United States Department of Labor
Employees' Compensation Appeals Board

TRACY A. GOLOBORODKO, Appellant	)	
and	)	**Docket No. 04-695**
	)	**Issued: June 16, 2004**
DEPARTMENT OF AGRICULTURE, FOREST SERVICE, Provo, UT, Employer	)	

Appearances:
Tracy A. Goloborodko, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On January 20, 2004 appellant filed a timely appeal from an Office of Workers' Compensation Programs' merit decision dated November 10, 2003. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.[1]

ISSUE

The issue is whether the Office properly reduced appellant's compensation to zero to reflect her wage-earning capacity in the selected position of receptionist.

FACTUAL HISTORY

On July 7, 1999 appellant, then a 26-year-old forestry aid, filed a traumatic injury claim, alleging that she injured her left ankle on July 3, 1999 when she slipped on some rocks. The Office accepted appellant's claim for a left sprained ankle and foot and left reflex sympathetic

[1] Appellant submitted additional evidence after the Office's decision, but the Board cannot consider such evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

dystrophy. Appellant has not worked since the injury. In a work capacity evaluation dated March 16, 2000, appellant's treating physician, Dr. Richard M. Rosenthal, a Board-certified anesthesiologist with a specialty in pain medicine, indicated that on June 1, 2000 appellant could work full time with restrictions of lifting less than 50 pounds and occasionally lifting 10 to 25 pounds. He indicated that she could walk less than 200 yards and stand for 30 to 60 minutes. In a report dated April 3, 2001, Dr. Rosenthal stated that appellant required restrictions of no lifting greater than 25 pounds and occasional lifting of 10 pounds. He stated that appellant could not stand longer than 15 minutes in 1 position and she should avoid excessive walking. The Office referred appellant for vocational rehabilitation on May 29, 2000 and appellant signed a vocational rehabilitation plan for job placement as a receptionist on September 24, 2001. The vocational rehabilitation counselor relied on Dr. Rosenthal's restrictions in his March 16, 2000 report, in identifying jobs that appellant could perform. The vocational rehabilitation counselor opined that appellant could perform the jobs of information clerk, appointment clerk and receptionist which were available full time on September 24, 2001. The salary of the receptionist ranged from $280.00 to $320.00 a week.

As appellant was unable to secure employment, vocational rehabilitation services were closed effective April 1, 2002. In the April 1, 2002 closure report, the vocational rehabilitation counselor, William Simmons, stated that entry level work for a receptionist existed without requirements for typing or computer literacy. He noted, however, that employers pay less for those without computer or typing experience and recommended a wage-earning capacity at the lower end for appellant at $280.00 a week. Mr. Simmons determined that the position of receptionist Department of Labor's *Dictionary of Occupational Titles*, (DOT) No. 237.367-038 was in the sedentary category which meant that it did not require prolonged standing or walking and only required occasional lifting of up to 10 pounds. He concluded that the position of receptionist was suitable, both medically and occupationally and was reasonably available in appellant's geographic area. Appellant's current pay rate for her job and step when injured was $217.39.

In a November 19, 2002 notice of proposed reduction of compensation, the Office advised that appellant's compensation be reduced to zero because the factual and medical vocational evidence established that appellant was no longer totally disabled. The Office advised appellant that she had the capacity to earn the wages of a receptionist and requested that she submit additional evidence or argument within 30 days if she disagreed with the proposed action.

Appellant then submitted reports from Dr. Rosenthal, dated November 20, December 2 and 18, 2002, in which he described appellant's findings on examination and detailed the management of her medications. Dr. Rosenthal did not address appellant's ability to work but stated that returning her to work was a treatment goal. The record also contains other reports, dated between June and October 2002, in which Dr. Rosenthal provided examination findings and discussed medication management. None of these reports indicated that appellant's ability to work had changed.

On December 10, 2002 appellant informed the Office that Dr. Rosenthal no longer performed disability evaluations and she requested an additional 30 days to obtain a report from Dr. Chuck Norp, to whom she was referred by Dr. Rosenthal. The Office, however, subsequently denied her request for treatment by Dr. Norp. Appellant stated that she had no

skills such as computer knowledge or typing to be a receptionist. Appellant also stated that she was on strong medications which made "it almost impossible to get a job" since all the work places were drug-free.

In a January 7, 2003 decision, the Office reduced appellant's compensation to zero and terminated appellant's compensation benefits effective January 26, 2003. The Office found that appellant had the capacity to earn wages as a receptionist at the rate of $280.00 a week and the position was medically and vocationally suitable for her. The Office stated that the vocational rehabilitation counselor recommended the lower end salary range for the receptionist position since appellant lacked computer and typing skills. Further, the Office noted that the rehabilitation counselor provided documentation that receptionist jobs were reasonably available which did not require computer literacy or proficient typing skills.[2]

By letter dated February 1, 2003, appellant requested an oral hearing before an Office hearing representative which was held on August 14, 2003. At the hearing, appellant stated that a note by Dr. Rosenthal "probably" dated January 2001, stated that she was off work until further notice. Appellant complained that her reflex sympathetic dystrophy traveled "from my left leg to my right leg to my right arm," but the Office hearing representative explained that her claim had not been accepted for reflex sympathetic dystrophy to her right leg and arm. Appellant identified a couple of employers who would not hire her because she was on medication. Appellant stated that she did not feel she could perform the job of receptionist due to her medication and pain. Appellant continued to submit reports, dated between January and October 2003, in which Dr. Rosenthal presented findings which were similar to those contained in his reports from late 2003.

On November 10, 2003 the Office hearing representative affirmed the Office's January 7, 2003 decision.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[3] An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.[4]

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 or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent the employee's wage-earning capacity or if the employee has no actual wages, the wage-earning capacity is determined with due regard to the nature of the injury, the

[2] The Office stated that its decision did not affect appellant's medical reimbursement for her work-related injury.

[3] *John D. Jackson*, 55 ECAB ____ (Docket No. 02-2281, issued April 8, 2004); *James B. Christenson*, 47 ECAB 775, 778 (1996); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

[4] 20 C.F.R. §§ 10.402, 10.403 (2002); *see Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

degree of physical impairment, the employee's usual employment, age, 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.[5]

The Office must initially determine appellant's medical condition and work restrictions before selecting an appropriate position that reflects her vocational wage-earning capacity. The Board has stated that the medical evidence upon which the Office relies must provide a detailed description of appellant's condition.[6] Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.[7]

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 DOT or otherwise available in the open labor market, that fits the employee's capabilities with regard to his or her physical limitations, education, age and prior experience.[8] 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 the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.[9]

ANALYSIS

In this case, on September 24, 2001 the vocational rehabilitation counselor identified the position of receptionist as being reasonably available within the geographic area where appellant resides and medically and vocationally suitable for appellant. In finding that appellant was capable of performing the duties of a receptionist, the vocational rehabilitation counselor relied on the March 16, 2000 physical restrictions of appellant's treating physician, Dr. Rosenthal, that appellant could work full time with restrictions of lifting less than 50 pounds and occasionally lifting 10 to 25 pounds. Dr. Rosenthal also indicated that appellant could walk less than 200 yards and stand for 30 to 60 minutes. On April 3, 2001 Dr. Rosenthal gave appellant slightly greater restrictions, stating that she could not lift more than 25 pounds, could occasionally lift 10 pounds and could not stand longer than 15 minutes in one position. The physical requirements of the receptionist position DOT #237.367-038 met either the March 2000 or April 2001 physical restrictions because this sedentary job does not require prolonged standing or walking and only requires occasional lifting of up to 10 pounds. Appellant did not

[5] 5 U.S.C. § 8115(a); *see Dorothy Lams*, 47 ECAB 584 (1996); *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

[6] *See William H. Woods*, 51 ECAB 619 (2000); *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

[7] *Carl C. Green, Jr.*, 47 ECAB 737, 746 (1996).

[8] *See Luis R. Flores*, 54 ECAB ____ (Docket No. 01-1148, issued December 18, 2002).

[9] *See William H. Woods, supra* note 6; *Hattie Drummond*, 39 ECAB 904 (1988); *see Albert C. Shadrick*, 5 ECAB 376 (1953).

submit any additional medical evidence to show that her restrictions changed.[10] Appellant contended that the medication she was taking would preclude her from successfully securing a job. She, however, did not submit any medical evidence describing how the medication impaired her ability to work.

Further, although appellant did not have computer or typing experience, in his April 1, 2002 report, the vocational rehabilitation counselor noted that some receptionist jobs did not require computer or typing experience, although the employer might pay less for those lacking that experience. The vocational counselor therefore recommended a wage-earning capacity of $280.00 based on the low range of the pay scale for a receptionist. Since appellant's current pay rate and step for her job when injured was $217.39, she did not sustain a wage loss.

CONCLUSION

The medical and vocational evidence of record establishes that appellant has the wage-earning capacity to perform the duties of a receptionist and that the position is reasonably available within her geographic area. The Board finds that the Office properly reduced appellant's compensation to zero and terminated disability benefits effective January 26, 2003.

ORDER

IT IS HEREBY ORDERED THAT the November 10, 2003 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: June 16, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[10] Appellant submitted numerous additional reports, dated in 2002 and 2003, in which Dr. Rosenthal reported her findings on examination and detailed the management of her medications. None of these reports indicated that appellant's ability to work had changed.