U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KATHY A. THOMPSON-SALAZAR and DEPARTMENT OF THE NAVY, NAVAL UNDERSEA WARFARE ENGINEERING STATION, UNDERSEAVEHICLES GROUP, Keyport, WA

Docket No. 03-1971; Submitted on the Record;
Issued July 23, 2004

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that the constructed position of file clerk represented appellant's wage-earning capacity; and (2) whether the Office met its burden of proof to terminate appellant's compensation benefits under section 8106(c) of the Federal Employees' Compensation Act on the grounds that she refused an offer of suitable work.

The Office accepted that on or before January 22, 2001 appellant, then a 44-year-old ordnance equipment mechanic, sustained a sprain and strain of the left shoulder and upper arm and left rotator cuff syndrome. She underwent arthroscopic subacromial decompression on September 14, 2001.

Appellant stopped work on January 22, 2001, may have briefly returned to work in a light-duty position, stopped work again as of February 15, 2001 and did not return. She received compensation for temporary total disability from March 25, 2001 through June 14, 2003. However, appellant disclosed in a May 7, 2001 letter and forms dated from May 29, 2001 to May 9, 2003, that she worked part time as a private sector real estate sales associate beginning in January 2000. She noted that she worked on commission, with earnings of $10,994.10 for the period January 1, 2000 through May 12, 2002 and $45,348.98 from May 2002 to May 2003.

In a January 17, 2002 report, Dr. Michael E. Morris, an attending Board-certified orthopedic surgeon, opined that appellant could work 8 hours per day with reaching with the left arm limited to 1 hour per day and pulling, pushing and lifting limited to 10 pounds. On April 18, 2002 she underwent a physical capacities evaluation demonstrating her fitness for medium work, with occasional exertion of 20 to 50 pounds of force and frequent exertion of 10 to 25 pounds of force. Based on this assessment, Dr. Morris opined in a May 6, 2002 report, that appellant had reached maximum medical improvement, but could not perform her date-of-injury position.[1]

In an October 25, 2002 report, Diane A. Sandrowski, a vocational rehabilitation counselor, noted that appellant was working as a real estate salesperson at "Re/Max in Bainbridge Island." Ms. Sandrowski obtained a personal and occupational history and prepared a transferable skills analysis on October 29, 2002. Following appellant's participation in a placement program, Ms. Sandrowski identified open file clerk positions and informed appellant of their availability in February 12 and March 7, 2003 letters. In an April 8, 2003 report, an Office rehabilitation specialist identified the positions of File Clerk I, U.S. Department of Labor, *Dictionary of Occupational Titles* (DOT) 206.387-034 and File Clerk II, DOT 206.367.014, both with wages of $348.40 per week, as being within appellant's skills, experience and training. Both positions had light physical demands with occasional lifting of up to 20 pounds and frequent reaching, handling and fingering. A labor market survey indicating that file clerk positions were available in the local labor market. Vocational rehabilitation was closed as of April 9, 2003.

By notice dated April 16, 2003, the Office advised appellant that it proposed to reduce her wage-loss compensation as she was capable of earning $348.40 per week as a file clerk, based on Dr. Morris' May 6, 2002 report. The Office afforded her 30 days in which to submit evidence or argument regarding her capacity to earn wages in the position described.

On April 24, 2003 the employing establishment offered appellant employment as a WG 10 modified ordnance equipment mechanic, with permanent light-duty restrictions, available as of April 24, 2003 at $972.86 per week. The position required reaching above the shoulder for up to 30 minutes per day and no continuous pushing, pulling or lifting over 20 pounds. Dr. Morris approved the ordnance mechanic position on April 27, 2003 but noted that he had not examined appellant since April 28, 2002.

In an April 29, 2003 letter, appellant stated that she did not contest the wage-earning capacity determination, but was confused as to whether to return to duty in the modified mechanic position or seek employment as a file clerk.

In a May 7, 2003 chart note, Dr. David B. Cowan, an attending Board-certified family practitioner, noted "some question" as to whether the offered ordnance mechanic position was consistent with a physical capacity evaluation performed one year previously, but noted that he had not reviewed the position description in detail.[1]

By decision dated May 16, 2003, the Office reduced appellant's wage-loss compensation based on her ability to earn wages as a file clerk. The Office ascertained that her weekly pay rate as of March 25, 2001 for the WG 10, Step 5, date of injury position was $890.18, with a current pay rate of $972.86 effective April 15, 2002 and that appellant was capable of earning $348.40.[2] By dividing her actual earnings by the current pay rate for the date-of-injury position, the Office determined that appellant had a 64 percent loss of wage-earning capacity.

[1] Dr. Cowan referred to "typed correspondence in the chart" regarding his support for the opinion of Kelly Campo, a physical therapist. However, this letter and her opinion are not of record.

[2] Effective November 17, 2002, the Office noted that the current pay rate for WG 5, step 10, date-of-injury position was $24.24 per hour or $972.86 per week.

In a May 19, 2003 letter, the Office advised appellant that, based on Dr. Morris' April 27, 2003 report, the modified ordinance equipment mechanic job was suitable work and remained available. The Office afforded appellant 30 days in which to submit argument or evidence establishing that the offered position was not suitable work. Appellant responded by June 11, 2003 letter, asserting that she should not be forced to work as an ordnance mechanic as she was already working as a real estate agent. She also contended that Dr. Cowan did not find the position suitable as he had not examined her within the year.

In a June 18, 2003 letter, the Office advised appellant that her reasons for refusing the offered position were insufficient. The Office afforded her 15 days in which to accept the position without penalty, noting that no further reasons for refusal would be considered. If appellant still refused the offered position, she would face termination of her wage-loss compensation benefits under section 8106(c) of the Act. She did not report to work by July 14, 2003.

By decision dated July 15, 2003, the Office terminated appellant's wage-loss compensation benefits under section 8106(c) of the Act, on the grounds that she refused an offer of suitable work without justification.

The Board finds that the Office properly determined appellant's wage-earning capacity based on the constructed position of file clerk.

Section 8115 of the Act[3] provide that wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent her wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity or the employee has no actual earnings, her wage-earning capacity is determined with due regard to the nature of her injury, the degree of physical impairment, her usual employment, her age, her qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect her wage-earning capacity in her disabled condition.[4]

The Board notes that at the time appellant was injured in the performance of her federal duties as a torpedo mechanic on January 22, 2001, she was also employed part time as a real estate agent in the private sector. She earned wages as a real estate sales associate from January 2000 through May 2003. Thus, her work in real estate constitutes private employment held at the time of injury and is dissimilar from her federal duties as a torpedo mechanic. In the *Long*[5] decision, the Board noted that it was well established that earnings from dissimilar private employment could not be considered evidence of a capacity to earn wages in the employment in which claimant worked at the time of injury. The Board further found that the Office was therefore precluded from adjusting appellant's compensation, by means of loss of wage-earning capacity, based on his actual earnings from the same concurrent dissimilar employment. Therefore it was appropriate to make a constructed loss of wage-earning capacity determination.

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[3] 5 U.S.C. §§ 8101-8193, 8115.

[4] *Ralph A. Nettles*, 54 ECAB ___ (Docket No. 02-1386, issued March 3, 2003); *Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

[5] *Earl D. Long*, 50 ECAB 464 (1999).

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 for selection of a position, listed in the DOT or otherwise available in the open market, that fits that employee's capabilities with regard to her physical limitations, 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. Finally, application of the principles set forth in *Albert C. Shadrick*[6] will result in the percentage of the employee's loss of wage-earning capacity. The basic range of compensation paid under the Act is 66 2/3 percent of the injured employee's monthly pay.[7]

The physical requirements of the constructed position of file clerk are sedentary in nature and include occasional lifting of up to 20 pounds, frequent reaching, handling and fingering. Dr. Morris, appellant's attending orthopedic surgeon, opined on May 6, 2002 that an April 18, 2002 physical capacity assessment demonstrated that she was fit for medium-duty work, including occasional lifting of 20 to 50 pounds.

Appellant received vocational rehabilitation services, including a 90-day placement program, from September 2002 to April 2003. Her vocational rehabilitation counselor obtained an occupational history, prepared a transferable skills analysis and identified the position of file clerk as being within appellant's skills and experience. A labor market survey demonstrated that file clerk positions were reasonably available in the local labor market. The rehabilitation counselor informed appellant in February 12 and March 7, 2003 letters, that she had located jobs for which appellant was medically and vocationally qualified. Appellant stated in an April 29, 2003 letter, that she did not contest the wage-earning capacity determination.

The Board finds that the Office considered the proper factors, such as availability of suitable employment, appellant's physical limitations, usual employment and employment qualifications, in determining that the constructed position of file clerk represented her wage-earning capacity. The weight of the evidence of record establishes that she had the requisite physical ability, skill and experience to perform the duties of a file clerk as described in the DOT. The rehabilitation counselor also verified that such position was reasonably available within appellant's commuting area. Therefore, the Office properly determined that appellant had the ability to earn wages as a file clerk with an entry-level salary of $348.40 per week.

Regarding the second issue, the Board finds that the Office improperly terminated appellant's compensation benefits under section 8106(c) of the Act.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[8] In this case, the Office terminated appellant's compensation under section 8106(c)(2) of the Act, which provide that, "a partially disabled

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[6] 5 ECAB 376 (1953).

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

[8] *Linda D. Guerrero*, 54 ECAB ___ (Docket No. 03-267, issued April 28, 2003); *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee is not entitled to compensation."[9] To justify termination of compensation, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[10] Section 8106(c) will be narrowly construed as it serves as a penalty provision, which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.[11]

Section 10.517(a) of the Act's implementing regulation provide that, an employee who refuses or neglects to work after suitable work has been offered or secured by the employee, has the burden of showing that such refusal or failure to work was reasonable or justified.[12] Pursuant to section 10.516, the employee shall be provided with the opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.[13]

In the present case, the Office terminated appellant's compensation on July 5, 2003 on the grounds that she refused an offer of suitable work. She contends that the employing establishment violated the Act's regulations by failing to send her or her attorney a copy of its March 19, 2003 letter to Dr. Morris, asking for his opinion as to the suitability of the offered position and by failing to timely send her Dr. Morris' April 27, 2003 report written in response to that letter. Section 10.506 of the Act's implementing regulation[14] provide that, if an employer contacts an injured employee's physician "in writing concerning the work limitations imposed by the effects of the injury and possible job assignments … the employer shall send a copy of any such correspondence to [the Office] and the employee, as well as a copy of the physician's response when received."

The Board finds that the March 19, 2003 letter was addressed only to Dr. Morris, with an "open copy" to the Office. Appellant's name and address and those of her attorney, do not appear. Thus, the record does indicate that appellant and her representative were not sent a copy of the Office's March 19, 2003 letter. However, the Board finds that the employing establishment's failure to send appellant or her representative a copy of the March 19, 2003 letter constitutes harmless, nondispositive error. The Board finds that the March 19, 2003 letter was not intended to exert any improper influence over Dr. Morris' opinion and is not critically relevant to the outcome of appellant's case.

The Board further finds that the employing establishment did commit dispositive procedural error by failing to provide appellant in a timely manner with a copy of Dr. Morris' April 27, 2003 letter approving the offered position. The Office's May 19, 2003 determination

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[9] 5 U.S.C. § 8106(c)(2); *see also Geraldine Foster*, 54 ECAB ___ (Docket No. 02-66, issued February 28, 2003).

[10] *Ronald M. Jones*, 52 ECAB 190 (2000); *Arthur C. Reck*, 47 ECAB 339, 341-42 (1995).

[11] *Joan F. Burke*, 54 ECAB ___ (Docket No. 01-39, issued February 14, 2003); *see Robert Dickerson*, 46 ECAB 1002 (1995).

[12] 20 C.F.R. § 10.517(a); *see Ronald M. Jones*, *supra* note 10.

[13] 20 C.F.R. § 10.516.

[14] 20 C.F.R. § 10.505 (2003).

that the offered modified ordnance equipment mechanic position was suitable work was predicated on Dr. Morris' approval. His April 27, 2003 report is thus, critical to the outcome of this case. However, appellant did not review this report until the Office provided her a copy accompanying its June 18, 2003 letter stating that no further reasons for refusal of the offered position would be accepted. This delay deprived appellant of the opportunity to contest Dr. Morris' findings during the 30-day response period, which began to run on May 19, 2003 to submit any evidence or argument in justification of a refusal. Without access to the medical basis of the Office's determination of suitability, appellant was deprived of the opportunity, as envisioned by section 10.506 of the regulation, to respond to Dr. Morris' opinion and to have her response considered by the Office before a determination was made with respect to termination of entitlement to compensation.[15] Thus, the employing establishment's failure to send appellant a copy of Dr. Morris' response as provided by section 10.506 constitutes dispositive error and the Office' July 15, 2003 decision terminating appellant's compensation benefits must be reversed.

The decision of the Office of Workers' Compensation Programs dated July 15, 2003 is hereby reversed. The decision of the Office dated May 16, 2003 is hereby affirmed.

Dated, Washington, DC
July 23, 2004

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[15] *John E. Lemker*, 45 ECAB 258 (1993).