

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

L.C., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS MEDICAL CENTER, Portland, OR,)
Employer)

Docket No. 12-978
Issued: October 26, 2012

Appearances:

John E. Goodwin, Esq., for the appellant

No appearance, for the Director

Oral Argument August 2, 2012

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge

ALEC J. KOROMILAS, Alternate Judge

MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 20, 2012 appellant, through her attorney, filed a timely appeal from the November 22, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 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 OWCP properly determined appellant's wage-earning capacity.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

Appellant, who worked in a temporary position as a part-time nurse, sustained a thumb injury on August 24, 2003. OWCP accepted her claim for right thumb sprain and joint derangement of the right hand and approved surgery.²

Appellant accepted a modified, temporary position as a nurse in the compliance office effective January 6, 2009. The position was described as sedentary. Appellant was to assist the compliance officer in ensuring that the medical center exercised due diligence with respect to business operations and compliance with applicable laws, regulations and policies. Work assignments were to include conducting physical and record audits of part-time physicians and the part-time physician program; collaborating with services and human resources/payroll regarding part-time physician time and attendance; making phone calls, facilitating meetings for managers and timekeepers; conducting seated review of physician log sheets for their scheduled tours; comparing paper documents to electronic records; aggregating part-time physician monitor reports; reviewing paper or electronic spreadsheets sent from the medical center services and entering the results via computer into Excel spreadsheets; performing resident supervision documentation audits; reviewing electronic patient lists; assisting with preparation of routine compliance reports; maintaining program records; collaborating with managers, supervisors and front line staff as needed; assisting with compliance program development by attending committee meetings involving planning, education and training programs; and completing miscellaneous web-based or onsite training as required for understanding of the compliance program.

Appellant worked in the modified position until April 5, 2009, when the assignment expired. On May 11, 2009 OWCP issued a formal loss of wage-earning capacity (LWEC) decision reducing her compensation benefits based on actual wages earned in her modified position. The May 11, 2009 decision was subsequently set aside and remanded on the issue of pay rate.³

² This case was previously before the Board. On August 30, 2005 the Board set aside a November 16, 2004 OWCP decision reducing appellant's compensation benefits for failing to cooperate with vocational rehabilitation. Docket No. 05-433 (issued August 30, 2005). In a December 23, 2008 decision, the Board set aside August 21, 2006 and May 3, 2007 decisions and remanded the case for further development to determine the correct pay rate for purposes of establishing wage-earning capacity. Docket No. 08-224 (issued December 23, 2008). On March 8, 2010 the Board affirmed May 20 and November 17, 2008 decisions denying appellant's compensation claim. Docket No. 09-1173 (issued March 8, 2010). In a March 17, 2010 decision, the Board remanded the case for a proper determination of the pay rate to be used in determining wage-earning capacity. Docket No. 09-1816 (issued March 17, 2010). On October 26 and 29, 2010 the Board dismissed appellant's appeals for lack of jurisdiction in Docket No. 10-531 (issued October 26, 2010) and Docket No. 10-260 (issued October 29, 2010). On January 20, 2012 the Board dismissed her appeal of a July 13, 2010 wage-earning capacity decision on the grounds that the case was in an interlocutory posture. Docket No. 11-554 (issued January 20, 2012). The facts and law contained in those decisions and orders are incorporated herein by reference.

³ In a decision dated March 17, 2010, the Board set aside the May 11, 2009 decision and remanded the case to OWCP for a proper calculation of appellant's pay rate. Docket No. 09-1816 (issued March 17, 2010).

In a May 20, 2011 decision, OWCP issued a formal LWEC decision reducing appellant's compensation based on the actual wages earned in the modified nurse position in which she worked from January 6 to April 4, 2009.

Appellant, through her representative, requested an oral hearing, which was held on September 28, 2011, contending that the position on which the LWEC decision was based was makeshift in nature. Yvonne Carson, a registered nurse and Injury Management Program Manager, attended the hearing on behalf of the employing establishment. In his opening statement, counsel requested that he be permitted to question Ms. Carson. Noting that Ms. Carson had been responsible for structuring and presenting to appellant the modified nurse position, he contended that she would be able to testify as to how the specific duties of the position were determined, whether other individuals had performed such duties before, whether they were in compliance with appellant's physical restrictions and whether they had been selected specifically for her. OWCP's hearing representative denied counsel's request to question Ms. Carson. He stated:

“As I indicated in our conversation about this issue before the hearing, there [is] no prior request for a subpoena or any indication that there is going to need to be agency testimony. The [employing establishment] can certainly address those questions in response to the transcript, and I [am] not going to have them sworn or be party to the hearing at this point.”

Appellant testified that she never performed the duties outlined in her modified position description. Rather, she went into work and “essentially did nothing.” Appellant sat at her desk and watched the clock, took long lunches, made telephone calls, went to Starbucks, helped her daughter with her homework, watched television, surfed the internet and listened to her iPod.

In a letter dated October 18, 2011, Ms. Carson stated that the employing establishment had very carefully designed the modified position to comply with appellant's physical restrictions. She was not aware that appellant was not performing duties in accordance with the job description.

In a letter dated October 30, 2011, counsel objected to OWCP's hearing representative's denial of his request to question Ms. Carson at the September 28, 2011 hearing. He reiterated his intent to solicit testimony to the effect that the temporary assignment was created to fit appellant's physical requirements and was noncompetitive employment. Counsel contended that appellant would have testified that the position did not have an official title or a formal position description; there was no Form 50 issued regarding the limited-duty position; the strict limitations precluded the performance of many nursing duties; and there was no evidence that she would have been able to secure a position in the community at large that required such limited duties. He noted that Ms. Carson would testify that appellant spent the bulk of her time in nonproductive activities. Counsel argued that the restricted duties of the modified position did not constitute a *bona fide* job that would have been available to appellant in the community at large. Therefore, the position did not fairly and reasonably represent appellant's wage-earning capacity and the original LWEC determination was erroneous.

By decision dated November 22, 2011, OWCP's hearing representative affirmed the May 20, 2011 decision. He found that the modified position fairly and reasonably represented her wage-earning capacity and was not makeshift in nature. The hearing representative acknowledged counsel's attempt to obtain Ms. Carson's testimony at the September 28, 2011 hearing regarding the makeshift nature of the modified position. He stated that Ms. Carson made it clear that the position was designed to accommodate appellant's restrictions, but that appellant was performing duties that were also performed by others in administrative nursing positions. The hearing representative also noted that appellant was observed to be working.

LEGAL PRECEDENT

Section 10.621 of the Code of Federal Regulations provide that when an oral hearing has been requested:

“(a) The employer may send one (or more, where appropriate) representative(s) to observe the proceeding, but the agency representative cannot give testimony or argument or otherwise participate in the hearing, except where the claimant or the hearing representative specifically asks the agency representative to testify.⁴

(b) The hearing representative may deny a request by the claimant that the agency representative testify where the claimant cannot show that the testimony would be relevant or where the agency representative does not have the appropriate level of knowledge to provide such evidence at the hearing. The employer may also comment on the hearing transcript, as described in § 10.617(e).⁵

OWCP's procedure manual requires that any decision issued must be well-written, use appropriate language to clearly communicate information and address all the facets of the evidence that led to the conclusion, including evidence the claimant submitted.⁶

OWCP is required to make findings of fact and a statement of reasons regarding the material facts of the case.⁷ Its findings should be sufficiently detailed so that the claimant can understand the reasoning behind the decision.⁸

ANALYSIS

On November 22, 2011 OWCP's hearing representative affirmed the May 20, 2011 decision reducing appellant's compensation based on the actual wages earned in the modified

⁴ See also Federal (FECA) Procedure Manual, Chapter 2 -- Claims, *Review Process*, Chapter 2.1601(6)(c) (October 2011).

⁵ 20 C.F.R. § 10.621.

⁶ Federal (FECA) Procedure Manual, Chapter 2 -- Claims, *Recommended Decisions*, Chapter 2.1400(5) (March 1997).

⁷ 20 C.F.R. § 10.126; *Beverly Dukes*, 46 ECAB 1014 (1995).

⁸ *Paul M. Colosi*, 56 ECAB 294 (2005).

nurse position. Appellant contended that the original LWEC decision was erroneous because the modified position on which it was based was makeshift in nature. She also contends that the hearing representative improperly denied counsel's request to question the employing establishment representative at the September 28, 2011 hearing. The Board finds that the case is not in posture for a decision due to a procedural error on the part of the hearing representative.

The record reflects that, in accordance with federal regulations, the employing establishment sent Ms. Carson to observe the September 28, 2011 hearing. The record further reflects that counsel requested that he be permitted to question Ms. Carson, noting that she had been responsible for structuring and presenting to appellant the modified nurse position. Counsel contended that Ms. Carson would be able to testify as to how the specific duties of the position were determined, whether other individuals had ever performed those duties before, whether they were in compliance with appellant's physical restrictions and whether they had been selected specifically for appellant. OWCP's hearing representative denied counsel's request, noting that Ms. Carson had not been subpoenaed to testify and he saw no indication that there was going to be a need for agency testimony.

As noted, OWCP's hearing representative may deny a request by a claimant that an agency representative testify where the claimant cannot show that the testimony would be relevant or where the agency representative does not have the appropriate level of knowledge to provide such evidence at the hearing.⁹ In this case, however, there was no claim or evidence presented that Ms. Carson did not have the expertise to address the issues at hand or that her testimony would not be relevant. The evidence reflects that she participated in formulating the modified position in question and possessed the requisite information. The hearing representative's decision was made without proper regards to FECA's implementing regulations.

The Board further finds that OWCP's hearing representative's November 22, 2011 decision was deficient, as it did not contain findings of fact and a statement of reasons regarding his denial of counsel's request to question Ms. Carson.¹⁰ Although he acknowledged counsel's attempt to obtain Ms. Carson's testimony and suggested that her written representations were sufficient to establish that the position was not makeshift, the hearing representative failed to adequately explain the reasoning behind his decision to deny counsel's request to have the agency representative testify.¹¹

For the foregoing reasons, the Board finds that this case is not in posture for decision. The case will be remanded for further action consistent with this decision.

⁹ See *supra* note 5. The provisions concerning a claimant's right to question an agency representative, who appears voluntarily at a hearing, are not to be confused with the procedures governing the right to subpoena witnesses to testify at oral hearings. See 20 C.F.R. § 619. See also Federal (FECA) Procedure Manual, Chapter 2 -- Claims, *Review Process*, Chapter 2.1601(6)(h) (October 2011).

¹⁰ *Supra* note 7.

¹¹ *Paul M. Colosi, supra* note 8.

CONCLUSION

The Board finds that this case is not in posture for a decision.

ORDER

IT IS HEREBY ORDERED THAT the November 22, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision.

Issued: October 26, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

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