United States Department of Labor
Employees' Compensation Appeals Board

K.N., Appellant	)	
and	)	**Docket No. 07-1505**
	)	**Issued: February 4, 2008**
DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, White Plains, NY, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 11, 2007 appellant filed a timely appeal of an October 12, 2006 merit decision of the Office of Workers' Compensation Programs, finding that the selected position of customer service representative represented her wage-earning capacity and a February 12, 2007 nonmerit decision, denying her request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this appeal.

ISSUES

The issues are: (1) whether the Office properly reduced appellant's compensation effective October 12, 2006 based on its determination that the selected position of customer service representative represented her wage-earning capacity; and (2) whether the Office properly denied appellant's request for a merit review of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On August 21, 2004 appellant, then a 34-year-old air traffic control specialist, sustained an emotional condition as a result of abuse and harassment at the employing establishment. She stopped work on August 25, 2004. By letter dated October 22, 2004, the Office accepted the claim for anxious mood and an adjustment reaction.

In a June 28, 2006 medical report, Bruce A. Levine, Ph.D., an attending clinical psychologist, provided his findings on examination. He reported depressed mood, tearfulness, agitation, anxiety, hopelessness and associated symptoms. Appellant presented as average height and weight and with rapid and pressured speech. She was correctly oriented and her thinking was clear and relevant but obsessional at times. Appellant's mood was clearly depressed and affect was agitated. Dr. Levine stated that she was highly motivated to return to work. He opined that appellant's symptoms were exogenous and would remit if her life circumstances returned to normal. Dr. Levine diagnosed adjustment disorder with anxiety and depression. He opined that there was a causal relationship between appellant's emotional condition and abuse by the employing establishment. Dr. Levine stated that the accompanying August 25, 2004 psychological test results supported his causal relation finding. He concluded that appellant was not totally disabled and that she was capable of returning to work on a full-time basis. Dr. Levine stated that the only restriction was that she could not return to work in the same location where the employment-related abuse occurred.

Because the employer was unable to accommodate her restrictions, the Office referred appellant to a vocational rehabilitation counselor. On July 3, 2006 the vocational rehabilitation counselor identified the position of customer service representative as being within appellant's physical limitations, vocational skills and geographical area. The customer service representative position, as it appeared in the Department of Labor, *Dictionary of Occupational Titles* (DOT), was classified as a sedentary position. The position required interviewing applicants and recording interview information into a computer for water, gas, electric, telephone or cable television system service. It further required talks with customers by telephone or in person and receipt of orders for installations, turn-on, discontinuance or change in service. The position required filling out contract forms, determining charges for service requested, collecting deposits, preparing change of address records and issuing discontinuance orders using a computer. The solicitation of the sale of new or additional services, adjustment of complaints concerning billing or service rendered and referral of complaints of service failures such as, low voltage or low pressure to designated departments for investigation were permitted. The position also permitted visits to customers at their place of residence to investigate conditions preventing completion of service-connection orders and to obtain contract and deposit when service was being used without a contract. Discussion of cable television equipment operation with a customer over the telephone to explain equipment usage and to troubleshoot equipment problems was allowed. The physical requirements included sedentary strength, reaching, handling, fingering and feeling often and frequent talking and hearing. No climbing, balancing, stooping, kneeling, crouching, crawling, tasting/smelling, near or far acuity, depth perception, accommodation, color vision and field of vision were required. The vocational rehabilitation counselor found that appellant's transferable skills and prior work experience qualified her for the selected position. He stated that the selected position was available on a full-time basis and

in appellant's commuting area based on a labor market survey and his contact with an employer in the area.

In an August 24, 2006 notice, the Office advised appellant that it proposed to reduce her compensation because the medical and factual evidence of record established that she was no longer totally disabled. The Office found that she had the capacity to earn the wages of a customer service representative. Based on the formula developed in *Albert C. Shadrick*,[1] the Office determined that appellant's compensation would be reduced to $1,615.00 every four weeks. Her salary on August 21, 2004, the date of her injury, was $1,026.64 per week; that the current adjusted pay rate for her job on the date of injury was $1,337.56 per week and that she was currently capable of earning $576.92 per week, the pay rate of a customer service representative. The Office determined that appellant had a 43 percent wage-earning capacity, which resulted in an adjusted wage-earning capacity of $441.46 per week. It determined that she had a loss of wage-earning capacity of $585.18 per week. The Office concluded that, based upon a two-thirds compensation rate, appellant's compensation would be $390.12 per week, increased by the consumer price index effective March 1, 2006 to $403.75 per week. She was provided 30 days to submit additional evidence or argument in support of any objection to the proposed reduction. Appellant did not respond within the allotted time period.

By decision dated October 12, 2006, the Office finalized the reduction of appellant's compensation benefits effective that date.

On November 9, 2006 appellant requested reconsideration. In a letter dated September 20, 2006, she contended that an accompanying August 8, 2006 letter from Thomas J. Cahill, an air traffic manager, established that she was totally disabled for work. Mr. Cahill stated that appellant had been deemed medically incapacitated from all air traffic control duties by a flight surgeon. He noted that her incapacitation for work was accommodated with two temporary alternative detail assignments from October 2 through November 1, 2005 and November 3, 2005 to February 11, 2006. Mr. Cahill reiterated that no administrative work was currently available for appellant at the employing establishment. He canvassed air traffic facilities and hub managers within the commuting area, but found no positions for which she was qualified.

By decision dated February 12, 2007, the Office denied appellant's request for reconsideration on the grounds that it did not contain relevant evidence sufficient to warrant a merit review of the Office's prior decision.

LEGAL PRECEDENT -- ISSUE 1

Once the Office has made a determination that an employee 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.[2]

[1] 5 ECAB 376 (1953).

[2] *William H. Woods*, 51 ECAB 619 (2000); *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

Under section 8115(a) of the Federal Employees' Compensation Act, 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 if the employee has no actual earnings, her wage-earning capacity is determined with due regard to the nature of her injuries and the degree of physical impairment, her usual employment, the employee's age and vocational qualifications and the availability of suitable employment.[3] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[4] 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.[5]

After the Office makes a medical determination of partial disability and of special work restrictions, it may refer the employee's case to an Office wage-earning capacity specialist for selection of a position listed in the DOT or otherwise available in the open market, that fits the employee's capabilities with regard to her physical limitations, education, age and prior experience. Once this selection is made, determination of wage rate and availability in the open labor market should be made through contact with the state employment services or other applicable services.[6] Finally, application of the principles set forth in *Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.[7] This has been codified by the regulations in 20 C.F.R. § 10.403(c).

ANALYSIS -- ISSUE 1

Appellant received compensation for total disability due to her accepted anxious mood as an adjustment reaction condition. She stopped work on August 25, 2004. In finding that appellant was physically capable of performing the duties of customer service representative, as of October 12, 2006, the Office relied on the June 28, 2006 medical report of Dr. Levine, an attending physician. On examination, Dr. Levine reported appellant's psychological symptoms. He stated that she was highly motivated to return to work. Dr. Levine opined that appellant's symptoms were exogenous and would remit if her life circumstances returned to normal. He diagnosed adjustment disorder with anxiety and depression. Dr. Levine opined that there was a causal relationship between appellant's emotional condition and abuse by the employing establishment as supported by psychological test results. He further opined that she was not totally disabled and that she was capable of returning to work on a full-time basis. Dr. Levine only restricted appellant from returning to work in the same location where the employment-related abuse occurred.

[3] *Samuel J. Chavez*, 44 ECAB 431 (1993).

[4] *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

[5] *Id.* The commuting area is to be determined by the employee's ability to get to and from the work site. *See Glen L. Sinclair*, 36 ECAB 664, 669 (1985).

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

[7] *See William H. Woods*, *supra* note 2; *Shadrick*, *supra* note 1.

The Board finds that Dr. Levine's report is well rationalized and based on a proper factual background. It constitutes the weight of the medical opinion evidence and establishes that appellant was capable of working full time as long as the position was not located where the employment-related abuse occurred.

The selected customer service representative position required interviewing applicants and recording this information into a computer for water, gas, electric, telephone or cable television system service. It further required talks with customers by telephone or in person and receipt of orders for installations, turn-on, discontinuance or change in service. The position also required filling out contract forms, determining charges for service requested, collecting deposits, preparing change of address records and issuing discontinuance orders using a computer. It permitted solicitation of the sale of new or additional services, adjustment of complaints concerning billing or service rendered and referral of complaints of service failures such as, low voltage or low pressure to designated departments for investigation. The position also permitted visits to customers at their place of residence to investigate conditions preventing completion of service-connection orders and to obtain contract and deposit when service was being used without a contract. Discussion of cable television equipment operation with a customer over the telephone to explain equipment usage and to troubleshoot equipment problems was allowed. The vocational rehabilitation counselor stated that appellant's transferable skills and prior work experience qualified her for the selected position. In light of the above, the Board finds that appellant is capable of performing the duties of the selected position.

The physical requirements of the customer service representative position involved sedentary strength, reaching, handling, fingering and feeling often and frequent talking and hearing. It did not require climbing, balancing, stooping, kneeling, crouching, crawling, tasting/smelling, near or far acuity, depth perception, accommodation, color vision and field of vision. Appellant did not have any physical restrictions. Based on the evidence of record, the Board finds that the selected position was within appellant's work restrictions and was appropriate for a wage-earning capacity determination.

Further, the vocational rehabilitation counselor confirmed that the selected position is available on a full-time basis and in appellant's commuting area based on a labor market survey and his contact with an employer in the area.

Finally, the Board finds that the Office properly determined appellant's loss of wage-earning capacity in accordance with the formula developed in *Shadrick*[8] and codified at section 10.403 of the Office's regulations.[9] In this regard, the Office indicated that her salary on August 21, 2004, the date of her injury, was $1,026.64 per week; that the current adjusted pay rate for her job on the date of injury was $1,337.56 per week and that she was currently capable of earning $576.92 per week, the pay rate of a customer service representative. It determined that appellant had a 43 percent wage-earning capacity, which resulted in an adjusted wage-earning capacity of $441.46 per week. The Office determined that appellant had a loss of wage-earning capacity of $585.18 per week. It concluded that, based upon a two-thirds compensation

[8] *See Albert C. Shadrick, supra* note 1.

[9] 20 C.F.R. § 10.403.

rate, her new compensation rate was $390.12 per week, increased by the consumer price index effective March 1, 2006 to $403.75 per week and that her net compensation for each four-week period would be $1,615.00. The Board finds that the Office's application of the *Shadrick* formula was proper and, therefore, it properly found that the position of customer service representative reflected appellant's wage-earning capacity effective October 12, 2006.[10]

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128 of the Act,[11] the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[12] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[13] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review of the merits.[14]

ANALYSIS -- ISSUE 2

On November 9, 2006 appellant disagreed with the October 12, 2006 finding that the selected position of customer service representative represented her wage-earning capacity. The relevant issue in this case is whether the Office's adjustment of appellant's wage-earning capacity based on the selected position of customer service representative and resultant calculation of her pay rate for compensation were proper.

Appellant contended that Mr. Cahill's August 8, 2006 letter established that she was totally disabled for work. Mr. Cahill stated that appellant had been deemed medically incapacitated from all air traffic control duties by a flight surgeon. He stated that, although she was assigned two temporary detail assignments to accommodate her incapacity to perform her work duties, no administrative work was currently available for her at the employing establishment. Mr. Cahill canvassed air traffic facilities and hub managers within the commuting area, but stated that there were no positions available for which appellant was qualified. This evidence, however, is not relevant to the main issue in the present case, *i.e.*, whether the Office properly adjusted her compensation in 2006 based on its determination that she was capable of performing the selected position of customer service representative and calculated her resultant pay rate for compensation. The Board has held that the submission of

[10] *Elsie L. Price*, 54 ECAB 734 (2003); *Stanley B. Plotkin*, 51 ECAB 700 (2000).

[11] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, [t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. 5 U.S.C. § 8128(a).

[12] 20 C.F.R. § 10.606(b)(1)-(2).

[13] *Id.* at § 10.607(a).

[14] *Id*. at § 10.608(b).

evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[15] Mr. Cahill did not address appellant's ability to perform the duties of the selected customer service representation position or the calculation of her pay rate for compensation in this position. Thus, the Board finds that Mr. Cahill's letter is not relevant and thus, insufficient to warrant reopening her claim for further merit review.

The evidence submitted by appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or constituted relevant and pertinent new evidence not previously considered. As she did not meet any of the necessary regulatory requirements, the Board finds that she is not entitled to further merit review.[16]

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation effective October 12, 2006 based on its determination that the selected position of customer service representative represented her wage-earning capacity. The Board further finds that the Office properly denied appellant's request for a merit review of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the February 12, 2007 and October 12, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 4, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

[15] *See Patricia G. Aiken*, 57 ECAB ___ (Docket No. 06-75, issued February 17, 2006).

[16] *See* 20 C.F.R. § 10.608(b); *Richard Yadron*, 57 ECAB ___ (Docket No. 05-1738, issued November 8, 2005).