# United States Department of Labor
# Employees' Compensation Appeals Board

| | | |
|---|---|---|
| **P.B., Appellant** | ) | |
| **and** | ) | **Docket No. 06-1601** |
| | ) | **Issued: March 14, 2007** |
| **DEPARTMENT OF THE TREASURY, BUREAU OF ENGRAVING & PRINTING, Fort Worth, TX, Employer** | ) | |

*Appearances:*
*Appellant, pro se*
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

### ***JURISDICTION***

On July 5, 2006 appellant filed a timely appeal from decisions of the Office of Workers' Compensation Programs dated August 8 and November 28, 2005 determining her wage-earning capacity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this claim.

### ***ISSUE***

The issue is whether the Office properly determined that the constructed position of receptionist properly represented appellant's wage-earning capacity.

### ***FACTUAL HISTORY***

On May 28, 1997 appellant, then a 25-year-old bookbinder, filed a traumatic injury claim alleging that, while she was lifting a bundle of currency on that date, she felt a strain in her lower right abdomen. On August 4, 1997 the Office accepted her claim for lumbar and thoracic strain.

Appellant resumed working in June 1997; however, she stopped work effective July 25, 1997. The Office subsequently accepted a herniated disc at L4-5.

In a medical report dated August 14, 2001, Dr. Stephen Ozanne, appellant's treating Board-certified orthopedic surgeon, noted an x-ray finding of multiple level degenerative disc, with disc disruption. He noted that appellant continued to have significant low back pain and that the effects of her work injury had not ceased. Dr. Ozanne opined that appellant was not capable of engaging in any employment-type activity. He listed appellant's activity limitations as severe and required her to lay down and rest frequently, sit for short periods of time and have short periods of standing and walking.

By letter dated November 19, 2001, the Office referred appellant to Dr. Farooq Selod, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated December 13, 2001, Dr. Selod opined that appellant "has lumbar radiculitis at L5 on the right side, disc displacement L4-5 and Dorsal strain-healed." He stated that appellant's symptoms were highly subjective and that she could return to work on a part-time basis with physical restrictions. In a work capacity evaluation of the same date, Dr. Selod indicated that appellant was limited to sitting, walking and standing for one hour, and could not reach, twist, operate a motor vehicle, push, pull, lift, squat, kneel or climb. He limited appellant to working four hours a day.

In a March 14, 2002 report, Dr. Ozanne indicated that, in view of appellant's persistent back and leg pain, she was a candidate for a spinal cord stimulator. On August 21, 2002 he indicated that appellant remained totally disabled as she was physically unable to handle more than minimal daily activities and that her medications made her unable to concentrate. Dr. Ozanne noted that surgery was not recommended and that her condition was permanent and stationary.

Appellant was referred to Dr. Alan B. Hurschman, a physiatrist, who first saw her on January 6, 2003. Dr. Hurschman gave appellant nerve injections on January 20 and February 28, 2003 and lumbar facet injections on April 11 and May 30, 2003.

On June 4, 2004 the Office referred appellant to Dr. Charles Graham, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a medical report dated July 15, 2004, Dr. Graham stated that appellant could return to gainful employment, starting with a sedentary job for four hours a day and gradually work up to eight hours a day. He noted that appellant could lift 10 pounds 10 times an hour, but would not be able to lift beyond that. Appellant would need some psychological counseling in order to overcome her fear of moving around and returning to work, but should be encouraged to return to work for her own mental and physical well being. In an accompanying duty status report, Dr. Graham indicated that appellant could sit for 4 hours; walk for 1 hour; and stand, reach, operate a motor vehicle, squat, kneel and climb for 30 minutes each. He noted that appellant could work four-hour days and that it would likely take three months to prepare her to work eight-hour days.

On November 12, 2004 the Office approved appellant's request for a change of physicians to Dr. J. John Stasikowski, a Board-certified orthopedic surgeon. Appellant first saw Dr. Stasikowski on November 3, 2004. In a December 9, 2004 report, Dr. Stasikowski

diagnosed degenerative disc disease of the lumbar spine at L3, L4, L5 and S1 with positive discogram. He recommended light-duty work, with no lifting over 25 pounds, no frequent bending, stooping, twisting, no work on unprotected heights and no running.

On September 21, 2004 the Office referred appellant for vocational counseling. In a report dated December 5, 2004, the vocational rehabilitation counselor noted that appellant had transferable skills from her work as a bookbinder. However, her skills were only transferable to light-duty jobs and not job titles within the restrictions of sedentary and part time. The counselor concluded that the remaining occupational base was sedentary unskilled and semi-skilled employment or jobs requiring 30 days to 6 months of training. The vocational counselor completed a vocational assessment of the position of receptionist on December 5, 2004. He stated that the position was available in appellant's commuting area part time at wages of $7.00 to $9.00 per hour. The survey stated that the position involved receiving callers at the establishment, determining the nature of business and directing callers to their destination as well as obtaining the caller's name and arranging appointments. The physical requirements were sedentary in nature. In response to calls and letters from the vocational counselor, appellant advised the vocational counselor on January 24, 2005 that she would not "carry forth" with the job search plan due to her current limitations.

By letter dated March 31, 2005, the Office informed appellant that she would receive an additional 90 days of job placement assistance and that it was very important that she cooperate with the rehabilitation counselor. From April 3 through June 28, 2005, the vocational counselor continued to send appellant job leads. In a July 25, 2005 report, the vocational counselor indicated that the most viable placement would be as a receptionist at an estimated $9.00 to $10.00 per hour for 20 hours a week. The vocational counselor had forwarded to appellant several job openings for receptionists.

In a notice of proposed reduction dated July 8, 2005, the Office noted that appellant's compensation be reduced due to her ability to earn wages as a receptionist in the amount of $180.00 per week. The Office noted that her physical capabilities were best represented by the report of Dr. Graham. The position was sedentary in nature. The Office indicated that her salary on May 28, 1997, the date of injury, was $1,028.39 per week and that the current adjusted pay rate for her job and step when injured was $1,468.32 per week. The Office found that appellant was capable of earning $180.00 per week. The Office determined that she had a 12 percent wage-earning capacity, which when multiplied by $1,028.39 totaled a wage-earning capacity of $123.41 per week. The Office then determined that appellant had a loss of wage-earning capacity of $904.98 by subtracting $904.98 from $1,028.39. The Office multiplied $123.41 by ¾ which amounted to a compensation rate of $678.74 per week. The Office then increased the rate by applicable cost-of-living adjustments to $798.00 per week or $3,192.00 every four weeks.

By letter dated August 1, 2005, appellant objected to the proposed reduction, contending that her prospects of seeking and maintaining employment while coping with her physical restrictions and pain would be an injustice. She submitted various medical reports and other documents that were already of record.

By decision dated August 8, 2005, the Office finalized the proposed reduction in appellant's benefits due to her ability to perform the duties of a receptionist.

On August 18, 2005 appellant requested review of the written record. No new evidence was submitted.

By decision dated November 28, 2005, the hearing representative affirmed the August 8, 2005 decision finding that appellant's wage-earning capacity was represented by the receptionist position.

## ***LEGAL PRECEDENT***

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]

Section 8115(a) of the Federal Employees' Compensation Act[2] titled determination of wage-earning capacity states, in pertinent part: In determining compensation for partial disability, the wage-earning capacity of an employee is determined by her actual earnings if her actual hearings fairly and reasonably represent her wage-earning capacity. Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.[3] 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 her 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.[4] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[5] 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.[6] In determining an employee's wage-earning capacity, the Office may not select a makeshift or odd lot position or one not reasonably available on the open labor market.[7]

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, *Dictionary of Occupational Titles* (DOT) or otherwise available in the open labor market, that fits the employee's capabilities with regard to her physical limitation,

---

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

[2] 5 U.S.C. § 8115.

[3] *Hubert F. Myatt*, 32 ECAB 1994 (1981); *Lee R. Sires*, 23 ECAB 12 (1971).

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

[5] *David Smith*, 44 ECAB 409, 411 (1982); *Albert L. Poe*, 37 ECAB 684, 690 (1986).

[6] *Id.*

[7] *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

education, age and 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.[8] 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.[9]

Appellant's claim was accepted for strain of the lumbar and thoracic spine and a herniated disc at L4-5. Dr. Graham, a referral physician, and Dr. Stasikowski, an attending physician, both found that she could perform light-duty work subject to physical restrictions.

## ***ANALYSIS***

As appellant was not employed, the Office determined that the constructed position of receptionist represented appellant's wage-earning capacity. The notice of proposed reduction of compensation was dated July 8, 2005 and the reduction of benefits became effective August 8, 2005.

The Board finds that the Office properly reduced appellant's compensation based on her ability to perform the duties of a receptionist. The Office adjusted her compensation on the grounds that appellant was capable of performing the duties of the constructed position. On June 4, 2004 the Office referred appellant to Dr. Graham for a second opinion. In a medical report dated July 15, 2004, he opined that appellant could work 4 hours a day but was limited to lifting 10 pounds 10 times an hour, sitting for 4 hours, walking for 1 hour, and standing, reaching, kneeling, climbing and squatting for 30 minutes each. Dr. Graham's restrictions are similar to those of appellant's treating physician, Dr. Stasikowski, who on December 9, 2004 recommended that appellant do light-duty work with no lifting over 25 pounds, no frequent bending, stooping, twisting or running. The weight of the medical evidence is represented by the reports of Drs. Graham and Stasikowski, both of whom found that appellant could perform sedentary work.

Appellant's vocational rehabilitation counselor determined that appellant was able to perform the position of receptionist and that the position was available in sufficient numbers so as to make it reasonably available in her commuting area. The vocational counselor had forwarded several position openings for jobs as receptionists to appellant.

The Office considered the proper factors, such as availability of employment and appellant's physical limitations, usual employment, age and education qualifications, in determining that the receptionist position represented appellant's wage-earning capacity.[10] The Office properly determined that the position of receptionist properly represented appellant's wage-earning capacity effective August 8, 2005.

[8] *Karen L. Lonon-Jones*, 50 ECAB 293, 297 (1999).

[9] *Id. See Albert C. Shadrick*, 5 ECAB 376 (1953).

[10] *Loni J. Cleveland*, 52 ECAB 171 (2000).

The Office properly determined appellant's loss of wage-earning capacity in accordance with the formula developed in *Shadrick*[11] and codified at section 10.403.[12] In this regard, the Office indicated that her salary on May 28, 1997, the date of her injury, was $1,028.39 per week, that the current adjusted pay rate for her job on the date of injury was $1,468.32 per week and that she was currently capable of earning $180.00 per week, the pay rate of a receptionist. The Office then determined that appellant had a 12 percent wage-earning capacity ($180.00 divided by $1,468.32), which was the multiplied by $1,028.39 to equal $123.41 per week. The Office went on to determine that appellant had a loss of wage-earning capacity of $904.98 by subtracting $123.41 from $1,028.39. The Office then multiplied $904.98 by ¾, as appellant had dependents, which amounted to a compensation rate of $678.74 per week. The Office found that, based on the current consumer price index, appellant's current adjusted compensation rate was $798.00 per week or $3,192.00 every four weeks. The Board finds that the Office's application of the *Shadrick* formula was proper.

## ***CONCLUSION***

The Board finds that the Office properly determined that the position of receptionist represented appellant's wage-earning capacity.

[11] *Supra* note 9.

[12] 20 C.F.R. § 10.403.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated November 28 and August 8, 2005 are affirmed.

Issued: March 14, 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