U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DEAN HARTLEY and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Phoenix, AZ

Docket No. 00-1238; Submitted on the Record;
Issued October 3, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation effective November 7, 1999 based on her capacity to earn wages as a recreation aide/activity assistant.

The Board finds that the Office properly reduced appellant's compensation effective November 7, 1999 based on her capacity to earn wages as a recreation aide/activity assistant.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[1] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[2]

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 appellant's injury, her degree of physical impairment, her usual employment, her age, her qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect her wage-earning capacity in her disabled condition.[3] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment

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[1] *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

[2] *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

[3] *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

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]

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 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 the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.[6]

In early 1994 the Office accepted that appellant, then a 50-year-old medical aide, sustained employment-related tendinitis of her right wrist and thumb.[7] Appellant received Office compensation for periods of disability and began to participate in vocational rehabilitation efforts.[8] By decision dated October 15, 1999, the Office reduced appellant's compensation effective November 7, 1999 based on her capacity to earn wages as a recreation aide/activity assistant.

The Office had received information from appellant's attending physicians who found that appellant was not totally disabled for work and had a partial capacity to perform work for eight hours per day subject to specified work restrictions. In a report dated January 30, 1996, Dr. Kevin Ladin, an attending physician Board-certified in physical medicine and rehabilitation, determined that appellant could work eight hours per day, but that she could not engage in repetitive hand motion such as typing. In a report dated February 13, 1996, Dr. Robert Saide, an attending Board-certified family practitioner, determined that appellant could work 8 hours per day and lift up to 30 pounds, but that she could not engage in constant typing.

In February 1999 appellant's vocational rehabilitation counselor determined that appellant was able to perform the position of recreation aide/activity assistant and that state employment services showed the position was available in sufficient numbers so as to make it reasonably available within appellant's commuting area. The position involved assisting in conducting recreational activities and included such duties as issuing sporting equipment, keeping scores at sporting events, and arranging chairs and tables. The position required lifting and carrying up to 25 pounds and the ability to reach, handle, finger and feel.

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

[5] *Id.*

[6] *See Dennis D. Owen*, 44 ECAB 475, 479-80 (1993); *Wilson L. Clow, Jr.*, 44 ECAB 157, 171-75 (1992); *Albert C. Shadrick*, 5 ECAB 376 (1953).

[7] Appellant underwent a right tenosynovectomy in April 1995.

[8] Appellant worked briefly in a limited-duty position in late 1995.

The Board finds that the record contains evidence showing that appellant was physically and vocationally capable of performing the position of recreation aide/activity assistant effective November 7, 1999.[9] The Office provided Dr. Ladin with a job description for the position of recreation aide/activity assistant and, in a report dated September 21, 1999, he stated:

> "I note you are asking me to determine whether [appellant] is physically capable of performing the duties of a recreational aide/activity assistant. I have reviewed the description of the job duties of a recreational aide according to the Dictionary of Occupational Titles. After reviewing this information, it is my medical opinion that in fact [appellant] is capable of performing the physical demands of this job within the limitations imposed by her work injury and her preexisting stroke residuals.
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> "In my opinion the patient's visual limitations do not prevent her from performing the duties of this position."

For these reasons, the Office properly reduced appellant's compensation effective November 7, 1999 based on her capacity to earn wages as a recreation aide/activity assistant.

The October 15, 1999 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
October 3, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

[9] As noted above, appellant's vocational rehabilitation counselor had determined that appellant was vocationally capable of performing the position of recreation aide/activity assistant