U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BOBBIE D. DALY and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Murfreesboro, TN

Docket No. 01-647; Submitted on the Record;
Issued May 22, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that the position of modified, part-time audiologist was representative of appellant's wage-earning capacity; and (2) whether the Office abused its discretion by denying appellant's request for a review of her case on the merits.

The Office accepted that appellant, then a 43-year-old speech language pathologist and audiologist, sustained bilateral carpal tunnel syndrome in the performance of duty.

In a September 30, 1996 report, Dr. Richard T. Hoos, an attending Board-certified neurologist, obtained electromyography (EMG) and nerve conduction velocity (NCV) studies showing "severe right carpal tunnel syndrome in the context of a mild, generalized diabetic neuropathy."[1]

Dr. Rex E.H. Arendall, an attending Board-certified neurosurgeon, performed right carpal tunnel release on November 14, 1996 and left carpal tunnel release on May 8, 1997. Appellant received compensation on the daily rolls.[2]

On September 9, 1997 Dr. Arendall approved a limited-duty assignment as a part-time, modified audiologist, offered to appellant on August 8, 1997. Appellant's morning duties would consist of seeing three patients, performing no more than two hearing aid evaluations and two hearing aid checks, with afternoon duties of one evaluation. The remaining two hours of

[1] In a March 17, 1997 report, Dr. Hoos noted a worsening of median nerve symptoms in the right hand and wrist, with objective muscle weakness in the right abductor pollicis brevis. He performed NCV testing showing "worsening of the slowing in the left carpal tunnel and marked improvement since surgery on the right."

[2] Appellant received rehabilitation nursing services from July 1997 through July 29, 1998. Appellant participated in a July and August 1997 functional capacity evaluation and work hardening program and attained improved upper extremity strength and endurance.

appellant's workday would consist of clerical duties. Appellant was scheduled to work eight hours per day, Monday through Friday. Appellant accepted the offer on September 8, 1997 and returned to work.

In October 1997, appellant worked eight hours per day in the modified audiologist position. When she experienced increased pain and paresthesias in both hands and wrists, appellant sent a series of electronic mail messages to her supervisor, audiologist Dr. Russell Mills, regarding her difficulties in performing her assigned duties. Dr. Mills responded to these messages, encouraging appellant to keep trying but not to injure herself.

In a November 7, 1997 report, Dr. Hoos related appellant's account of increased paresthesias in both hands following her September 8, 1997 return to work. He performed EMG and NCV studies showing improvement in the left and right median nerves, with some slowing that could be related either to carpal tunnel syndrome or diabetic neuropathy.

In a December 8, 1997 note, Dr. Arendall restricted appellant to working only two days per week for two months.

The Office accepted that appellant sustained a December 9, 1997 recurrence of disability. Appellant returned to work for four hours per day in January 1998.

In a February 18, 1998 report, Dr. Arendall restricted appellant to lifting up to 25 pounds less than one hour per day, restricted fine manipulation, grasping, pushing and pulling and permanently restricted appellant to working four hours per day. He opined that appellant had reached maximum medical improvement.

In a March 6, 1998 report, Dr. Robert E. Clendenin, a Board-certified orthopedic surgeon and second opinion physician, noted that appellant experienced increased paresthesias and weakness in both hands even after being restricted to seeing only three patients per day since December 8, 1997. Dr. Clendenin noted that a functional capacity evaluation showed "inconsistent effort," and that postoperative EMGs showed "normalization of her median motor latencies bilaterally with continued loss of sensory response possibly attributable to her diabetes." He stated that "[]objectively since her carpal tunnel releases, her EMGs have returned to normal," but that appellant exhibited neurologic deficits in the lower extremities consistent with diabetic polyneuropathy. Dr. Clendenin found that appellant medically was able to work for eight hours per day as an audiologist, but noted that she "should not place undue stress on her hands." He noted that appellant should "not type more than 30 minutes continuously without a 10-minute break."

In an April 27, 1998 report, Dr. Hoos noted improved electrodiagnostic test results bilaterally, with no significant change since November 1997.

In a May 20, 1998 note, Dr. Arendall stated that appellant could "work in a restricted manner as an audiologist over an eight-hour day," if she limited "her patients to four patients in an eight-hour day."

The Office found a conflict of opinion between Dr. Clendenin, for the government, who opined that appellant could work eight hours per day modified duty and Dr. Arendall, for appellant, who found that she was capable of working only four hours per day. To resolve this conflict, the Office referred appellant, the record and a statement of accepted facts to Dr. James P. Anderson, a Board-certified neurologist.

In a June 5, 1998 report, Dr. Anderson provided a history of condition and treatment. On examination, he found bilaterally positive Tinel's and Phalen's signs, diminished pinprick sensation in both hands, greater on the left and slight bilateral weakness of the thenar eminence muscles. Dr. Anderson noted that appellant's job duties, including using jewelers tools to repair and fit hearing aids, threading fine tubes and devices used in audiologic testing and extruding hearing aid molds. He conducted an EMG of both arms and the left leg, showing a generalized peripheral sensory neuropathy, attributable to diabetes. Dr. Anderson also found "clear overlying carpal tunnel syndromes on both sides, rated as moderate to severe on the right and moderate on the left," with "active denervation of the median nerve innervated thenar eminence muscles in both hands." He concluded that it would be advisable for appellant "to find employment that would not require the fine motor movements of her fingers as does her current position. However, if she is to continue in this line of work, then her condition will probably continue to progress." Dr. Anderson recommended eliminating all fine motor activities for three months, then obtaining EMG and NCV studies to determine if there was any improvement in her condition. He opined that appellant would "develop severe thenar eminence wasting if she continues as she is currently since she clearly has active denervation in the thenar eminence muscles on my needle EMG, whereas no such active denervation was documented on prior EMG studies."

In a June 25, 1998 report, Dr. Anderson opined that appellant could work eight hours per day if she were not required to perform fine motor tasks, "particularly with force, in the fingers flexed position, for a period of three months."

In an August 11, 1998 note, Dr. Arendall noted that appellant's EMG results had worsened and that she should "protect her hands."[3]

On September 7, 1998 appellant filed a claim for a recurrence of disability commencing October 1, 1997.

In October 14, 1998 notes, Dr. Arendall held appellant off work on December 17, 1997, March 19, April 21, June 1 and 4, July 30 and from August 20 to 31 1998 due to bilateral carpal tunnel syndrome.

In October 1998, appellant sent electronic mail messages to Dr. Mills complaining of increased bilateral hand pain, clumsiness and paresthesias when performing fine motor tasks.

[3] In an August 21, 1998 letter, Dr. Arendall noted that a myelogram showed cervical spondylolysis with disc protrusion at C6-7, which did not involve the C5-6 nerve roots innervating the carpal tunnel region.

In a March 24, 1999 report, Dr. Arendall noted continued moderate carpal tunnel syndrome bilaterally, with new lumbar and cervical spine complaints. He recommended further testing.

April 7, 1999 NCV and EMG studies obtained for Dr. Anderson showed "severe right and moderate left carpal tunnel syndrome" with "a mild underlying generalized peripheral neuropathy."

The record indicates that appellant stopped work in August 1999 and did not return.

In an August 10, 1999 letter, Dr. David J. Kapley, an attending Board-certified psychiatrist, diagnosed severe major depression with features of anxiety. Dr. Kapley noted that although appellant "recently and valiantly" attempted a return to work, "her problems with concentration and organization were so severe that she made repeated mistakes in her job and had to be removed from her position." He held appellant off work due to a "serious mood disorder which has incapacitated her concentration and work performance."

In a September 1, 1999 report, Dr. Arendall found appellant permanently disabled for work as an audiologist due to carpal tunnel syndrome. He stated that the risks of future surgery outweighed potential benefits.

By decision dated September 21, 1999, the Office denied appellant's claim for a recurrence of disability commencing October 1, 1997 on the grounds that appellant submitted insufficient evidence demonstrating causal relationship. The Office noted that appellant had not submitted evidence establishing a total disability for work from August 21 to 31, 1998.

By decision dated May 23, 2000, the Office found that the position of modified, part-time audiologist, that she had performed beginning on December 9, 1997, fairly and reasonably represented appellant's wage-earning capacity and adjusted her compensation rate to reflect a 51 percent loss of wage-earning capacity.[4]

Appellant disagreed with this decision and in an August 30, 2000 letter, through her representative, requested reconsideration of the May 23 and October 2, 2000 decisions. She submitted additional evidence.[5]

In a January 4, 1999 letter, appellant asserted that she suffered a breakdown at work on November 10, 1998 and was under treatment for severe depression.[6]

[4] The Office noted that as of the December 9, 1997 recurrence of disability, the pay rate for her date-of-injury position was $1,066.23 per week and that the current pay rate for her date-of-injury position was $1,097.12 per week. Appellant's actual earnings were $533.20 per week in the modified, part-time audiologist position. Dividing appellant's actual earnings by the pay rate as of December 9, 1997, the Office found that appellant had a 49 percent wage-earning capacity and that 49 percent of the date of recurrence pay rate was $522.45, leaving a $543.78 wage loss per week. Multiplying the $543.78 wage loss by the three-fourths compensation rate, the Office calculated a $407.84 per week compensation rate, increased to $425.00 per week due to consumer price index increases effective December 9, 1998. Appellant's new compensation rate every four weeks was $1,702.00.

[5] Appellant also submitted copies of medical reports previously of record.

In January 4 and June 9, 1999 letters, Dr. Mills stated that appellant had been under additional pressure due to an increased demand for hearing aid services during the previous two years. He noted that on October 20, 1998 appellant "lost her temper" within "range of a patient in the clinic waiting room," and that Dr. Mills issued a disciplinary admonishment, held in abeyance when appellant agreed to seek treatment.

In a March 29, 1999 deposition and an undated statement, Dr. Mills noted that appellant was required to write, keyboard, perform computer data entry, operate audiometers and other electronic equipment, manipulate hearing aids and prepare hearing aid molds by "extruding a soft impression material through a 60 cc syringe and into the ear canal," a process that could require "significant effort." He noted that, at the time of her September 1996 claim, appellant performed the above activities for 6 to 10 hours per day, 4 days per week.[7] Dr. Mills stated that, following her return to work in January 1998, appellant performed inadequately, with inaccurate results in 67 percent of test evaluations.

In a January 13, 1999 deposition, Dr. Kapley diagnosed major depression and anxiety related to "work[-]related stress," including interpersonal problems with coworkers. He commented that appellant's symptoms increased when she worked and decreased when she was off work. Dr. Kapley held appellant off work from December 2, 1999 to June 30, 2000 for unspecified "medical problems."

Dr. Paul W. Wheeler, an attending rheumatologist, submitted May 20, June 3 and August 1999 reports regarding treatment for a frozen left shoulder with adhesive capsulitis.

Dr. Richard Rogers, an attending orthopedic surgeon, submitted September 1999 reports regarding adhesive capsulitis of the left shoulder.

In a February 2, 2000 deposition, Dr. Arendall testified that "[f]ine manipulation with dials and manipulation of mall objects with her fingers and working with hearing aids, opening boxes, modifying the things using little jeweler-type tools … can cause and activate and reactivate carpal tunnel problems."

By decision dated October 2, 2000, the Office denied reconsideration on the grounds that the evidence submitted was repetitious and cumulative and, therefore, insufficient to warrant a merit review of the May 23, 2000 decision. The Office found that the "[m]ajority of the medical evidence [was] repetitive and cumulative," and did not "support a causal relationship of [her] recurring disability on October 1, 1997." The Office concluded that appellant had not provided "any medical establishing a material worsening of [her] bilateral carpal tunnel syndrome for the October 1, 1997 recurrence."

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[6] Appellant submitted August 15, 2000 affidavits from her husband and herself regarding her bilateral carpal tunnel syndrome beginning in September 1996.

[7] Dr. Mills listed appellant's job activities in a June 9, 1999 letter.

Regarding the first issue, the Board finds that the Office improperly found that the position of part-time, modified audiologist fairly and reasonably represented appellant's wage-earning capacity.

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 her wage-earning capacity.[8] In this regard, the Board has stated, "Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure."[9]

In this case, the Office accepted that, on or before September 16, 1996, appellant sustained bilateral carpal tunnel syndrome. She returned to work in September 1997 in the modified, part-time audiologist position and performed the job intermittently through August 1999.

The Office determined in its May 3, 2000 decision that appellant had a 51 percent loss of wage-earning capacity based on her actual earnings as a part-time, modified audiologist at the employing establishment beginning in September 1997. As appellant had performed the position for more than one year, the Office determined that the position fairly and reasonably represented appellant's wage-earning capacity.

However, the Board finds that the record demonstrates that appellant had great difficulty in performing the position as offered to her in September 1997. The record contains October 1997 electronic mail messages between appellant and Dr. Mills, her supervisor, describing increased pain and paresthesias in both hands and wrists. Appellant sustained a recurrence of disability in December 1997, related to performing the modified job duties. The position required further modification upon appellant's return to work in January 1998.

The record also shows an objective worsening of appellant's condition after she began working in the modified audiologist position in September 1997. In a February 18, 1998 report, Dr. Arendall, appellant's attending Board-certified neurosurgeon, restricted appellant to working no more than four hours per day, noting that she had reached maximum medical improvement. Although he found in a May 20, 1998 note, that appellant could work eight hours per day, this change was predicated on appellant only seeing four patients per day, in essence, working for four hours out of an eight-hour tour. Dr. Arendall noted in an August 11, 1998 letter that appellant's EMG results had worsened and that she should "protect her hands."

Dr. Anderson, a Board-certified neurologist and impartial medical examiner, also found that appellant's condition had worsened and opined that the modified position was injurious to her. In his June 5, 1998 report, Dr. Anderson opined that appellant should "find employment that would not require the fine motor movements of her fingers as does her current position.… [I]f she is to continue in this line of work, then her condition will probably continue to progress."

[8] 5 U.S.C. § 8115(a).

[9] *Michael E. Moravec*, 46 ECAB 192 (1995); *Floyd A. Gervais*, 40 ECAB 1045, 1048 (1989).

He explained that appellant would develop "severe thenar eminence wasting," as active denervation of the thenar eminence muscles was newly apparent on EMG, whereas previous studies did not show this deficit. Dr. Anderson obtained April 7, 1999 EMG and NCV studies showing the predicted worsening of appellant's condition, particularly on the right.

The Board finds that the modified, part-time audiologist position did not fairly and reasonably represent her wage-earning capacity. Therefore, the case will be returned to the Office for reinstatement of compensation due and owing from May 23, 2000.

Regarding the second issue, the Board finds that the Office in its October 2, 2000 decision improperly denied appellant's request for reconsideration on its merits under 5 U.S.C. § 8128(a) on the basis that her request for reconsideration did not meet the requirements set forth under section 8128.[10]

Under section 8128(a) of the Act,[11] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,[12] which provides that a claimant may obtain review of the merits if her written application for reconsideration, including all supporting documents, set forth arguments and contain evidence that:

> "(i) Shows that [the Office] erroneously applied or interpreted a point of law; or
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> "(ii) Advances a relevant legal argument not previously considered by the Office; or
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> "(iii) Constitutes relevant and pertinent new evidence not previously considered by the [Office]."[13]

Section 10.608(b) provides that any application for review of the merits of the claim, which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[14]

Appellant submitted affidavits from herself, her husband and Dr. Kapley regarding a November 10, 1998 "breakdown," and subsequent treatment for depression and anxiety. Dr. Mills, her supervisor, also submitted statements concerning workplace stress. However, as there is no claim of record for an emotional condition, these documents are not relevant. Similarly, appellant submitted reports from Dr. Wheeler, a rheumatologist and Dr. Rogers, an

[10] *See* 20 C.F.R. §10.606(b)(2) (i-iii).

[11] 5 U.S.C. § 8128(a).

[12] 20 C.F.R. § 10.606(b) (1999).

[13] 20 C.F.R. § 10.606(b).

[14] 20 C.F.R. § 10.608(b).

orthopedic surgeon, regarding adhesive capsulitis of the left shoulder. However, there is no claim of record for a left shoulder condition.

Appellant also submitted a February 2, 2000 deposition from Dr. Arendall, explaining that fine manipulation of the testing equipment and tools used in audiometric evaluations and hearing aid fittings "can cause and activate and reactive carpal tunnel problems." This statement is new, not repetitive of reports previously of record and is relevant to the issue of recurrence of disability. Thus, Dr. Arendall's deposition constitutes new, relevant evidence requiring a review of the case on the merits. The case will be remanded to the Office to conduct a merit review.

On remand of the case, the Office shall conduct a review of Dr. Arendall's February 2, 2000 deposition and issue an appropriate decision in the case.

The October 2 and May 23, 2000 decisions of the Office of Workers' Compensation Programs are hereby set aside and the case remanded for further development consistent with this decision.

Dated, Washington, DC
May 22, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member