

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROSA M. GARCIA and U.S. POSTAL SERVICE,
POST OFFICE, Inglewood, Calif.

*Docket No. 95-2413; Submitted on the Record;
Issued January 7, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly adjusted appellant's compensation to reflect her wage-earning capacity in the position of social worker.

The Office accepted appellant's claim for a lumbosacral strain she sustained at work on June 9, 1987. In a work restriction evaluation dated September 30, 1992, appellant's treating physician, Dr. Jonathan L. Chang, a Board-certified orthopedic surgeon, stated that appellant could work eight hours a day with restrictions, including no lifting or bending and intermittent walking. In October 1992 appellant was referred to a vocational counselor for rehabilitation services. A vocational rehabilitation plan received by the Office on April 29, 1993 stated that appellant could perform the work of a social worker which was primarily sedentary and did not require fine hand manipulation. The report also stated that appellant had above average intellectual capacity and had worked as a social worker for a period of 5 years from 1968 to 1973. Further, the report noted that a labor market survey indicated that social worker positions were available and that appellant's Spanish speaking ability enhanced her opportunity for employment.

In a report dated November 11, 1992, the vocational counselor noted that appellant had a masters of science degree from a college in Mexico where she had majored in social work, and subsequently worked five years at Santa Marta Hospital in the accounts receivable department performing clerical work. The record contains two labor market surveys and vocational reports received by the Office on June 9, August 3 and October 6, 1993 indicating that the vocational counselor contacted approximately 160 prospective employers to determine whether there were openings for social workers and determined that there were some openings. In the labor market surveys at least four jobs were identified that required a bachelor of arts or science degree or did not require experience.

In a report dated November 30, 1993, the vocational counselor stated that numerous resumes had been sent to prospective employers and that appellant had received interviews but it

was possible that appellant's desire to return to work at the employing establishment, establishing which she continually demonstrated, might have impeded the interview conversations that might have lead to employment. Further, the vocational counselor noted that appellant had advised prospective employers that she might have trouble driving and that might have interfered with her ability to obtain employment even though this alleged difficulty was not supported by the medical evidence.

In a notice of proposed reduction of compensation dated May 26, 1994, the Office advised appellant that it proposed to reduce her compensation for wage loss on account of her June 9, 1987 employment injury because the medical and factual evidence of record established that she was no longer disabled. The Office stated that appellant was partially disabled and had the capacity to earn wages as a social worker at a weekly rate of \$500.00.¹ The Office based its determination on Dr. Chang's September 30, 1992 work restriction evaluation, the vocational counselor's reports indicating positions were available for one with appellant's qualifications and physical limitations, and the description of a social worker as provided in the Department of Labor *Dictionary of Occupational Titles* (DOT) which indicated that the job was sedentary, required the ability to talk and hear, and was inside 75 percent of the time. Appellant was advised that she had 30 days in which to submit additional evidence.

By letter dated June 22, 1994, appellant stated that during the 5-month period of vocational rehabilitation she attended all the interviews but believed she did not obtain a job offer because she graduated from college in Mexico and had not practiced since 1973, more than 20 years ago. Appellant also enclosed medical reports from Dr. Antonio C. Ong, a Board-certified neurologic surgeon, dated November 11, 1992, August 4 and December 1, 1993 and June 9, 1994, a report from Dr. Chang dated August 28, 1992, and the results of magnetic resonance imaging tests dated August 19, 1992.

By decision dated June 29, 1994, the Office reduced appellant's compensation based on her capacity to earn wages as a social worker at the weekly rate of \$500.00.

By decision dated August 1, 1994, the Office modified the June 29, 1994 decision, noting that it had used an incorrect pay rate in that decision.

By letter dated April 6, 1995, appellant, through her attorney, requested reconsideration of the Office's June 29, 1994 decision. Appellant's attorney stated that appellant received a degree from a college in Mexico in 1971 and worked for the Santa Marta Hospital for three years from 1971 through 1973 in accounts receivable. Appellant's attorney asserted that appellant was not qualified to be a social worker in California because she had not received a degree in social work from an accredited school and was not licensed to practice social work. Appellant submitted evidence including rehabilitation reports dated November 11, 1992, and February and March 22, 1993, one of the labor market surveys, a vocational assessment profile, the vocational rehabilitation plan, miscellaneous correspondence, several rejection letters, sections of the

¹ Based on a formula that computes the difference between appellant's wages when injured and her current wage-earning capacity as a social worker, the Office calculated that appellant was entitled to a weekly compensation rate of \$42.19.

California *Business and Professions Code*, and a copy of the Office's May 26, 1994 memorandum to the Director.

By decision dated May 16, 1995, the Office denied appellant's reconsideration request.

The Board finds that the Office properly reduced appellant's compensation benefits effective June 29, 1994.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of benefits.²

Under section 8115(a) of Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent his or her wage-earning capacity, or if the employee has not actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his or her usual employment, age, qualifications for other employment, the availability of suitable employment, and other factors and circumstances which may affect wage-earning capacity in his or her disabled condition.³

Wage-earning capacity is a measure of the employee's ability to earn wages in the open market under normal employment conditions. The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.⁴ The Board has consistently held that the fact that appellant has been unsuccessful in obtaining jobs in the selected position does not establish that the work is not available in the area.⁵

In the instant case, the Office determined that appellant could physically perform the work of a social worker based on Dr. Chang's September 30, 1992 work restriction evaluation in which he stated that appellant could work eight hours with lifting, bending and walking restrictions. The description of a social worker in DOT was that the job was sedentary, did not require fine hand manipulation and was inside 75 percent of the time. Appellant therefore meets the physical qualifications for a social worker. The Office also determined based on the vocational counselor's job surveys and vocational reports showing that several openings for a social worker were available to one with appellant's educational background and degree of

² *Sylvia Bridcut*, 47 ECAB _____ (Docket No. 95-63, issued November 6, 1996); *James B. Christenson*, 47 ECAB _____ (Docket No. 95-1106, issued September 5, 1996).

³ See *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); *petition for recon. denied*, (Docket No. 92-118, issued February 11, 1993); see also 5 U.S.C. § 8115 (a).

⁴ *Albert L. Poe*, 37 ECAB 684, 690 (1986); *Sandra Foster*, 35 ECAB 183, 187 (1983).

⁵ *Steve Costello*, 37 ECAB 251, 256 (1985); *Leo A. Chartier*, 32 ECAB 652, 657 (1981).

experience as some of the jobs required a bachelor of arts or science degree or no experience.⁶ The fact that appellant was not successful in obtaining a job as a social worker despite her going to interviews and sending out resumes to prospective employers does not establish that suitable work for appellant was not available.

Accordingly, the Office of Workers' Compensation Programs' decisions dated May 16, 1995, and August 1 and June 29, 1994 are affirmed.

Dated, Washington, D.C.
January 7, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

⁶ Although appellant stated in her June 22, 1994 letter that she stopped practicing, possibly alluding to social work, in 1973, it appears from the record that appellant majored in social work and performed clerical work at the Santa Marta Hospital for three to five years. The Board notes that the Office did not rate appellant as a licensed clinical social worker, a position which requires licensure under California State law.