U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARCIA GIBSON and DEPARTMENT OF THE TREASURY, FINANCIAL MANAGEMENT SERVICE, Philadelphia, PA

Docket No. 99-2130; Submitted on the Record;
Issued February 27, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation benefits based on her wage-earning capacity as a customer service representative.

On April 24, 1996 appellant, then a 48-year-old mail and file clerk, filed a notice of occupational disease and claim for compensation (Form CA-2), alleging that she sustained a herniated disc in the performance of duty. By letter dated July 25, 1996, appellant's claim was accepted for a herniated disc at L4-5.

Appellant returned to work light duty, with intermittent absences. However, in a letter dated May 19, 1997, the employing establishment informed the Office that they did not have a vacant position to accommodate her physical limitations. Accordingly, the Office referred appellant for vocational rehabilitation services.

By letter dated November 10, 1996, the Office referred appellant to Dr. Evelyn Witkin, a Board-certified orthopedic surgeon, for the purpose of determining extent of residuals due to the accepted work-related condition. In a medical report dated December 10, 1996, Dr. Witkin determined that appellant suffered from a herniated disc at L4-5 and L5-S1 and that, clinically, she still displayed evidence of radiculopathy on her right side. She opined that appellant's disability was connected to her work and precluded her from returning to her regular duties, but that appellant could continue working light duty. By letter dated August 8, 1997, the Office requested further information from Dr. Witkin. In a medical report dated September 9, 1997, Dr. Witkin listed appellant's restrictions as follows:

> "[Appellant] may work full time with the following restrictions. She is able to walk continuously for about thirty minutes and intermittently up to two hours a day. Her lifting should be intermittent and no more than 25 pounds. [Appellant] should be able to occasionally climb, kneel or twist. She is able to stand no longer than thirty minutes continuously and intermittently up to two hours.

> [Appellant] is restricted to pushing and pulling of weights no greater than 10 pounds. [She] has no difficulty with fine manipulation. [Appellant] is occasionally able to reach over her shoulder.
>
> "[Appellant] may also use foot controls for repetitive movement with respect to her left leg only and this should be occasional. She is able to operate a car intermittently to two hours at a time. There are no cardiac, visual or hearing limitations. [Appellant] does have some limitations and restrictions with regard to extreme heat, cold and dampness, as well as temperature changes as this exacerbates her back pain.
>
> "[Appellant] is not affected by any interpersonal relationships. She is able to work eight hours a day and in fact the job description you have enclosed, a file clerk (otherwise known as a presort clerk), is appropriate for the patient. There is only one exception, she is not allowed to move cabinets or work for prolonged periods of time standing, bending, crouching or otherwise lifting and carrying heavy loads of trays or pouches.

An extensive period of vocational rehabilitation and testing followed. In a psychological report dated December 5, 1997, John Spychalski, a licensed clinical psychologist, reviewed several vocational tests given to appellant and concluded that appellant had superior intelligence and ego functioning.

By letter dated February 5, 1998, the vocational counselor notified appellant of several positions that may be appropriate for her, including that of customer service representative. He noted the availability of one such position with the University of Pennsylvania, with a starting salary of $355.00 to $445.00 per week and noted that the position was sedentary in nature and offered on-the-job training. By letter dated February 9, 1998, the vocational rehabilitation counselor informed appellant that the Philadelphia Job Center had various jobs in the Philadelphia labor market, which met her restrictions and listed two of these jobs, one of which was for a customer service representative. In a report dated February 24, 1998, the vocational rehabilitation counselor noted that appellant had still not applied for the positions that they had sent her and she had delayed sending the vocational counselor her resume. In a letter dated March 10, 1998, the Office informed appellant that based on the information of the vocational counselor, it appeared that she had discontinued good faith participation in the job-placement program. By letter to the Office dated April 8, 1998, the vocational rehabilitation counselor noted that appellant's file would be closed and that she was not motivated to return to the labor market. It was noted that appellant was not totally disabled from returning to work in the Philadelphia labor market.

On May 27, 1998 the Office issued a notice of proposed reduction of compensation, finding that the position of customer service representative was medically and vocationally suitable and notified appellant that if she disagreed with this proposal, she had 30 days from the date of the letter to submit further evidence or argument.

By decision dated August 10, 1998, the Office advised appellant that the proposed decision to reduce her compensation was made final. The reduction was based on appellant's ability to earn $459 per week as a customer service representative.

By letter dated August 28, 1998, appellant requested an oral hearing. By letter dated March 22, 1999, appellant switched her request to a review of the written record.

Appellant submitted a letter dated April 19, 1999 from Jim Ewing, a member of the American Board of Vocational Experts. Mr. Ewing stated:

> "It is my opinion that [appellant] does not have the [specific vocational preparation] to meet the requirements of a customer service representative as stated in the DOT. It is further my opinion that the reports listed above do not demonstrate the reasonable availability of CSR positions in her commuting area and these reports do not demonstrate that the average weekly wage for a CSR is $459.00 in her commuting area."

In a decision dated June 14, 1999, the hearing representative affirmed the findings of the Office.

The Board finds that the Office properly determined that the constructed position of customer service representative reasonably reflected appellant's wage-earning capacity.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[1]

An injured employee who is unable to return to the position held at the time of injury (or to earn equivalent wages), but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity. If the actual earnings of the employee do not fairly and reasonably represent her wage-earning capacity or if the employee has no actual earnings, her wage-earning capacity as appears reasonable under the circumstances 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 his disabled condition.[2] 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.[3]

When the Office makes a medical determination of disability and of specific work restrictions, it may refer the employee's case to an Office wage-earning capacity specialist for selection of a position, listing in the Department of Labor's *Dictionary of Occupational Titles* or

[1] *James R. Verhine*, 47 ECAB 460, 464 (1996).

[2] *David W. Green*, 43 ECAB 883 (1992); *Hattie Drummond*, 39 ECAB 904 (1988); *Pope D. Cox*, 39 ECAB 143 (1988); *see* 5 U.S.C. § 8115(a).

[3] *Richard Alexander*, 48 ECAB 432, 434 (1997).

otherwise available in the open labor market, that fits the employee's capabilities with regard to his or her 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.[4] Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.[5]

The Board finds that the medical evidence establishes that appellant is capable of performing the position of customer service representative. This position was well within the work restrictions imposed by Dr. Witkin on September 9, 1997. Furthermore, there is no medical evidence in the record to contradict that the position of customer service representative is not within appellant's restrictions.

Appellant submitted a report by Mr. Ewing to contradict the report of the vocational rehabilitation counselor retained by the Office. The Board is not persuaded by Mr. Ewing's opinion. Contrary to Mr. Ewing's assertion that the position required further training and was, therefore, outside of appellant's vocational abilities, there is evidence in the record that training can be provided on the job. As the vocational psychologist's report indicated that appellant had superior intelligence and ego functioning, there is no indication in the record that appellant would not be able to handle this position. The Board finds that these positions are performed in reasonable numbers so as to be generally available within appellant's commuting area. The Office vocational rehabilitation counselor specifically noted that these positions were within appellant's commuting area and there is no specific evidence to the contrary.

Finally, the Board finds that the Office properly determined, based on the principle in *Shadrick*,[6] appellant had the capacity to earn $459.00 week, which was greater than the wages appellant earned at her prior job of $351.15 a week. Therefore, the Office determined that appellant had no loss of wage-earning capacity. This is supported by the closing report of the Office's vocational rehabilitation experts.

The Board finds that the Office considered the proper facts, such as availability of suitable alternate employment and appellant's physical limitations, usual employment and age and employment qualifications, in determining that the position of customer service representative represented appellant's wage-earning capacity.[7] The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of customer service representative and that such a position was reasonably available within the general labor market of appellant's commuting area. Therefore, the Office properly determined that the position of customer service representative reflected appellant's wage-earning capacity.

---

[4] *Francisco Bermudez*, 51 ECAB ___ (Docket No. 98-1395, issued May 11, 2000)

[5] *See Albert C. Shadrick*, 5 ECAB 376 (1953).

[6] *Id*.

[7] *Richard Alexander*, 48 ECAB 432, 435 (1997).

The decisions of the Office of Workers' Compensation Programs dated June 14, 1999 and August 10, 1998 are hereby affirmed.

Dated, Washington, DC
February 27, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member