U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LINDA GREEN and DEPARTMENT OF THE NAVY,
NAVAL WEAPONS STATION, Colts Neck, NJ

Docket No. 00-1943; Submitted on the Record;
Issued March 25, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issues are: (1) whether the Office of Workers Compensation Programs properly reduced appellant's compensation based on her capacity to earn wages as a telephone solicitor; and (2) whether the Office properly denied appellant's request for a hearing.

On February 20, 1991 appellant, then a 40-year-old supply technician, was injured in the performance of duty when a chair broke and she fell landing on her knees. The Office accepted the claim for contusions to both knees and a herniated disc at L4-5. Appellant received continuation of pay and was placed on the periodic rolls for disability compensation.

In an August 11, 1995 report, appellant's treating physician, Dr. Edwin Melendez, a Board-certified orthopedic surgeon, stated that appellant continued to have residuals of her work injury but opined that she could perform sedentary work. He completed an OWCP-5 work restriction form indicating that appellant could work 6 to 8 hours a day, with no prolonged walking, sitting or standing and no heavy lifting over 5 to 10 pounds. She was also to avoid kneeling and bending.

The Office also referred appellant for a second opinion evaluation with Dr. Theodore Parsons, a Board-certified orthopedic surgeon, in order to assess appellant's capacity for work. In a report dated September 7, 1995, Dr. Parson noted appellant's history of injury and described his clinical findings. Dr. Parsons expressed skepticism that appellant would actually return to work but stated:

> "Physiologically, there is no good reason why she could not have a sedentary job, which would allow her to get up and switch positions, provided that she could sit in a comfortable chair and move around as she felt the need to do so. ... [Appellant] does continue to be disabled, but vocational rehabilitation might be beneficial to her. [While] I am skeptical that she will actually be able to return to work, it is certainly worth trying to retrain her into a vocation that will allow her a sedentary job that has the freedom to move around as she needs to, to alleviate her

back pain and will not require her to do any lifting, squatting, bending or stooping."

On the basis of the second opinion evaluation and the work restrictions provided by Dr. Melendez, appellant was referred for vocational rehabilitation services. On February 29, 1996 appellant was offered a limited-duty position as a clerk typist, which she declined on March 7, 1996.

In an April 8, 1996 report, Dr. Melendez indicated that he had reviewed the limited job offer and believed that appellant could perform the duties of the job.[1] He stated: "I agree with the job description, however, I restate that the last appointment that I had with [appellant], I [reiterated to her] that she was able to do some jobs of sedentary nature and she disagreed with me and wanted to consider seeking another physician to assume her care."

In letters dated April 11 and 15, 1996, appellant stated her reasons for refusing the job offer.[2]

In a decision dated May 16, 1996, the Office terminated appellant's compensation on the grounds that she refused an offer of suitable work.

Appellant requested a hearing and submitted reports dated July 7 and September 29, 1997 by Dr. Bernard Seger, a Board-certified orthopedist, who was an associate of Dr. Melendez. In his July 7, 1999 report, Dr. Seger stated that appellant "has been disabled from her problems for a long time. I do not see that she is going to return to work. "Dr. Seger did not provide any medical rationale to support his disability opinion, nor did he give any indication that he was aware that appellant had been offered a limited-duty job.

In a November 12, 1997 decision, an Office hearing representative set aside the May 16, 1996 Office decision terminating appellant's compensation, finding that the Office failed to comply with its own procedural requirements.[3]

In a letter dated July 8, 1998, the Office sent Dr. Seger a copy of the limited-duty position and requested that he provide his opinion as to whether appellant could perform the job. Dr. Seger was also asked to provided a description of appellant's work restrictions.

When the Office failed to receive a response from Dr. Seger, it scheduled another second opinion evaluation with Dr. Rufino H. Gonzalez, a Board-certified orthopedic surgeon. In his report dated March 26, 1999, Dr. Gonzalez noted physical findings and reviewed the medical

[1] The job was described as involving only occasional lifting of no more than 10 pounds with no bending, twisting, reaching or kneeling and was of a sedentary nature.

[2] The Office received these letters before issuing its May 16, 1996 decision, but did not inform appellant that her reasons for refusing the job were not acceptable or that she had an additional 15 days to accept the job or have her compensation terminated.

[3] The Office hearing representative noted, however, that the weight of the medical evidence supported that appellant could perform the offered position.

record. He concluded that appellant could perform light sedentary type of work since her symptoms had not really changed over the past several years. Dr. Gonzalez, however, felt that it was totally unrealistic that appellant would actually agree to accept a job since she had not done any type of work in eight years and had no motivation to return to work. He also noted that appellant was emotional and he feared she might sustain an additional injury if she was forced to go back to work.

The rehabilitation counselor assigned to appellant's case reported that appellant had an AA degree, typing skills, eight years of experience as a computer operator and supply clerk and training in computer operation and Windows, DOS and WordPerfect. Based on these skills, the rehabilitation counselor identified several jobs for which appellant qualified including a position as an entry-level telephone solicitor. Although the counselor tried to secure a job for appellant as an entry-level telephone solicitor, appellant apparently was not successful in obtaining employment. In reports dated July 31 and November 10, 1999, the rehabilitation counselor indicated that appellant had not been successful in obtaining a job as a telephone solicitor and was reticent to take advantage of placement efforts, alleging that she was not physically able to work. The counselor advised that the position of telephone solicitor was available in appellant's commuting area and that entry-level rate of pay was $250.00 per week.

The position of telephone solicitor was described in the *Dictionary of Occupational Titles*, (299.357-014) as follows:

> "Solicits orders for merchandise or services over telephone. Calls prospective customers to explain type of service or merchandise offered. Quotes prices and tries to persuade customers to buy, using prepared sales talk. Record names, addresses, purchases and reactions of prospects solicited. [R]efers orders to other workers for filling. Key data from order card into computer, using keyboard. May develop lists of prospects from city and telephone directories. May type report on sales activities."

The physical demands for the position of telephone solicitor is also described under *Dictionary of Occupational Titles* as sedentary, "[e]xert force to 10 [pounds] occasionally or a negligible amount of force frequently to lift, carry , push, pull or move objects."

On November 19, 1999 the Office issued a notice of proposed reduction of compensation on the grounds that the position of telephone solicitor represented appellant's wage-earning capacity. Appellant was informed that she had 30 days to submit additional evidence or argument if she disagreed with the proposed action.

In a decision dated January 3, 2000, the Office reduced appellant's compensation based on her capacity to earn wages as a telephone solicitor at the rate of $201.73 week.

In a letter dated February 21, 2000, appellant requested an oral hearing.

In a decision dated March 31, 2000, the Office denied appellant's request for a hearing as untimely filed. The Office further noted that the issue in the case could be equally resolved through the reconsideration process.

In an April 10, 2000 letter, appellant requested reconsideration and submitted additional evidence.

In a report dated January 5, 2000, Dr. Seger noted that appellant continued to have a lot of problems with both knees and was under his care.[4] Physical findings were reported and under impression, the physician listed; (1) degenerative medial meniscus tear of the right knee; (2) chrondomalacia of the left knee; (3) chronic lumbar strain; and (4) exogenous obesity. He concluded that he saw no reason to change appellant's disability or impairment rating.

In a January 12, 2000 report, Dr. Luckay stated:

> "[Appellant] returned ... still symptomatic of low back and left lower limb pain with some weakness in dorsiflexion on the left side. However, she is using her [c]anadian crutches now and is able to clear the foot satisfactorily. She remains completely totally disabled from returning to any sort of occupation at this time and will remain in this situation for the foreseeable future. Her back situation is that of a spinal stenosis at two levels, as well as nerve root compromise."

In a decision dated April 26, 2000, the Office denied modification of its prior decision.

The Board finds that the Office properly reduced appellant's compensation based on her capacity to earn wages as a telephone solicitor.

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.[5]

Under section 8115(a) of the Federal Employees' Compensation Act,[6] wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent 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, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect wage-earning capacity in the employee's disabled condition.[7] Wage-earning capacity is a measure of the ability to earn wages in the open labor market under normal employment conditions.[8] Where vocational rehabilitation is unsuccessful, the rehabilitation counselor will prepare a final report that lists two or three jobs

[4] He further noted that appellant was being seen by his partner Dr. Frank Luckay, a Board-certified orthopedist. The record indicates that Drs. Melendez, Seger and Luckay were all associates of an orthopedic practice.

[5] *James B. Christenson*, 47 ECAB 775 (1996); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

[6] 5 U.S.C. § 8115(a).

[7] *See Richard Alexander*, 48 ECAB 432 (1997); *Pope D. Cox*, 39 ECAB 143 (1988).

[8] *Id*.

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.[9]

The Office procedures pertaining to vocational rehabilitation services emphasize returning disabled employees to suitable employment.[10] If the employment injury prevents the injured worker from returning to the job held at the time of injury, vocational rehabilitation services are provided to assist the employee in placement with the previous employer in a modified job or, if not feasible, developing an alternative plan based on vocational testing which may include medical rehabilitation, training and/or placement services.[11] When rehabilitation services prove unsuccessful, the Office's procedures instruct the rehabilitation counselor to submit a closure report to the Office, with relevant information regarding the suitability and availability of selected positions.[12] 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.[13]

In this case, Drs. Melendez, Gonzalez and Parsons are in agreement that appellant can perform sedentary work with no lifting over 10 pounds. Although appellant came under the care of Dr. Seger, subsequent to Drs. Melendez and Seger has stated that appellant is disabled from work, the physician has provided no rationale for his opinion. Dr. Seger was specifically requested to review a proposed job description of a telephone solicitor to ascertain whether it was suitable for appellant but he did not respond to the Office's request. Dr. Seger failed to cooperate with the Office in addressing appellant's ability to perform the position in question, his unreasoned medical opinion on appellant's disability status is therefore of limited probative value. Likewise, Dr. Luckay's statement of disability is of limited probative value because he also failed to provide a rationale for conclusion that appellant was disabled. Thus, the Board finds that the Office properly concluded based on the opinions of Drs. Melendez, Gonzalez and Parsons that appellant could perform sedentary work.

With appellant's work restrictions in mind, a rehabilitation counselor determined that appellant was able to perform the job of a telephone solicitor, that the position was available in sufficient numbers so as to make it reasonably available within appellant's commuting area and that the salary range for the position was $250.00 a week.

The Board find that the Office considered the proper factors, such as availability of suitable employment, appellant's physical limitations, usual employment, age and her employment qualifications in determining that the position of a telephone solicitor represented appellant's wage-earning capacity. The weight of the evidence establishes that appellant can

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.814.8 (December 1993); *see also Slyvia Bridcut*, 48 ECAB 162 (1996).

[10] *Id*.

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.813.6(b) (December 1993); *see Sylvia Bridcut*, *supra* note 9; *Clayton Varner*, 37 ECAB 248 (1985).

[12] *Philip S. Deering*, 47 ECAB 692 (1996).

[13] *Richard Alexander*, *supra* note 7.

perform this position. The rehabilitation counselor followed appropriate guidelines for finding that the position was reasonably available within the general labor market to appellant's commuting area. Therefore, the Office properly reduced appellant's compensation based on appellant's capacity to earn wages as a telephone solicitor.

The Board finds that the Office properly denied appellant's hearing request as untimely filed.

Section 8124(b) of the Act provides that, before review under section 8128(a), a claimant for compensation who is not satisfied with a decision of the Secretary is entitled to a hearing on his claim on a request made within 30 days after the date of issuance of the decision before a representative of the Secretary.[14] As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.[15]

As appellant's hearing request was dated February 21, 2000, more than 30 days after the Office's January 3, 2000 decision, appellant was not entitled to a hearing as a matter of right.[16] The Office further considered appellant's request for a hearing and determined that the issue of the case could be equally well resolved through a request for reconsideration. Accordingly, the Board finds that the Office did not abuse its discretion in its denial of appellant's request for a hearing.

[14] *See* 5 U.S.C. § 8124(b).

[15] *See* 20 C.F.R. § 10.616(a) (1999); *Charles J. Prudencio*, 41 ECAB 499, 501 (1990).

[16] The postmark date is considered to be the date that the hearing request was sent to or filed with the Office. *See* 20 C.F.R. § 10.616.

The decisions of the Office of Workers' Compensation Programs dated April 26 and January 3, 2000 are hereby affirmed.

Dated, Washington, DC
March 25, 2002

Alec J. Koromilas
Member

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member