United States Department of Labor
Employees' Compensation Appeals Board

M.H., Appellant	)	
and	)	**Docket No. 09-2349**
	)	**Issued: September 2, 2010**
U.S. POSTAL SERVICE, YESO POST OFFICE, Yeso, NM, Employer	)	

Appearances:
Gordon Reiselt, 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 September 25, 2009 appellant filed a timely appeal from a September 1, 2009 decision of the Office of Workers' Compensation Programs regarding a wage-earning capacity determination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether the Office properly determined that the position of receptionist represented appellant's wage-earning capacity as of January 10, 2005.

On appeal counsel asserts that the Office's September 1, 2009 decision is contrary to the facts and to the law.

FACTUAL HISTORY

This case was previously before the Board. In a November 21, 2007 order,[1] the Board remanded the Office's October 30, 2006 and February 8, 2007 decisions regarding an overpayment of compensation and a subsequent hearing request. The Board directed the Office to clarify a June 22, 2005 wage-earning capacity determination affecting the amount of the overpayment. The facts of the case as set forth in the Board's order are incorporated by reference. The relevant facts are set forth.

The Office accepted that on February 26, 1998 appellant, then a 60-year-old part-time postmaster,[2] sustained a temporary aggravation of osteoarthritis of both hands. On April 7, 1998 she underwent a right carpometacarpal hemitrapeziectomy with palmaris longus tendon interposition. Appellant stopped work on April 17, 1998 and did not return.

Dr. R.E. Pennington, an attending Board-certified physiatrist, submitted treatment reports from 2000 to 2003. He diagnosed severe osteoarthritis of both hands, bilateral carpal tunnel syndrome, de Quervain's tenosynovitis of the right upper extremity and degenerative lumbar disc disease. On September 11, 2002 the Office obtained a second opinion report from Dr. Donald A. Vichick, a Board-certified orthopedic surgeon, who found appellant totally disabled for work due to severe osteoarthritis deformities and weakness of both hands.

In a May 20, 2004 report, Dr. Pennington listed permanent restrictions against reaching above the shoulder, repetitive movements of the wrist and elbow, pulling, lifting and squatting.[3] On September 24, 2004 he advised that appellant could work four hours a day modified duty with limited use of her hands and no typing.[4] As the medical evidence established that she was no longer totally disabled for work, the Office referred appellant for vocational rehabilitation services.

In December 10, 29 and 31, 2004 reports, the counselor noted that, due to a lack of local employers, appellant self-selected employment as a receptionist, Department of Labor, *Dictionary of Occupational Titles* (DOT) #237.367-038, at Innovative Training and Consulting Services, Inc., a company owned and operated by her daughter and son-in-law. As there were very few employers in her commuting area, the counselor asked appellant's daughter to employ her.[5] Starting wages were $6.00 an hour. Duties included answering the telephone, scheduling

[1] Docket No. 07-1121 (issued November 21, 2007).

[2] The postmaster position was 24 hours a week upon hiring.

[3] Dr. N. Alexander, an attending Board-certified anesthesiologist, submitted reports from June to September 2004 diagnosing chronic carpal tunnel syndrome and degenerative joint disease of both upper extremities and de Quervain's tenosynovitis of the right arm.

[4] In a November 1, 2004 report, Dr. Evan L. Nelson, an attending Board-certified family practitioner, held appellant off work pending evaluation of degenerative cervical disc disease.

[5] In reports through October 2004, the vocational rehabilitation counselor noted that appellant had few choices of employers as she lived in a very small, remote village in an economically depressed area, at least 60 miles from the next significant labor market.

appointments, "minimal filing of client's folders in filing cabinet," photocopying training materials and assembling client packets. The company vice-president would assist appellant as needed. The work schedule was flexible, not to exceed 4.5 hours a day, 5 days a week, for a total of 24 hours a week. Appellant would be accommodated by the Office purchasing her a telephone headset[6] and her employer allowing her to work from home, "work at her own pace" and take breaks as needed. She would not be required to push, pull or lift more than five pounds, type or perform repetitive motions with either hand. The counselor noted that Dr. Vichick found appellant capable of sedentary and clerical activities. Appellant signed the job offer on December 29, 2004.

In a January 3, 2005 letter, Dr. Pennington stated "no" in response to whether appellant was medically able to perform the receptionist position. By decision dated June 22, 2005, the Office reduced her compensation based on her actual earnings as a private sector receptionist as of January 10, 2005. In the November 21, 2007 order, the Board set aside the June 22, 2005 decision and remanded the case to determine if the receptionist position was suitable work.

In a January 7, 2008 letter, the Office requested that Dr. Pennington clarify whether appellant was medically able to perform the receptionist position. Dr. Pennington responded on February 18, 2008 that she could perform limited or modified activities, but should undergo a functional capacity evaluation.[7]

The Office obtained a second opinion from Dr. Thomas Grace, a Board-certified orthopedic surgeon. In a March 27, 2008 report, Dr. Grace reviewed a statement of accepted facts and medical record. He noted that appellant was on medication for osteoarthritis, hypertension, diabetes, hypercholesterolemia and had undergone bladder surgery. Dr. Grace cautioned that she could not perform sedentary "cognitive" work as she required prescription narcotics during the day. On examination, he found contractions and deformities throughout both hands and severely diminished grip strength. Dr. Grace diagnosed severe osteoarthritis of both hands with history of occupational aggravation and a resection arthroplasty of the right thumb. He opined that the accepted aggravation had not ceased and appellant's condition worsened from 1998 to 2005. Dr. Grace opined that the receptionist job was suitable according to Dr. Vichick's September 2002 restrictions, but that those limitations might have required modification as of 2005. He found appellant totally and permanently disabled for work.

By decision dated January 16, 2009, the Office reduced appellant's compensation under sections 8106 and 8115 of the Federal Employees' Compensation Act, based on her actual earnings as a private sector receptionist from January 10 to May 5, 2005. It made the determination retroactive to January 10, 2005 finding that her actual earnings properly represented her wage-earning capacity as of that date. The Office accorded the weight of the medical opinion to Dr. Grace.

[6] Appellant received the headset on January 11, 2005.

[7] In June 20 and 21, 2008 reports, Dr. Pennington characterized appellant's work capacity as "limited," noting that she was unable to perform her date-of-injury position.

In a January 23, 2009 letter appellant requested a telephonic hearing, held June 1, 2009. At the hearing, she stated that from January 10 to May 5, 2005 she worked as a receptionist at Innovative Training and Consulting Services, her daughter's business. Appellant stated that she had many absences, worked a varied schedule and tried to make up time by working Saturdays. She was terminated as she was unable to perform the duties of the position. Counsel asserted that appellant was unable to work due to underlying conditions and the side effects from prescription narcotics. The hearing representative left the record open for 30 days to allow her to submit additional evidence or argument.

Following the hearing, counsel submitted a June 1, 2009 letter asserting that Dr. Pennington's February 18, 2008 opinion was vague and inaccurate. Counsel contended that the Office misinterpreted Dr. Grace's opinion, as he found that the accepted aggravation of osteoarthritis had not ceased and medication side effects made sedentary office work unsuitable. Counsel argued that, as appellant worked for her daughter, this was "sheltered employment" not available in the open market.

In a February 17, 2008 letter, the vice-president of Innovative Training and Consulting Services stated that, from January 10 through early May 2005, appellant was able to "take calls, make copies and assist with scheduling." Appellant was unable to carry training materials, write quickly or legibly due to "issues with her hands." The vice-president noted that he altered her work "on many occasions," trying to find things that she could do. However, these attempts failed. Appellant was terminated as she could "not keep up with the work."

By decision dated and finalized September 1, 2009, an Office hearing representative affirmed the January 16, 2009 decision. The hearing representative found that appellant was able to perform some aspects of the position, although the company vice-president found her unable to perform her essential functions. He concluded that Dr. Pennington's January 3, 2005 report was insufficiently rationalized to establish that she was medically unable to perform the receptionist position.

LEGAL PRECEDENT

Under section 8115 (a) of the Act,[8] wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent her wage-earning capacity. Generally, wages actually earned are the best measure of a wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.[9] The Office's procedure manual provides that factors to be considered in determining whether the claimant's work fairly and reasonably represents her wage-earning capacity include the kind of appointment, that is, whether the position is temporary, seasonal or permanent and the tour of duty, that is, whether it

[8] 5 U.S.C. §§ 8101-8193, 8115(a).

[9] *Hayden C. Ross*, 55 ECAB 455 (2004).

is part time or full time.[10] Further, a makeshift[11]or odd-lot position designed for a claimant's particular needs will not be considered suitable.[12]

The formula for determining loss of wage-earning capacity based on actual earnings, developed in the Board's decision in *Albert C. Shadrick*,[13] has been codified by regulations at 20 C.F.R. § 10.403. Office procedures provide that a determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity should be made after an employee has been working in a given position for more than 60 days.[14] The amount any compensation paid is based on the wage-earning capacity determination and it remains undisturbed until properly modified.[15]

ANALYSIS

The Office accepted that appellant sustained a temporary aggravation of osteoarthritis of both hands on February 26, 1998. Following April 1998 hand surgery, she remained off work. Dr. Pennington, an attending Board-certified physiatrist, submitted periodic reports through 2003 noting severe osteoarthritis of both hands. Dr. Vichick, a Board-certified orthopedic surgeon and second opinion physician, opined on September 11, 2002 that appellant was totally disabled for work due to flexion contractures and deformities of all digits.

On September 24, 2004 Dr. Pennington released appellant to light-duty work for four hours a day with restrictions. Based on these limitations, the Office developed a vocational rehabilitation plan, resulting in her employment as a receptionist from January 10 to May 5, 2005.[16] Appellant was terminated as she could not perform the essential functions of the position. The Office reduced her compensation effective January 10, 2005 based on her actual earnings as a receptionist. The Board finds, however, that this reduction was improper as the receptionist position appellant performed from January 10 to May 5, 2005 was a make-shift position not available in the open labor market.[17]

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[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (July 1997).

[11] A makeshift position is one that is specifically tailored to an employee's particular needs and generally lacks a position description with specific duties, physical requirements and work schedule. *See William D. Emory*, 47 ECAB 365 (1996); *James D. Champlain*, 44 ECAB 438 (1993).

[12] *See, e.g., Michael A. Wittman*, 43 ECAB 800 (1992).

[13] 5 ECAB 376 (1953).

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993).

[15] *See Sharon C. Clement*, 55 ECAB 552 (2004).

[16] The Board notes that the vocational counselor found the receptionist position to be suitable work based on Dr. Vichick's September 11, 2002 report. However, Dr. Vichick found appellant totally disabled for work.

[17] *Elbert Hicks*, 49 ECAB 283 (1998).

The Board delineated factors of make-shift work in *A.J.*, where the employer had actual earnings as a limited-duty clerk.[18] The Board reversed the Office's wage-earning capacity determination, finding that the clerk position was make-shift work specifically tailored to the claimant's needs. There was no detailed job description or set schedule, her significant medical limitations precluded many clerical duties and the employee was allowed to delegate tasks to her supervisor if she felt unable to perform them. The employee confirmed that she performed very limited clerical duties for one to two hours a day, then read novels and worked on union grievances as there were no work tasks she was able to perform. The Board found that the claimant's restricted duties did not constitute a *bona fide* job that would be available to her in the community at large.

The actual earnings on which the Office based its wage-earning capacity determination are unreliable as to appellant's ability to earn wages in the open labor market under normal employment conditions. While wages actually earned may be the best measure of an injured worker's capacity for employment such wages may not be based on sheltered employment.[19] The job appellant obtained was performed for the company owned by her daughter and son-in-law and appears to consist of "made work" designed around her severe osteoarthritis and effects from medication. The corporate vice-president noted that appellant was employed approximately four months during which "the work was altered to attempt to assist … in her duties." There are also special circumstances giving rise to appellant's employability in this case. It cannot be said that the wages paid were not the result of a charitable motive or sympathy on the part of the daughter employer for her mother.[20] The personal relationship between the employer and employee in this case also makes the nature of the earnings suspect. Appellant did not sell her services in the competitive labor market; the facts of the employment were distorted by the close relationship of this employer to the injured employee.

In the present case, the receptionist position entailed performing sedentary clerical tasks, at home, at appellant's own pace, on her own schedule, with rest breaks at her discretion. The job had no set schedule and appellant was free to modify her work hours at will. Also, appellant's inability to write legibly, keyboard or use her hands for repetitive tasks prevented her from performing essential job functions, such as assembling client packets. The company vice-president assisted appellant with her work and repeatedly customized her duties to fit her needs. Despite these accommodations, appellant could not perform essential functions of the position.

The receptionist position involved a self-determined schedule of miscellaneous clerical tasks that were changed frequently to accommodate appellant's restrictions. This demonstrates that the job was make-shift work designed for her specific needs and not a position available in the open labor market.[21]

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[18] 61 ECAB ___ (Docket No. 10-619, issued June 29, 2010).

[19] *See Connie L. Potratz-Watson*, 56 ECAB 316 (2005).

[20] Arthur Larson & Lex K. Larson, *The Law of Workers' Compensation*, Chapter 82 (2006), citing *Modern Equip. Co. v. Industrial Comm'n*, 247 Wis. 517, 20 N.W.2d 121 (1945) where the injured worker was the brother of his employer.

[21] *Id.*

The Office erred by accepting her actual earnings in the receptionist position as the best measure of her wage-earning capacity.[22] The September 1, 2009 wage-earning capacity determination will be reversed.

CONCLUSION

The Board finds that the Office improperly found that the position of receptionist properly represented appellant's wage-earning capacity as of January 10, 2005.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 1, 2009 is reversed.

Issued: September 2, 2010
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

[22] *Id. See also Afegalai L. Boone*, 53 ECAB 533 (2002).