U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BARBARA RODMAN and DEPARTMENT OF THE NAVY, DEFENSE LOGISTICS AGENCY, Bremerton, WA

Docket No. 02-771; Submitted on the Record;
Issued January 28, 2003

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective February 13, 2002.

On December 23, 1996 appellant, then a 45-year-old supply technician, filed a claim for a recurrence of disability beginning December 5, 1996.[1] The Office accepted the claim for bilateral carpal tunnel syndrome. Appellant came under the care of Dr. Larry D. Iversen, an orthopedist. She underwent a right carpal tunnel release on April 15, 1997, left carpal tunnel release on May 8, 1997 and left ulnar nerve transposition surgery on October 14, 1997. On December 7, 1999 the left carpal tunnel procedure was repeated and on January 18, 2000, Dr. Iversen did a right ulnar nerve transposition for right tardy ulnar nerve palsy.

In a report dated April 26, 2000, Dr. Iversen noted that appellant continued to be impaired with neuritis and neuralgia of the right forearm, despite her recent ulnar nerve surgery. He opined that appellant could work on a full-time basis with restrictions, including no lifting over five pounds.

The Office referred appellant for a second opinion evaluation with Dr. Harry Reese, a Board-certified orthopedic surgeon, on June 12, 2000. In his report of the same date, Dr. Reese discussed appellant's history of injury and the medical record. He reported current symptoms and the results of his orthopedic examination and objective medical testing. Dr. Reese opined that appellant had work-related ulnar nerve irritation. He recommended that appellant undergo functional capacity evaluation (FCE) to ascertain her work restrictions.

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[1] Appellant originally filed a claim for carpal tunnel syndrome of the right hand on July 28, 1987, which was accepted by the Office. She underwent a right carpal tunnel release on December 17, 1987. Appellant returned to work in January 1989. She was off work again for a right trigger thumb release, which was also performed on August 4, 1989. Appellant appears to have worked regularly until she filed her recurrence of disability claim for December 5, 1996.

An FCE was conducted by a physical therapist on July 27, 2000. Appellant was found able to perform light-duty level work. It was noted that a copy of her job description as a supply technician was provided by appellant's rehabilitation specialist. The physical therapist stated that appellant's testing demonstrated that she could perform reaching on an occasional basis only. The report further read:

> "The job description I received does not specify the exact amount of reaching involved. The duties listed included processing documents, use of automated systems and the telephone. [Appellant] states her job mainly involves filing, paperwork and use of automated systems and the telephone. [She] states her job mainly involves filing paperwork and use of the keyboard.… I presume from the information I have received that supply technician duties require frequent to constant reaching."

In a September 13, 2000 letter, Dr. Iversen indicated that he had reviewed the job analysis for the supply technician position and felt that the job could not be modified enough in terms of the required reaching, handling, grasping and fingering to match appellant's physical restrictions. He stated that the supply technician job was outside of appellant's physical capacities based on the need for her to perform frequent reaching and continuous handling, grasping and fingering. Dr. Iversen further stated that he relied on the findings of the FCE.

In a January 4, 2001 letter, the employing establishment informed appellant that her position of supply technician was to be terminated in 30 days because it was unable to accommodate her work restrictions.

The record indicates that on January 15 2001 appellant notified the rehabilitation specialist assigned to her case that she was relocating to Japan and would not be participating in the job skills training.

In a March 12, 2001 report, Dr. Reese indicated that he had reviewed the July 27, 2000 FCE and saw no reason why appellant should be restricted in reaching to only an occasional basis.

In a December 12, 2000 report, Dr. Reese reiterated that the job of a supply technician as described in the record required no lifting or carrying over 25 pounds. He stated:

> "There is frequent reaching that is done between shoulder height and mid-calf level and generally tasks that require reaching from between waist level and shoulder height. Given the findings of the performance-based physical capacity evaluation, it would seem that the job analysis of supply technician is compatible. This examiner would still suggest that the worker is capable of performing the work as a supply technician."

On March 14, 2001 a rehabilitation specialist indicated that appellant had decided to move to Japan and was not cooperating with rehabilitation efforts or job placement. A job classification was prepared for the position of a general clerk, which was categorized as sedentary to light work. The job description for general clerk under the *Dictionary of Occupational Titles* (DOT) Number 209.562-010 stated that the person would have to write, type

or otherwise enter information onto a computer to prepare correspondence, bill statements, receipts or documents. The general clerk would be required to handle correspondence, make copies of documents, answer telephones, convey messages and run errands as needed. The physical demands of the job were listed as light strength and frequent reaching, handling and fingering. A general clerk was required to lift less than 10 pounds on a frequent basis and less than 20 pounds on an occasional basis. The rehabilitation specialist reported that the job was being performed in sufficient numbers so as to make it reasonably available to appellant within her commuting area.

In a March 27, 2001 letter, appellant responded that she was unable to perform a clerical type of job.

On September 6, 2001 the Office adjusted appellant's compensation to reflect that she had the capacity to earn wages as a general clerk.

The Office subsequently determined that a conflict arose in the medical record concerning whether or not appellant was capable of returning to her date-of-injury job. The Office, therefore, referred appellant for an impartial medical evaluation with Dr. David L. Schenkar, a Board-certified orthopedic surgeon. The physician was provided with a copy of the medical record, a statement of accepted facts, job description and a statement of conflict of medical opinion. In a report dated October 16, 2001, Dr. Schenkar discussed appellant's history of bilateral hand, wrist and arm pain since 1986. He noted that she had diminished grip strength in the right hand more than the left hand and complaints of an uncomfortable feeling around the right elbow. The bilateral carpal incisions and ulnar decompression incisions showed no abnormalities. Dr. Schenkar felt that the objective evidence indicated that appellant could perform medium level work despite her contention that she was unable to return to her job. He found that appellant was not disabled from performing the full duties of supply technician.

On February 13, 2002 the Office issued a notice of proposed termination of compensation, finding that the medical evidence demonstrated that appellant was no longer disabled from performing the duties of her date-of-injury job. The Office advised appellant that she had thirty days to submit additional evidence if she disagreed with the proposed action.

In a decision dated March 20, 2002, the Office terminated appellant's wage-loss compensation.

The Board initially finds that the Office improperly reduced appellant's wage-loss compensation on September 6, 2001 to reflect her capacity to earn wages as a general clerk.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of benefits.[2]

[2] *James B. Christenson*, 47 ECAB 775 (1996); *Wilson L Clow, Jr.*, 44 ECAB 157 (1992).

Under section 8115(a) of the Federal Employees' Compensation Act,[3] wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represented wage-earning capacity or if the employee had no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect wage-earning capacity in the employee's 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.[5] The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area where the employee lives.[6] 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.[7]

The Office procedures pertaining to vocation rehabilitation services emphasize returning partially disabled employees to suitable employment.[8] If the employment injury prevents the injured worker from returning to the job held at the time of injury, vocational rehabilitation services are provided to assist the employee in placement with the previous employer in a modified position or, if not feasible, developing an alternative plan based on vocational testing which may include medical rehabilitation, training and/or placement services.[9]

Based on appellant's work experience, an Office rehabilitation specialist identified the constructed job of general clerk as being reasonably available in her commuting area and capable with her education and skills. The Office reviewed the selected position and found that it was consistent with appellant's work restrictions and modified appellant's compensation payments of September 6, 2001 to reflect that she had the capacity to earn wages as a general clerk. The Board, however, finds that a conflict existed in the record at the time of the September 6, 2001 reduction as to whether appellant could perform repetitive reaching. This conflict was acknowledged by the Office subsequent to the reduction of appellant's benefits. Although the Office determined that the conflict existed between Dr. Iversen and Dr. Reese as to whether appellant could return to her regular job, that conflict was also relevant to appellant's capacity to perform the job of a general clerk, which also required frequent reaching. Thus, the Board finds that the Office erred in reducing appellant's compensation on September 6, 2001.

[3] 5 U.S.C. § 8115(a).

[4] *See Richard Alexander*, 480 ECAB 432 (1997); *Pope D. Cox*, 39 ECAB 143 (1988).

[5] *Id.*

[6] *Rosa M. Garcia*, 49 ECAB 272 (1998).

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.814.8 (December 1993).

[8] *Id.*

[9] *Id*. at Chapter 2.813.6(b); *see Sylvia Bridcut*, 48 ECAB 162 (1996); *Clayton Varner*, 37 ECAB 248 (1985).

The Board nonetheless finds that the Office properly terminated appellant's compensation effective February 13, 2002.

The Board notes that the Office correctly determined that a conflict existed in the record between Dr. Iversen and the Office's referral physician, Dr. Reese, as to whether appellant was capable of returning to his date-of-injury job as a supply technician. The Office also properly referred appellant for an impartial medical evaluation with Dr. Schenkar, who opined that appellant was capable of medium level of strength work and that she was capable of working in her prior date-of-injury job as a supply technician.[10]

Where opposing medical reports of virtually equal weight and rationale exist and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently rationalized and based upon a proper factual background, must be given special weight.[11] The Board has reviewed the opinion of the impartial medical specialist in this case and finds that his opinion is entitled to special weight. Dr. Schenkar has reviewed the entire medical record and a statement of accepted facts provided by the Office. He has considered the work capacity evaluation at issue and found that appellant is capable of the frequent lifting required by her date-of-injury job. Because Dr. Schnekar provided a reasoned opinion based on a proper factual background, the Office correctly credited his opinion in terminating appellant's compensation effective February 13, 2002.

Given the Board's determination that the Office prematurely adjusted appellant's compensation on September 6, 2001, appellant is entitled to compensation for the period of September 6, 2001 to February 13, 2002.

The decision of the Office of Workers' Compensation Program dated September 6, 2001 is reversed and the decision dated March 20, 2002 is hereby affirmed.

Dated, Washington, DC
January 28, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[10] Section 8123(a) of the Act provides: "If there is 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." *See* 5 U.S.C. § 8123(a).

[11] *See Kemper Lee*, 45 ECAB 565 (1994); *Roger S. Wilcox*, 45 ECAB 265 (1993).

Michael E. Groom
Alternate Member