jules P. Steinmintz, an attending Board-certified physiatrist,[1] appellant worked a 24-hour per week schedule from

[1] On November 5, 1998 Dr. Steinmintz limited appellant to working 32 hours per week restricted duty. On March 25 and April 20, 1999 form reports, Dr. Steinmintz restricted appellant to working three days per week, eight hours per day for one month. Appellant worked 24 hours per week modified duty from September 1999 onward, based on Dr. Steinmintz's continued work limitations. In a June 30, 1999 report, Dr. David M. Atkin, a Board-certified orthopedic surgeon and impartial medical examiner appointed to resolve a conflict of opinion between Dr. Steinmintz, for appellant and Dr. Norman Sokoloff, a second opinion physician, agreed with Dr. Steinmintz's restriction of a three-day work week.

March 1999 onward. Her position remained classified as full time. The Office accepted recurrences of disability from April 4 to June 3, 1999 and March 16 to 20, 2001.[2] From April 2001 through November 1, 2002, appellant received wage-loss compensation on the daily rolls for approximately 16 hours per week,[3] based on her March 14, 2001 recurrent pay rate of $1,176.65 per week for a 40-hour week.[4] As of November 17, 2001, appellant was a GS-11, step 10 program manager, working 24 hours per week in the full-time position. As of November 1, 2002, appellant's actual earnings were $882.63 per week. Compared to the March 14, 2001 recurrent pay rate of $1,176.65 per week, the Office calculated a 25 percent loss of wage-earning capacity. Appellant's case was placed on the periodic rolls as of November 3, 2001 through December 28, 2002.

[2] In reports from September 16, 1999 through August 14, 2002, Dr. Steinmintz found appellant able to work 24 hours per week modified duty, 6 hours per day for 4 days per week, with keyboarding limited to 2 hours per day with a 5-minute break each hour and the use of wrist splints, gloves and ergonomic devices and modifications. He prescribed an electric stapler on March 9, 2000 and an electric toothbrush on August 22, 2000 due to diagnosed tendinitis. Dr. Steinmintz diagnosed a ganglion on the extensor tendons of the left fourth digit on March 20, 2001. He held appellant off work on March 15 and 16, 2001 secondary to pain from fibromyalgia. Although appellant related worsening symptoms in May 2001, Dr. Steinmintz continued to find appellant able to work 24 hours per week modified duty. He again held appellant off work from September 25 to October 1, 2001 due to fibromyalgia and myofascial pain syndrome. In 2002, Dr. Steinmintz ordered "training for voice dictation, a back support for driving, four sets of cloth wrist supports, a right and left molded hand and wrist supports," a laptop computer and voice dictation software, an ergonomic chair with floor pad and continued medication. Dr. Steinmintz noted, in an August 14, 2002 report, that appellant found voice dictation so helpful that she wished to increase her schedule to 30 hours per week. In November 5, 2002 reports, Dr. Steinmintz held appellant off work from November 6 to 20, 2002 due to a flare-up of upper extremity and neck symptoms due to increased repetitive motion at work. He noted that appellant also developed migraine headaches, chest pain and a "'stress induced' vertigo…." As of November 20, 2002, Dr. Steinmintz opined that appellant was able to increase her work schedule from 24 to 28 hours per week with telecommuting and use of ergonomic devices and a voice dictation computer system. In a February 2, 2003 report, Dr. Steinmintz reiterated that keyboarding, writing and repetitive motion at work would cause periodic symptoms flares.

[3] From March 5, 2001 to January 16, 2003, appellant requested leave without pay to cover work absences pursuant to her restricted schedule. The record indicates that these requests were approved.

[4] In a May 16, 2002 letter, Office confirmed that appellant's "current compensation payments [were] based on a pay rate of $1,176.65 … the pay rate in effect on the date of [her] recurrence of March 14, 2001. From May 13 to October 14, 2002, appellant lost 14 to 15 hours per week. From September 30 to November 1, 2002, appellant lost 22 hours.

In a November 29, 2002 letter, L. Kenneth Swasey, appellant's supervisor, stated that appellant's physician recently held her off work as a "project which required a great deal of computer work" aggravated her condition. Mr. Swasey noted that appellant continued working a reduced schedule with restrictions. He asserted that the employing establishment attempted to accommodate appellant, including allowing telecommuting.[5]

In a December 12, 2002 letter, the Office noted that appellant had been reemployed "as a program manager with wages of $706.08 per week … effective on approximately April 2000." The Office stated that it would reduce appellant's monetary compensation effective December 29, 2002 based on her actual earnings. The Office noted that appellant's weekly pay rate was $1,776.65 and her adjusted wage-earning capacity was $1,741.11 per week, resulting in a $35.54 loss of wage-earning capacity per week.[6]

In a January 27, 2003 report,[7] Dr. Stanley Baer, a Board-certified orthopedic surgeon and second opinion physician, opined that appellant had sustained a recurrence of disability on November 6, 2002, noting that she likely had a permanent partial disability due to "significant repetitious and forceful use of the upper extremities especially doing keyboarding."[8] Dr. Baer opined that appellant could work eight hours per day with permanent restrictions, but did not specify a total number of hours per week.

In a February 19, 2003 form report, Dr. Steinmintz found appellant able to work 6 hours per day, "up to 28 hours per week" with telecommuting and limited keyboarding to 1 hour per day with a 5-minute break each hour.

By decision dated March 7, 2003, the Office determined that the position of program manager fairly and reasonably represented appellant's wage-earning capacity, finding that the position was suitable work as she had performed it since February 1995, a period longer than 60 days. The Office noted that appellant's weekly pay rate when disability recurred on March 25,

[5] Appellant submitted July and August 2002 letters and electronic mail messages asserting that the employing establishment was not meeting her requests for job accommodations in a timely manner. In a July 9, 2002 electronic mail message to her supervisor, Mr. Swasey, appellant asserted that she was experiencing nonoccupational migraines and anxiety. Appellant also submitted electronic mail messages dated from April to October 2002 regarding her work in the travel office. In a January 5, 2003 letter, appellant noted concurrent conditions of dental work, chronic low back pain, chronic migraines, hepatitis C, dysmenorrhea, vertigo, chest pain and pressure, bruxism and "[a]cute [s]tress and [a]nxiety associated with work detail of April 2002." The record does not indicate if appellant filed a claim for a work-related stress or anxiety condition.

[6] The record contains a decision dated December 6, 2002 in which the Office retroactively terminated appellant's wage-loss compensation effective April 2000 on the grounds that her actual earnings met or exceeded the current wages of her date-of-injury position. The record indicates that the Office did not issue this decision, but, instead sent appellant the December 12, 2002 informational letter. In a March 6, 2003 letter, the Office advised appellant of a forthcoming decision reducing her wage-loss compensation "based on [her] reemployment as program manager ..." working 24 hours per week.

[7] On its face, the report is dated January 27, 2002. However, as Dr. Baer's report discusses findings on a January 9, 2003 examination, it is apparent that the report should have been dated January 27, 2003.

[8] In a February 4, 2003 letter, appellant described her work duties including clerical tasks, patient contacts, staff supervision, scheduling, determining clinic schedules and "senior management activities."

2001 was $1,176.65 for a 40-hour work week. As of January 2003, the current pay rate for appellant's date-of-injury position as a GS-5, step 10 medical clerk, was $15.86 per hour or $634.40 for 40 hours per week. Appellant's pay rate in her current position of program administrator was $29.42 per hour or $706.08 for 24 hours per week.[9] The Office found that, as appellant's current actual earnings exceeded the current wages of her date-of-injury job, she had no loss of wage-earning capacity and was no longer entitled to wage-loss compensation. Therefore, the Office "terminated" appellant's wage-loss compensation benefits. The Office noted that the decision did not affect appellant's entitlement to medical benefits. The effective date of the decision was noted as January 2001.

In a May 3, 2003 letter, appellant requested reconsideration of the March 7, 2003 decision and April 17, 2003 letter. She asserted that there was a conflict of medical opinion, as Dr. Steinmintz limited appellant to working 28 hours per week and Dr. Baer indicated that she could work 40 hours per week.[10] Appellant submitted May 5, 2003 reports from Dr. Steinmintz noting that appellant was working "6 hours a day, 28 hours a week with telecommuting. She states [that] she cannot increase this." Dr. Steinmintz noted Dr. Baer's opinion that appellant could "work eight hours a day." On examination, he found "diffuse tenderness over neck and upper extremities." Dr. Steinmintz stated an impression of myofascial pain syndrome, repetitive strain injury of both upper extremities and fibromyalgia. He opined that appellant was at maximum medical improvement and capable of working 6 hours per day, 28 hours per week with telecommuting.[11]

By decision dated August 1, 2003, the Office denied reconsideration on the grounds that the additional evidence was irrelevant or cumulative and, therefore, insufficient to warrant a review of appellant's claim on the merits. The Office noted that, although appellant alleged a conflict in medical opinion regarding the number of hours she could work, this was not relevant

[9] Appellant's annual salary as a program management officer was $61,186 effective January 12, 2001, $64,502 as of January 11, 2002 and $66,511 effective January 12, 2003.

[10] Prior to her formal request for reconsideration, appellant submitted a March 24, 2003 letter alleging that the Office erred in its correspondence with second opinion physicians and statement of accepted facts by stating that appellant worked part time since 1993, whereas she had done so only since 1999. Appellant then submitted an April 8, 2003 letter listing what she believed were errors by the Office: in the Office's request to Dr. Baer, the Office stated that appellant had been working part time since 1993, whereas she had been doing so since 1999; listing Dr. Charles Mead as being involved with her case, while omitting Dr. Harry J. Bunke; using her current salary to compute loss of wage-earning capacity; that she was entitled to 30 hours of wage-loss compensation for November 2002; that she was underpaid by 40 hours for the period November 30, 2002 to March 22, 2003; that she was not given a cost-of-living increase effective March 1, 2003; that she was underpaid by 2 hours per pay period beginning November 29, 2002. In an April 17, 2003 letter, the Office advised appellant to "consult the appeal rights issued in the decision regarding [her] wage-earning capacity if [she] believe[d] there were errors…." Appellant telephoned the Office on April 23, 2003. In an April 25, 2003 letter, the Office advised appellant that, if she disagreed with the reduction of her compensation to zero, she should follow her appeal rights. The Office noted that appellant's recurrences did "not effect the decision" and that there was no overpayment determination.

[11] Appellant also submitted copies of wage rate schedules previously of record and copies of compensation checks. In a May 8, 2003 letter, the Office acknowledged appellant's May 3, 2003 letter. The Office stated that if appellant "disagree[d] with the decision reducing [her] compensation consult the appeal rights attached to the decision. The issue will not be reviewed without an appeal." As appellant made a formal request for reconsideration in her May 3, 2003 letter, the purpose of the May 8, 2003 letter is unclear.

as her wage-earning capacity had been determined based on the 24-hour schedule and not a 40-hour work week.[12]

The Board finds that the Office properly determined that appellant's actual earnings as a program manager fairly and reasonably represented her wage-earning capacity.

Under section 8115(a) of the Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity.[13] Generally, wages actually earned are the best measure of a wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.[14]

The method of determining wage-earning capacity is based on actual wages was outlined in the Board's decision in *Albert C. Shadrick*,[15] codified at 20 C.F.R. § 10.403. The regulations define three basic terms used in formulating an employee's entitlement to compensation based on his or her wage-earning capacity. These terms are: (1) pay rate for compensation purposes; (2) current pay rate; and (3) earnings. Pay rate for compensation purposes, as defined in section 8101(4), is the greater of the employee's pay as of the date of injury, the date disability begins or the date of recurrence of disability if more than six months after returning to work. Current pay rate is defined as the salary or wages for the job the employee held at the time of injury. "Earnings" is defined as the employee's actual earnings or the salary or pay rate of the position selected as representative of his or her wage-earning capacity.[16]

As applied to this case, the pay rate for compensation purposes is appellant's recurrent pay rate as of March 14, 2001 of $1,176.65 for a 40-hour work week. At that time, appellant was working 24 hours per week and receiving wage-loss compensation for the remaining 16 hours per week. As of January 2003, the current pay rate for appellant's date-of-injury position as a GS-5, step 10 medical clerk was $634.40 for a 40-hour week. Appellant's actual earnings as of March 2003 were $706.08 for a 24-hour work week.

The Office must then determine appellant's wage-earning capacity by dividing her earnings by the current or updated, pay rate for the position she held at the time of injury.[17] In this case, the Office properly determined appellant's wage-earning capacity in terms of percentage by dividing her actual earnings of $706.08 by the current pay rate for the job held at the time of injury or $634.40, to arrive at more than 100 percent wage-earning capacity. Thus, the Office determined that appellant had no loss of wage-earning capacity as her actual earnings as a program manager exceeded the current pay rate of the date-of-injury position.

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[12] Appellant filed her appeal with the Board on August 6, 2003.

[13] 5 U.S.C. § 8115(a).

[14] *Francis J. Carter*, 53 ECAB ___ (issued April 11, 2002); *Dennis E. Maddy*, 47 ECAB 259 (1995).

[15] 5 ECAB 376 (1953).

[16] 20 C.F.R. § 10.403(b)(2) (1999).

[17] *Donna M. Rowan*, 54 ECAB ___ (Docket No. 03-908, issued July 11, 2003).

On appeal, appellant contends that the initial comparison of her date-of-injury position to her current actual earnings was incorrect. She argues that the Office should have used the March 14, 2001 recurrent pay rate. This would not, however, be consistent with the principles of wage-earning capacity as noted in *Shadrick*.[18] The loss of wage-earning capacity percentage is a measurement based on the earnings at the time of injury, updated to current levels, compared with current actual earnings. The purpose of the comparison is to measure the effect of the original injury on the subsequent capacity to earn wages. The Board has held that "the percentage of loss of the employee's wage-earning capacity is to be determined by taking into account the type of work he was performing at the time of injury and the present pay rate he would be earning in that work but, for the injury and resulting physical impairment."[19] It is well established that factors, such as subsequent promotions are not considered; "the comparison must be made between the pay of the step of the grade in which appellant was working at the time of the injury and the current pay of that same grade step."[20] The only appropriate method for determining loss of wage-earning capacity and the only method contemplated by *Shadrick*, is to utilize the current pay rate of the date-of-injury position in calculating the percentage of loss of wage-earning capacity.

The Board notes that there is no indication of record that the program manager position that appellant worked from April 2000 onward was not suitable for a wage-earning capacity determination. Personnel action forms dated January 12, 2001 and January 11, 2002 classify appellant's GS-11, step 10 position as a program management officer as full time. Due to her medical restrictions, appellant was allowed to work part-time hours in this full-time position. Appellant's part-time earnings exceeded her updated date-of-injury earnings. Under the facts of this case, the fact that appellant worked part time in a full-time position does not make the position unsuitable for a wage-earning capacity determination. Appellant's actual earnings in this position did fairly and reasonably represent her wage-earning capacity.

Appellant's performance of the program manager position since April 2000 is persuasive evidence that it represents her wage-earning capacity. There is no medical evidence that this position did not fairly and reasonably represent appellant's wage-earning capacity. Dr. Steinmintz, appellant's attending Board-certified physiatrist, submitted frequent periodic reports from September 1999 through February 2003 finding appellant able to work 24 hours per week with duty restrictions.

The Board notes that the Office's March 7, 2003 decision has an effective date of January 2001, more than two years prior to the date of the decision. However, the Office procedures provide that the Office may make a retroactive wage-earning capacity determination, when a claimant has worked in an alternative position for at least 60 days, the Office has determined that the employment fairly and reasonably represented the wage-earning capacity and the work stoppage did not occur because of any change in the claimant's injury-related condition affecting his or her ability to work. The procedures further indicate that an assessment of suitability need

[18] *Francis J. Carter*, 53 ECAB ___ (Docket No. 00-1789, issued April 11, 2002).

[19] *Melvin Hoff, Sr.*, 27 ECAB 458, 462 (1976).

[20] *Fabian W. Fraser*, 9 ECAB 865, 868-69 (1958).

not be made since the employee's performance of the duties is considered the best evidence of whether the job is within the employee's physical limitations.[21] The Board has concurred that the Office may perform a retroactive wage-earning capacity determination in accord with its procedures.[22]

Accordingly, the Board finds that the Office properly calculated appellant's loss of wage-earning capacity by comparing her current actual earnings with the current pay for a GS-5, step 10 employee. The Office then properly applied the percentage derived to the pay rate for compensation purposes. There is no evidence of error in the wage-earning capacity determination in this case.

The Board further finds that the Office properly denied appellant's request for a merit review under section 8128(a) of the Act.

Under section 8128(a) of the Act,[23] the Office has the discretion to reopen a case for review on the merits. Under section 10.606(b)(2) of the Office's implementing regulations,[24] a claimant may obtain a merit review of his claim if his written application for reconsideration, including all supporting documents, set forth arguments and contain evidence that:

> "(i) Shows that [the Office] erroneously applied or interpreted a point of law; or
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> "(ii) Advances a relevant legal argument not previously considered by the Office; or
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> "(iii) Constitutes relevant and pertinent new evidence not previously considered by the [Office]."[25]

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[26]

In support of her request for reconsideration, appellant submitted a May 3, 2003 letter asserting a conflict of medical opinion between Dr. Baer, a second opinion physician for the government and Dr. Steinmintz, her attending physiatrist, regarding the number of hours per week she was capable of working. Dr. Baer indicated, in his January 27, 2003 report, that

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

[22] *Ramon C. Estrada*, Docket No. 00-2220 (issued June 12, 2002); *see Tamra McCauley*, 51 ECAB 375 (2000); *Elbert Hicks*, 49 ECAB 283 (1998).

[23] 5 U.S.C. § 8128(a).

[24] Under 20 C.F.R. § 10.606, the Office had limited its discretion to reviewing decisions under section 8128(a) on motion of the claimant. *Annette Louise*, 54 ECAB ___ (Docket No. 03-445, issued August 26, 2003).

[25] 20 C.F.R. § 10.606(b).

[26] 20 C.F.R. § 10.608(b).

appellant could work 8 hours per day, indicating that he believed appellant was capable of working a full 40-hour week. Dr. Steinmintz, however, continued to limit appellant to working 24 to 28 hours per week. As the Office found, in its August 1, 2003 decision, the Office based its March 7, 2003 determination of appellant's wage-earning capacity on the 24-hour work week prescribed by Dr. Steinmintz. Therefore, the alleged conflict of opinion is moot.

Prior to appellant's May 3, 2003 letter, she submitted March 24 and April 8, 2003 letters asserting that the Office erred in listing or failing to list her physicians correctly in the record, and misstating, in a statement of accepted facts, that she had begun to work part time in 1993 instead of 1999. Appellant also alleged computational errors in her compensation for the period November 30, 2002 to March 22, 2003 and that she was entitled to a cost-of-living increase as of March 1, 2003. The Board finds that these arguments are not relevant to the wage-earning capacity issue and are therefore, insufficient to warrant a review of appellant's case on the merits.[27] Appellant also submitted May 5, 2003 reports from Dr. Steinmintz reiterating his findings and diagnoses identical to those contained in his 2002 reports. The Board has held that evidence which is duplicative of evidence previously of record is insufficient to warrant a merit review.[28]

As appellant has not submitted new, relevant evidence or evidence demonstrating that the Office committed legal error, the Office's August 1, 2003 decision denying appellant's request for a merit review is proper under the laws and facts of this case.

[27] *Claudio Vazquez*, 52 ECAB 496 (2001).

[28] *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

The decisions of the Office of Workers' Compensation Programs dated August 1 and March 7, 2003 are hereby affirmed.

Dated, Washington, DC
December 3, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member