United States Department of Labor
Employees' Compensation Appeals Board

K.T., Appellant	)	
and	)	**Docket No. 06-2127**
	)	**Issued: April 5, 2007**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Fresno, CA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 18, 2006 appellant filed a timely appeal from a May 25, 2006 decision of the Office of Workers' Compensation Programs which reduced her compensation benefits and a June 12, 2006 decision denying merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office met its burden of proof to reduce appellant's compensation benefits based on her capacity to earn wages as a telephone solicitor; and (2) whether the Office properly refused to reopen her claim for further review of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On May 9, 1999 appellant, then a 24 year-old tax examining assistant, sustained a left ankle sprain when she slipped and fell at work. She stopped work that day and has not returned.[1] The accepted conditions include left ankle reflex sympathetic dystrophy. Appellant was placed on the periodic rolls.[2] In December 1998, she moved to Kent, Washington, in June 1999, to Sevierville, Tennessee and in September 20, 2000 to San Antonio, Texas where she came under the care of Dr. Stephanie Jones, a Board-certified anesthesiologist. By report dated April 29, 2004, Dr. Jones advised that appellant was capable of sedentary work without prolonged standing or walking. In a July 28, 2004 work capacity evaluation, Dr. David Cantu, Board-certified in family medicine, advised that appellant could work eight hours a day with restrictions for one year of two hours of walking, standing, twisting, bending, stooping, lifting and no squatting, kneeling or climbing. Lifting was restricted to 10 pounds.

In April 2004, appellant moved to Port Aransas, Texas, near Corpus Christi. On January 20, 2005 she was referred to a vocational rehabilitation counselor, Donna Johnson, M. Ed. As appellant was unable to secure employment, on May 31, 2005 Ms. Johnson identified the positions of cashier, ticket seller and telephone solicitor as within appellant's sedentary strength category. Ms. Johnson noted appellant's work restrictions and that the positions were reasonably available in the local labor market of Corpus Christi, Texas. In an undated letter received on November 10, 2005, appellant informed the Office that she had moved from Port Aransas to New Braunfels, Texas.

By letter dated January 19, 2006, the Office proposed to reduce appellant's compensation benefits based on her capacity to earn wages as a cashier. In a response dated January 27, 2006, appellant disagreed with the proposed reduction, contending that she could not stand for more than one-half hour per day. In reports dated September 2 and December 2, 2005, Dr. Jones noted diagnoses of reflex sympathetic dystrophy and leg pain. In a February 3, 2006 report, she advised that the cashier position would require too much standing but that appellant could otherwise perform sedentary work.

On March 23, 2006 the Office proposed to reduce appellant's compensation benefits based on her capacity to earn wages as a telephone solicitor.[3] In an April 7, 2006 treatment note, Dr. Jones reiterated her diagnoses and advised that appellant was stable.

By decision dated May 25, 2006, the Office reduced appellant's compensation benefits, effective May 23, 2006 based on her capacity to earn wages as a telephone solicitor.

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[1] Appellant initially fell on a wet floor at work on May 2, 1989 and fell in the parking lot at work on May 9, 1989.

[2] On February 28, 1996 appellant was granted a schedule award for a 100 percent loss of use of the left leg. The award ran from August 16, 1995 to February 20, 2001 and during this period, she also received retirement benefits from the Office of Personnel Management. After the schedule award expired in 2001, appellant opted the Federal Employees' Compensation Act benefits and she was returned to the periodic rolls.

[3] Section 299.357-014 of the *Dictionary of Occupational Titles* (DOT) provides that the position of telephone solicitor requires sedentary strength and it is described as a position in which merchandise or services are solicited over the telephone. *United States Department of Labor, Dictionary of Occupational Titles*, 4th ed. rev. 1991.

On June 3, 2006 appellant requested reconsideration. In a May 25, 2006 report, Dr. Gerlyn Friesenhahn, a Board-certified neurologist, noted the history of injury and appellant's complaints of pain and recent leg weakness that caused falls. Dr. Friesenhahn advised that there were no neurologic findings on examination to account for her falls and advised that she used a cane. By decision dated June 12, 2006, the Office denied appellant's reconsideration request.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[4] 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.[5]

Section 8115 of the Act[6] and Office regulations provide 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 or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, usual employment, age, qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect the wage-earning capacity in his or her disabled condition.[7]

The Office must initially determine a claimant's medical condition and work restrictions before selecting an appropriate position that reflects his or her wage-earning capacity. The medical evidence upon which the Office relies must provide a detailed description of the condition.[8] Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.[9]

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 or her 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

[4] *James M. Frasher*, 53 ECAB 794 (2002).

[5] 20 C.F.R. §§ 10.402, 10.403; *John D. Jackson*, 55 ECAB 465 (2004).

[6] 5 U.S.C. §§ 8101-8193.

[7] 5 U.S.C. § 8115; 20 C.F.R. § 10.520; *John D. Jackson, supra* note 5.

[8] *William H. Woods*, 51 ECAB 619 (2000).

[9] *John D. Jackson, supra* note 5.

service.[10] Finally, application of the principles set forth in *Albert C. Shadrick*[11] will result in the percentage of the employee's loss of wage-earning capacity.[12]

In determining an employee's wage-earning capacity based on a position deemed suitable, but not actually held, the Office must consider the degree of physical impairment, including impairment results from both injury related and preexisting conditions, but not impairments resulting from post injury or subsequently acquired conditions. Any incapacity to perform the duties of the selected position resulting from subsequently acquired conditions is immaterial to the loss of wage-earning capacity that can be attributed to the accepted employment injury and for which appellant may receive compensation.[13]

ANALYSIS -- ISSUE 1

The Board finds that the Office did not properly find that appellant was capable of performing the selected position of telephone solicitor. The medical evidence consisted of the April 29, 2004 report provided by Dr. Jones and the July 28, 2004 work capacity evaluation provided by Dr. Cantu which established that appellant was no longer totally disabled and the Office properly referred her for vocational rehabilitation counseling in January 2005. Because appellant was unable to secure employment on May 31, 2005, the vocational rehabilitation counselor identified three positions, cashier, ticket seller and telephone solicitor, that fit appellant's capabilities. The Office based its May 25, 2006 decision on the latter position which is identified in the *Dictionary of Occupational Titles* as sedentary.[14] In a February 3, 2006 report, Dr. Jones advised that appellant could work a sedentary position. The medical evidence, therefore, established that she was physically capable of performing the telephone solicitor position.

As previously noted, however, the selected position must be reasonably available in appellant's commuting area. The rehabilitation counselor based her May 31, 2005 job classification survey on the Corpus Christi, Texas area. Appellant had moved from Port Aransas, Texas, in the Corpus Christi area, to New Braunfels, Texas in the Fall of 2005.[15] The Office did not reduce her compensation until May 23, 2006. Office procedures state that the availability of the employment is usually evaluated with respect to the area where the injured employee resides at the time the determination is made.[16] As the Office based its reasonable availability findings without any consideration of appellant's move in the fall of 2005, it failed to

[10] *James M. Frasher, supra* note 4.

[11] 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.403.

[12] *James M. Frasher, supra* note 4.

[13] *John D. Jackson, supra* note 5.

[14] *Supra* note 3.

[15] The Board notes that New Braunfels is located approximately 210 miles northwest of Port Aransas, Texas.

[16] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.814.8(c)(1) (December 1995).

meet its burden of proof to establish that the position of telephone solicitor was reasonably available in the general labor market in the commuting area in which appellant lived at that time, New Braunfels, Texas. Accordingly, the Office failed to establish that the position of telephone solicitor represented appellant's wage-earning capacity and failed to properly reduce her compensation benefits.

CONCLUSION

The Board finds that the Office did not meet its burden of proof in reducing appellant's wage-earning capacity based on her ability to earn wages in the constructed position of telephone solicitor because the Office did not establish that the selected position of telephone solicitor was reasonably available in appellant's commuting area of New Braunfels, Texas.

In view of the Board's disposition of the first issue, the second issue is moot.[17]

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 25, 2006 be reversed.

Issued: April 5, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[17] In light of this finding, the Board did not review Dr. Friesenhahn's report, which appellant submitted with her June 3, 2006 reconsideration request. Appellant also submitted evidence subsequent to the Board's June 12, 2006 decision. The Board cannot consider this evidence, however, as its review of the record is limited to the evidence of record which was before the Office at the time of its final decision. 5 U.S.C. § 501.2(c).