U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANNAMARIE A. DASILVA and DEPARTMENT OF VETERANS AFFAIRS, BOSTON VETERANS HOSPITAL, Boston, MA

Docket No. 02-867; Submitted on the Record;
Issued October 2, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to modify appellant's loss of wage-earning capacity determination on the grounds that she had been vocationally rehabilitated.

The Office accepted that on May 27, 1992 appellant, then a 29-year-old diagnostic radiological technician, sustained a left shoulder strain and left shoulder inferior capsule damage, for which surgery was authorized, while lifting a patient. Appellant stopped work on May 28, 1992, returned on June 8 and 9, 1992, but stopped again on June 10, 1992. Her left arm was immobilized and she returned to partial duty on June 12, 1992 and to regular duty, full time on June 29, 1992, until August 6, 1992 when she was again placed on restricted duty. Thereafter she never returned to full duty and the Office continued to pay appellant for intermittent lost time through June 1, 1994 when she stopped work completely due to her left shoulder surgery.

Appellant did not return to work due to her activity restrictions and in September 1994 she began working as a special needs tutor for the Town of Lexington Massachusetts, earning $11.41 per hour working a 32-hour week.[1]

On August 24, 1995 the Office made an initial loss of wage-earning capacity determination on the basis of her actual earnings as a special needs tutor earning $365.00 per week working 32 hours per weeks.

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[1] On March 15, 1995 the employing establishment offered appellant a suitable position of clerk (light duty) based upon her physical condition and vocational preparation. The duties were detailed and required records maintenance, pulling and transporting files, locating missing files, scheduling, screening calls, taking messages, providing directions, assisting with projects, computer database input, general office duties, contacting clinic personnel, physicians and patients, providing clerical and administrative support, interrogating persons, dealing with a variety of people, exchanging information, delivering documents and other administrative duties in a technical setting as required.

Thereafter appellant continued to work in various similar entry-level type jobs as follows:

September 1995 to September 1996, the Town of Weston;

1995, Able Phone Service, $591.90 total;

December 1995 to June 1996, MacDonald's cashier, $6.00 per hour

July 1996 to April 1997, Macy's cashier, $6.30 per hour;

February 1997, Town of Lexington, substitute teacher, $39.31 per day;

April 1997, Town of Belmont, substitute teacher, $42.21 per day;

May 1997 to August 1997, Costco, retail sales associate, $7.00 per hour;

1998, Town of Belmont, $84.42 total;

September to December 1997, January to April 1998, community newsdealer, customer service, $8.25 to .75 per hour

January 1999, Walker Home and School, $9.17 per hour;

February to April 1999, The Lapis Company, science teacher, $496.00 total;

January to April 1999, envelope stuffing, $385.00 total;

September to December 1999, Leigh R. Grossman, contract projects, $1,025.00;

May to December 1999, City of Waltham, substitute teacher, $2,395.00;

October 1999, Peabody Essex Museum, $308.00

December 1999 to April 2000, Kathy McCrohon Dance Center, $8.00 per hour;

April 2000, Kennison and Associates, $11.00 per hour; and

2000, Self-employed designing business cards, $120.00 total.

On September 3, 1997 the Office granted appellant a schedule award for a four percent permanent impairment of her left upper extremity.

On June 12, 2000 after a stint as temporary office help working for Martha Payne at Charles River Ventures, appellant was hired by Ms. Payne as an office assistant working 40 hours per week earning $17.78 per hour or $711.20 per week, based upon her energy, enthusiasm and rapport with Ms. Payne. Appellant received no training or vocational preparation for the job at Charles River Ventures and her duties were administrative in nature and determined daily by Ms. Payne. However, Ms. Payne was removed as appellant's supervisor in early March 2001

and appellant was fired two weeks later after being told that she did not have the skills necessary to produce the levels of work required of an office assistant.[2]

On January 3, 2001 the Office proposed to reduce appellant's compensation on the basis that she was earning more money as an office assistant then the current pay of the job of special needs tutor for which she had been previously rated. The Office did a rate-of-pay comparison with the salary of her date-of-injury job on June 12, 2000.

The Office requested a description of appellant's duties at Charles River Ventures and on January 31, 2001 it received a list of specific activities which included ordering business cards, cellular telephones, office supplies, maintenance and equipment repair and new employee supplies; maintaining database information including archives, off-site storage, building access cards, AMEX and calling cards, contact lists, the PARLANCE system, CRV contacts, billing information, equipment and an employee telephone list; making sure there is enough postage; backing up receptionists; coordinating new employees' cubicle set-ups; tracking shipping costs; comparing telephone, fax and copier rates; making specific information available; distribution of information; filing documents; company support -- making sure table, chairs and PCs were available if requested.

On February 27, 2001 the Office finalized the proposed reduction of compensation on the basis of appellant actual earnings as an office assistant, claiming that she was presently earning 25 percent more than current the pay of the job of special needs tutor for which she had been previously rated and had therefore rehabilitated herself.[3]

Appellant requested an oral hearing which was held on August 30, 2001. By decision dated December 20, 2001, the hearing representative affirmed the Office's February 27, 2001 decision finding that the Office had properly determined that appellant's present actual wages represented her wage-earning capacity.

The Board finds that this wage-earning capacity modification must be reversed.

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was found to be erroneous.[4] The burden of proof is on the party attempting to show a modification of the wage-earning capacity award.[5]

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[2] Thereafter, appellant began work as a medical secretary for Weston Pediatrics Physicians Associates on April 17, 2001 working 40 hours per week earning $13.50 per hour or $540.00 per week.

[3] Appellant argued that she worked 32 hours per week when she was a special needs tutor, meaning her February 2001 comparative pay rate would be $418.88 and not the $523.60 amount that the Office used.

[4] *Mildred Alder-Johnson*, 50 ECAB 474 (1999); *Charles D. Thompson*, 35 ECAB 22 (1983); *Elmer Strong*, 17 ECAB 226 (1965).

[5] *Id.; see also Jack E. Rohrbaugh*, 38 ECAB 186 (1986).

Neither the Federal Employees' Compensation Act nor its implementing regulations specifically address the criteria for modification of a loss of wage-earning capacity determination. The Office's procedure manual provides instructional guidelines to be used in determining whether the wage-earning capacity determination should be modified. The procedure manual specifically states as follows:[6]

> "b. (2) If the [Office] is seeking modification (usually on the basis of a decrease in wage loss), the [Office] must establish that the original rating was in error or that the injury-related condition has improved, or that the [employee] has been vocationally rehabilitated.
>
> c. Increased Earnings. It may be appropriate to modify the rating on the grounds that the [employee] has been vocationally rehabilitated if one of the following two circumstances applies.
>
> > (1) The [employee] is earning substantially more in the job for which he or she was rated. This situation may occur where an [employee] returned to part-time duty with the employing agency and was rated on that basis, but later increased his or her hours to full-time work.
> >
> > (2) The [employee] is employed in a new job (i.e. a job different from the job for which he or she was rated) which pays at least 25 percent more than the current pay of the job for which the [employee] was rated.
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> d. Claims Examiner (CE) Actions. If these earnings have continued for at least 60 days, the CE should:
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> > (1) Determine the duration, exact pay, duties and responsibilities of the current job.
> >
> > (2) Determine whether the claimant underwent training or vocational preparation to earn the current salary.
> >
> > (3) Assess whether the actual job differs significantly in duties, responsibilities or technical expertise from the job at which the claimant was rated.
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> e. If the results of this investigation establish that the claimant is rehabilitated or self-rehabilitated, or if the evidence shows that the claimant was retrained for a different job, compensation may be redetermined using the *Shadrick* formula.

In this case, appellant underwent no formal or informal vocational rehabilitation, no training and no additional certification. Following her wage-earning capacity determination appellant was employed in a series of entry-level jobs which did not demonstrate a job

[6] Federal (FEC A) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11 (June 1996, July 1997).

progression or acquisition of new skills. These included working as a cashier at MacDonald's and Macys, working as a sales clerk at Costco, stuffing envelopes, performing customer service activities, designing business cards and doing substitute teaching. As appellant was originally trained as a diagnostic radiologic technician, a skilled technical job and was rated as a special needs tutor, also a job requiring certain technical skills and abilities, these subsequent jobs, in comparison, were of a lesser preparation level for performance and, therefore, did not show any job progression from the position of special needs tutor.[7]

The job as an administrative assistant with Charles River Ventures required general administrative assistant duties which are briefly articulated in the case record as a list of specific but which, when her hiring superior left, were found by the company to be beyond her level of functioning. It was revealed during the hearing that she not meet the basic level of competency required to successfully perform the job on which the Office based its modification of wage-earning capacity. The Board notes, after review of the case record, that on March 15, 1995 the employing establishment offered appellant a position of clerk (light duty) in the hematology -- oncology department which it found suitable based upon her physical limitations and training. It required a full range of technically based, clerical and administrative duties, including computer database management, document management and input. Specific requirements included records maintenance, pulling and transporting files, locating missing files, scheduling, screening calls, taking messages, providing directions, assisting with projects, computer database input, general office duties, contacting in person, by telephone or by letter, clinic personnel, physicians and patients, providing clerical and administrative support, interrogating persons, dealing with a variety of people, exchanging information, delivering documents and other administrative duties in a technical setting as required. This job was found to be vocationally suitable for appellant in 1995 and the Office did not disagree.

The listed specific tasks of an administrative assistant at Charles River Ventures, requiring ordering things, updating things, maintaining things, tracking things, distributing things and backing up people and activities as administratively necessary, do not differ that significantly from the duties found by the employing establishment and the Office to be vocationally suitable for appellant in 1995, prior to her wage-earning capacity determination based on the position of special needs tutor.[8] Therefore, although the Board notes that the administrative duties at Charles River Ventures differed from the duties as a special needs tutor, the Board does not believe that the administrative duties appellant was expected to perform at Charles River Ventures were substantively different from the 1995 vocationally suitable job offer.

The Board notes, however, that considering the jobs appellant held during the period 1995 to 2001, there is not any clear "job progression" from being a technically trained special

[7] The positions as substitute teacher and science teacher are basically on par, technically with appellant's preexisting training and also do not demonstrate job progression or skill acquisition.

[8] The Office found the offered position of clerk in oncology-hematology was suitable vocationally but was not suitable physically because it did not specify a lifting limit in pounds, and therefore did not comply with appellant's 10-pound lifting limit restriction with her left arm and it did not specify whether she would be expected to work with her left arm about her shoulder.

needs tutor to being a cashier, a sales clerk, an envelope stuffer, a substitute teacher, a business card designer, a customer service representative or a temporary office helper who was hired full time for administrative/clerical duties because her superior liked her enthusiasm, from which she later was fired for not being proficient.

In this case, the Office determined that modification of a preexisting wage-earning capacity was appropriate based only on an increased salary, without any evidence of rehabilitation, self-rehabilitation or training.[9] The issue is not that appellant's actual wages increased, but rather whether or not her loss of capacity to earn wages has changed. Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn and not on actual wages lost.[10] The Board has explained that an increase in pay, by itself, without any other changes in job status or job duties, is not sufficient evidence that there has been a change in the employee's capacity to earn wages. Without a showing of additional qualifications obtained by the appellant through retraining, it was improper to make a new loss of wage-earning capacity determination based on increased earnings.[11] Further, an increase in pay, by itself, is not sufficient evidence that there has been a change in the employee's capacity to earn wages. Without a showing of additional qualifications obtained through retraining, it is improper to make a new loss of wage-earning capacity determination based on increased earnings.

In this case, it appears that the Office determined the duration and exact pay of appellant's job, but did not attempt to determine whether she underwent any formal or informal training or other vocational preparation to earn the 2001 salary, merely ascribing it to appellant's "self-rehabilitation" as evidenced by her increased salary. The Office did not explain this assumption, particularly in light of the fact that in 1995 the employing establishment and the Office found a similar administrative/clerical position vocationally suitable for appellant at that time and these present administrative duties do not appear to differ significantly from those 1995 "suitable" duties except for subject matter involved.

The Board finds that the record does not support that appellant has either been retrained or obtained any vocational preparation or has obtained a series of progressively more responsible positions, as her various jobs held between 1995 and 2000 were all entry level jobs. Therefore, the Board finds that in this case an increase in pay alone, without any additional training, vocational preparation or progressively more responsible positions is insufficient upon which to base the conclusion that appellant has been vocationally "self-rehabilitated." This conclusion is underscored by the testimony at the hearing which revealed that appellant was fired after her hiring superior left, because she lacked the skills and training required in the job to perform it properly.

[9] The Board also notes that the Office, in its January 3, 2001 notice of proposed reduction of compensation, used the pay rate of appellant's date-of-injury job on June 12, 2000 rather than the current pay rate as of January 3, 2001. This is inappropriate for comparison with her December 15, 2000 salary.

[10] *Odessa C. Moore*, 46 ECAB 681 (1995); *Ronald M. Yokota*, 33 ECAB 1629 (1982); *Robert M. Caldwell*, 13 ECAB 437 (1962).

[11] *Penny L. Baggett* 50 ECAB 559 (1999); *Billy R. Beasley*, 45 ECAB 244 (1993); *Richard R. Phillips*, 44 ECAB 188 (1992); *Willard N. Chuey*, 34 ECAB 1018 (1983); *Stephen M. Planieta*, 33 ECAB 519 (1982).

Therefore, appellant has not been vocationally rehabilitated and the Office failed to discharge its burden of proof to demonstrate an increased wage-earning capacity in appellant.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated February 27 and December 20, 2001 are hereby reversed.

Dated, Washington, DC
October 2, 2002

Alec J. Koromilas
Member

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member