U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ILENE E. HESSE and DEPARTMENT OF VETERANS AFFAIRS, ALEDA E. LUTZ VETERANS ADMINISTRATION MEDICAL CENTER, Saginaw, MI

Docket No. 98-2228; Submitted on the Record;
Issued August 14, 2000

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 determined that appellant had a 72 percent loss of wage-earning capacity.

On August 13, 1992 appellant, then a 46-year-old licensed practical nurse, was helping a coworker lift an uncooperative patient from a bed to a wheelchair when she developed low back pain on the left side, extending down her left leg. She stopped working the next day. The Office accepted appellant's claim for sciatica of the left leg. Appellant received continuation of pay for the period August 14 through September 27, 1992. The Office began payment of temporary total disability compensation effective September 29, 1992.

In a July 7, 1995 decision, the Office found that appellant could perform the duties of an office nurse and, therefore, had a 72 percent loss of wage-earning capacity. The Office reduced her compensation effective July 23, 1995. Appellant requested a hearing before an Office hearing representative. In a February 26, 1996 decision, issued without a hearing, an Office hearing representative found that the position of office nurse required the ability to lift up to 20 pounds but appellant was restricted to lifting over 10 pounds. He, therefore, set aside the Office's July 7, 1995 decision. In a May 28, 1996 decision, the Deputy Chief of the Office's Branch of Hearings and Review set aside the Office hearing representative's February 26, 1996 decision because he apparently had overlooked the statement of a rehabilitation counselor who had indicated that he had identified six employers within appellant's commuting area who required only that an office nurse lift up to 10 pounds. The Deputy Chief assigned appellant's case to a second Office hearing representative. After a September 23, 1996 hearing, the second Office hearing representative, in a January 15, 1997 decision, found that the weight of the medical evidence established that appellant could perform the duties of an office nurse for positions available within her commuting area. In a January 14, 1998 letter, appellant through her attorney, requested reconsideration. In an April 13, 1998 merit decision, the Office denied appellant's request for modification of the prior decision.

The Board finds that the Office properly determined that appellant could perform the duties of an office nurse and, therefore, had a 72 percent loss of wage-earning capacity.

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injuries and the degree of physical impairment, his or her usual employment, the employee's age and vocational qualifications and the availability of suitable employment.[1] Accordingly, the evidence must establish that jobs in the position selected for determining wage-earning capacity are reasonably available in the general labor market in the commuting area in which the employee lives. In determining an employee's wage-earning capacity, the Office may not select a makeshift or odd lot position or one not reasonably available on the open labor market.[2]

Dr. Kenneth M. MacKinnon, a Board-certified family practitioner, indicated initially that appellant had back pain with decreased strength in the dorsiflexors of the left foot and decreased sensation in the left leg. Dr. MacKinnon reported that a magnetic resonance imaging (MRI) scan was negative. The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Mark C. Stewart, a Board-certified orthopedic surgeon, for an examination and second opinion. In an April 6, 1993 report, Dr. Stewart indicated that he saw no evidence of a herniated disc in the x-ray studies. He commented that he was not convinced appellant had sciatica. Dr. Stewart stated appellant could have some facet degeneration at L5-S1 that could have conceivably been aggravated by her employment injury. He indicated appellant could not perform as a licensed practical nurse. In a May 13, 1993 report, Dr. MacKinnon stated that appellant had persistent low back pain and left leg pain associated with a traumatic spondylolisthesis and spondylosis. He stated that appellant could not return to work with identified anatomic progression and increasing symptomatology.

The Office found that a conflict in the medical evidence existed between the reports of Drs. MacKinnon and Stewart and referred appellant together with a statement of accepted facts and the case record, to Dr. Darrell Potter, a Board-certified orthopedic surgeon, to act as an impartial medical specialist. In an October 26, 1993 report Dr. Potter diagnosed degenerative arthritis and disc disease, spondylosis and Grade I spondylolisthesis at L5-S1 and degenerative disc disease at C4-5 and C5-6 with moderate stenosis at C4-5. He stated that appellant was not a candidate for returning to work at her previous job and was not able to work in the future because she could not do the bending and lifting required. Dr. Potter commented that appellant could return to lighter work with no lifting over 10 pounds and the option to sit, stand or change positions as necessary for comfort on the job. He indicated that appellant did not show evidence of nerve root irritation as she had not shown significant nerve root irritation secondary to nerve root impingement. In an accompanying work restriction evaluation Dr. Potter reported that appellant could walk or stand intermittently for two hours a day and sit, squat, climb or kneel intermittently one hour a day. He noted that appellant could not twist or bend and could perform only minimal lifting. Dr. Potter noted that appellant could lift up to 10 pounds. He concluded that appellant could not work eight hours a day at first but could slowly increase up to eight

[1] *See generally*, 5 U.S.C. § 8115(a); A. Larson *The Law of Workers' Compensation* § 57.22 (1989).

[2] *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

hours a day. In an April 27, 1995 report, Dr. MacKinnon stated that appellant should avoid bending, reaching, twisting, climbing and carrying anything over 10 pounds and should be able to modify her position from standing to sitting and would find sitting to be a greater limiting position that she could not tolerate for more than 20 minutes at a time.

The Office concluded that appellant could perform the duties of an office nurse, a light-duty position which required the ability to walk and stand.[3] The rehabilitation counselor indicated that six employers within appellant's employment area stated that an office nurse at their offices would not have to lift more than 10 pounds. The counselor indicated that the job was performed in sufficient numbers so as to be generally available within appellant's commuting area. The medical reports of Drs. MacKinnon and Potter indicated that appellant could lift up to 10 pounds and could work in a job where she was allowed to change positions when necessary. The position description for office nurse indicates that an office nurse might be asked to perform the duties of a receptionist or a secretary. There is no evidence or record, however, that appellant would be required to sit for prolonged periods or would not be allowed to change position when necessary. The medical evidence of record, therefore, supports the finding that appellant could perform the duties of an office nurse.

In a September 21, 1995 report, Dr. Gavin I. Awerbuch, a Board-certified neurologist, diagnosed fibromyalgia, lumbar spondylolisthesis and disc disease with S1 radiculopathy, shoulder capsulitis and cervical radiculopathy. In a September 5, 1996 report, Dr. Awerbuch stated that appellant had diagnoses of fibromyalgia, lumbar spondylolisthesis, spondylosis and radiculopathy, cervical stenosis, and radiculopathy, adjustment disorder, depression and vertigo. He concluded appellant was totally disabled for gainful employment due to persistent hip pain, neck pain, vertigo, poor concentration and memory loss caused by these diagnoses. Dr. Awerbuch, however, did not discuss whether these diagnosed conditions were causally related to appellant's employment or preexisted appellant's employment injury. He also did not describe how any employment-related or preexisting conditions caused permanent disability for work. Dr. Awerbuch's reports, therefore, have limited probative value and are insufficient to overturn the Office's determination that appellant could perform the duties of an office nurse.[4]

The decision of the Office of Workers' Compensation Programs, dated April 13, 1998, is hereby affirmed.

Dated, Washington, D.C.
August 14, 2000

[3] Department of Labor, *Dictionary of Occupational Titles*, (DOT) No. 075.374-014 (4th ed. 1974).

[4] The Board notes that, in appellant's January 14, 1998 request for reconsideration, her attorney made reference to a deposition by Dr. Awerbuch. The Office, in its April 13, 1998 decision, indicated that the deposition had not been received by the time of its decision. The record on appeal does contain a copy of Dr. Awerbuch's deposition but the deposition does not contain any notation on when the Office received it. There is no evidence that the deposition was received prior to the April 13, 1998 decision. The Board's scope of review is limited to the evidence that was before the Office at time it issued a final decision. 20 C.F.R. § 501.2. The Board, therefore, cannot review Dr. Awerbuch's deposition as there is no evidence that it was before the Office at the time of the April 13, 1998 decision.

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member