U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JACQUELINE HOLLISTER and U.S. POSTAL SERVICE, POST OFFICE, Chicago, IL

Docket No. 03-219; Submitted on the Record;
Issued April 2, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON, A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof in reducing appellant's compensation based on its determination that the position of a receptionist represented appellant's wage-earning capacity; and (2) whether the Office properly denied modification of appellant's loss of wage-earning capacity determination.

This is the fourth appeal in the present case.[1] In an August 16, 2002 decision, the Board set aside the February 8, 2001 decision of the Office and remanded the case for the Office to reopen appellant's claim for a merit review. The Board found that the Office abused its discretion by refusing to reopen appellant's claim for further review on its merits under 5 U.S.C. § 8128.[2] The facts and circumstances of the case up to that point are set forth in the Board's prior decision and incorporated herein by reference.

In a decision dated October 16, 2002, the Office denied appellant's request for reconsideration of the November 19, 1999 decision on the grounds that the evidence submitted in support of the request for reconsideration was insufficient to warrant modification of the prior decision.

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[1] Appellant's claim was accepted for a head contusion, concussion, post-traumatic anxiety neurosis and schizophrenic reaction. Appellant stopped work on August 29, 1975 and did not return. On October 13, 1999 the Office issued a notice of proposed reduction of compensation, finding that appellant was no longer totally disabled. The Office noted that appellant had the capacity to earn wages as a receptionist at the rate of $360.00 a week. The Office noted that this position was in compliance with the restrictions of appellant's treating physician and Board-certified psychiatrist, Dr. Jeffrey Klopper, that appellant work in a low stress position. By decision dated November 19, 1999, the Office adjusted appellant's compensation benefits to reflect her wage-earning capacity as a receptionist. In an October 3, 2000 letter, appellant requested reconsideration of her claim. By decision dated February 8, 2001, the Office denied appellant's application for review without conducting a merit review on the grounds that the evidence submitted was cumulative in nature and insufficient to warrant review of the prior decision.

[2] Docket No. 01-1527 (issued August 16, 2002).

The Board finds that the Office met its burden of proof in reducing appellant's compensation benefits based on its determination that the position of a receptionist represented appellant's wage-earning capacity.

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, his or her usual employment, the employee's age and vocational qualifications and the availability of suitable employment.[3] When the Office makes a medical determination of partial 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, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open 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 or wage rate and availability in the open market should be made through contact with the state employment service or other applicable services. Finally, application of the principles set forth in the *Alfred C. Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.[4]

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.[5]

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 his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, his degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his wage-earning capacity in his 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 a job reasonably available in the general labor market in the commuting area in which the employee lives.[8]

Appellant was referred for vocational rehabilitation in 1988, 1993 and in 1999. In a rehabilitation closure report dated October 1, 1999, the counselor indicated that there were a number of jobs available in appellant's area of residence which are suitable to her diagnosis and functional capacity level. Appellant was evaluated to have transferable skills and was provided

[3] *See James R. Verhine*, 47 ECAB 460 (1996); 5 U.S.C. § 8115(a).

[4] *See Hattie Drummond*, 39 ECAB 904 (1988); *Albert C. Shadrick*, 5 ECAB 376 (1953).

[5] *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

[6] *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

[7] *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

[8] *Id.*

with job search assistance toward employment in light clerical positions such as a general clerk or a receptionist. The labor market survey provided by the rehabilitation counselor documented numerous receptionist or general clerk positions were available in appellant's current commuting area and that the wage of the position was $360.00 per week for a receptionist. The rehabilitation counselor noted that there were receptionist and general clerk positions available and that appellant met the requirements and were within the medical restrictions established by Dr. Klopper. She noted that appellant made some effort in the job placement process but did not show diligent follow through on the provided job leads. Where vocational rehabilitation is unsuccessful, the rehabilitation counselor will prepare a final report, which lists two or three jobs which are medically and vocationally suitable for the employee and proceed with information from a labor market survey to determine the availability and wage rate of the position.[9]

In this case, the Office received a work capacity evaluation from appellant's attending physician, Dr. Klopper, dated December 21, 1996, which indicated that appellant reached maximum medical improvement. He noted that appellant could work in her usual workplace as long as there was a lower stress level. Dr. Klopper noted in his report of March 31, 1997 that appellant continued to have residual disabilities related to her diagnosis of depressive disorder not otherwise specified and post-traumatic stress disorder. However, he noted that appellant's residuals did not prevent her from obtaining a low stress, low volume job. Appellant submitted no other reports at that time indicating that she had greater restrictions than those imposed by Dr. Klopper.

The Board 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 receptionist represented appellant's wage-earning capacity.[10] The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of receptionist and that such a position was reasonably available within the general labor market of appellant's commuting area. Appellant, did not submit any medical evidence or legal argument to demonstrate that the selected position was unsuitable to her partially disabled condition. Thereafter, the Office finalized its loss of wage-earning capacity determination. Because the Office followed proper procedures in determining appellant's loss of wage-earning capacity, the Board affirms the Office's reduction of appellant's compensation.

The Board further finds that appellant did not submit sufficient medical evidence, following the Office's November 19, 1999 decision, to justify modification of the Office's loss of wage-earning capacity determination.

Once the loss of wage-earning capacity 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,

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.813.2 (December 1993).

[10] *See Clayton Varner*, 37 ECAB 248, 256 (1985).

or the original determination was, in fact, erroneous. The burden of proof is on the party attempting to show modification of the award.[11]

After the Office properly found that appellant could perform the modified duties of receptionist, the pertinent medical issue is whether there had been any change in her condition that would render her unable to perform those duties.[12] For a physician's opinion to be relevant on this issue, the physician must address the duties of the selected position.[13] However, medical evidence submitted by appellant after the loss of wage-earning capacity determination did not specifically address whether the position of receptionist was unsuitable. Dr. Klopper's report of June 13, 2000 noted that appellant's medical issues relating to the schizophrenic reaction were determining factors that would contribute to appellant's ability to maintain any job. He indicated that the residuals from appellant's injury were extensive and interfered with her rehabilitation process and had not permitted her to hold a job. Although Dr. Klopper's opinion supported total disability, his conclusory statement failed to note a change in her condition which would render her unable to perform the position of receptionist nor did he retract or distinguish his previous opinion which indicated that appellant could perform in a low stress, low volume job situation.[14] The medical reports from Dr. Klopper released appellant to work in a low stress, sedentary position such as a receptionist. His release of appellant medically certified that she would be able to maintain consistent participation in work activities as long as appellant was in a low stress position. Also submitted was a report from Dr. Fiona Hill, a psychologist, dated April 13, 2000. Dr. Hill noted that appellant's language abilities were intact; and there were significant deficits in attention, visual/spatial processing, delayed memory and processing speed. She noted that these deficits would likely impair appellant's functioning to the point that managing a simple job would be difficult. However, Dr. Hill did not make any finding that appellant remained totally disabled or unable to do any work due to residuals of her employment injury.[15]

The Board finds that there is no medical evidence which establishes a change in appellant's employment-related condition such that a modification of the Office's loss of wage-earning capacity determination would be warranted. The evidence from Dr. Hill and Dr. Klopper does not indicate that the position of receptionist was unacceptable. Consequently, appellant has failed to carry her burden of proof to establish modification of the wage-earning capacity determination.

[11] *James D. Champlain*, 44 ECAB 438 (1986).

[12] *Phillip S. Deering*, 47 ECAB 692 (1996).

[13] *Id.*

[14] *Id.*; *see also Theron J. Barham*, 34 ECAB 1070 (1983) (where the Board found that a vague and unrationalized medical opinion on causal relationship had little probative value).

[15] *Id.*

The decision of the Office of Workers' Compensation Programs dated October 16, 2002 is affirmed.

Dated, Washington, DC
April 2, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member