

The Office accepted that on June 5, 2000 appellant, then a 44-year-old materials examiner in temporary status, sustained left wrist tendinitis with pisotriquetral dysfunction when she slipped and fell, landing on her left hand. She was separated from the employing

establishment on September 30, 2000 due to a reduction-in-force. Appellant received wage-loss compensation for temporary total disability beginning October 1, 2000.

On February 2, 2001 appellant underwent surgical removal of the pisiformis bone, ulnar nerve release and tenolysis of the left wrist. The Office authorized this procedure. Dr. David A. Labosky, an attending Board-certified orthopedic surgeon, opined that appellant reached maximum medical improvement June 7, 2001. He found that appellant was able to perform full-time sedentary duty with upper extremity restrictions.¹ By decision dated February 25, 2002, the Office granted appellant a schedule award for a nine percent impairment of the left upper extremity due to restricted left wrist motion.²

Dr. Labosky submitted periodic reports through May 20, 2004 noting appellant's complaints of left wrist pain with transient numbness and paresthesias in the fingers. He also found mild osteoarthritic changes in the left wrist.

In an October 6, 2004 form, Dr. Charles Wadsworth, a Board-certified internist, noted the accepted injury and surgery. He also listed appellant's history of three lumbar surgeries, arthritis of the knees and wrists, asthma and allergic rhinitis. Dr. Wadsworth indicated that, if appellant worked full time, she would need to lie down for 15 minutes every 2 hours and would miss 4 or more days of work a month. He limited her to carrying 5 pounds occasionally, standing for no more than 30 minutes continuously, occasional reaching and repetitive movements.

On January 19, 2005 the Office referred appellant to Dr. Hendrick J. Arnold, III, a Board-certified orthopedic surgeon, for a second opinion examination. It provided him a copy of the medical record and a statement of accepted facts. Dr. Arnold submitted a February 2, 2005 report noting appellant's history of three lumbar surgeries, three left knee surgeries, a right foot operation, asthma and seizures as well as the accepted left wrist condition and surgery. He related her complaints of left hand pain, swelling and clumsiness. Dr. Arnold observed restricted ranges of motion in both wrists. He opined that appellant continued to have a partial disability of the left hand and wrist due to the June 5, 2000 injury. Dr. Arnold found appellant able to perform sedentary duty for eight hours a day, with lifting limited to five pounds and no repetitive motions with the left arm. He recommended a left wrist splint.

On February 23, 2005 the Office authorized vocational rehabilitation services and referred appellant to Nora Dunne, a vocational rehabilitation counselor. In reports dated April 6 to June 6, 2005, Ms. Dunne noted that appellant attended school through the ninth grade in Germany, was not a native speaker of English and had work limitations due to the accepted injury and a nonoccupational lumbar condition. However, appellant obtained American citizenship and took a two-year community college course in dietetics. Also, she had three prior jobs requiring vocational preparation at Level 3 or higher, equal to 30 days to 3 months of

¹ Dr. Labosky obtained a July 10, 2001 functional capacity evaluation demonstrating that appellant could perform light duty for eight hours a day.

² Dr. Labosky opined that, according to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, appellant had a 9 percent impairment of the left upper extremity due to limited left wrist motion; 3 percent for palmar flexion limited to 40 degrees; 4 percent for dorsal flexion limited to 40 degrees; 2 percent for radial deviation limited to 10 degrees.

training. Ms. Dunne scheduled vocational testing for June 17, 2005, which appellant did not attend due to an illness. Appellant then expressed a disinterest in continuing with a vocational rehabilitation plan.

In a July 27, 2005 report, Ms. Dunne identified employers in appellant's commuting area for the positions of parking lot cashier, U.S. Department of Labor's *Dictionary of Occupational Titles* (DOT) #211.462-010 and telephone sales representative DOT #299.375-014. Both positions were classified as sedentary and semi-skilled. The telephone sales representative position required computer data entry, occasional reaching and handling and frequent fingering. Specific vocational preparation was noted as Level 3. Ms. Dunne determined that the telephone sales representative position had an entry-level wage of \$320.00 a week in appellant's commuting area.

In an August 19, 2005 letter, the Office asked Dr. Labosky to review position descriptions for telephone sales representative and parking lot cashier, state whether appellant could perform those jobs and whether any modifications would be needed. Dr. Labosky responded on August 23, 2005 that appellant was capable of performing the duties of both jobs. In a September 19, 2005 form, he indicated that she could perform either position full time.

By notice dated February 16, 2006, the Office advised appellant that it proposed to reduce her wage-loss compensation by her earning capacity as a telephone sales representative of \$320.00 a week. The Office stated that she had skills and experience appropriate for the telephone sales representative position. It found that, according to labor market research performed from July 26, 2005 to February 14, 2006, the telephone sales representative job was performed in sufficient numbers as to make it reasonably available to appellant within her commuting area. The Office determined that appellant had a 36 percent loss of wage-earning capacity based on the formula set forth in *Albert C. Shadrick*.³ It afforded her 30 days in which to submit additional evidence regarding her capacity to earn wages as a telephone sales representative. Appellant did not submit additional evidence regarding her wage-earning capacity prior to April 17, 2006.⁴

By decision dated April 17, 2006, the Office finalized the proposed reduction of compensation effective May 14, 2006, based on appellant's ability to earn wages in the selected position of telephone sales representative. The Office noted that, effective February 16, 2006, the current pay rate for her date-of-injury job and step was \$499.68. Appellant was capable of earning \$320.00 a week as a telephone sales representative. The Office determined that she had a 36 percent loss of wage-earning capacity. It found that the position was medically suitable and within her physical requirements.

³ 5 ECAB 376 (1953).

⁴ By an April 6, 2006 notice, the Office advised appellant that an overpayment of \$2,080.58 was created in her case. She received compensation at the augmented rate from January 7 to 21, 2006 when she had no eligible dependents as her husband had died on January 6, 2005. Appellant repaid the entire amount by check on April 12, 2006. The overpayment issue is not before the Board on the present appeal.

In a June 1, 2006 letter, appellant requested reconsideration. She contended that the Office failed to consider her preexisting lumbar and knee conditions in selecting the telephone sales representative position. Appellant stated that she underwent an L5-S1 laminectomy and discectomy on September 18, 1986 and August 19, 1988, with an L5-S1 decompression on November 15, 1989. She also asserted that the position was beyond her vocational skills. Appellant submitted an April 17, 2006 vocational evaluation by John Drew, a rehabilitation counselor retained by appellant's attorney. Mr. Drew found that appellant read English at a seventh grade level, spelled at a sixth grade level and had mathematical competency at an eighth grade level. He opined that appellant was not readily employable as a telephone sales representative due to her medical conditions and low academic skills.

By decision dated July 7, 2006, the Office denied modification of the April 17, 2006 decision. It found that Dr. Arnold noted appellant's preexisting lumbar, knee and foot conditions and opined that she could perform full-time sedentary work. Dr. Labosky also opined that appellant could perform the telephone sales representative position. The Office found that her education and employment history were consistent with the skills required for the telephone sales representative position. It found that the vocational rehabilitation report prepared by Mr. Drew was not medical evidence as he was not a physician. Also, the report was of diminished probative value as it was based on appellant's opinion of her work capacities, not the medical record.

LEGAL PRECEDENT

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.⁵ Under section 8115(a), 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 do 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.⁶

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 of wage rate and availability in the labor market should be made through contact with the state employment service or other applicable service. Finally, application of the

⁵ David W. Green, 43 ECAB 883 (1992).

⁶ Karen L. Lonon-Jones, 50 ECAB 293 (1999).

principles set forth in *Albert C. Shadrick*,⁷ will result in the percentage of the employee's loss of wage-earning capacity.⁸

ANALYSIS

The Office accepted that appellant sustained left wrist tendinitis with pisotriquetral dysfunction, requiring surgery on February 2, 2001. It granted her a schedule award for a nine percent impairment of the left upper extremity due to the accepted injury. Following an attempted vocational rehabilitation effort, the Office identified the position of telephone sales representative as being within appellant's medical and vocational capacities. It reduced appellant's wage-loss compensation based on her ability to earn wages in the selected position of telephone sales representative. Appellant does not contest the mathematical accuracy of the Office's calculations or the pay rates used. She contends that it failed to consider her preexisting lumbar, knee and foot conditions in considering the telephone sales representative position.

In selecting the telephone sales representative position, the Office relied on the opinion of Dr. Arnold, a Board-certified orthopedic surgeon and second opinion physician. In a February 2, 2005 report, Dr. Arnold noted appellant's occupational and nonoccupational conditions, including the accepted left wrist injury and surgery, three lumbar surgeries, three left knee surgeries, a right foot operation, asthma and seizures. He opined that, despite these conditions, appellant was able to perform full-time sedentary work with restrictions on use of the left arm. The Board finds that Dr. Arnold's report was based on a complete medical history, including appellant's preexisting back, knee and foot problems. Dr. Labosky, an attending Board-certified orthopedic surgeon, also reviewed and approved the position description for telephone sales representative. He opined on August 23 and September 19, 2005 that appellant could perform the position full time. Thus, her own physician found her medically capable of working as a telephone sales representative. There is no probative medical evidence contradicting Dr. Labosky's opinion. The medical evidence does not establish that appellant's preexisting lumbar, knee or foot conditions prevent her from performing the duties of the selected position.

Appellant asserts that her vocational skills are below those required for the job, as she completed only nine years of formal education and was not a native speaker of English. Ms. Dunne, a vocational rehabilitation counselor, noted both these facts in reports from April to June 2005. She also noted that appellant had sufficient language and academic skills to obtain American citizenship and take a two-year community college dietetics course. Also, three of appellant's previous jobs required vocational preparation equal to or greater than the 30 days to 3 months required by the telephone sales representative position. The Board, therefore, finds that the selected position of telephone sales representative was vocationally appropriate. The Office properly reduced appellant's wage-loss compensation based on her ability to earn wages in the selected position of telephone sales representative.

⁷ 5 ECAB 376 (1953).

⁸ *James A. Birt*, 51 ECAB 291 (2000); *Francisco Bermudez*, 51 ECAB 506 (2000).

CONCLUSION

The Board finds that the selected position of telephone sales representative properly represented appellant's wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 7 and April 17, 2006 are affirmed.

Issued: January 10, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board