United States Department of Labor
Employees' Compensation Appeals Board

S.S., Appellant	)	
and	)	**Docket No. 08-627**
	)	**Issued: April 2, 2009**
DEPARTMENT OF DEFENSE, DEFENSE LOGISTICS AGENCY, Stockton, CA, Employer	)	

Appearances:
Norman F. Nivens, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 31, 2007 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated November 26, 2007, which denied modification of her wage-earning capacity determination. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this decision.

ISSUES

The issue is whether appellant has established that the Office's wage-earning capacity determination should be modified.

FACTUAL HISTORY

Appellant, then a 35-year-old packer, filed a Form CA-2 claim for benefits on October 11, 1999, alleging that she developed an elbow condition caused by employment factors. The Office accepted the claim for bilateral lateral and medial epicondylitis. Appellant received appropriate compensation for total disability and was placed on the periodic rolls.

In a report dated March 8, 2001, Dr. Ronald K. Robinson, a specialist in preventive medicine and appellant's treating physician, recommended that appellant be restricted from repetitive pushing, pulling, lifting, lifting exceeding five pounds and working in cold environments.

On September 5, 2002 the Office referred appellant for vocational rehabilitation counseling. In reports dated February 24 and March 31, 2003, a vocational rehabilitation counselor indicated that a job as a receptionist was within appellant's physical restrictions.

In a report dated April 9, 2003, Dr. Robinson stated that appellant had missed a considerable amount of work because the employing establishment had been unable to accommodate her work restrictions. He advised that she did not appear to require any further treatment as her symptoms were currently minimal.[1]

On April 22, 2003 Dr. Corwin Hull, a specialist in preventive medicine and an attending physician, stated that he had reviewed the job description for receptionist, the Department of Labor's, *Dictionary of Occupational Titles*, DOT #237.367-038 and found that the position was physically appropriate for appellant.

By letter dated June 19, 2003, the Office advised appellant that the job of receptionist, selected by her vocational rehabilitation counselor, was within her physical limitations.

In order to determine her current condition and her ability to secure gainful employment, the Office referred appellant to Dr. John R. Chu, Board-certified in orthopedic surgery, for a second opinion examination. In a February 1, 2005 work capacity evaluation, Dr. Chu stated that appellant could perform an eight-hour workday with restrictions on repetitive activities involving her wrists and elbows for more than two hours out of an eight-hour workday, with no lifting for more than two hours and no lifting exceeding 20 pounds. He also instructed her to take 5-minute breaks per every 30 minutes of repetitive activities. Dr. Chu also advised that appellant might have some difficulty with reading and arithmetic.

In a December 27, 2005 report, Dr. Robinson advised that he had reviewed Dr. Chu's report. He related that appellant had asserted that her vocational rehabilitation training was not adhering to Dr. Chu's work restrictions, as she was required to do repetitive motion on a daily basis. Dr. Robinson stated that, if her schooling required more repetitive motion than this or if the work that she will be performing once she is finished with school will require more repetitive

[1] The job description for receptionist stated: "Receives callers at establishment, determines nature of business and directs callers to destination. Obtains caller's name and arranges for appointment with person called upon. Directs call to destination and records name, time of call, nature of business and person called upon. May operate PBX telephone console to receive incoming messages. May type memorandums, correspondence, reports and other documents. May work in office of medical practitioner or in other health care facility and be designated outpatient receptionist (medical services) or receptionist, [physician's] office (medical services). May issue visitor's pass when required. May make future appointments and answer inquiries.... May perform variety of clerical duties ... and other duties pertinent to type of establishment. May collect and distribute mail and messages."

motion than this, she will not be able to perform these activities. He concluded: "I would like her to continue her current regiment of activity." [2]

The vocational rehabilitation counselor submitted a June 20, 2006 report summarizing her efforts to rehabilitate, train and find employment for appellant. She stated:

> "Areas of concern that impact [appellant's] return to work [include] her perception that she learned nothing during her training. She feels she has no skills to present to employers and to my knowledge has not attempted to increase her skill level. [Appellant] continues to approach potential employers with the inquiry about whether the potential job exceeds her physical abilities, which she indicates is the inability to use her arms for more than two hours per day. She indicates all employers report the jobs are beyond her abilities. [Appellant] indicates [that] she has requested various employers to write letters on her behalf indicating the employment opportunities exceed her abilities.
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> "[Appellant] indicates [that] she only wants to return to federal employment and intends to make [an] application [with] her time of injury employer. This counselor has encouraged [appellant] to follow-up with all potential employers regarding jobs that fall within the job titles that have been identified as suitable."
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> "[Appellant] believes she is unjustly being forced to participate in vocational services that exceed her physical limitations. She claims that Goodwill did not provide suitable training for which she received certification. [Appellant] indicates [that] she will be taking legal action against all parties involved in her vocational rehabilitation. Her attitude is not conducive to a successful return to work."

In a closure report dated June 30, 2006, the vocational rehabilitation manager issued a closure report. She stated:

> "[Appellant] attended her approved training program on a somewhat inconsistent, sporadic basis. Her attendance was characterized by a near obsessive focus on her perceived medical issues and a pronounced sense of entitlement. Despite this mindset, [appellant] eventually managed to complete her training successfully. Immediately upon completion, she was transitioned into a focused and personalized direct placement effort beginning on March 8, 2005. In addition to direct job placement, the assigned rehabilitation counselor attempted to focus the claimant on such ancillary skills as resume preparation, application completion, interviewing presentation and techniques, general organization of a job search as

[2] The Board notes that in a December 9, 2005 progress report from the vocational rehabilitation counselor, received by the Office on December 20, 2005, appellant's counselor stated that her instructor from the Goodwill training course indicated that appellant had been encouraged to take breaks every 30 minutes and change activities as needed. The instructor reiterated that no one was forcing appellant to exceed her medical restrictions. In fact, the opposite phenomenon had occurred, as appellant's restrictions were being strictly accommodated and the Goodwill staff was strictly monitoring her training activities to ensure that nothing was being done to increase her pain or symptomatology.

> well as utilization of appropriate community resources and the development of effective networking skills. Unfortunately, the claimant's pronounced sense of entitlement to permanent benefits from [the Office] and her apparently deep seated belief that she is unable to work in any capacity (despite medical evidence to the contrary) effectively trumped the RC's efforts. Not surprisingly, the claimant continued to fail in the placement process despite the Herculean attempts by [the vocational counselor] to motivate her."
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> "[Appellant's] failure to secure employment is directly and solely attributable to her own lack of motivation and pronounced sense of entitlement. [She] consistently remained focused on her real and perceived medical issues and [on] her belief that she should be afforded essentially lifelong benefits from [the Office]. This set of unfortunate characteristics effectively precluded any potential for success in the rehabilitation placement process."

The vocational rehabilitation service recommended that a position for appellant listed in the Department of Labor's *Dictionary of Occupational Titles*, which, it determined, reasonably reflected appellant's ability to earn wages, that of receptionist, DOT #237.367-038. The vocational rehabilitation counselor selected the receptionist position based on listings from five employers, displaying wages of $8.00 to $12.00 per hour.

By notice of proposed reduction dated July 19, 2006, the Office advised appellant of its proposal to reduce her compensation because the factual and medical evidence established that she was no longer totally disabled and that she had the capacity to earn wages as a receptionist.[3]

By decision dated August 24, 2006, the Office advised appellant that it was reducing her compensation effective on September 3, 2006 because the weight of the medical evidence showed that she was no longer totally disabled for work due to effects of her October 1999 employment injury and that the evidence of record showed that the position of receptionist represented her wage-earning capacity.

On August 20, 2007 appellant, through her attorney, requested reconsideration. Appellant's attorney contended that: (1) appellant was not qualified for the receptionist position because she had a learning disability; (2) the work and training requirements at Goodwill exceeded appellant's work restrictions; and (3) the vocational rehabilitation counselor and the

[3] The Office found that this position was suitable and within appellant's work restrictions based on the rehabilitation counselor's closure report. It noted that the receptionist job provided more varied duties and flexibility than a cashier position, which was also available pursuant to the rehabilitation counselor's survey. The Office further found that the jobs identified were reasonably available in sufficient numbers in appellant's local labor market and general commuting area.

Office did not take into account appellant's low IQ and academic deficiencies, which made it extremely difficult to interview for jobs and consequently obtain employment as a receptionist.[4]

Appellant submitted her own affidavit dated February 22, 2007 as well as two reports from a learning disability specialist, Dr. Elizabeth Maloney, dated March 10, 2006 and June 29, 2007. In her affidavit, she outlined her 28-year employment history with the employing establishment, her physical restrictions and her opinions regarding the vocational rehabilitation training she had received. Regarding her ability to perform the duties of a receptionist, appellant noted that she was a slow typist. In her March 10, 2006 report, Dr. Maloney noted that tests indicated that appellant had low academic skills, significant difficulty in math fluency, short-term memory and verbally-related IQ tasks; she recommended that appellant take a memory and thinking course. However, she also stated that "in reviewing her certificates obtained from [Goodwill] along with her testing done by the Learning Disabilities department at San Joaquin Delta College and [the vocational rehabilitation counselor's] medical evaluation, I am recommending employment in positions such as receptionist."

In her June 29, 2007 report, Dr. Maloney stated that, with regard to the receptionist position and the effect of her learning disability on her ability to handle the job, she believed appellant would be able to answer calls but might experience difficulty in taking messages properly. She stated that when she suggested appellant should seek a receptionist position in her March 2006 report she was referring to a position where appellant would not be the primary contact source in the office. Dr. Maloney considered that appellant best suited for sheltered employment.

By decision dated November 26, 2007, the Office denied modification of the August 23, 2006 wage-earning capacity determination.

LEGAL PRECEDENT

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was, in fact, erroneous.[5] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[6]

ANALYSIS

Subsequent to the Office's August 23, 2006 wage-earning capacity decision, appellant's attorney argued that the Office erred in finding the receptionist job suitable because the vocational rehabilitation counselor failed to consider appellant's learning disability, low IQ and

[4] Appellant's attorney also contended that the Office erred in finding a cashier job suitable. However, as the Office selected the receptionist position in reducing her wage-earning capacity, the Board will not address appellant's arguments regarding her unsuitability for the cashier job.

[5] *Tamra McCauley*, 51 ECAB 375 (2000).

[6] *Linda Thompson*, 51 ECAB 694 (2000).

academic difficulties. The Board record does not establish this contention. The progress reports from the vocational rehabilitation service indicated that appellant had sufficient cognitive ability to complete the training program despite her demonstrated recalcitrance. The vocational rehabilitation counselor in fact noted that appellant had successfully completed her training program for placement in the private sector despite her own insistence that she was entitled to either compensation benefits or federal employment. The counselor further noted that, following appellant's successful completion of the training program, focused and directed placement efforts were initiated with private employers, but these efforts were undermined by appellant. The counselor concluded: "unfortunately, the claimant's pronounced sense of entitlement to permanent benefits from [the Office] and her apparently deep seated belief that she is unable to work in any capacity (despite medical evidence to the contrary) effectively trumped the RC's efforts."

In support of appellant's allegation that she was vocationally unable to perform the duties of receptionist and that the wage-earning capacity determination was therefore issued in error, she submitted reports from Dr. Maloney. In the March 2006 report, Dr. Maloney noted that appellant had low academic skills, significant difficulty in math fluency, short-term memory and verbally-related IQ tasks. However, she also recommended that appellant be reemployed in a position as a receptionist based upon the vocational rehabilitation training she had received at Goodwill and the testing performed by the Learning Disabilities department at San Joaquin Delta College. Dr. Maloney subsequently reported on June 29, 2006 that when she suggested appellant should seek a receptionist position in her March 2006 report, she was referring to a position where appellant would not be the primary contact source and that appellant was best suited for sheltered employment. She however offered no rationalized explanation as to why she "recommended" in March 2006 that appellant be employed as a receptionist, but changed her opinion in June 2006 to a finding that appellant should only be employed in a sheltered position. In her March 2006 report, Dr. Maloney stated that she had reviewed the vocational training reports from Goodwill as well as aptitude tests results from the Learning Disabilities department at San Joaquin Delta College. In her June 2006 report, she did not cite any new test results that would collaborate her revised opinion regarding appellant's vocational abilities.

Appellant's representative also alleged that the wage-earning capacity was issued in error because appellant's physical restrictions were not met by the vocational training program. Dr. Robinson commented on this allegation in his December 27, 2005 report, wherein he noted that appellant had asserted that her vocational rehabilitation training was not adhering to Dr. Chu's work restrictions, as she was required to do repetitive motion on a daily basis. He stated that, if her schooling required more repetitive motion than this or if the work that she will be performing once she is finished with school will require more repetitive motion than this, she will not be able to perform these activities. However, rejecting appellant's allegations Dr. Robinson concluded: "I would like her to continue her current regimen of activity."

Appellant did not submit the necessary probative evidence to establish that the Office erred in determining her wage-earning capacity.[7] As she did not submit evidence showing that the Office's original determination with regard to her wage-earning capacity was erroneous, she

[7] The Board notes that Dr. Maloney has a doctorate in education; she is not a physician, so her opinion does not constitute medical evidence pursuant to section 8101(2).

has not met her burden of proof to establish that the Office's wage-earning capacity decision should be modified.[8]

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation benefits effective September 3, 2006 on the grounds that she had the capacity to earn wages in the selected position of receptionist. The Board further finds that appellant has not established that the Office's wage-earning capacity determination should be modified.

ORDER

IT IS HEREBY ORDERED THAT the November 26, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 2, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[8] The Board notes that appellant's attorney has filed a brief in support of her appeal. The Board finds that the contentions counsel raises on appeal are identical to those considered and properly rejected by the Office in its November 26, 2007 decision.