U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of AVIA E. YOUNG and LIBRARY OF CONGRESS,
JAMES MADISON BUILDING, Washington, DC

Docket No. 99-1867; Submitted on the Record;
Issued June 8, 2001

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's monetary compensation benefits effective November 20, 1998 on the grounds that the position of front desk clerk represented her wage-earning capacity.

The Office accepted that on February 28, 1979 appellant, then a 25-year-old peripheral equipment operator, caught herself as she was falling down some stairs and sustained a rotary subluxation of her left wrist scaphoid bone. Appellant stopped work that date and did not return. Appropriate compensation benefits were paid.

Appellant underwent several left wrist surgeries including fusion and began vocational rehabilitation efforts in early 1987. On April 13, 1988 a vocational rehabilitation specialist was authorized. Thereafter, appellant had multiple instances of obstruction of the vocational rehabilitation efforts from 1987 through 1997. In May 1995 appellant was investigated, by the Office of Inspector General for Federal Employees' Compensation Act fraud. On December 16,

1995 the rehabilitation counselor determined, based on a second opinion specialist's report from Dr. Sagar V. Nootheti that appellant could return to full-time sedentary work with restrictions.[1]

By letter dated April 7, 1998, the Office advised appellant that a claimant who fails to cooperate with the Office more than once during the course of vocational rehabilitation should be given progressively more serious sanctions for subsequent incidents of noncooperation and that if she did not undergo vocational rehabilitation as directed and return to compliance and provide reasons for her period of noncompliance, the Office would presume that vocational rehabilitation would have resulted in return to work with no loss of wage-earning capacity and would reduce her compensation accordingly to zero, which would continue until she complied in good faith with the Office's directions concerning vocational rehabilitation.

By decision dated April 22, 1998, the Office reduced appellant's compensation to zero based on her refusal to participate in vocational rehabilitation efforts.

By letter dated April 28, 1998, appellant stated that she would keep all scheduled appointments that were required and would notify the counselor if she could not.

On May 8, 1998 appellant's rehabilitation counselor suggested two possible job vacancies appropriate for appellant's partially disabled condition, including the position of front desk clerk. However, she expressed doubt that appellant could be placed due to her chronic alcoholism and suggested that appellant required long-term inpatient alcoholism services.

On May 13, 1998 the rehabilitation counselor noted that appellant had been released for full-time sedentary duty with restrictions, that her physical restrictions were within the duty requirements of front desk clerk, annual salary range from $13,884.00 to $16,120.00, that a local labor market survey confirmed that such a position was being performed in sufficient numbers within appellant's local area so as to make such a position reasonably available and that job placement in such a position was feasible. Appellant was advised by letter dated May 27, 1998, that she would receive 90 days of assistance with her reemployment effort, after which her compensation would be reduced based upon the wage-earning capacity of $13,884.00 to $16,120.00 per year.

[1] On May 5, 1986 the Office determined that the medical evidence of record at that point showed that appellant was no longer totally disabled for work and that a wage-earning capacity would be done. On September 21, 1986 Dr. Kevin F. Hanley, a Board-certified orthopedic surgeon, found no disability and opined that appellant could work eight hours per day without restrictions except for no lifting, pushing and pulling with the left hand. In a prior September 9, 1986 report, Dr. Hanley had opined that it was totally unreasonable to consider appellant totally disabled as she was right-handed and only sustained injury to the left hand, that her alleged total disability for seven years was unfathomable and that the medical record disclosed no reason why she could not have been working the entire time. Appellant's own treating physician did not identify any basis for continuing total disability as early as 1986 or 1987. He treated her with Motrin and a left wrist splint. Prior to December 1995, an Office second opinion specialist, Dr. Nootheti, a Board-certified orthopedic surgeon with illegible handwriting, opined that appellant could work 8 hours per day performing continuous sitting and/or walking, intermittent lifting with the right hand up to 20 pounds and intermittent bending and should avoid using the left hand, climbing, kneeling, twisting and standing and working in a cold environment. No reason for restrictions on kneeling, twisting or standing were apparent or given, as the employment injury was limited to the left wrist only.

On June 8, 1998 the vocational counselor determined that appellant was once again obstructing rehabilitation; she noted that, after completing front desk clerk training, a front desk clerk job was secured for appellant, but that appellant failed to return any calls or answer any messages or a letter regarding the job offer and the position was filled by another candidate. The counselor noted that thereafter new job vacancies for a front desk clerk arose, but that appellant never contacted the employer as instructed.

On June 9, 1998 the rehabilitation specialist noted that the vocational consultant reported that appellant was not cooperating or providing a good faith effort in securing and accepting suitable employment. The rehabilitation specialist recommended that a warning letter be issued.

By letter dated June 9, 1998, the Office again advised appellant of her responsibilities and the consequences for noncompliance, noted that jobs had been secured for appellant and noted that she had failed to follow through in accepting any of these positions. Appellant was directed to contact the Office within 30 days, otherwise rehabilitation efforts would be terminated and her compensation would be reduced under 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.124(f). However, no response from appellant was forthcoming and no compliance was resumed.

On November 2, 1998 the Office rehabilitation specialist closed appellant's case finding that all of the vocational efforts and job placement efforts were not successful in returning appellant to gainful employment after more than a reasonable time period. A loss of wage-earning capacity determination was recommended, based upon the position of front desk clerk. He further noted that such position was within appellant's medical restrictions, was within her vocational qualifications as she had had substantially more than three months of job experience secured from separate specific vocational training, in addition to experience from her federal employment and that this position was reasonably available within appellant's commuting area as verified by state employment service reports and the positions actually secured for appellant.

By decision dated November 16, 1998, the Office, in accordance with 5 U.S.C. § 8106 and 5 U.S.C. § 8115, advised appellant that it was adjusting her monetary compensation benefits to reflect her loss in wage-earning capacity based upon her ability to perform the position of front desk clerk. The Office noted that appellant had been advised on multiple occasions of her rights and obligations connected with her vocational rehabilitation program, that considerable efforts had been spent in rehabilitating appellant, despite her multiple incidents of obstruction, that appropriate jobs had been identified and secured for her, but that she had persisted with obstruction and had not pursued leads given, had not contacted employers with secured positions as instructed, had not appeared for scheduled meetings as requested and had not responded to correspondence as directed. The Office concluded that, therefore, appellant's compensation would be reduced on the grounds that the position of front desk clerk fairly and reasonably represented her wage-earning capacity.

The Board finds that the Office properly determined that the position of front desk clerk represented appellant's wage-earning capacity effective November 20, 1998.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[2] After it has determined that an employee has disability causally related to her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[3]

Under section 8115(a) of the Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent her wage-earning capacity. It the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings her wage-earning capacity is determined with due regard to the nature of her injury, her degree of physical impairment, her usual employment, her age, her qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect her wage-earning capacity in her partially 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 given the nature of the employee's injuries and the degree of physical impairment, her usual employment, the employee's age and vocational qualifications and the availability of suitable employment.[5] 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 job selected must be one reasonably available in the general labor market in appellant's commuting area.[6] The Office may not select a makeshift or odd lot position or one not reasonably available on the open labor market.[7]

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 for rehabilitation services and for identification of a position available in the open labor market that fits the employee's capabilities with regard to 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.

In the present case, the Office received information from multiple physicians who found that appellant was not totally disabled from her 1979 left wrist injury as early as 1986 and had

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[2] *Bettye F. Wade*, 37 ECAB 556 (1986); *Harold S. McGough*, 36 ECAB 332 (1984).

[3] *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

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

[5] *See generally*, 5 U.S.C. § 8115(a); A. Larson *The Law of Workers' Compensation* § 57.22 (1989); *see also Bettye F. Wade, supra* note 2.

[6] *See Richard Alexander*, 48 ECAB 432 (1997); *Albert L. Poe*, 37 ECAB 684 (1986).

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

the capacity to work eight hours per day with restrictions only on left hand usage. Vocational rehabilitation was begun as early as 1987 and was continued since that time until December 16, 1995 when the rehabilitation counselor determined, based on a second opinion specialist's report from Dr. Nootheti, that appellant could return to full-time sedentary work with restrictions. He opined that appellant could work 8 hours per day performing continuous sitting and/or walking, intermittent lifting with the right hand up to 20 pounds and intermittent bending and should avoid using the left hand, climbing, kneeling, twisting and standing and working in a cold environment.

By report dated May 8, 1998, appellant's rehabilitation counselor suggested two possible job vacancies appropriate for appellant's partially disabled condition, including the position of front desk clerk. On May 13, 1998 the rehabilitation counselor noted that appellant had been released for full-time sedentary duty with restrictions, that her physical restrictions were within the duty requirements of front desk clerk, annual salary range from $13,884.00 to $16,120.00, that a local labor market survey confirmed that such a position was being performed in sufficient numbers within appellant's local area so as to make such a position reasonably available and that job placement in such a position was feasible.

On June 8, 1998 the vocational counselor determined that appellant was once again obstructing rehabilitation; she noted that, after completing front desk clerk training, a front desk clerk job was secured for appellant, but that appellant failed to return any calls or answer any messages or a letter regarding the job offer and the position was filled by another candidate. The counselor noted that thereafter new job vacancies for a front desk clerk arose, but that appellant never contacted the employer as instructed. On June 9, 1998 the rehabilitation specialist noted appellant was not cooperating or providing a good faith effort in securing and accepting suitable employment. Appellant's obstruction continued until November 2, 1998.

On November 2, 1998 the Office rehabilitation specialist closed appellant's case finding that all of the vocational efforts and job placement efforts were not successful in returning appellant to gainful employment after more than a reasonable time period. A loss of wage-earning capacity determination was calculated, based upon the position of front desk clerk, as such position was within appellant's medical restrictions, was within her vocational qualifications as she had had substantially more than three months of job experience secured from separate specific vocational training, in addition to experience from her federal employment and that this position was reasonably available within appellant's commuting area as verified by state employment service reports and the positions actually secured for appellant.

The Board finds that the Office considered the proper factors such as availability of suitable employment, appellant's physical limitations and her usual employment, age, qualifications and training, in determining that the position of front desk clerk 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 front desk clerk 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 front desk clerk reflected appellant's wage-earning capacity effective November 20, 1998.

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

Dated, Washington, DC
June 8, 2001

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member