United States Department of Labor
Employees' Compensation Appeals Board

T.W., Appellant	)	
and	)	**Docket No. 10-937**
	)	**Issued: March 28, 2011**
DEPARTMENT OF AGRICULTURE, FORESTRY SERVICE, McCloud, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 19, 2010 appellant filed a timely appeal of a January 4, 2010 Office of Workers' Compensation Programs' merit decision reducing her compensation benefits. Pursuant to the Federal Employees' Compensation Act[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether the Office met its burden of proof to reduce appellant's compensation benefits based on her capacity to earn wages in the constructed position of office assistant.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been on appeal before the Board on two occasions.[2] On September 22, 1988 appellant, then a 26-year-old seasonal[3] engineering aide, filed a traumatic injury claim alleging that on September 21, 1988 she injured her right knee and elbow when she fell on stairs while carrying a door. The Office accepted her claim for right knee strain and right elbow contusion on January 26, 1989. It expanded appellant's claim to include bulging disc at L4-5 and herniated disc at L4-5 on July 18, 2001. By decision dated March 2, 2004, the Office terminated her compensation benefits effective March 21, 2004 on the grounds that she refused an offer of suitable work. In its March 25, 2005 decision,[4] the Board reversed the Office's March 2, 2004 decision finding that the employing establishment made no effort to determine whether reemployment was possible in the location where appellant resided, Conception Junction, Missouri, and that the Office had an obligation to develop this aspect of the case before determining that she had refused suitable work.

By decision dated March 23, 2007, the Office terminated appellant's compensation benefits effective April 15, 2007 finding that she refused an offer of suitable work based on a second opinion evaluation by Dr. Edward J. Prostic, a Board-certified orthopedic surgeon, dated January 30, 2007. Dr. Prostic found that appellant could walk and stand for six hours a day and could twist, bend and stoop for one hour a day. He also found that she could lift up to 20 pounds for two hours a day. The Board reversed the Office's March 23, 2007 decision on April 24, 2008,[5] finding that the medical evidence did not support that she could perform the offered position. The facts and the circumstances of the case as set out in the Board's prior decisions are adopted herein by reference.

The Office placed appellant on the periodic rolls on June 30, 2008. It made a preliminary determination on November 6, 2008 that she had received an overpayment of compensation in the amount of $8,317.64 for the period August 6, 2006 through April 14, 2007. The Office finalized this decision on December 16, 2008.[6]

On November 25, 2008, based on Dr. Prostic's January 30, 2007 report, the Office referred appellant for vocational rehabilitation services. Appellant met with the counselor beginning on December 22, 2008. The vocational rehabilitation counselor referred her for computer training in Microsoft Word, Access and Excel. He selected two positions for appellant, office assistant and customer service. These positions were light and sedentary, respectively, with occasional lifting of up to 20 pounds and no climbing, balancing, stooping,

[2] Appellant's name was previously Teresa L. Steinke. Docket No. 04-1351 (issued March 25, 2005) and Docket No. 07-1686 (issued April 24, 2008). Appellant married on September 23, 2006.

[3] Appellant stated that she worked full time from April to September 1988.

[4] Docket No. 04-1351 (issued March 25, 2005).

[5] Docket No. 07-1686 (issued April 24, 2008).

[6] As this decision was issued more than 180 days prior to the date of appellant's appeal to the Board on February 19, 2010, the Board is precluded from reviewing this issue on appeal. 20 C.F.R. § 501.3(e).

kneeling, crouching or crawling and only occasional reaching. The vocational rehabilitation counselor found on January 7, 2009 that these positions were being performed in sufficient numbers so as to make the jobs reasonably available for appellant within her commuting area. On April 1, 2009 appellant advised the vocational rehabilitation counselor that she would like to obtain a job in St. Joseph, Missouri or Maryville, Missouri but was willing to look for employment in Kansas City, Missouri. The vocational rehabilitation counselor provided her with job openings within those three locations. On June 9, 2009 appellant informed the rehabilitation counselor that if she was not able to find work within 40 miles of her home in Maryville she would move to Kansas City as the last resort. The vocational rehabilitation counselor completed a report on June 25, 2009 and stated that he had completed a job search locating several positions within a 45-mile radius of her home.

In a letter dated July 9, 2009, the Office informed appellant that she would receive 90 days of assistance to secure employment. It stated that at the end of this period her compensation would be reduced based on a wage-earning capacity of $20,800.00 a year.

Appellant submitted a report dated July 21, 2009 from Dr. Patrick B. Harr, a Board-certified family practitioner, stating that she should not bend or stoop. Dr. Harr also found that she should not sit or stand for prolonged periods of time. He stated that appellant had some pain in her back and new findings suggesting an L1-2 problem.

Appellant continued to cooperate with vocational rehabilitation services and stated that she and her husband might move closer to Kansas City as there were no positions available in Maryville. On November 25, 2009 the vocational rehabilitation counselor reported that appellant had not obtained employment despite transferable skills and motivation. He stated that she had been very cooperative in her efforts to obtain employment, but that the only jobs available in Maryville were either labor positions beyond her capabilities or health related such as nursing. The vocational rehabilitation counselor concluded, "I believe the reason she has not obtained employment, is that the job market is extremely poor right now, she lives in a rural area and the sedentary positions for which she is applying, she is competing with 60 to 200 other applicants with more experience and bachelor degrees." The Office provided appellant with 180 days of placement services.

By letter dated December 3, 2009, the Office proposed to reduce appellant's compensation benefits. It stated that the medical evidence established that she was no longer totally disabled and had the capacity to earn wages as an office assistant at the rate of $400.00 a week. In an attached worksheet, the Office found that appellant's pay rate when her disability recurred on September 21, 1988 was $230.80 a week; the current adjusted pay rate for her job on the date of injury was $469.60 a week and she was currently capable of earning $400.00 a week as an office assistant. It determined that appellant had 85 percent wage-earning capacity of $196.18 a week and that she had a loss of wage-earning capacity of $34.62 a week. At the three-fourths augmented compensation rate, appellant would receive wage-loss benefits of $34.62 a week, increased by cost-of-living adjustments to $44.50 a week, for net compensation of $178.00 every four weeks.

Appellant responded on December 21, 2009 and stated that she had cooperated with vocational rehabilitation efforts, but there was no work available. She alleged that the vocational

rehabilitation counselor had not updated the availability of the selected position since January 7, 2009. Appellant also alleged that Kansas City was outside her commuting area.[7] She alleged that the wages for an office assistant were $8.00 an hour. Appellant also stated that her back was deteriorating as the two discs above the original injury were showing signs of problems and that she was experiencing more pain.

By decision dated January 4, 2010, the Office reduced appellant's compensation benefits effective January 17, 2010 based on the finding that the position of office assistant was medically and vocationally suitable for her and fairly and reasonably represented her wage-earning capacity.

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.[8]

Section 8115(a) of the Act[9] 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.[10] 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.[11] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[12] 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.[13] 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.[14]

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[7] Appellant repeated these allegations on appeal.

[8] *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984); *H.N.*, Docket No. 09-1628 (issued August 19, 2010); 5 U.S.C. § 8115(a).

[9] 5 U.S.C. § 8115.

[10] *Hubert F. Myatt*, 32 ECAB 1994 (1981); *Lee R. Sires*, 23 ECAB 12 (1971); *H.N., supra* note 8.

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

[12] *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982); *H.N., supra* note 8.

[13] *Id.*

[14] *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984); *H.N., supra* note 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* (DOT) or otherwise available in the open labor market, that fits that employee's capabilities with regards 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.[15] 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.[16]

ANALYSIS

Appellant's claim was accepted for right knee strain and right elbow contusion on January 26, 1989 as well as bulging disc at L4-5 and herniated disc at L4-5.

Dr. Prostic, the Office second opinion physician, completed a report on January 30, 2007 finding that appellant could walk and stand for six hours a day, could lift 20 pounds for two hours a day and could twist, bend and stoop for one hour a day. Appellant submitted an additional report from Dr. Harr, dated July 21, 2009, stating that she could neither bend, stoop nor sit or stand for prolonged periods of time. While Dr. Harr mentioned that appellant had some pain in her back and new findings suggesting an L1-2 problem, he did not provide a firm diagnosis or indicate whether this condition reduced her work restrictions. The Board finds that the weight of the medical evidence rests on Dr. Prostic's report.

The vocational rehabilitation counselor selected the position of office assistant for appellant. He found on January 7, 2009 that this position was being performed in sufficient numbers so as to make the job reasonably available for her within her commuting area. This position was light with occasional lifting of up to 20 pounds and no climbing, balancing, stooping, kneeling, crouching or crawling and only occasional reaching. These requirements are within appellant's physical limitations as set by Dr. Prostic. The Board finds that the office assistant position conforms to work restrictions set forth by Dr. Prostic and is within her work restrictions. In a report dated June 25, 2009, the vocational rehabilitation counselor noted that there were several appropriate positions available within a 45-mile radius of appellant's home. Appellant challenged the Office's selection of the position of office assistant on the grounds that it was not reasonably available within her commuting area.

The Office's procedure manual provides that "[b]ecause the [rehabilitation specialist] is an expert in the field of vocational rehabilitation, the [claims examiner] may rely on his or her opinion as to whether the job is reasonably available and vocationally suitable."[17] In this

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

[16] *Id. See* 5 ECAB 376 (1953); 20 C.F.R. § 10.403.

[17] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(b)(2) (October 2009).

instance, the rehabilitation counselor considered a commute of 45 miles reasonable. While appellant argued that she would have to move to Kansas City to find a position, the Board finds that this argument relates more to her perception of the availability of positions rather than the extent of a 45-mile commute. Furthermore, the Board finds that she did not provide any evidence to establish that a 45-mile commuting area was unreasonable or that a move to Kansas City was necessary. The Board concludes that the Office properly relied on the rehabilitation specialist's expertise in determining that the constructed position of office assistant was reasonably available within appellant's commuting area.[18]

Because the weight of the evidence establishes that appellant had the requisite physical ability, skill and experience to perform the position of office assistant, the Office properly referred her to its rehabilitation counselor for the selection of a position that fit her capabilities in light of her physical limitations, education, age and experience. The rehabilitation counselor determined that the office assistant position was performed in sufficient numbers to make it reasonably available to appellant within her commuting area at the weekly pay rate of $400.00. The Board has found that the record must establish that jobs for a selected position are reasonably available in the general labor market in the commuting area in which the employee lives.[19] The Office's procedure manual provides that the lack of current job openings does not equate to a finding that the position was not performed in sufficient numbers to be considered reasonably available.[20] On January 7, 2009 the vocational rehabilitation counselor contacted the Missouri Job Service and confirmed the availability of jobs within a 45-mile radius of the individual's residence. The fact that appellant was not successful in securing employment does not establish that the constructed position is not vocationally suitable.[21]

The Office calculated appellant's wage-earning capacity by properly applying the principles set forth in *Albert C. Shadrick*.[22] It compared the earnings she could earn as an office assistant, based on her employment-related injuries, to the current pay rate of her date-of-injury position and found that her wage-earning capacity was 85 percent. The Board notes that appellant remains entitled to wage-loss compensation. The Office met its burden of proof to establish that the constructed position of office assistant reflected her wage-earning capacity effective December 3, 2009.

On appeal and before the Office, appellant contested the reduction of her compensation and contended that the position is not reasonably available in her commuting area and that the vocational rehabilitation counselor's labor market survey was almost one year old. As noted above, the position was determined to be reasonably available within her commuting area. The

[18] *See Dim Njaka*, 50 ECAB 425 (1999) (finding that a 120-mile daily commute was reasonable and customary based on the conclusions of the rehabilitation specialist).

[19] *Id*. at 591-92.

[20] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(c) (October 2009). This provision provides that the vocational rehabilitation counselor will determine the reasonable availability of the position within appellant's commuting area.

[21] *Lawrence D. Price*, 54 ECAB 590 (2003).

[22] *Karen L. Lonon-Jones, supra* note 15; *see also* 20 C.F.R. § 10.403.

vocational rehabilitation counselor found that there were enough people performing the position in the general labor market, making it reasonably available. Furthermore, the Board does not find that a labor market survey which is less than one year old is stale[23] and notes that appellant has not provided any evidence to support her allegation that the survey was not accurate at the time the Office issued its decision.

CONCLUSION

The Board finds that the Office met its burden of proof to reduce appellant's compensation based on its determination that the constructed position of office assistant represented her wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the January 4, 2010 the Office of Workers' Compensation Programs is affirmed.

Issued: March 28, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[23] *R.H.,* Docket No. 10-807 (January 4, 2011) (labor market surveys conducted within one year of the Office's decision were not stale).