

**United States Department of Labor
Employees' Compensation Appeals Board**

C.P., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Bellmawr, NJ, Employer)

**Docket No. 09-1784
Issued: July 20, 2010**

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 8, 2009 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated March 23, 2009, which affirmed a wage-earning capacity decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether the Office met its burden of proof to reduce appellant's compensation based on its determination that the constructed position of medical office administrator represented her wage-earning capacity.

FACTUAL HISTORY

On November 16, 2000 appellant, then a 50-year-old mail handler, sustained a herniated disc while performing her work duties. The Office accepted her claim for herniated disc at L5-S1. Appellant stopped work on November 10, 2000 and did not return. She received wage-loss compensation for all periods of disability.

Appellant came under the treatment of Dr. Gregory S. Maslow, a Board-certified orthopedic surgeon, from March 8, 2002 to October 7, 2003. On June 12, 2002 Dr. Maslow performed a lumbar laminectomy and discectomy at L5-S1. On October 31, 2006 he noted that appellant experienced neck and back pain due to degenerative disc disease. In an October 31, 2006 work capacity evaluation, Dr. Maslow advised that she could work full time with restrictions of sitting for four hours, walking for one hour, standing for two hours, occasional reaching and twisting, pushing and pulling occasionally up to 35 pounds, lifting, squatting and kneeling occasionally with no climbing.

On December 1, 2006 appellant was referred for vocational rehabilitation. In a July 30, 2007 rehabilitation plan, the rehabilitation counselor recommended a 90-day job placement plan and that she could work at the light sedentary physical level. She noted that appellant had a bachelors degree in teaching, excellent communication skills, experience in the health care system and many transferable skills. The rehabilitation counselor advised that the delay in developing a plan was due to appellant's marginal cooperation and resistance to return to work. A rehabilitation plan was prepared with the objective of obtaining a position as a medical administrative office assistant. Appellant was approved to attend the medical office administrative program at Camden County Community College from September 10 to November 28, 2007. The average annual salary for a medical administrative office assistant was \$24,000.00 a year. The rehabilitation counselor found that the job was within appellant's educational capabilities based on vocational testing and reasonably available in her commuting area. She attached a job classification for the position.

On August 17, 2007 the Office advised that the rehabilitation plan developed by appellant and her vocational rehabilitation counselor was within her work restrictions. The rehabilitation counselor's vocational evaluation and survey of the local labor market revealed a wage-earning capacity of \$24,000.00 a year for the position. The Office advised appellant that, at the end of the rehabilitation program, whether employed or not, it would reduce her wage-loss compensation.

In an October 16, 2007 report, Dr. Maslow diagnosed lumbar degenerative disc disease. In an attached work capacity evaluation, he advised that appellant could work eight hours a day with restrictions of sitting limited to six hours, walking and standing limited to one hour, reaching, reaching above the shoulder, twisting, bending/stooping occasionally, no operating a vehicle, pushing, pulling and lifting limited to 25 pounds, squatting, kneeling and climbing occasionally with 10-minute breaks.

In a February 22, 2008 rehabilitation report, the rehabilitation counselor noted that appellant completed her training at Camden County Community College. Appellant indicated that job placement was not a priority because she was overwhelmed with personal issues at home but would like to work in a medical environment, not more than 10 miles from home and which did not require prolonged sitting. In May 15, 2008 report, the rehabilitation counselor advised that job placements efforts failed so she expanded the search to include other jobs and a broader geographical area.

In reports dated March 18 and May 20, 2008, Dr. Maslow treated appellant for back and leg pain. A May 13, 2008 magnetic resonance imaging (MRI) scan of the lumbar spine revealed

inflammatory changes of the L5-S1 endplates, moderate amount of scar tissue and inflammation of the left and right nerve roots with mild bulging at L4-5.

In a June 1, 2008 closure report, the rehabilitation counselor noted that appellant was not offered a job with the employing establishment, Dr. Maslow released appellant to full-time sedentary employment in 2007 and she completed training as a medical administrative office assistant. The rehabilitation counselor advised that an updated labor market survey revealed the market was favorable for a medical office administrator and positions were readily available in sufficient numbers both full and part time in appellant's commuting area. She noted that a survey of Camden County, New Jersey, where appellant resided, revealed that the average wages for the selected position were \$39,199.00 a year with a range from \$29,244.00 to \$48,522.00 a year. The average weekly wage of a medical office administrator, *Dictionary of Occupational Titles* (DOT) # 201.362-014 was \$600.00. Under the job classification for a medical office administrator, the rehabilitation counselor found that appellant was qualified for the job, the position was consistent with the medical restrictions provided by Dr. Maslow and the functional capacity evaluation of February 12, 2002.

On July 15, 2008 the Office issued a proposed reduction of compensation finding that appellant was partially disabled and had the capacity to earn wages as a medical office administrator, at the rate of \$600.00 per week or \$31,200.00 a year. The position was in compliance with Dr. Maslow's restrictions and the functional capacity evaluation. The Office referenced the rehabilitation counselor's report, which determined that appellant was employable as a medical office administrator and the position reasonably represented her wage-earning capacity.

In an August 6, 2008 statement, appellant disagreed with the proposed reduction of her compensation. She contended that she sent out 115 resumes and received no job offers. Appellant submitted reports from Dr. Maslow previously of record. She was also treated by Dr. Vincent M. Padula, an osteopath, from July 18 to October 29, 2008. Dr. Padula diagnosed left L5 radiculopathy and lumbar postlaminectomy syndrome and recommended L5 transforaminal epidural injections.

In an August 26, 2008 decision, the Office reduced appellant's monetary compensation to reflect her wage-earning capacity as a medical office administrator effective August 25, 2008.

On September 3, 2008 appellant requested an oral hearing which was held on January 12, 2009. On August 26, 2008 Dr. Maslow indicated that a May 13, 2008 MRI scan revealed inflammatory changes at the endplates at L5-S1. No evidence of a recurrent or resident disc herniation was found. Dr. Maslow advised that appellant stated that she had considerable back pain. Appellant was limited to lifting 15 to 20 pounds on an occasional basis, she could not sit or stand for prolonged periods without a break and could not repetitively squat, stoop or bend. Dr. Maslow opined, however, that she was not totally disabled from all work activity. He reviewed the physical requirements for a medical office administrator which included stooping, kneeling, crouching and crawling and advised that appellant could not perform these activities now or in the future. Dr. Maslow opined that she could not perform the job of medical administrator without significant restrictions. In a November 11, 2008 report, he advised that appellant was very restricted in her job outlook and had permanent impairment.

In a decision dated March 23, 2009, an Office hearing representative affirmed the August 26, 2008 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.¹

Under section 8115(a) of the Federal Employees' Compensation Act,² titled "Determination of Wage-Earning Capacity," provides that, 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 that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.³ 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.⁴ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.⁵ 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.⁶ 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.⁷

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 DOT 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

¹ *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

² 5 U.S.C. § 8115.

³ *Hubert F. Myatt*, 32 ECAB 1994 (1981); *Lee R. Sires*, 23 ECAB 12 (1971).

⁴ *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

⁵ *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

⁶ *Id.*

⁷ *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

applicable service.⁸ 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.⁹

ANALYSIS

Appellant received compensation for total disability for her accepted herniated disc condition that precluded her return to work at the employing establishment. The October 31, 2006 report of Dr. Maslow and a functional capacity evaluation, found that she was not disabled for all work but could perform light sedentary duty, with restrictions of sitting limited to four hours, walking limited to one hour, standing limited to two hours, occasional reaching and twisting, pushing and pulling occasionally up to 35 pounds, lifting, squatting and kneeling occasionally and no climbing.

The Office referred appellant for vocational rehabilitation. The vocational rehabilitation counselor advised that appellant had a bachelor's degree in teaching, excellent communication skills and experience in the health care system. Appellant completed the medical office administrative program at a community college on November 28, 2007. As she was unable to secure employment, the vocational counselor identified the position of a medical office administrator, as work that she would be capable of performing and which was available in her commuting area.¹⁰ The position is listed in the Department of Labor's, DOT # 201.362-014. The rehabilitation counselor provided the required information concerning the position description, the availability of the position within appellant's commuting area and pay ranges within the geographical area, as confirmed by state officials. She determined that the medical office administrator conformed to appellant's background, education and experience. The rehabilitation counselor advised that an updated labor market survey revealed the market was favorable for a medical office administrator and that the position was readily available in sufficient numbers both full and part time in appellant's commuting area. She advised that appellant did not secure employment because finding a job was not a high priority due to family constraints. The average weekly wage of a medical office administrator, DOT # 201.362-014 was \$600.00 with hiring occurring regularly. The rehabilitation counselor found that the position was consistent with the medical restrictions provided by Dr. Maslow and a functional capacity evaluation. It required sitting limited to four hours, walking for one hour, standing for two hours, occasional reaching and twisting, pushing and pulling occasionally up to 35 pounds, lifting, squatting and kneeling occasionally and no climbing. As the rehabilitation counselor is

⁸ *Karen L. Lonon-Jones*, 50 ECAB 293, 297 (1999).

⁹ *Id.* See *Shadrick* at 5 ECAB 376 (1953).

¹⁰ Where vocational rehabilitation is unsuccessful, the rehabilitation counselor will prepare a final report, which lists two or three jobs which are medically and vocationally suitable for the employee and proceed with information from a labor market survey to determine the availability and wage rate of the position. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(b) (December 1995); see also *Dorothy Jett*, 52 ECAB 246 (2001).

an expert in the field of vocational rehabilitation, the Office may rely on his or her opinion in determining whether the job is vocationally suitable and reasonably available.¹¹

The Board finds that the Office met its burden of proof to reduce appellant's monetary compensation based on her ability to earn wages as a medical office administrator. The medical evidence establishes that she is capable of performing the duties of the selected position. Dr. Maslow provided work restrictions based on a functional capacity evaluation and advised that appellant could return to work full-time modified duty with restrictions. In a subsequent work capacity evaluation dated October 16, 2007, Dr. Maslow noted that she would work eight hours per day with restrictions of sitting limited to six hours, walking and standing limited to one hour, reaching, reaching above the shoulder, twisting, bending/stooping occasionally, no operating a vehicle, pushing, pulling and lifting limited to 25 pounds, squatting, kneeling and climbing occasionally with 10-minute breaks. The duties of the selected position conform with the recommended limitations.

Appellant submitted reports from Dr. Maslow dated March 18 and May 20, 2008. Dr. Maslow noted an MRI scan revealed inflammatory changes of the L5-S1 endplates and a moderate amount of scar tissue. The reports from Dr. Padula dated July 18 to October 29, 2008, diagnosed left L5 radiculopathy and lumbar postlaminectomy syndrome and recommended epidural injections. Neither, physician found that appellant was incapable of performing the duties required of the selected position. Dr. Padula did not address whether she was totally disabled or unable to perform a sedentary position. As of August 26, 2008 decision, the weight of medical evidence supported appellant's capacity for work in the selected position.

In reports dated August 26 and November 11, 2008, Dr. Maslow noted inflammatory changes at the endplates at L5-S1 and opined that appellant was totally disabled from all work activity. He stated that he reviewed the physical requirements for the job of medical office administrator and did not think that she could perform the job without significant restrictions. Dr. Maslow, however, did not support appellant's contentions that she remained totally disabled for work. He reiterated restrictions on lifting with no prolonged sitting or standing. Dr. Maslow did not clearly explain whether appellant was physically unable to perform the duties of a medical office administrator with regard to his prior findings on October 16, 2007, which advised that she was capable of employment full time with restrictions consistent with the selected position. While Dr. Maslow stated that appellant unable to perform the position of medical office administrator due to duties that included stooping, kneeling, crouching and crawling; however, the vocational counselor specially noted that the activities of stooping, kneeling, crouching and crawling were excluded from the physical demands of the selected position as it pertained to her. It is apparent that he was not provided an accurate description of the physical demands listed in the case.

The Board finds that the Office considered the factors, of the availability of the position and appellant's physical limitations, usual employment and age and employment qualifications, in determining that the position of medical office administrator represented her wage-earning capacity. The weight of the evidence of record establishes that appellant had the requisite

¹¹ *Dorothy Jett, supra* note 10; Federal (FECA) Procedure Manual, *supra* note 10, Chapter 2.814.8(b)(2) (December 1993).

physical ability, skill and experience to perform the duties of the position and that it was reasonably available within the general labor market of appellant's commuting area. The Office properly determined that the position of medical office administrator reflected appellant's wage-earning capacity and reduced appellant's compensation effective August 25, 2008.

Although appellant asserted that she still had residuals of her work injury and experiences back pain with radiculopathy, the medical evidence does not support that she is unqualified to perform the duties of medical office administrator. As noted, the medical evidence supports her capacity to performing the position subject to specific physical limitations. The Board finds that the Office properly determined that the position of medical office administrator reflected appellant's wage-earning capacity effective August 25, 2008.

On appeal, appellant asserted that the position did not represent her wage-earning capacity in view of her accepted and preexisting conditions. She referenced Dr. Maslow's October 16, 2007 work capacity evaluation and the August 26, 2008 report. Appellant further asserts that the weekly pay rate found by the Office was too high for an introductory position. As noted the October 16, 2007 work capacity evaluation found that she was able to work full time, eight hours per day, with permanent restrictions. Dr. Maslow's August 26, 2008 report did not find that appellant remained totally disabled. Although he noted the physical requirements of stooping, kneeling, crouching and crawling as activities she could not do; as noted, the selected position does not require that she perform such activities. As to appellant's assertion that the weekly pay rate used by the Office for a medical office administrator was too high, the Board notes that the rehabilitation counselor provided an updated labor market survey on May 27, 2008 which revealed that in Camden County, New Jersey, where she resides, the average wages for the selected position were \$39,199.00 a year with a range from \$29,244.00 to \$48,522.00 a year. In this instance, the Office used wages of \$600.00 per week or \$31,200.00 a year which is in the lower end of the salary range provided by the survey. Appellant submitted no evidence to establish that the vocational counselor erred in making this determination.

CONCLUSION

The Board finds that the Office properly determined that the position of medical office administrator reflects appellant's wage-earning capacity effective August 25, 2008.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated March 23, 2009 is affirmed.

Issued: July 20, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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