U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MILDRED S. DUNCAN and DEPARTMENT OF THE TREASURY, BUREAU OF ENGRAVING & PRINTING, Washington, DC

Docket No. 98-2066; Submitted on the Record;
Issued September 18, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
VALERIE D. EVANS-HARRELL

The issues are: (1) whether the Office of Workers' Compensation Programs properly reduced appellant's compensation benefits based on her capacity to earn wages as an information clerk; and (2) whether the Office abused its discretion by denying appellant's request for a subpoena.

The Board has duly reviewed the case on appeal and finds that the Office properly reduced appellant's compensation benefits based on her capacity to earn wages as an information clerk.

Appellant, a distribution worker, filed a claim alleging that on December 20, 1982 she injured her right hand in the performance of duty. The Office accepted her claim for contusion of the right distal phalanges on April 26, 1983 and right carpal tunnel syndrome. The Office entered appellant on the periodic rolls on November 7, 1985. She received a schedule award for a 100 percent permanent impairment of her right upper extremity on June 13, 1986. The Office referred appellant for rehabilitation services. Appellant's attending physician completed a report on August 23, 1995 and indicated that appellant was not totally disabled. By letter dated March 25, 1997, the Office proposed to reduce appellant's compensation benefits based on her capacity to perform the constructed position of information clerk. By decision dated May 12, 1997, the Office finalized its reduction of appellant's compensation benefits based on her capacity to earn wages as an information clerk. Appellant requested an oral hearing on June 5, 1997. By decision dated May 15, 1998 and finalized May 19, 1998, the hearing representative affirmed the Office's May 12, 1997 decision.

Section 8115 of the Federal Employees' Compensation Act[1] provides that wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and

[1] 5 U.S.C. §§ 8101-8193, 8115.

reasonably represent wage-earning capacity, or the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, the degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect his wage-earning capacity in his disabled condition.

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 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*[2] will result in the percentage of the employee's loss of wage-earning capacity. The basic rate of compensation paid under the Act is 66 2/3 percent of the injured employee's monthly pay.[3]

In this case, appellant's attending physician, Dr. Mayo F. Friedlis, a physician Board-certified in physical medicine and rehabilitation, completed a work restriction evaluation and found appellant could work eight hours a day with limitations on reaching, lifting and right arm use. He stated that appellant should not use her right arm and hand at all. In a note dated January 24, 1996, Dr. Friedlis stated that appellant could return to work in a job that involved no active or repetitive use of the right upper extremity. He stated that he would need to approve any specific job to which she was returned but indicated there were many things that she could do. On April 2, 1997 Dr. Friedlis again stated that appellant could perform light-duty work with no active use of the right upper extremity and no overhead work. On April 28, 1997 he stated that he expected to review any job that appellant was offered to ensure that it was appropriate for her and that the position would not aggravate her condition.

In reports dated February 11 and March 30, 1998, Dr. Friedlis stated that appellant's sales position was aggravating her condition.

Dr. Friedlis completed a report dated March 18, 1998 and stated that he understood that appellant had been determined to be able to work in a certain category of jobs which he did not identify. He stated a position that could require lifting on a frequent basis overhead up to one third of the day would aggravate appellant's condition consistently and significantly. Dr. Friedlis stated, "She simply is not available for a job that requires any overhead activities at all, no repetitive use of the right upper extremity, even for menial tasks that entail grasping and manipulating."

The rehabilitation specialist determined that the position of information clerk was within appellant's abilities. This is a sedentary position which requires occasional lifting of 10 pounds.

[2] 5 ECAB 376 (1953).

[3] *Karen L. Lonon-Jones*, 50 ECAB ___ (Docket No. 97-155, issued March 18, 1999).

The position required reaching occasionally, which is defined as up to one third of the time. The rehabilitation specialist noted that the training was provided on the job and that the position was being performed in sufficient numbers so as to make it available to appellant in her commuting area. On January 27, 1997 the rehabilitation specialist stated that the selected position did not require both or dominate hand use.

Although Dr. Friedlis opined that appellant could not reach overhead with her right arm for one third of the day, the rehabilitation specialist confirmed that the position of information clerk did not require appellant to use either both or her dominate hand. Therefore, there is no evidence that this position does not comply with the work restrictions set forth stated by Dr. Friedlis. The constructed position of information clerk does not require right arm use, including reaching or lifting, and therefore complies with appellant's work restrictions. Furthermore, the position does not require any training other than that provided on the job and is reasonably available within appellant's commuting area. The fact that appellant was unable to secure a job as an information clerk does not establish that the work is not available or suitable.[4] Moreover, the Office properly calculated appellant's wage-earning capacity based on the difference between her weekly wage at the time of the injury, $344.80 and the weekly wage of an information clerk of $334.00, using the *Shadrick* formula. Therefore, the Office properly determined that appellant could earn the wages of an information clerk and reduced her compensation benefits accordingly.

The Board further finds that the Office did not abuse its discretion by denying appellant's request for a subpoena.

On June 5, 1997 appellant, through her attorney requested an oral hearing. Appellant's attorney requested a subpoena for the rehabilitation counselor requiring her appearance and provide a complete copy of her rehabilitation files on appellant and for questioning at the oral hearing as to how she conducted her assigned tasks. On January 7, 1998 the Office hearing representative denied the request on the grounds that all rehabilitation evidence was of record. The hearing representative further found that to obtain testimony to verify that the rehabilitation counselor performed all assigned duties in the prescribed manner was not a sufficient basis on which to issue a subpoena. At the oral hearing, on January 28, 1998, appellant's representative objected to the denial of the subpoenas.

Section 8126 of the Act provides, in relevant part, "The Secretary of Labor, on any matter within his jurisdiction under this subchapter, may (1) issue subpoenas for and compel attendance of witnesses within a radius of 100 miles."[5]

An abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and

[4] *Frank Hampton Bratton,* 31 ECAB 114 (1979); *Raymond F. Porter,* 29 ECAB 692 (1978).

[5] 5 U.S.C. § 8126.

probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.[6]

The issue to be determined at the hearing was whether appellant's reduction of compensation benefits was justified. Appellant requested that the rehabilitation counselor be subpoenaed to appear and testify regarding the performance of her duties and to test conclusions regarding appellant's ability to perform the selected position. The rehabilitation counselor's performance of duties is substantiated in the record through documentation. The issue of appellant's ability to perform the selected position is fundamentally a medical question.[7] The medical evidence of record would either support or deny this conclusion. Therefore, the Board must conclude that the Office did not abuse its discretion in denying appellant's requests for subpoenas.

The May 19, 1998 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
September 18, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Valerie D. Evans-Harrell
Alternate Member

[6] *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

[7] *See Patricia A. Keller*, 45 ECAB 278 (1993).