United States Department of Labor
Employees' Compensation Appeals Board

A.C., Appellant	)	
and	)	**Docket No. 07-1728**
	)	**Issued: January 10, 2008**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Birmingham, AL, Employer	)	

Appearances:
Madelyn A. Curry, for the Appellant
No appearance, for the Director

Oral Argument December 13, 2007

DECISION AND ORDER

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

JURISDICTION

On June 15, 2007 appellant filed an appeal from an October 19, 2006 decision of the Office of Workers' Compensation Programs reducing her compensation to zero and a May 3, 2007 decision of the Office denying her request for a hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether the Office properly reduced appellant's compensation to zero effective October 29, 2006 under section 8115 of the Federal Employees' Compensation Act based on her ability to earn wages in the selected position of registered nurse; and (2) whether the Office properly denied appellant's request for a hearing.

FACTUAL HISTORY

This is appellant's second appeal before the Board in this case. By decision dated August 22, 2002, the Board reversed the Office's November 21, 2000 affirmance of the

November 5, 1999 termination of appellant's compensation under section 8106(c) of the Act on the grounds she refused an offer of suitable work.[1] The Board found that the Office improperly found an offered automation clerk position to be suitable work without first obtaining medical evidence establishing that it was within appellant's restrictions. The Board further found that the Office did not afford appellant 30 days to respond to the job offer before terminating her compensation. The law and the facts of the case as set forth in the Board's prior decision are hereby incorporated by reference.

Following the Board's August 22, 2002 decision, the Office conducted additional development. In a January 10, 2003 report, Dr. Christopher S. Randolph, a Board-certified psychiatrist and second opinion physician, diagnosed severe major depression with psychotic features, hallucinations and a thought disorder. He stated that appellant was unemployable as she was psychotic. In an April 13, 2004 report, Dr. Paul G. Fredette, a Board-certified psychiatrist and second opinion physician, found appellant unable to work as she was unable to perform sustained tasks, was easily overwhelmed and could not deal with the general public. He diagnosed major depressive disorder, single episode.

In August 2005, appellant completed a bachelor's degree in nursing with a 3.74 grade point average. The Alabama Board of Nursing confirmed that appellant's license was active through December 2006.

In an October 19, 2005 letter, the Office referred appellant, the medical record and a statement of accepted facts to Dr. Stewart D. Waddell, a Board-certified psychiatrist and neurologist, for a second opinion examination. Dr. Waddell submitted a November 10, 2005 report reviewing the medical record. He noted that appellant was then pursuing a master's degree in nursing and taking additional college classes. Dr. Waddell characterized appellant's anger as "almost paranoid" at times. He diagnosed chronic major depression, single episode, symptoms of post-traumatic stress disorder, episodes of vagueness and a personality disorder not otherwise specified. Dr. Waddell stated that, while appellant's psychological disorders impaired her ability to work, "she should be able to hold at least part-time employment" or participate in a vocational rehabilitation program. He opined that appellant could return to work part time for three to four hours a day, gradually increasing to eight hours a day over a one to two month period. Dr. Waddell opined that appellant could not work "with her previous supervisor or in her previous setting" due to unresolved anger.

On March 8, 2006 the Office referred appellant for vocational rehabilitation services, based on Dr. Waddell's opinion that she was able to work. Jinnie Lawson, a vocational rehabilitation counselor, prepared a plan for appellant to seek employment as a registered nurse.[2]

[1] 53 ECAB 750 (2002). The Office accepted that on or before March 15, 1996 appellant, then a 28-year-old clerk typist, sustained prolonged depression and an adjustment reaction due to several workplace incidents. Appellant stopped work on March 18, 1996 and did not return. She received compensation on the periodic rolls from June 1996 onward.

[2] In an April 28, 2006 letter, appellant alleged that the rehabilitation plan was inappropriate and asserted that her physician should select a vocational rehabilitation counselor. In a May 11, 2006 letter, the Office denied appellants' request to change rehabilitation counselors, finding Ms. Lawson's actions appropriate and in conformance with Office guidelines.

On May 15, 2006 the Office opened a 90-day job placement effort for employment as a registered nurse, Department of Labor, *Dictionary of Occupational Titles* (DOT #075.364-010). A November 2004 labor market survey showed a national mean entry level wage of $50,490.00.

In a May 18, 2006 letter, the Office advised appellant that the selected registered nurse position was suitable work, commensurate with her medical and vocational capacities. The Office noted that appellant would receive 90 days of job placement assistance, after which her compensation would likely be reduced based on her ability to earn $50,490.00 in annual wages as a registered nurse. Ms. Lawson prepared an individual rehabilitation placement plan for appellant to spend four hours a day looking for work and contacting a minimum of 25 employers a week.

From May to August 2006, the vocational rehabilitation counselor forwarded appellant approximately 120 job leads for full-time registered nurse positions in Birmingham, Alabama. Appellant declined to sign the vocational rehabilitation plan or sign a release for information. She asserted that the Office should first reimburse her for all her educational expenses. In an August 4, 2006 report, Ms. Lawson stated that appellant was uncooperative in placement efforts.

Appellant completed a master's of nursing degree in August 2006.

By notice dated September 7, 2006, the Office advised appellant that it proposed to reduce her compensation to zero based on her ability to earn wages in the selected position of registered nurse. The Office noted that the rehabilitation counselor worked with appellant for over 90 days and identified available full-time registered nurse positions with entry level wages of $970.96 a week, greater than the current pay rate for appellant's date-of-injury position of $434.21 a week. The Office found that the physical requirements of the registered nurse position were within her work limitations.

The Office closed the placement effort on September 10, 2006, noting that appellant made no contacts on the job leads given to her by the vocational rehabilitation counselor.

In a September 12, 2006 note, the Office stated that the position of registered nurse remained reasonably available in appellant's commuting area with entry level wages of $50,490.00 a year.

In a September 29, 2006 letter, appellant asserted that she did not receive the Office's September 7, 2006 notice until "much later" and that the vocational rehabilitation counselor had no involvement in her education. In an October 1, 2006 letter, she requested copies of various records. Appellant asserted that Dr. Waddell found her totally disabled for work.

By decision dated October 19, 2006, the Office reduced appellant's monetary compensation benefits to zero effective October 29, 2006 based on her ability to earn wages in the selected position of registered nurse. The Office found that the position of registered nurse was "medically and vocationally suitable for [appellant] and reasonably represent[ed her] wage-earning capacity." The Office further found that appellant's September 29 and October 1, 2006 letters did "not contain any compelling reasons that allow an extension of time in this case. Accordingly, an extension of time [was] not granted."

In a letter dated February 13, 2007 and received by the Office's Branch of Hearings and Review on February 15, 2007, appellant requested a hearing.

By decision dated May 3, 2007, the Office denied appellant's request for a hearing on the grounds that it was not timely filed. The Office found that appellant's request for a hearing was postmarked February 13, 2007, more than 30 days after the October 19, 2006 decision. Therefore, it was not timely filed. The Office then exercised its discretion and denied appellant's request for a hearing on the additional grounds that the issues involved could be addressed equally well on reconsideration, by submitting evidence establishing that the position of registered nurse did not reasonably represent her wage-earning capacity.

LEGAL PRECEDENT

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.[3] Under section 8115(a), 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 his or her wage-earning capacity, or if 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, his or her usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect wage-earning capacity in his or her 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 an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor, *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 of wage rate and availability in the 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 of the employee's loss of wage-earning capacity.[6]

ANALYSIS

The Office accepted that appellant sustained prolonged depression and an adjustment reaction due to work factors occurring on or before March 15, 1996. She stopped work on March 18, 1996 and did not return. While receiving continuing compensation for total disability, appellant earned a bachelor's of nursing degree in August 2005 and a master's of nursing degree

[3] *David W. Green*, 43 ECAB 883 (1992).

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

[5] 5 ECAB 376 (1953).

[6] *James A. Birt*, 51 ECAB 291 (2000); *Francisco Bermudez*, 51 ECAB 506 (2000).

in August 2006. In a November 10, 2005 report, Dr. Waddell, a Board-certified psychiatrist and neurologist and second opinion examiner, opined that appellant "should be able to hold at least part-time employment" or participate in vocational rehabilitation. He opined that appellant should be working for three to four hours a day, gradually increasing to eight hours a day over a one- to two-month period.

Based on Dr. Waddell's opinion and appellant's education, the Office referred her for vocational rehabilitation. The Office identified the selected position of registered nurse as medically and vocationally appropriate. The vocational rehabilitation counselor forwarded appellant more than 100 job leads for full-time nurse positions. The Office reduced appellant's wage-loss compensation to zero effective October 29, 2006 based on her ability to perform the selected nursing position.

The Board finds that the selected position of registered nurse did not properly represent appellant's wage-earning capacity as it was not suitable work. Dr. Waddell found appellant capable of only part-time work at the beginning of her reemployment. The selected position was full time, in violation of the restrictions imposed by Dr. Waddell. Thus, the Office erred in finding that the offered position was suitable work representative of appellant's wage-earning capacity.[7] Therefore, the Office's October 19, 2006 decision reducing her compensation to zero must be reversed. The case will be returned to the Office for payment of all compensation due and owing following the October 29, 2006 reduction of compensation.

The Board further finds that as the October 29, 2006 decision must be reversed, the May 13, 2007 decision denying appellant's request for a hearing is moot.

CONCLUSION

The Board finds that the Office improperly reduced appellant's compensation benefits to zero effective October 29, 2006. The offered position was not within the medical restrictions set forth by the second opinion examiner. The May 13, 2007 decision regarding the denial of appellant's hearing request is therefore moot.

[7] *Anna M. Delaney*, 53 ECAB 384 (2002). *See also J.M.*, Docket No. 07-482 (issued May 15, 2007) (the Board reversed the Office's termination of the claimant's benefits under 5 U.S.C. § 8106, finding that the offered position was not suitable work. An impartial medical examiner opined that appellant must begin work part time. However, the offered position was full time, in violation of the impartial medical examiner's restrictions).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 19, 2006 is reversed. The Office's May 13, 2007 decision denying appellant's hearing request is moot.

Issued: January 10, 2008
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