U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARMAINE A. THOMPSON and DEPARTMENT OF VETERANS AFFAIRS, MEDICAL CENTER, Coatesville, PA

Docket No. 98-2348; Submitted on the Record;
Issued May 24, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the position of customer service representative properly represents appellant's wage-earning capacity.

On September 8, 1989 appellant, then a 33-year-old temporary nursing assistant,[1] filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that she injured her right upper arm on September 7, 1989 while pulling a heavy patient in a wheelchair. She stopped work on the date of injury. The Office of Workers' Compensation Programs accepted the claim for an acute sprain of the right arm and paid appropriate wage-loss compensation.

The Office referred appellant for vocational rehabilitation services on February 28, 1992.

In a report dated December 27, 1992, the rehabilitation counselor closed the case due to appellant's lack of cooperation with vocational rehabilitation services.

In a report dated December 28, 1995, Dr. Kevin Mansmann,[2] based upon a statement of accepted facts, review of the medical record and physical examination, concluded that appellant was capable of returning to light-duty work and then progressing to full duties. He opined that appellant's sprain/strain had resolved, noting that appellant had a full range of motion, "no motor deficit other than voluntary cogwheel" and that a magnetic resonance imaging (MRI) scan and nerve conduction tests "do not document a significant disc herniation or radicular findings." He noted that appellant had no medical care since 1990.

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[1] Appellant's temporary appointment ended September 30, 1989.

[2] A second opinion Board-certified orthopedic surgeon.

In a September 11, 1997 report, Dr. Daniel L. Zimet,[3] diagnosed C5, C6 radiculopathy, right arm cubital tunnel syndrome and a small mass on the right forearm which was tender. As to causality, he opined that the radiculopathy could have been caused by the September 7, 1989 employment injury and that the ulnar neuropraxia at the right cubital was not work related as it first was present in an electromyogram and nerve conduction velocity tests taken on August 25, 1997, almost eight years after the work injury. Regarding disability, Dr. Zimet indicated that appellant could perform light or sedentary work. In a work capacity evaluation (Form OWCP-5c) dated September 26, 1997, he indicated that appellant should limit lifting and reaching activities as well as do no lifting over five pounds. Dr. Zimet opined that desk work would be best for appellant and that she was capable of working eight hours per day. He indicated that the restrictions he had noted were unrelated to her work injury as they were due to a nonwork-related right elbow problem.

By letter dated November 13, 1997, the Office referred appellant to Dr. Mansmann, together with a statement of accepted facts and list of questions to be answered, to clarify the extent and cause of her accepted employment injury.

In a report dated December 5, 1997, Dr. Mansmann, based upon an employment injury history, review of the medical records, statement of accepted facts and physical examination, indicated that appellant was capable of returning to light-duty work provided she did no lifting over 20 pounds and required no repetitive use of the upper extremity. He upon physical examination noted:

> "[Appellant] had aching in the ulnar aspect of her right forearm. She had a positive Phalen's on the right, positive Tinel's in the right elbow at the cubital tunnel and at the wrist…. [Appellant] had no evidence of atrophy in her hand musculature either the interosseous thenar or hypothenar eminences."

Dr. Mansmann diagnosed a resolved strain/sprain with a C5-6 chronic radiculopathy on the right with right ulnar neuropathy. Regarding the diagnosis of right ulnar neuropathy, he opined it was unrelated to appellant's September 7, 1989 employment injury based upon the objective evidence. Dr. Mansmann concluded that appellant's chronic cervical radiculopathy was related to the September 7, 1989 employment injury. Lastly, he opined that "based on her work-related injury alone, that she could return to work as she does not have C5-6 distributions complaints as much as ulnar neuropathy complaints" and he would return her to light work initially and progress her up to her full duties.

On April 16, 1998 the Office again referred appellant for vocational rehabilitation services.

In a status report dated April 21, 1998, the rehabilitation counselor noted that appellant had been released to full-time light-duty work. Based upon appellant's skills and work limitations, the positions of hotel clerk and customer service representative were identified as suitable positions based upon their availability and work requirements.

[3] A physician specializing in orthopedic surgery.

The position description of customer service representative indicated that it entailed interviewing applicants, recording interview information into the computer; talking by telephone or in person with customers, receiving "orders for installation, turn-on, discontinuance, or change in service," filling out contract forms, determining charges for requested services, collecting deposits, preparing change of address forms and troubleshoot problems with the equipment. The physical requirements of the position were sedentary with a maximum lifting requirement of 10 pounds. The position also required the ability to feel, finger, handle and reach. The position required six months to a year of vocational preparation which was done on the job. The weekly wage was identified as $310.80. The rehabilitation counselor noted that, through contact with the State employment service, the position was being performed in sufficient numbers so as to be reasonbly available in appellant's commuting area.

By letter dated April 28, 1998, the Office issued a notice of proposed reduction of compensation as appellant was no longer totally disabled and had the capacity to earn wages as a customer service representative at $310.80 per week, or an 84 percent wage-earning capacity. The Office allowed appellant 30 days to submit evidence if she disagreed.

By decision dated June 16, 1998, the Office reduced appellant's compensation effective June 21, 1998, finding that the position of customer service representative reflected her wage-earning capacity.

The Board finds that the position of customer service representative properly represents appellant's wage-earning capacity.

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.[4]

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.[5] 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 effect her wage-earning capacity in her disabled condition.[6]

[4] *Sylvia Bridcut*, 48 ECAB 162 (1996); *James B. Christenson*, 47 ECAB 775 (1996); *Carla Letcher*, 46 ECAB 452 (1995).

[5] 5 U.S.C. § 8106.

[6] *Pope D. Cox*, 39 ECAB 143 (1987).

The Office determined that appellant could perform the duties of a customer service representative which included interviewing and talking to customers, inputting the interview information into the computer, talking to customers by telephone or in person, receiving orders, filling out contract forms, determining charges for requested services, collecting deposits, preparing change of address forms and troubleshooting equipment problems. The physical requirements of the position were sedentary with no indication that appellant was required to lift more than 10 pounds. The position required six months to one year of education or vocational experience and appellant has a high school education and transferable skills from her prior nursing aide job. Both Drs. Mansmann and Zimet noted physical restrictions requiring a sedentary position with no heavy lifting although Dr. Zimet stated no lifting over five pounds and Dr. Mansmann noted no lifting over twenty pounds. Dr. Zimet did not specifically attribute the lifting restriction to appellant's work-related condition or to a condition that preexisted her work injury.[7] In the instant case, the job restrictions do not require any lifting over 10 pounds. Furthermore, Dr. Zimet opined that appellant could perform desk job for eight hours per day and the position of customer service representative is a sedentary desk job. The vocational rehabilitation counselor noted that he had performed a labor market survey indicating that customer service relations positions were available in appellant's commuting area. Thus, the Office met its burden of proof in reducing appellant's compensation as the weight of the medical evidence indicates that appellant could perform the duties of the selected position.

Inasmuch as the evidence of record establishes that appellant could perform sedentary work with no heavy lifting and as the Office followed established procedures for determining vocational suitability and reasonable availability of the position selected, the Board finds that the Office, having given due regard to the factors specified at section 8115(a) of the Act, properly reduced appellant's monetary compensation on the grounds that he has the capacity to earn wages as a customer service representative.

[7] Federal (FECA) Procedure Manual , Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.814.8(d) (December 1995). Dr. Zimet's September 11, 1997 report indicates that appellant's ulnar neuropraxia at the right cubital tunnel arose subsequent to the 1989 work injury and that her cervical radicular findings at C5 and C6 were not objectively established until an August 25, 1997 (EMG) and nerve conduction velocity test was performed.

The decision of the Office of Workers' Compensation Programs dated June 16, 1998 is hereby affirmed.

Dated, Washington, D.C.
May 24, 2000

George E. Rivers
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member