

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LAURA PADILLA and DEPARTMENT OF HEALTH & HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION, Albuquerque, NM

*Docket No. 00-93; Submitted on the Record;
Issued August 3, 2001*

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 reduced appellant's wage-loss compensation to reflect his capacity to earn wages in the constructed position of a teller for four hours per day.

On October 2, 1984 appellant, then a 56-year-old computer clerk, filed a claim for a traumatic injury alleging that she bent down at work and experienced a severe pain in her lower back. The claim was accepted for a lumbar strain and a herniated disc. Appellant was initially off work from October 2 to 14, 1984. She stopped work on March 18, 1985 and has not returned.¹

Appellant has been under the care of several physicians for treatment of her work injury but has not had any surgical intervention. She was first treated by Dr. Ronald W. Racca, a Board-certified orthopedic surgeon from 1988 to 1993. Dr. Racca confirmed that an MRI demonstrated a herniated disc and degenerative changes consistent with severe cervical spondylolysis. He prescribed anti-inflammatory medication, a course of physical therapy, chiropractic treatment on a monthly basis. Appellant has also received epidural steroid injections to relieve her complaints of low back spasm with decreased motion in the neck and lower back.

Appellant came under the care of Dr. Jorge Sedas, a Board-certified internist, Dr. Robert McRoberts, a Board-certified orthopedic surgeon, Dr. Colin Kavanagh, an osteopath, and Dr. Richard McKenzie, a Board-certified internist.

In an October 18, 1997 report, Dr. McKenzie discussed appellant's history of work injury and symptoms of lower back and neck pain. He reported physical findings and diagnosed chronic disc degeneration in the cervical and lumbar spine. Dr. McKenzie opined that appellant would have to be limited to sedentary to very light duty from four to six hours per day. He

¹ Appellant was involved in a motor vehicle accident in 1971 with a low back sprain.

opined that appellant would benefit from a referral to a spine center for rehabilitative therapy and recommended that she undergo a functional capacity evaluation (FCE).²

In a February 2, 1998 report, Dr. McKenzie noted that appellant was seen for follow-up after her FCE, which identified that appellant required lifting restrictions of no more than 10 pounds on a frequent basis and no more than 20 pounds on an occasional basis. He further noted that appellant needed to change positions frequently and that she should not sit or stand for over 30 to 45 minutes at a time. Dr. McKenzie stated that “it is likely that the maximum she could work would be up to four hours per day.”

Because the employing establishment indicated that there were no jobs available to appellant within the medical restrictions assigned by Dr. McKenzie, the Office referred appellant for vocational rehabilitation.

In a July 10, 1998 report, James B. Howard, an Office rehabilitation specialist, reported that a rehabilitation counselor had completed vocational assessment and was able to identify suitable employment opportunities in the private sector based on her existing transferable skills.

A Form CA-66 Job Classification was provided for the position of teller under the Department of Labor’s *Dictionary of Occupational Titles* (DOT) (211-362.018). The job was reported by the rehabilitation counselor to be reasonably available within appellant’s commuting area.³ The physical demands of the job were listed as light with occasional lifting up to 20 pounds. The job description stated as follows:

“Receives and pays out money, and keeps record of money and negotiable instruments in financial transactions. Enters customer’s transactions into computer to record transactions, and issues receipts. Orders daily supply of cash, and counts incoming cash. Balances cash drawer at end of shift, using computer, and compares totaled amounts. May open new accounts, remove deposits from ATM, or may accept utility and loan payments.”

The record indicates that appellant received authorization to change physicians from Dr. McKenzie to Dr. Aaron B. Kaufman, an osteopath.

On August 4, 1998 appellant was notified that the Office would provide her with 90 days of assistance in finding employment as a teller.

On December 11, 1998 the Office issued a notice of proposed reduction of compensation advising appellant that the medical and factual evidence of record established that she was no longer totally disabled from work, and that she had the capacity to earn the wages as a bank teller for six hours a day at the rate of \$287.00 per week.

² A functional capacity evaluation was conducted on December 10, 1997 under the direction of an exercise physiologist.

³ This was confirmed by telephone contact with Charles Lehman at the state employment service in Albuquerque, New Mexico.

In a decision dated January 19, 1999, the Office reduced appellant's compensation to reflect her capacity to earn wages in the position of a part-time teller for six hours per day.

On June 24, 1999 appellant by counsel requested reconsideration.

In support of her reconsideration request, appellant submitted a March 25, 1999 report from Dr. Kaufman, her new attending physician. Dr. Kaufman noted that he had examined appellant regarding a request that she return to work as a bank teller. He stated that appellant was unable to perform the work of a bank teller six hours per day because "[with] using her hands and arms as she would be required to do in this job she develops arm, neck and upper back pain which is debilitating." He also noted that "prolonged standing and bending lead to lumbosacral pain." Dr. Kaufman stated as follows:

"[Appellant] is likely to be able to stand no more than 15 minutes 3 times a day due to lumbosacral and leg pain. She can sit no more than 15 minutes 3 times a day for the same reasons. She is capable of walking approximately 30 minutes at a time but after that amount, the above-mentioned leg and lower back pain ensue. Use of her hands and arms repetitively more than 15 minutes at any one period 4 times a day lead, to neck, shoulder, and lower back pain. I believe that [appellant] can work four-hour workdays five days a week. However, this is speculative as [she] has not attempted this and her job description and how much stress it placed on her body would certainly be determining factors. Certainly, if the work is producing great bodily pain she would be unable to continue."

The rehabilitation specialist, Mr. Howard, submitted a follow-up report on August 3, 1999 in response to an inquiry by the Office as to clarification on reasonable availability of part-time teller jobs in the Albuquerque area. He indicated that he had gone to the New Mexico Job Bank on the internet and found two out of nine advertised jobs were for part-time positions. He further stated that the Albuquerque Journal Classifieds online showed five out of ten advertised teller jobs were for part-time positions. He noted that the state employment agency often did not distinguish between part-time and full-time job listings, and that many teller jobs available with financial institutions in the area did not advertise job vacancies through the state employment agency. He concluded once again that the position of a part-time teller was being performed in sufficient numbers to make it reasonably available in appellant's commuting area.

In an August 4, 1999 decision, the Office granted reconsideration and modified its prior decision to reflect that appellant could work for four hours a day and reimbursed her for the period of January 31 to August 14, 1999 to reflect the difference of two hours.

The Board finds that the Office properly reduced appellant's compensation to reflect her capacity to earn wages in the position of bank teller for four hours per day.

Under section 8115(a) of the 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 wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, his wage-earning capacity is determined with regard to the nature of his injury, his degree of physical

impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.⁴ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.⁵ 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.⁶

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office or to an Office wage-earning capacity specialist for selection of a position, listed in the DOT or otherwise available in the open labor market, that fits that employee's capabilities with regard to his physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service.⁷

In this case, the rehabilitation counselor reported that he had researched and identified a constructive position as a teller for which appellant met the vocational requirements. He provided a job description for the teller position under the DOT indicating that the job involved light duty with no more than occasional lifting of up to 20 pounds consistent with appellant's medication restrictions. According to appellant's vocational rehabilitation counselor, there were also jobs as a part-time teller that were reasonably available within the general labor market of appellant's commuting area.

The Board finds that the Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment, and age and employment qualifications, in determining that the constructed position of Cashier II represented appellant's wage-earning capacity. The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of teller as described in the DOT. The rehabilitation counselor also verified that such position was reasonably available within appellant's commuting area. Therefore, the Office properly determined that appellant had the ability to earn wages as a teller for four hours per day with a weekly salary of \$2,870.00.⁸

⁴ See *Pope D. Cox*, 39 ECAB 143 (1988); 5 U.S.C. § 8115(a).

⁵ *Richard Alexander*, 48 ECAB 432 (1997); *Albert L. Op*, 37 ECAB 684 (1986).

⁶ *Id.*

⁷ *Alexander*, *supra* note 5.

⁸ Although appellant submitted a March 25, 1999 report from Dr. Kaufman on reconsideration, the physician acknowledged that appellant could work four hours per day, five days per week. He did not dispute appellant's ability to perform the position of a part-time teller. His only concern was that appellant be able to quit the job if it became too much for her.

The decision of the Office of Workers' Compensation Programs dated August 4, 1999 is hereby affirmed.

Dated, Washington, DC
August 3, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member