United States Department of Labor
Employees' Compensation Appeals Board

D.C., Appellant	)	
and	)	**Docket No. 08-999**
	)	**Issued: February 12, 2009**
DEPARTMENT OF DEFENSE, DECA-WEST REGION, MCCLELLAN AIR FORCE BASE, 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 February 19, 2008 appellant filed a timely appeal from a February 4, 2008 Office of Workers' Compensation Programs' wage-earning capacity decision. 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 in reducing appellant's compensation effective February 17, 2008, based on its determination that the constructed position of a telephone sales representative represented her wage-earning capacity.

FACTUAL HISTORY

This case has previously been on appeal before the Board.[1] In an August 21, 2007 decision, the Board reversed the Office's January 5 and April 6, 2006 decisions which reduced

[1] Docket No. 06-1238 (issued August 21, 2007).

appellant's compensation based on the constructed position of a telephone sales representative effective February 20, 2004. The Board found that, as the Office did not first consider whether appellant's actual earnings as a part-time motivator fairly and reasonably represented her wage-earning capacity, it did not meet its burden of proof. The facts and the history contained in the prior appeal are incorporated by reference.

On January 10, 2008 the Office requested that the employing establishment provide appellant's current pay information for her date-of-injury position.

On January 23, 2008 the Office received pay rate information from the employing establishment which reflects that appellant would have received an hourly rate of $16.75 as a store worker at WG-4 Step 4 effective January 8, 2008 in Barstow, California and $16.54 on January 15, 2008 in Topeka, Kansas, as a store worker.

On February 1, 2008 the Office received current wage information in the local area for a telephone sales representative from Leslie Nelson, the rehabilitation specialist, who noted that she had previously rated appellant for a position as a telephone sales representative in the local area. Ms. Nelson indicated that the current wage information in the local area was obtained from the Occupational Employment Statistics and Kansas Occupational Wage and Outlook Reports for 2006, which was the most current information available. She noted that the compilation of wage information for the year 2007 had not been released to date. Regarding the Topeka, Kansas area, Ms. Nelson noted that the entry level wage for a sales representative was $24,100.00 per year or $11.57 per hour. She noted that the wages for a sales representative were the most representative of the job of telephone sales representative in the labor market. Ms. Nelson concluded that appellant was educationally, vocationally and medically capable of performing the duties of telephone sales representative, DOT 299.357-014.

By decision dated February 4, 2008, the Office finalized the proposed reduction of compensation to $641.00 every four weeks, effective February 17, 2008, based on her ability to work as a telephone sales representative. It considered appellant's position as a part-time motivator effective February 17, 2004 and noted that she worked approximately 16 hours per week. However, the Office concluded that her actual earnings did not fairly and reasonably represent her wage-earning capacity because the part-time position was not equivalent to the job she held at the date of injury, which was a permanent full-time job. It noted that the position at the Curves Fitness Center was a part-time job, which only paid $6.50 per hour, while her date-of-injury job paid her $9.96 per hour, full time. The Office concluded that the actual earnings of the part-time position did not fairly and reasonably represent her wage-earning capacity. It also found that the weight of the medical evidence continued to support that appellant was capable of performing the position of telephone sales representative.

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]

[2] *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

Section 8115(a) of the Federal Employees' Compensation Act,[3] provides in determining compensation for partial disability, the wage-earning capacity of an employee is determined by her actual earnings if her actual earnings fairly and reasonably represent her wage-earning capacity. Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.[4] If the actual earnings do not fairly and reasonably represent wage-earning capacity or if the employee has no actual earnings, her wage-earning capacity is determined with due regard to the nature of her injury, her degree of physical impairment, her usual employment, her age, her qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect her wage-earning capacity in her disabled condition.[5] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[6] The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.[7] In determining an employee's wage-earning capacity, the Office may not select a makeshift or odd lot position or one not reasonably available on the open labor market.[8]

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 or to an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits that employee's capabilities with regard to her physical limitation, 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.[9] Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.[10]

ANALYSIS

The Board previously found that the Office did not meet its burden of proof in reducing appellant's compensation based on the constructed position of a telephone representative, effective February 20, 2004 and reversed the Office's January 5 and April 6, 2006 decisions,

[3] 5 U.S.C. § 8115.

[4] *Hubert F. Myatt*, 32 ECAB 1994 (1981); *Lee R. Sires*, 23 ECAB 12 (1971).

[5] *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

[6] *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

[7] *Id.*

[8] *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

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

[10] *Id. See Albert C. Shadrick*, 5 ECAB 376 (1953).

because the Office did not consider appellant's actual earnings as a part-time motivator for Curves, a fitness facility.

Following the Board's action, the Office considered appellant's position as a part-time motivator for Curves and noted that she worked approximately 16 hours per week and earned $6.50 per hour as of February 17, 2004. It found that appellant had demonstrated the ability to perform the duties of the part-time position for two months or more; however, it concluded that the actual earnings of that position did not fairly and reasonably represent her wage-earning capacity. The Office found that the kind of appointment and tour of duty were not equivalent to the job appellant held on the date of injury. It explained that, on the date of injury, appellant worked in a permanent, full-time position as a store worker with the employing establishment for 40 hours per week and earned $9.96 per hour.

The Office also requested that the rehabilitation specialist provide current wage information in the local area for the constructed position of a telephone sales representative. Ms. Nelson provided updated information for a telephone sales representative in the Topeka, Kansas area and determined that the entry level wages for a sales representative, were approximately $24,100.00 per year or $11.57 per hour. She noted that the wages for the sales representative most closely represented the job of telephone sales representative in the labor market and that appellant was educationally, vocationally and medically capable of performing the duties of telephone sales representative, DOT 299.357-014.

By decision dated February 4, 2008, the Office made a determination that the constructed position of a telephone sales representative represented appellant's wage-earning capacity. However, the Office's procedures require that a prereduction of compensation notice be provided to appellant. In particular, the procedures note:

> "After selecting a position from those listed by the RC and after determining that the job is suitable and available, the CE should provide the claimant with a prereduction notice as described in FECA PM 2-1400.6 and 7. This action should be taken within 30 days of receipt of the RC's or RS's final report.
>
> > (a) If the claimant does not respond within 30 days of the notification of proposed reduction, the [claims examiner] should prepare a formal decision (Form CA-1048) determining the claimant's [wage-earning capacity] and reducing the compensation payments beginning with the next periodic roll payment cycle."[11]

The Office provided no prereduction notice in this case. It indicated that it was finalizing the February 20, 2004 proposed notice of reduction. However, the Board reversed the earlier decision which sought to finalize the reduction of compensation proposed in that notice. Furthermore, the rehabilitation counselor provided updated information and the Office further developed the matter of whether appellant's actual earnings fairly and reasonably represented her

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-earning Capacity*, Chapter 2.814.8(e) (December 1995); *see also David W. Green*, 43 ECAB 883 (1992); 20 C.F.R. § 10.540.

wage-earning capacity. Office procedures, as noted, contemplate that a prereduction notice be issued.

The Board notes that reduction of benefits prior to the issuance of a notice of proposed reduction of compensation defeats the purpose of the Office's procedures that provide for notice before reduction of benefits since "the claimant must be provided with written notice of the proposed action and given 30 days to submit relevant evidence or argument to support entitlement to continued compensation."[12] These procedures indicate that the notice of proposed reduction in compensation does not constitute a decision to reduce compensation and they contemplate that reduction of compensation will follow the issuance of a notice-of-reduction of compensation.[13] None of the exceptions to the requirement of prereduction notice apply to this situation where the Office is seeking to reduce appellant's compensation.[14]

CONCLUSION

The Board finds that the Office did not reduce appellant's compensation based on its determination that the constructed position of a telephone sales representative represented her wage-earning capacity effective February 4, 2008.

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.6 (March 1997).

[13] *Id.* at para. 7(a).

[14] *See id.* at para 6. Office regulations, at 20 C.F.R. § 10.541(b) provide that, if the beneficiary submits evidence that fails to refute the evidence upon which the proposed action was based but which requires further development by the Office, the Office will not provide another notice of proposed action upon completion of such development. The Board notes that such regulatory provision is not applicable to the present situation as the Board previously reversed the Office's reduction of compensation when it found that the Office did not meet its burden of proof to reduce appellant's compensation.

ORDER

IT IS HEREBY ORDERED THAT the February 4, 2008 decision of the Office of Workers' Compensation Programs is reversed.

Issued: February 12, 2009
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