U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PAMELA J. DARLING and DEPARTMENT OF VETERANS AFFAIRS, MEDICAL CENTER, Houston, Tex.

Docket No. 96-274; Submitted on the Record;
Issued January 21, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined appellant's loss of wage-earning capacity based on her actual wages.

On February 3, 1993 appellant, then a 34-year-old electrician, sustained an injury while in the performance of duty. Her claim was accepted by the Office for a cervical sprain with myositis. Appellant received appropriate compensation benefits under the Federal Employees' Compensation Act for intermittent disability following her return to work. Appellant underwent physical therapy and a work-hardening program. Effective January 8, 1995 she was placed on the periodic roll for total disability.[1]

Appellant was referred by her attending physician, Dr. Donald Metz, for examination by Dr. Robert Levinthal, a Board-certified neurosurgeon. In a March 23, 1995 report, Dr. Levinthal noted that appellant had been undergoing a work-hardening program and had not worked since November 1994. He noted that a magnetic resonance imaging (MRI) scan of her cervical spine, dated March 3, 1993, revealed no evidence of a focal disc herniation or nerve compression. Cervical spine x-rays were also reported as normal.

Appellant was placed in rehabilitation counseling. In a May 30, 1995 report, the rehabilitation counselor noted that testing revealed results significantly above average on intellectual functioning. Dr. Metz completed a work capacity evaluation which found appellant could lift up to 10 pounds continuously for 8 hours a day, 10 to 20 pounds on an intermittent basis, and indicated appellant could stand, walk, bend squat, climb and push/pull for 8 hours a day on an intermittent basis. Dr. Metz opined that appellant could work eight hours a day but

[1] The Board notes that in a May 23, 1995 compensation order the Office rejected appellant's claim for a schedule award as her treating physician provided an estimate of impairment of her cervical spine. Neither the Act nor the implementing federal regulations provide for the payment of a schedule award for loss of use of the back or spine; *see George E. Williams*, 44 ECAB 530 (1993); *James E. Mills*, 43 ECAB 215 (1991).

could only reach above her shoulders from one to two hours a day and that she would be released for work as of June 15, 1995. The rehabilitation counselor noted that she spoke with appellant about her vocational options at the employing establishment and that appellant did not believe she could perform any of the jobs in the electrical department. The counselor noted that the employing establishment would work on a job offer not in the electrical department.

By letter dated June 14, 1995, the employing establishment offered appellant the position of temporary light-duty clerk, which met her physical limitations. The attached job description set forth the duties of the position, noting it was created "for the purpose of providing temporary office automation and clerical assistance," and would not be made permanent.[2] The record reflects that appellant returned to work in the light-duty clerical position on June 26, 1995. Appellant's salary was equivalent to her rate of pay as of the date her disability began.

By letter dated July 17, 1995, the Office advised appellant that it was terminating her monetary compensation benefits effective June 25, 1995 based on her actual earnings as a light-duty clerk.

By decision dated September 6, 1995, the Office determined that the light-duty clerk position fairly and reasonably represented appellant's wage-earning capacity as her actual wages met or exceeded the wages of the position held when injured. Appellant was advised that the decision did not affect payment of her continuing medical expenses as needed for treatment of her condition. In the attached memorandum, the claims examiner noted that appellant had been successfully employed for 60 days.

The Board finds that the Office improperly determined appellant's loss of wage-earning capacity based on her actual earnings as a light duty-clerk.

Once the Office has accepted a claim and pays compensation, it has the burden of proof to justify termination or modification of compensation benefits.[3]

Section 8115(a) of the Act provides that the wage-earning capacity of an employee may be determined by actual earnings if actual earnings fairly and reasonably represent his or her wage-earning capacity.[4] Generally, wages actually earned are the best measure of wage-earning capacity and in the absence of evidence that they do not fairly or reasonably represent the injured employee's wage-earning capacity, will be accepted as such measure.[5]

Following appellant's return to work in the light-duty clerical position, the Office applied its procedures to determine that her actual wages represented her wage-earning capacity after the

[2] A July 20, 1995 rehabilitation report noted that the light-duty job was a temporary position which would end on September 30, 1995.

[3] *Mary Jo Colvert*, 45 ECAB 575 (1994); *Harold S. McGough*, 36 ECAB 332 (1984).

[4] *See* 5 U.S.C. § 8115(a).

[5] *Clarence D. Ross*, 42 ECAB 556 (1991); *Lee R. Sires*, 23 ECAB 12 (1971).

expiration of 60 days in the light-duty position.[6] The Board notes, however, that this policy can be invoked only in the absence of contrary evidence. In the present case, the record reflects that at the time appellant returned to work in the light-duty clerical position, such position was temporary in nature. It does not appear that the Office followed its procedures in its preliminary assessment of the suitability of the light-duty job offered to appellant. In this regard, the Office's procedure manual states:

> "A temporary job will be considered unsuitable unless the claimant was a temporary employee when injured and the temporary job reasonably represents the claimant's wage-earning capacity. Even if these conditions are met, a job which will terminate in less than 90 days will be considered unsuitable."[7]

At the time appellant returned to work in the light-duty clerical position, the record reflects that it was temporary in nature, terminating by September 30, 1995 or approximately 94 days following her return to duty. The job description highlighted the temporary nature of the light duty offered to appellant, stating it was created "for the purpose of providing temporary office automation and clerical assistance," and would not be made permanent. In *Jack L. Woolever*,[8] the Board noted it was improper for the Office to base an injured employee's wage-earning capacity on a temporary position. In this case, it does not appear that appellant was a temporary employee at the time she sustained injury on February 3, 1993. Nor does it appear fair or reasonable to base the reduction of her monetary compensation on a position scheduled to expire shortly following a period of 90 days. The mere fact that appellant worked more than 60 days in the light-duty position does not provide, in and of itself, a sufficient basis for the Office's wage-earning capacity determination given the circumstances of this case. As appellant's light-duty clerical position can be deemed temporary in nature, the Office cannot use her earnings from this position to determine her wage-earning capacity.

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993) provides: "After the claimant has been working for 60 days, the claims examiner will determine whether the claimant's actual earnings fairly and reasonably represent his or her wage-earning capacity. If so, a formal decision should be issued no later than 90 days after the date of return to work. If not, the claims examiner should proceed with a constructed loss of wage-earning capacity determination...."

[7] *Id*. at Chapter 2.814.4(b)(3).

[8] 29 ECAB 111 (1977).

The September 6, 1995 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, D.C.
January 21, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member