United States Department of Labor
Employees' Compensation Appeals Board

E.H., Appellant	)	
and	)	**Docket No. 08-2057**
	)	**Issued: July 1, 2009**
DEPARTMENT OF HOMELAND SECURITY, CITIZENSHIP & IMMIGRATION SERVICES, Westminster, CA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 21, 2008 appellant filed an appeal from decisions of the Office of Workers' Compensation Programs dated November 5, 2007 and June 13, 2008. Pursuant to 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 the Office met its burden of proof to reduce appellant's compensation benefits based on her capacity to earn wages in the constructed position of branch manager.

FACTUAL HISTORY

On November 4, 1999 the Office accepted that appellant, then a 56-year-old adjudicator, sustained an employment-related right knee and low back strain. On December 17, 1999 Dr. Christopher A. Wills, Board-certified in orthopedic surgery, performed repair of a right medial meniscal tear. Appellant subsequently returned to limited duty. On January 17, 2002 she

was granted a schedule award for a two percent permanent impairment of the right lower extremity. On February 16, 2005 the employing establishment informed appellant that it could no longer accommodate her physical restrictions. Appellant stopped work on March 6, 2005 and filed a Form CA-7, claim for compensation. On June 20, 2005 she was referred for vocational rehabilitation services and was placed on the periodic roll.

On December 15, 2005 Mike Hooker, a rehabilitation specialist, identified the positions of manager, credit and collections and branch manager as appropriate for appellant. Placement efforts began on January 20, 2006. In a work capacity evaluation dated November 1, 2006, Dr. Wills advised that appellant could sit, walk, stand, reach and perform repetitive movements of the wrists and elbows for eight hours a day, could push and pull for six hours a day, could reach above the shoulder for three hours daily, twist, bend, stoop and lift for two hours daily, and could not squat, kneel or climb.

By letter dated April 14, 2007, appellant informed the Office that she was in the process of relocating from her home in San Bernardino, California, to Roy, Utah. On May 1, 2007 her rehabilitation counselor, Denise Stanton, identified the positions of manager, credit and collection and branch manager, finding that they were within the sedentary strength category, within appellant's work restrictions and qualifications and reasonably available in the local labor market.[1]

On August 21, 2007 the Office proposed to reduce appellant's wage-loss compensation based on her capacity to earn wages as a branch manager. It advised appellant that, if she disagreed with the proposed reduction, she should submit additional evidence or argument within 30 days. The Office also requested that Dr. Wills provide an updated work capacity evaluation. By letter dated August 30, 2007, appellant disagreed with the proposed reduction. Dr. Wills replied that the Office should use his November 1, 2006 report.

In a November 5, 2007 decision, the Office reduced appellant's compensation benefits, effective October 28, 2007, based on her capacity to earn wages as a branch manager, finding the position medically and vocationally suitable.

On December 2, 2007 appellant requested a telephonic hearing that was held on March 17, 2008. At the hearing appellant, who was represented by counsel, described her job duties and unsuccessful job search. She relocated to Roy, Utah, approximately 30 miles north of Salt Lake City, because she "had wind" that her compensation was going to be reduced. Counsel argued that appellant did not have the requisite skills or physical ability to perform the branch manager position and that, at her age, the chance of obtaining work was vastly reduced. He concluded that the labor market survey should have been done in Utah rather than in California.

By decision dated June 13, 2008, an Office hearing representative affirmed the November 5, 2007 decision.

[1] The labor market surveys do not indicate what commuting area was used to determine availability.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[2] An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.[3]

Section 8115 of the Federal Employees' Compensation Act[4] and Office regulations provide that wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity or the employee has no actual earnings, the wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the employee's usual employment, age and qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect the wage-earning capacity in his or her disabled condition.[5]

The Office must initially determine a claimant's medical condition and work restrictions before selecting an appropriate position that reflects his or her wage-earning capacity. The medical evidence upon which it relies must provide a detailed description of the condition.[6] Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.[7]

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 Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open market, that fits that employee's capabilities with regard to his or 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.[8] Finally, application of the principles set forth in *Albert C. Shadrick*[9] will result in the percentage of the employee's loss of wage-earning capacity.[10]

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[2] *James M. Frasher*, 53 ECAB 794 (2002).

[3] 20 C.F.R. §§ 10.402, 10.403; *John D. Jackson*, 55 ECAB 465 (2004).

[4] 5 U.S.C. §§ 8101-8193.

[5] 5 U.S.C. § 8115; 20 C.F.R. § 10.520; *see John D. Jackson, supra* note 3.

[6] *William H. Woods*, 51 ECAB 619 (2000).

[7] *John D. Jackson, supra* note 3.

[8] *James M. Frasher, supra* note 2.

[9] 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.403.

[10] *James M. Frasher, supra* note 2.

In determining an employee's wage-earning capacity based on a position deemed suitable, but not actually held, the Office must consider the degree of physical impairment, including impairments resulting from both injury-related and preexisting conditions, but not impairments resulting from post injury or subsequently acquired conditions. Any incapacity to perform the duties of the selected position resulting from subsequently acquired conditions is immaterial to the loss of wage-earning capacity that can be attributed to the accepted employment injury and for which appellant may receive compensation.[11]

Office procedures provide that the availability of employment is usually evaluated with respect to the area where the injured employee resides at the time the determination is made, rather than the area of residence at the time of injury. However, when the employee voluntarily moves to an isolated locality with few job opportunities, the question of availability should be applied to the area of residence at the time of the injury.[12]

ANALYSIS

The Board finds that the Office did not properly determine that appellant was capable of performing the selected position of branch manager. The medical evidence from Dr. Wills, established that appellant was no longer totally disabled and the Office properly referred her for vocational rehabilitation counseling in June 2005. Because appellant was unable to secure employment, on May 1, 2007, the vocational rehabilitation counselor identified the positions of manager, credit and collection, and branch manager as within her capabilities. The Office based its November 5, 2007 decision on the latter position which is identified in the *Dictionary of Occupational Titles*[13] as sedentary. Dr. Wills provided a November 1, 2006 work capacity evaluation and reiterated his findings in a November 2007 report. He advised that appellant could perform her usual job of adjudicator and provided permanent restrictions to her physical activities that were within the requirements of a sedentary position. Appellant has submitted no additional medical evidence. The medical evidence established that she was physically capable of performing the branch manager position.

As noted, however, the selected position must be reasonably available in appellant's commuting area. Ms. Stanton, the rehabilitation counselor, did not identify the geographic area she used in the labor market surveys dated May 1, 2007. As she is based in California and appellant lived and worked in the greater Los Angeles area prior to her relocation to Utah, it is reasonable to assume that the labor market surveys completed by Ms. Stanton were based on information pertaining to the greater Los Angeles area. Appellant moved from San Bernardino, California to Roy, Utah, in April 2007 and the Office did not reduce her compensation until October 28, 2007. Office procedures provide that the availability of the employment is usually evaluated with respect to the area where the injured employee resides at the time the

[11] *John D. Jackson*, *supra* note 3.

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment*: *Vocational Rehabilitation Services*, Chapter 2.814.8(c)(1) (December 1995).

[13] Department of Labor, *Dictionary of Occupational Titles*.

determination is made.[14] The Office did not explain what geographic area it used in the May 1, 2007 labor market surveys. The Board cannot determine if it considered appellant's move in April 2007 in its finding of reasonable availability. The Office failed to meet its burden of proof to establish that the position of branch manager was reasonably available in the general labor market in the greater Salt Lake area in which appellant lived when issued the November 5, 2007 decision. Accordingly, it failed to establish that the selected position of branch manager represented appellant's wage-earning capacity and failed to properly reduce her compensation benefits.

CONCLUSION

The Board finds that the Office did not meet its burden of proof in reducing appellant's wage-earning capacity based on her ability to earn wages in the selected position of branch manager because the Office did not establish that the position was reasonably available in appellant's commuting area of Roy, Utah.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 13, 2008 and November 5, 2007 be reversed.

Issued: July 1, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.814.8(c)(1) (December 1995).