U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CATHERINE L. STONE and DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Covington, KY

Docket No. 97-2837; Submitted on the Record;
Issued October 7, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly adjusted appellant's compensation to reflect her wage-earning capacity in the position of information clerk.

The Office accepted appellant's claim for bilateral carpal tunnel syndrome. The Office began paying appellant compensation benefits for total disability on April 1, 1994.

From November 17, 1992 through November 10, 1993, appellant's treating physician, Dr. Robert K. Johnson, a Board-certified orthopedic surgeon, diagnosed carpal tunnel syndrome and synovitis and opined that appellant could return to work but must avoid heavy or repetitive use of her hands. In his report dated May 6, 1993, Dr. Johnson noted that appellant had a postoperative electromyogram (EMG) of the hands performed on May 3, 1993 which showed mild carpal tunnel syndrome improved postoperatively. He stated that the surgical decompression was complete and adequate and that any residual problems would be due to previous compression of the nerves and diabetes. Dr. Johnson noted that appellant had problems with her back, heart, arthritis and diabetes but for the purposes of his examination he was addressing her hand problem. In his July 6, 1993 report, Dr. Johnson examined appellant and reiterated that she was capable of light-duty work. He stated that appellant needed to "make" her hands work and noted that she had tried to do some clipping outdoors which had caused her pain.

In an attending physician's supplemental report dated March 29, 1993, Dr. Michael G. Leadbetter, a Board-certified plastic surgeon with a sub-specialty in emergency medicine, diagnosed bilateral carpal tunnel syndrome, checked the "yes" box that appellant's condition was work related and opined that appellant was totally disabled. He recommended splinting, the continuation of anti-inflammatories and a possible work hardening program and physical therapy.

In a report dated August 10, 1994, Dr. Peter J. Stern, a Board-certified orthopedic surgeon, considered appellant's history of injury, performed a physical examination and reviewed x-rays. He diagnosed that appellant's pain was coming from degenerative changes in the right wrist and that it was possible that her pain was related to her diabetes or she had "some type of neuropathy." In notes dated August 16, 1995, Dr. Stern stated that appellant could return to work with restrictions of not lifting more than 10 pounds and no repetitive motion. In his work restriction evaluation dated September 5, 1995, Dr. Stern stated that appellant could return to work but must wear a hand splint and be subject to limited lifting of no more than 20 pounds and limited grasping and fine manipulation. In his January 22, 1996 report, he stated that the electrodiagnostic evidence showed evidence of mild right carpal tunnel syndrome, which might be related to appellant's diabetes or might be of an idiopathic nature. Dr. Stern stated that if she did repetitive work as a tax examiner, this might have exacerbated the problem.

Appellant was initially referred for vocational rehabilitation on August 12, 1993. In a report dated November 29, 1995, the rehabilitation specialist, Dallas Scherk, found that appellant, who had worked as a tax processor for the employing establishment in Northern Kentucky sorting mail and removing staples from Internal Revenue Service forms, had transferable skills as a paralegal. Mr. Scherk noted that appellant received training as a paralegal in 1992. He identified jobs including paralegal, legal investigator, test technician, employment clerk, identification clerk and charge account clerk, which would fit into appellant's academic, vocational and medical abilities.

In a vocational report dated January 8, 1996, the rehabilitation specialist identified two jobs that were available and allegedly within appellant's work restrictions, which were an information clerk at an automobile club and a paralegal. The automobile information clerk was described as sedentary with no lifting greater than 10 pounds and occasional reaching, handling, fingering and feeling. The specific vocational preparation had a number of 4 which, according to the Department of Labor's Supplement to the *Dictionary of Occupational Titles* (DOT), meant three to six months of training was required. The rehabilitation specialist stated that the information clerk was found in sufficient numbers so as to make the job reasonably available. The hourly wage of the information clerk was $5.75 an hour.

By a notice of proposed reduction of compensation dated January 17, 1996, the Office found that appellant's compensation should be reduced to reflect the earnings of an automobile information clerk at the weekly rate of $230.00 a week.

In a response dated February 13, 1996, appellant stated that she was physically unable to perform the information clerk based on Dr. Stern's October 16, 1995 restrictions and further, the position did not exist in significant numbers in the economy.

An addendum to the vocational rehabilitation report dated April 3, 1996, showed that there were 587 receptionists and information clerks in Northern Kentucky with 40 actual openings and 7,316 receptions and information clerks in the state with 488 openings.

By decision dated April 12, 1996, the Office found that the position of automobile information clerk fairly and reasonably represented appellant's wage-earning capacity and reduced appellant's compensation benefits accordingly.

By letter dated April 12, 1996, appellant requested a hearing before an Office hearing representative which was held on November 21, 1996.

Appellant also submitted additional evidence some of which had been previously submitted. New evidence included a decision by the Social Security Administration dated March 15, 1994, holding that appellant had impairments consisting of bilateral carpal tunnel syndrome, and degenerative joint disease of the lumbar spine, cervical spine and the right hand and was totally disabled. In a report dated October 16, 1995, Dr. Stern stated appellant could return to work but could not lift more than 10 pounds and must avoid repetitive motion. In a report dated November 20, 1996, Dr. Michelle Murray, a Board-certified family practitioner, diagnosed coronary artery disease, diabetes, hyperlipidemia and chronic back pain. A computerized axial tomography (CAT) scan of the lumbar spine dated November 23, 1994, showed right posterolateral broad disc bulge at L3-4 and degenerative arthritis of the facet joints on the left at L4-5 and bilaterally at L5-S1. Further, an attorney at appellant's attorney's firm signed a notarized affidavit dated November 20, 1996, stating that he spoke with Ann Prince, the Manager of Human Relations for the American Automobile Association (AAA) at their Cincinnati, Ohio office on that date and she informed him that AAA is the only automobile club in Northern Kentucky and their total number of employees were 20 to 22. In a letter dated November 20, 1996, Ms. Prince wrote to appellant's attorney that AAA Cincinnati currently employed 13 people at their Florence, Kentucky office and one other employee who works at their Thrifty Office in Hebron, Kentucky.

At the hearing, appellant described her efforts to obtain work and her interaction with the rehabilitation counselor. She stated that she sent out resumes for a paralegal position to different law firms but the counselor told her to call the school where she had just graduated to obtain job placement. After a few weeks the woman at the school called her back and said the only job she had was in Missouri. Appellant testified that her symptoms including the severe difficulty she had using her right hand. Appellant's attorney stated that appellant was totally disabled based on Dr. Leadbetter's report and the Social Security Administration's decision as well as the fact that appellant had numerous other conditions consisting of heart disease, diabetes, obesity and hyperlipidemia. Appellant's counsel also noted that appellant had a high school degree. Further, appellant's attorney stated that the vocational plan had been to have appellant obtain a job as a paralegal, not an automobile clerk and the jobs available for an automobile clerk were not available in significant numbers within the community.

By decision dated March 28, 1997, the Office hearing representative affirmed the Office's April 23, 1986 decision.

By letter dated May 13, 1997, appellant requested reconsideration of the Office's decision and submitted medical evidence consisting of an operative report dated April 18, 1997, describing surgery appellant underwent on her right wrist consisting of a repeat right carpal tunnel decompression, median nerve aponeurotomy and A1 pulley release of the long finger. Appellant also submitted an EMG dated March 26, 1997 and hospital notes dated from April 21, 1993 through March 26, 1997.

By decision dated July 25, 1997, the Office denied appellant's request for reconsideration, but held that the April 18, 1997 operative report, established that appellant

sustained a recurrence of disability, which entitled her to total disability compensation from April 18 through May 29, 1997, the period of time the Office estimated that appellant required to recuperate.

The Board finds that the case is not in posture for decision.

Once the Office has made a determination that a claimant 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.[1]

Under section 8115(a) of Federal Employees' Compensation Act, 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 to not fairly and reasonably represent his or her wage-earning capacity, or if the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his or her usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect wage-earning capacity in his or her disabled condition.[2]

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 or to an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits that employee's capabilities with regard to his 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.[3] Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.[4] The basic rate of compensation paid under the Act is 66 2/3 percent of the injured employee's monthly pay.

In the present case, the Office's holding in its July 25, 1997 decision, that appellant sustained a recurrence of disability as of April 18, 1997 and was entitled to total disability compensation as of that date through May 29, 1997, is reasonable as it supported by the July 25, 1997, operative report stating that appellant underwent surgery on her right wrist on April 18, 1997 and would return in a week for a follow-up examination. The Office, however, has not established that appellant was physically able to perform the job of automobile information clerk

[1] *Sylvia Bridcut*, 48 ECAB ___ (Docket No. 95-63, issued November 6, 1996); *James B. Christenson*, 47 ECAB 775 (1996).

[2] *See Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); *petition for recon. denied*, (Docket No. 92-118, issued February 11, 1993)*; see also* 5 U.S.C. § 8115 (a).

[3] *Raymond Alexander*, 48 ECAB ___ (Docket No. 94-2589, issued April 11, 1997); *Dorothy Lams*, 47 ECAB 584 (1996).

[4] *Dorothy Lams, supra* note 3; *Albert C. Shadrick*, 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.303.

prior to April 18, 1997 as a disagreement exists in the evidence between the opinion of appellant's treating physician, Dr. Johnson, that appellant can perform light work which involves no repetitive motion and the opinion of Dr. Leadbetter, that appellant is totally disabled due to her bilateral carpal tunnel syndrome. Although Dr. Leadbetter did not provide a rationalized opinion for his conclusion that appellant is totally disabled, he checked the "yes" box that appellant's condition of carpal tunnel syndrome was related to his employment. Merely checking the "yes" box is insufficient to establish that appellant's disabling condition is work related.[5] However, it is well established that proceedings under the Act are not adversarial in nature,[6] and the Office shares responsibility in the development of the evidence.[7] The Office has an obligation to see that justice is done.[8] Having obtained a report from a physician stating that appellant was totally disabled, the Office should have further developed the evidence and requested a narrative report including a rationalized medical opinion from that physician to explain his opinion. The case must, therefore, be remanded for the Office to further develop the evidence in this regard,[9] to be followed by a *de novo* decision.

[5] *See Debra S. King*, 44 ECAB 203, 210 (1992).

[6] *See Rebel L. Cantrell*, 44 ECAB 660, 666 (1993).

[7] *Id; Dorothy L. Sidwell*, 36 ECAB 699 (1985).

[8] *Cantrell*, *supra* note 6.

[9] *See John J. Carlone*, 41 ECAB 354 (1989).

The holding that appellant sustained a recurrence of disability from April 18 through May 25, 1999 in the decision of the Office of Workers' Compensation Programs dated July 25, 1997 is hereby affirmed. The decisions of the Office dated July 25, 1997 and November 25, 1996 are otherwise vacated and the case is remanded for further development consistent with this opinion.

Dated, Washington, D.C.
October 7, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member