U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SUSAN A. BYERS and DEPARTMENT OF THE INTERIOR, BUREAU OF RECLAMATION, Phoenix, AZ

Docket No. 03-1654; Submitted on the Record;
Issued November 5, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO, DAVID S. GERSON

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof in reducing appellant's compensation based on its determination that the position of a civil drafter represented her wage-earning capacity; and (2) whether the Office properly denied modification of appellant's loss of wage-earning capacity determination.

In the present case, the Office accepted that on March 12, 1990 appellant, then a 39-year-old construction inspector, sustained multiple injuries to her head, shoulder and back, a fractured coccyx, left radial neuritis, concussion and a coccygectomy in 1992, when the main entry gate to the employing establishment, weighing 400 to 600 pounds, fell on her, knocking her down and pinning her underneath. Appellant returned to a light-duty position as a Safety and Occupational health specialist on February 16, 1992. She never returned to her date-of-injury job. On September 24, 1993 appellant filed a new claim for traumatic injury alleging that on September 12, 1993 she sustained additional injuries to her right leg, when her left leg gave out, causing her to fall. The Office determined that this was a consequential injury of her 1990 employment injuries and accepted the claim for right ankle sprain, right ankle synovitis, avascular lesion of the right ankle, with right ankle surgeries performed on September 20, 1994, April 28, 1999 and December 6, 2000. Appellant stopped work on September 13, 1993 and has not returned. Her pay stopped on September 16, 1993.

In a report dated December 2, 1993, Dr. Kevin S. Ladin, appellant's treating Board-certified physiatrist, stated that appellant's injuries related to the March 12, 1990 accident were stationary and no further medical treatment was needed for these conditions. The physician further stated, however, that with respect to her lower extremities, she had possibly suffered an additional left peroneal nerve injury and required additional testing and additional physical therapy for her right ankle. On a work capacity evaluation form, OWCP-5, dated July 25, 1994, Dr. Ladin stated that appellant had reached maximum medical improvement for all of her conditions except her right ankle, which was being treated by another physician. He indicated that she could work 8 hours a day and could not climb, but could sit continuously and could intermittently walk, lift 10 to 20 pounds, bend, squat, kneel, twist and stand for 8 hours a day.

Dr. Ladin also noted that appellant could not push or pull and should limit fine manipulation, reaching or working above the shoulder and repetitive use of the left hand.

Appellant underwent right ankle surgery on September 20, 1994. In a treatment note dated March 27, 1995, Dr. Robert O. Wilson, a Board-certified orthopedic surgeon, who was treating appellant for her right ankle condition, stated that she was released to work, but was restricted from walking more than 30 minutes and could only walk on flat, level ground or flooring but not on uneven ground. In addition, appellant was restricted from jumping and climbing ladders or construction apparatus, but sitting was unlimited. The physician summarized that appellant could perform some light duty on her feet for short time periods during the day. On an accompanying work capacity evaluation form, OWCP-5, dated March 28, 1995, Dr. Wilson clarified that appellant's restrictions included no climbing, no repetitive foot activity, walking and standing on flat level ground for no more than 30 minutes, 3 to 4 times a day, squatting 1 to 2 times an hour with less than 1 pound of weight and operating only cars or light trucks.

Based on Dr. Wilson's restrictions, the Office determined that appellant could not return to work at the employing establishment. The Office began vocational rehabilitation efforts and she enrolled in a computer aided drafting course.

On February 29, 1996 appellant underwent a second opinion evaluation by Dr. Louis H. Rappoport, a Board-certified orthopedic surgeon. In a report completed April 26, 1996, he stated that from a spinal standpoint, appellant had reached maximum medical improvement and could return to work, but that she required further evaluation regarding her left shoulder and her right ankle.

In a report dated May 30, 1996, Dr. H. Royer Collins, a Board-certified orthopedic surgeon, to whom appellant was referred by Dr. Rappoport, stated that appellant's right ankle condition rendered her incapable of performing her prior job as a Safety and Occupational Health Specialist, which required walking on uneven, rocky terrain.... He stated that appellant was also unable to perform work above the shoulder level and that, therefore, she was unable to reach above the shoulders to grasp and climb ladders, as was also required by her prior position. On an accompanying duty status report dated May 30, 1996, Dr. Collins stated that appellant could perform sedentary work requiring lifting of up to 10 pounds, could intermittently lift up to 20 pounds for ½ hour a day, could intermittently sit for 6 hours, stand for 2 to 3 hours, kneel for ½ hour, push and pull for ¼ hour, walk, bend, stoop and twist for 1 hour and perform simple grasping and fine manipulation for 4 to 6 hours.

On July 18, 1998 appellant began treatment for her right ankle condition with Dr. Mark R. Gorman, a podiatrist. Under his care, appellant underwent additional right ankle surgery on April 28, 1999 and December 6, 2000. In a progress note dated January 16, 2001, Dr. Gorman stated that appellant was doing well and at that time could sit for no more than 2 hours in 1 position, stand for no more than 30 minutes, walk for no more than 15 minutes and lift nothing heavier that 15 pounds. On June 20, 2001, Dr. Gorman completed a work restriction evaluation form, OWCP-5, on which he indicated that appellant was restricted from lifting more than 20 pounds and stated: "I feel her returning to school and working as a computer aided draftingperson is indicated." In a progress note dated September 6, 2001, Dr. Gorman noted that

appellant reported that after sitting for long hours at a computer terminal during her computer aided drafting classes, holding her foot in the dependent position, she had difficulties trying to get up even though the class provided regular breaks. He concluded that while appellant could continue with her computer aided drafting training classes, he felt she was not a candidate for a full eight-hour occupation, but would probably have to seek a four hour a day occupation "as complete dependency at a computer terminal with minimal ambulation is contraindicated for long term rehab[ilitation]." In additional progress notes dated May 7, 2001 and February 5, 2002, Dr. Gorman documented appellant's care and treatment but did not discuss her ability to work.

On April 30, 2002 at the request of the Office, a rehabilitation counselor identified the job of part-time civil drafter as a job that was within appellant's physical restrictions that she had qualified for through her coursework and vocational programs and was reasonably available. The job duties were described, in part, as drafting detailed construction drawings, topographical profiles and related maps and specifications used in planning and construction of civil engineering projects, such as highways, river and harbor improvements, flood control and drainage, either using conventional materials or computer-assisted drafting equipment and software. The physical requirements were described as sedentary with occasional lifting up to 10 pounds. Occasional was defined as up to one-third of the time. The position also called for no climbing, balancing, stooping, kneeling, crouching or crawling, constant reaching, handling fingering and feeling, occasional talking and hearing, no tasting or smelling and constant near acuity, depth perception, accommodation, color vision and field of vision. The position did not require exposure to any environmental extremes, such as heat, cold or dampness.

In a notice of proposed reduction of compensation dated June 25, 2002, the Office found that the position of civil drafter was medically suitable, as it was within the restrictions set forth by appellant's medical providers of no climbing, no repetitive foot activity, walking or standing only 30 minutes at a time, 3 to 4 times a day and working only 4 hours a day. The Office found that the position was classified as sedentary, that appellant had the training and background to perform the job and the availability of the job, including part-time work, had been confirmed. The Office, therefore, proposed to reduce her compensation to reflect her wage-earning capacity as a part-time civil drafter. In computing appellant's reduced compensation, the Office noted that the current pay rate for her date-of-injury job, Construction Inspector, Grade 7, step 1, was $30,597.00. The Office gave appellant 30 days to respond.

On July 22, 2002 appellant submitted a narrative statement contesting the Office's proposed decision. She specifically asserted that the position was not medically suitable and that the Office had erred in failing to consider her potential for promotion in calculating her reduced compensation.

By decision dated July 31, 2002, the Office reduced appellant's compensation on the grounds that the position of civil drafter, part time, represented her wage-earning capacity.

Subsequent to the Office's July 31, 2002 decision, appellant requested reconsideration and submitted additional medical evidence from Dr. Gorman. In a decision dated May 5, 2003, the Office found the newly submitted evidence insufficient to warrant modification of the prior decision.

The Board finds that the Office met its burden of proof in reducing appellant's compensation based on its determination that the position of a civil drafter represented appellant's wage-earning capacity.

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injuries and the degree of physical impairment, his or her usual employment, the employee's age and vocational qualifications and the availability of suitable employment.[1] When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case 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 market, that fits the employee's capabilities with regard to his or her physical limitations, education, age and prior experience. Once this selection is made, a determination or wage rate and availability in the open market should be made through contact with the state employment service or other applicable services. Finally, application of the principles set forth in the *Alfred C. Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.[2]

Appellant was referred for vocational rehabilitation in 1996 and her training continued, with interruptions, through 2001, when she completed a computer aided drafting training course. In a labor market survey dated April 29, 2002, the rehabilitation counselor stated that there was a big demand for civil drafters, that both full-time and part-time positions were available in appellant's current commuting area and that the wage of the position was $456.00 a full week or $228.00 a 20-hour week. The rehabilitation counselor noted that appellant was trained and qualified to work as a civil drafter and that the position was within the medical restrictions established by her physicians. The counselor noted that appellant refused to work as a drafter or to apply for any drafting jobs because she wished to return to her prior employment, even though she understood it was beyond her physical capabilities.

Where vocational rehabilitation is unsuccessful, the rehabilitation counselor will prepare a final report, which lists two or three jobs which are medically and vocationally suitable for the employee and proceed with information from a labor market survey to determine the availability and wage rate of the position.[3] In this case, the most recent physical restrictions are those provided by Dr. Gorman, appellant's treating physician, who stated in a progress note dated January 16, 2001, that, at that time, appellant could sit for no more than 2 hours in 1 position, stand for no more than 30 minutes, walk for no more than 15 minutes and lift nothing heavier than 15 pounds. On June 20, 2001 Dr. Gorman completed a work restriction evaluation form, OWCP-5, on which he indicated that appellant was only restricted from lifting more than 20 pounds and stated: "I feel her returning to school and working as a computer aided draftsperson is indicated." In a progress note dated September 6, 2001, Dr. Gorman provided his final

[1] *See James R. Verhine*, 47 ECAB 460 (1996); 5 U.S.C. § 8115(a).

[2] *See Hattie Drummond*, 39 ECAB 904 (1988); *Albert C. Shadrick*, 5 ECAB 376 (1953).

[3] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.813.2 (December 1993). In the instant case, the rehabilitation counselor also identified the position of architectural drafter as a suitable position for appellant.

restrictions, noting that appellant was not a candidate for a full eight-hour occupation, but would probably have to seek a four hour a day occupation "as complete dependency at a computer terminal with minimal ambulation is contraindicated for long term rehab[ilitation]." Appellant submitted no other reports at that time indicating that she had greater restrictions than those imposed by Dr. Gorman.

The Board finds that the Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment and age and employment qualifications, in determining that the position of civil drafter represented appellant's wage-earning capacity.[4] The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of civil drafter, four hours a day and that such a position was reasonably available within the general labor market of her commuting area. Appellant, did not submit any medical evidence or legal argument to demonstrate that the selected position was unsuitable to her partially disabled condition. Furthermore, with respect to her argument that had she not been injured, she would now be a GS-11, rather than a GS-7 step 1, the probability that an employee, if not for his injury-related condition, might have had greater earnings is not proof of a loss of wage-earning capacity and does not afford a basis for payment of compensation under the Federal Employees' Compensation Act.[5] Because the Office followed proper procedures in determining appellant's loss of wage-earning capacity, the Board affirms the Office's reduction of appellant's compensation.

The Board further finds that appellant did not submit sufficient medical evidence, following the Office's July 31, 2002 decision, to justify modification of the Office's loss of wage-earning capacity determination.

Once the loss of wage-earning capacity is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous. The burden of proof is on the party attempting to show modification of the award.[6]

In support of her reconsideration request, appellant submitted additional medical evidence from Dr. Gorman. In a report dated August 20, 2002, Dr. Gorman noted that appellant was concerned that she would not be able to sit and work for four hours, due to the fact that her foot would be hanging down throughout this normal working period with the inability to get up and walk and as a result she would have swelling, irritation and pain. He noted that appellant reported that this was particularly true after she had been sitting at her computer aided drafting occupation. Dr. Gorman performed a physical examination, recorded some swelling and compared morning and afternoon ankle measurements. He stated: "It should be noted that [appellant] has secondary dependency. Although she is trying to rehabilitate herself in

[4] *See Dorothy Jett*, 52 ECAB 246 (2001).

[5] 5 U.S.C. §§ 8101-8193; *Donald R. Johnson*, 48 ECAB 455 (1997).

[6] *James D. Champlain*, 44 ECAB 438 (1986).

coordination with her industrial injury, she has dependent edema with secondary inflammatory process. At this point, appellant will continue with aggressive exercises, strengthening, [range of motion]." Dr. Gorman concluded that appellant would be reevaluated three times a year and would be a candidate for a new Ritchie brace and orthotics at her next visit.

In a progress note dated October 31, 2002, Dr. Gorman noted that appellant reported continued difficulties with her computer aided drafting training due to her feet hanging in the dependent position. He noted that on physical examination, appellant's condition was unchanged, with evidence of edema noted bilaterally and stated: "Based on the above findings, the physical findings -- I feel [appellant] needs to be continued with the same work disability status that she has had on previous occasions -- even the fact that she was training in a very aggressive manner to proceed with a new occupation. This should not have any indication to her ability to carry on normal activities and to be reimbursed at a status that she was prior to her industrial injury." In a work capacity evaluation form, OWCP-5, dated November 5, 2002, Dr. Gorman stated: "Ms. Byers has difficulty in standing and walking. When she sits in a dependent position, she continues with weakness and limitation in motion." The physician indicated that appellant could work two to four hours a day and added that "Ms. Byers' inability to stand or sit in a dependent position limits her ability to carry on normal activities." Dr. Gorman further indicated that appellant could sit and stand 15 to 20 minutes, walk for 15 minutes, operate a motor vehicle for 20 to 30 minutes and could not squat, kneel or climb. With respect to whether she could reach, reach above the shoulder, twist, perform repetitive movements of the wrists and elbows and push, pull or lift, Dr. Gorman indicated that these restrictions were not applicable. Finally, in an accompanying narrative report also dated November 5, 2002, he stated that he anticipated that appellant would continue to have swelling, pain and difficulty and should not be penalized due to her attempt to be retrained in a computer aided drafting occupation.

After the Office properly found that appellant could perform the duties of a civil drafter, four hours a day, the pertinent medical issue became whether there has been any change in her condition that would render her unable to perform those duties.[7] For a physician's opinion to be relevant on this issue, the physician must address the duties of the selected position.[8] While Dr. Gorman stated that appellant should be returned to her total disability status and paid full compensation, he did not give any rationalized explanation for this statement or explain how it comported with his November 5, 2002 opinion that appellant was capable of working up to four hours a day, with certain restrictions. Medical conclusions unsupported by rationale are of diminished probative value.[9] In addition, except for references to appellant's feet being in the dependent position, he did not specifically address whether the part-time sedentary position of civil drafter was unsuitable. Finally, Dr. Gorman failed to note a change in appellant's condition which would render her unable to perform the position of civil drafter nor did he retract or distinguish his previous opinion which indicated that "returning to school and working as a

[7] *Phillip S. Deering*, 47 ECAB 692 (1996).

[8] *Id.*

[9] *Vicky L. Hannis*, 48 ECAB 538 (1997); *Jacquelyn L. Oliver*, 48 ECAB 232 (1996).

computer aided draftsperson is indicated."[10] Finally, the Board notes that the sedentary position of part-time civil drafter remains within the new physical restrictions provided by Dr. Gorman on November 5, 2002.

The Board finds that there is no rationalized medical evidence which establishes a change in appellant's employment-related condition such that a modification of the Office's loss of wage-earning capacity determination would be warranted. The evidence from Dr. Gorman does not indicate that the position of civil drafter was unacceptable. Consequently, appellant has failed to carry her burden of proof to establish modification of the wage-earning capacity determination based on her physical condition.

Appellant further asserted on reconsideration that the Office incorrectly based her compensation on her pay rate at the time of her original injury, March 12, 1990, rather than on her pay rate at the time of her September 12, 1993 recurrence of disability due to her consequential injury. In order to determine appellant's loss of wage-earning capacity based on her ability to earn wages as a part-time civil drafter, in accordance with the principles outlined in the *Shadrick* decision, the Office first calculated appellant's wage-earning capacity in terms of a percentage by dividing her potential earnings by her current date-of-injury pay rate. In this case, the Office used appellant's potential earnings of $222.00 a week and a current pay rate for her date-of-injury job of $588.40 to determine that she had a 38 percent wage-earning capacity. The Office then multiplied the pay rate at the time of her September 12, 1993 recurrence of disability due to her consequential injury, $552.21, by the 38 percent wage-earning capacity percentage. The resulting figure of $209.83 was subtracted from appellant's date of recurrence pay rate of $552.21 to yield her loss of wage-earning capacity of $342.38. The Office multiplied this amount by the appropriate compensation rate of 75 percent, to yield $256.79 and then the applicable cost-of-living adjustments were added to reach the final compensation figure of $309.75 or $1,239.00, every four weeks.[11] The Board finds that the Office properly determined that appellant's potential earnings as a civil drafter reasonably represent her wage-earning capacity and the Office properly reduced appellant's compensation in accordance with the *Shadrick* formula.

[10] *Id*.

[11] The Board notes that with respect to appellant's potential earnings, the Office mistakenly used a figure of $222.00 a week, rather than $228.00 a week as determined by the rehabilitation counselor. In addition, the Office also mistakenly used the figure of $552.21 to represent appellant's date of recurrence pay rate, when her actual pay rate at that time was $550.40. However, this is a harmless error on the part of the Office, as the application of the correct figures to the *Shadrick* formula yields a compensation rate of $251.80, rather than $256.79 as determined by the Office, which would result in appellant receiving less a week in compensation than the Office determined she is entitled to receive.

The decisions of the Office of Workers' Compensation Programs dated May 5, 2003 and July 31, 2002 are affirmed.

Dated, Washington, DC
November 5, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member