

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARCIA E. JONES and DEPARTMENT OF THE ARMY,
SIERRA ARMY DEPOT, Herlong, Calif.

*Docket No. 98-1000; Submitted on the Record;
Issued October 19, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's wage-loss compensation based on the proposed position of hotel clerk.

This case has previously been before the Board on two occasions. In decisions dated March 20, 1989¹ and August 7, 1991,² the Board found that the Office failed to meet its burden of proof to terminate appellant's compensation benefits. The facts and circumstances of the case as set out in the Board's prior decisions are adopted herein by reference.

Following the Board's August 7, 1991 decision, the Office referred appellant for additional medical evaluation. In a report dated September 29, 1993, Drs. David Curtis, a Board-certified orthopedic surgeon, and Alvin Wirthlin, a neurologist, determined that appellant was not totally disabled. The physicians determined that appellant could work eight hours a day; sitting and walking for four hours each, standing, kneeling, lifting and bending for one hour each and squatting for two hours. Appellant could not climb, twist nor lift above the shoulder. She could lift up to 20 pounds. The physicians completed a report on September 20, 1994 and again found that appellant was not totally disabled. Drs. Curtis and Wirthlin limited appellant's lifting to 20 pounds with no stooping and bending. The Office referred appellant to a rehabilitation counselor on March 3, 1995. On September 12, 1995 the rehabilitation counselor recommended that appellant's file be closed as she was not motivated to return to work.

The Office proposed to reduce appellant's compensation benefits on November 6, 1997 on the grounds that she was no longer disabled and was capable of earning wages as a hotel clerk. The physical demands of hotel clerk required lifting up to 20 pounds, occasional stooping, reaching, handling, fingering and feeling. The position required frequent talking, hearing and

¹ Docket No. 88-1913.

² Docket No. 91-858.

vision. The position included a chair or stool to sit or stand as needed. The position description indicated that hotel clerks may post charges manually or use the computer. Appellant's specific vocational preparation included prior work keeping accounts, sales work, answering telephones and meeting people. The rehabilitation counselor confirmed availability by telephone contact with specific employers. He indicated that there were no employers in appellant's home town and that there was an opening available in Idaho Falls.

Appellant objected to the proposed reduction on November 25, 1997 alleging that she could not drive, that the jobs were located 66 miles from her home in Pocatello and that all of the hotel clerk jobs required computer knowledge which she lacked.

By decision dated January 26, 1998, the Office reduced appellant's compensation based on her capacity to earn wages as a hotel clerk. The Office stated that appellant lived in a remote area and that the average commute would be expected to be greater than 35 miles. The Office noted that there were at least 12 motels located between 12 and 25 miles from Grace. The Office concluded that the evidence of numerous businesses in the area and state employment records demonstrate that the position of hotel clerk is performed in reasonable numbers in appellant's commuting area.

The Board finds that the Office did not properly reduce appellant's compensation benefits based on her capacity to earn wages as a hotel clerk.

Once the Office has determined that an employee is totally disabled as a result of an employment injury, it has the burden of justifying a subsequent reduction of compensation. If the employee's disability is no longer total but is partial, appellant is only entitled to the loss of her wage-earning capacity.³

Section 8106 of the Federal Employees' Compensation Act provides that a claimant may be paid 66 percent of the difference between her monthly pay and her monthly wage-earning capacity after the beginning of partial disability.⁴ With regard to section 8115(a), this section of the Act provides that wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent her wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or the employee has no actual earnings, her wage-earning capacity is determined with due regard to the nature of her injury, the degree of physical impairment, her usual employment, her age, her qualifications for other employment, the availability of suitable employment and other factors or circumstances, which may affect her wage-earning capacity in her disabled condition.⁵

In the instant case, the Office determined that appellant was no longer totally disabled based on the reports of Drs. Curtis and Wirthlin, who reported that appellant could work eight

³ *Anthony W. Warden*, 40 ECAB 168, 181-82 (1988).

⁴ 5 U.S.C. § 8106.

⁵ *Pope D. Cox*, 39 ECAB 143, 148 (1988).

hours a day with restrictions. The Board finds the Office's determination that appellant was no longer totally disabled for work and capable for some type of employment was proper.

The Office then relied on appellant's vocational rehabilitation counselor's determination that the position of hotel clerk was within appellant's work restrictions. However, the Board notes that the position description requires stooping whereas Drs. Curtis and Wirthlin indicate that appellant should not stoop. Furthermore, as appellant noted, there is evidence in the position description that computer skills may be required. Appellant has asserted that she lacks such skills and there is no evidence in the record supporting that appellant is familiar with computer operation. Finally, the rehabilitation counselor did not offer an opinion that the position was reasonably available within appellant's commuting area. He found that the motels or hotels in appellant's immediate area were likely to require additional duties outside the accepted job description, such as cleaning rooms. The rehabilitation counselors utilized by the Office found only a few positions available in appellant's general area of the state and did not indicate that these were within appellant's commuting distance. The Office performed its own search of available positions, but the record does not indicate whether the Office considered if the employers location provided appropriate positions.

As the Office did not consider appellant's physical ability, training and the reasonable availability of the position in appellant's commuting area, the Office failed to meet its burden of proof to reduce appellant's compensation benefits.

The decision of the Office of Workers' Compensation Programs dated January 26, 1998 is hereby reversed.

Dated, Washington, D.C.
October 19, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member