U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NANCY B. RUSSELL and DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Covington, KY

Docket No. 02-492; Submitted on the Record;
Issued July 26, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issue is whether the selected position of order clerk represented appellant's wage-earning capacity.

This case has been before the Board in a prior appeal. The Board set aside the Office of Workers' Compensation Programs' February 2, 1984 decision terminating appellant's compensation and remanded the case for the Office to determine appellant's wage-earning capacity.[1] The facts in that decision are incorporated herein by reference.

On remand, the Office reinstated appellant's wage-loss compensation and referred her to vocational rehabilitation after the employing establishment was unable to provide medically suitable work. Her long-time treating physician, Dr. Charles Horsley, who is Board-certified in family practice, stated on April 18, 1996, that appellant could work two to four hours a day with intermittent walking and standing and no lifting, bending, kneeling or twisting. On June 23, 1998 he reported that appellant's condition and functional capacity had not changed in the past two years.

On June 7, 1999 appellant refused to sign the job placement agreement and requested a change in treating physicians, which the Office approved.

On January 5, 2001 the Office issued a notice of proposed reduction of compensation based on its determination that appellant had the capacity to earn wages as a part-time order clerk. Appellant disagreed with the Office's determination, stating that Dr. Paula Lafranconi, Board-certified in internal medicine, had referred her for a magnetic resonance imaging (MRI) scan of her back.

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[1] Docket No. 86-1364 (issued October 14, 1986).

On February 12, 2001 the Office reduced appellant's wage-loss compensation on the basis of her capacity to earn $67.03 a week as an order clerk. The Office relied on the opinion of Dr. Malcolm A. Meyn, Jr., a Board-certified orthopedic surgeon, who resolved a conflict in the medical opinion evidence over appellant's ability to work.

Appellant requested reconsideration and the Office denied modification of its prior decision on December 12, 2001.

The Board finds that the position of order clerk represents appellant's wage-earning capacity.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened to justify termination or modification of compensation.[2] If a claimant is no longer totally disabled, but has residual disability, the Federal Employees' Compensation Act[3] provides that monthly monetary compensation shall be paid equal to 66 2/3 percent of the difference between monthly pay and wage-earning capacity.[4]

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 his wage-earning capacity.[5] If 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 disabled condition.[6]

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[7] The job selected for determining wage-earning capacity must be reasonably available in the general labor market in the commuting area in which the employee lives.[8]

After the Office makes a medical determination of disability and specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office or to an Office specialist for selection of a position, listed in the Department of Labor, *Dictionary of Occupational Titles* or otherwise available in the open labor market; this

[2] *Raymond W. Behrens*, 50 ECAB 221, 222 (1999); *Bettye F. Wade*, 37 ECAB 556, 565 (1986).

[3] 5 U.S.C. §§ 8101-8193.

[4] 5 U.S.C. § 8106(a).

[5] 5 U.S.C. § 8115(a); *Penny L. Baggett*, 50 ECAB 559, 560 (1999).

[6] *Richard Alexander*, 48 ECAB 432, 434 (1997); *Pope D. Cox*, 39 ECAB 143, 148 (1988).

[7] *Dim Njaka*, 50 ECAB 425, 433 (1999); *Albert L. Poe*, 37 ECAB 684, 690 (1986).

[8] *Philip S. Deering*, 47 ECAB 692, 699 (1996).

position must fit that employee's capabilities with regard to his physical limitations, education, age and prior experience.[9] Once this selection is made, a wage rate and the availability of the selected position in the open labor market should be determined through contact with the state employment service or other applicable service.[10]

In this case, the Office selected the position of order clerk after appellant refused to cooperate with the rehabilitation counselor in job placement efforts. Dr. Horsley, who had treated appellant since 1987, found her capable of part-time work with certain restrictions in 1996. However, her new treating physician, Dr. Lafranconi, found appellant to be totally disabled for all work, due to the pain she experienced and her inability to ambulate.

The Office referred appellant to Dr. Richard T. Sheridan, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated September 28, 1999, he found her capable of working eight hours a day in her previous job as a tax examiner. Dr. Sheridan stated that appellant's work-related conditions, right knee contusion and lumbar strain had resolved because there were no objective findings to support any residuals of these injuries. He added that, while she still had spinal arthritis, the accepted precipitation of that condition had also resolved. The current arthritis in appellant's spine was due to her obesity and natural aging.

Because of a conflict of medical opinion between Dr. Lafranconi, who found appellant unable to work and Dr. Sheridan, who concluded that appellant could return to her date-of-injury job, the Office referred appellant to Dr. Meyn to resolve the issue.[11]

In a report dated April 24, 2000, Dr. Meyn reviewed a statement of accepted facts, a medical history provided by appellant, a job description and the treatment records, including diagnostic testing. He examined appellant and noted restricted motion of the lumbar spine, advanced degenerative arthritis and multiple areas of facet hypertrophy. Dr. Meyn concluded that these conditions had progressed from the time of injury through the present and prevented appellant from resuming her date-of-injury job as a tax examiner because of the extensive sitting required.

While appellant also had advanced arthritis in her right knee and required a total knee replacement, this condition was not related to the accepted contusion sustained in 1972. Dr. Meyn explained that the contusion healed shortly after the injury and the knee symptoms occurred more than 10 years after the work injury; the gap was much too long to find a causal relationship between the 1972 fall and the current diagnosis.

Dr. Meyn concluded that appellant could sit for four hours a day, but needed to change positions after one hour. Total standing and walking should be limited to one hour, with

[9] *Dorothy Lams*, 47 ECAB 584, 586 (1996).

[10] *James R. Verhine*, 47 ECAB 460, 464 (1996); *Albert C. Shadrick*, 5 ECAB 376 (1953).

[11] 5 U.S.C. § 8123(a) states in pertinent part: "If there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

intermittent breaks and movement. Appellant should not climb stairs and should refrain from bending, stooping, crawling, kneeling or crouching. While appellant's use of her upper extremities was unrestricted, lifting was limited to five pounds.

Asked by the Office to clarify his opinion, Dr. Meyn noted that appellant had nonwork-related conditions that hindered her return to work, her massive obesity, her age and her 27-year nonworking status. However, if the medical restrictions were observed, appellant was capable of working at a physically suitable job for no more than four hours a day.

Based on this report, the Office determined that the sedentary position of order clerk (DOT No. 249.362-026) was medically and vocationally suitable. The type of duties listed were compatible with the skills appellant had developed as a clerk and tax examiner for the employing establishment, including record keeping, report writing, filing, auditing, typing and answering the telephone. The rehabilitation counselor conducted an open labor market survey on December 6, 2000 and found that the job was reasonably available within appellant's commuting area on a part-time basis.

In situations where opposing medical opinions on an issue are of virtually equal evidentiary weight and rationale, the case shall be referred for an impartial medical examination to resolve the conflict in medical opinion.[12] The opinion of the specialist properly chosen to resolve the conflict must be given special weight if it is sufficiently well rationalized and based on a proper factual background.[13]

The Board finds that Dr. Meyn's report represents the weight of the medical evidence and establishes that appellant was capable of performing the duties of an order clerk.[14] Dr. Meyn provided medical rationale for his conclusion that appellant's work-related conditions had resolved. While he was pessimistic for other reasons that appellant would ever return to work, the physical restrictions he imposed would not prevent her from performing the duties of a part-time sedentary position in which she could move around as needed.

The Board also 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 position of order clerk represented appellant's wage-earning capacity.[15] The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to work as a clerk in a sedentary position and that such positions were reasonably available within the general labor market of appellant's

[12] *Richard L. Rhodes*, 50 ECAB 259, 263 (1999).

[13] *Sherry A. Hunt*, 49 ECAB 467, 471 (1998).

[14] *See Richard L. Rhodes*, 50 ECAB 259, 263 (1999) (finding that the Office met its burden of proof in relying on the impartial medical examiner's conclusion that appellant's hysterical conversion disorder had resolved).

[15] *See Donald W. Woodall*, 49 ECAB 415, 421 (1998) (finding that the Office followed its established procedures for determining that the position of gate guard represented appellant's wage-earning capacity).

commuting area.[16] Therefore, the position of order clerk reflected appellant's wage-earning capacity and the Office properly reduced appellant's wage-loss benefits accordingly.

On reconsideration appellant submitted copies of a printout of her medications, transcription notes from Dr. Edward J. Lairson, Board-certified in physical medicine and rehabilitation and results of an MRI scan dated March 13, 2001. The list of medications and the MRI scan are irrelevant to the issue of whether appellant is capable of working four hours a day in a sedentary job.[17] The brief reports dated June 8 and August 8, 2001 by Dr. Lairson focused on appellant's treatment and did not address the issue of work capability. Therefore, this evidence is insufficient to modify the Office's previous decision.

The December 12 and February 12, 2001 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
July 26, 2002

Alec J. Koromilas
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[16] At the time of the wage-earning capacity determination, appellant was living in Cincinnati, Ohio. Her duty station at the time of injury in 1972 was Covington, Kentucky. However, the Office used Marietta, Georgia, in the Atlanta metropolitan area, in calculating wage-earning capacity according to the Office of Personnel Management's general schedule for locality rates of pay. Inasmuch as this computation benefited appellant, the Board will not disturb the Office's determination.

[17] *See David J. McDonald*, 50 ECAB 185, 189 (1998) (finding that documents submitted by appellant on reconsideration failed to address the relevant issue in his case and were, therefore, insufficient to warrant merit review).