United States Department of Labor
Employees' Compensation Appeals Board

KIMBERLY A. RINEER, Appellant	)	
and	)	**Docket No. 04-390**
	)	**Issued June 25, 2004**
DEPARTMENT OF TRANSPORTATION, LANCASTER AIR TOWER, Lititz, PA, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On December 1, 2003 appellant, through her attorney, filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated November 19, 2003 reducing appellant's compensation based on her capacity to earn wages as a part-time secretary. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office met its burden of proof to reduce appellant's compensation benefits based on her capacity to earn wages as a part-time secretary.

FACTUAL HISTORY

On July 20, 1995 appellant, then a 34-year-old air traffic control specialist, filed a notice of traumatic injury alleging that she developed an emotional condition due to sexual harassment in the performance of federal duties. The Office accepted appellant's claim for adjustment disorder on February 27, 1996. On January 28, 1997 the Office authorized compensation

benefits. By decision dated May 11, 1998, the Office denied appellant's claim for any continuing compensation benefits. On August 17, 2000 in response to a request for reconsideration the Office vacated the May 11, 1998 decision. The Office approved appellant's claim on November 6, 2000 and accepted the additional condition of major depression, single episode.

In a decision dated November 4, 2002, the Office reduced appellant's compensation benefits based on her capacity to earn wages as a part-time secretary working 25 hours a week.[1] Appellant, through her attorney requested an oral hearing on November 19, 2002. Appellant's attorney later amended this request to a review of the written record. In a brief submitted in support of appellant's claim, appellant's attorney alleged that the medical evidence was not reasonably current, that there was an existing conflict of medical opinion evidence regarding appellant's ability to work even part time and that the rehabilitation counselor failed to conduct vocational testing in determining that appellant could perform the duties of a secretary on a part-time basis. By decision dated November 19, 2003, the hearing representative affirmed the Office's November 4, 2002 decision.

LEGAL PRECEDENT

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.[2] Section 8115 of the Federal Employees' Compensation Act[3] provides that 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 the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, the degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect his wage-earning capacity in his disabled condition.[4]

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office 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 that employee's capabilities with regard to his physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in *Albert C. Shadrick*[5] will result in the percentage

[1] The Office did not provide appellant with a prereduction notification as required by its procedures. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment*: *Determining Wage-Earning Capacity*, Chapter 2.814.8(e) (December 1995).

[2] *Mary A. Lowe*, 52 ECAB 223, 223-24 (2001).

[3] 5 U.S.C. §§ 8101-8193, 8115.

[4] *Pope D. Cox,* 39 ECAB 143, 148 (1988).

[5] 5 ECAB 376 (1953).

of the employee's loss of wage-earning capacity. The basic rate of compensation paid under the Act is 66 2/3 percent of the injured employee's monthly pay.[6]

ANALYSIS

In determining appellant's wage-earning capacity, the Office relied on the October 6, 2000 report for Dr. Andrew R. Bolmann, a Board-certified psychiatrist and Office second opinion physician, who noted appellant's history of injury and reviewed her medical records. He diagnosed major depression, single episode due to appellant's employment-related sexual harassment. Dr. Bolmann concluded that appellant was partially disabled due to her continued employment-related depression, but that she could work five or six hours a day.

Appellant submitted a report dated October 8, 2001 from Dr. Roger C. Sider, a Board-certified psychiatrist, who also diagnosed work-related major depression. Dr. Sider stated that appellant displayed significant symptoms including anergia, lack of motivation and adhedonia due to her accepted employment-related condition. He also noted appellant's additional diagnosis of fibromyalgia and accompanying multiple joint pains. Dr. Sider stated that appellant attempted to return to work as a gardener in the summer and fall of 2000, but that she was unable to continue this part-time work due to her severe depression. He stated: "I do not regard her as employable at this time although I continue to work with her in the hope that the day will come when she will be able to regain her ability to work productively in the workforce."

Section 8123(a) of the Act,[7] 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." The Office's second opinion physician, Dr. Bolmann, a Board-certified psychiatrist, examined appellant and concluded that she could work five hours a day. Appellant's physician, Dr. Sider, a Board-certified psychiatrist, provided treatment for appellant beginning in March 2000, noted her attempt to return to work in the summer and fall of 2000 and opined that the severity of her symptoms of depression currently rendered her totally disabled. Due to this disagreement between appellant's attending physician and the Office referral physician on the extent of appellant's disability for work, the Board finds that there is an unresolved conflict of medical opinion evidence requiring referral to an impartial medical specialist.

As the Office has not resolved the conflict of medical opinion evidence in accordance with the provision of the Act, the Office did not meet its burden of proof to justify the reduction of appellant's monetary compensation on November 4, 2002 based on the report of Dr. Bolmann.

CONCLUSION

The Board finds that there is an unresolved conflict of medical evidence such that the Office failed to meet its burden of proof to reduce appellant's compensation benefits based on her capacity to earn wages as a part-time secretary.

[6] *Karen L. Lonon-Jones*, 50 ECAB 293, 297 (1999).

[7] 5 U.S.C. §§ 8101-8193, 8123(a).

ORDER

IT IS HEREBY ORDERED THAT the November 19, 2003 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 25, 2004
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member