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

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| **S.W., Appellant** | ) | |
| **and** | ) | **Docket No. 07-1286** |
| | ) | **Issued: April 14, 2008** |
| **U.S. POSTAL SERVICE, POST OFFICE, Denver, CO, Employer** | ) | |

*Appearances:*
*John P. Evangelisti, Esq.*, for the appellant
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

### ***JURISDICTION***

On April 10, 2007 appellant, through her attorney, filed a timely appeal from the April 14, 2006 and January 10, 2007 merit decisions of the Office of Workers' Compensation Programs which reduced her compensation benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

### ***ISSUE***

The issue is whether the Office properly reduced appellant's compensation benefits effective April 16, 2006 based on its finding that she had the capacity to earn wages in the selected position of accounting clerk.

### ***FACTUAL HISTORY***

On March 4, 2003 appellant, then a 47-year-old casual laborer/custodian, filed a claim for an injury occurring on February 24, 2003 in the performance of duty. She stopped work on February 28, 2003 and returned to limited-duty work on March 3, 2003. The Office accepted the claim for sprains/strains of the right shoulder, upper arm, knee and leg and strains/sprains of the

bilateral feet, elbows and forearms. On November 28, 2003 Dr. Frederick F. Teal, III, a Board-certified orthopedic surgeon, performed arthroscopic surgery on appellant's right knee for traumatic chondromalacia. The Office paid her compensation for total disability beginning December 26, 2003.[1]

In a report dated February 19, 2004, Dr. Teal related that depression complicated appellant's recovery from a very minimally aggressive arthroscopy. He recommended a psychiatric evaluation. In a work restriction evaluation dated April 15, 2004, Dr. Teal opined that appellant could perform sedentary employment for four hours per day, gradually increasing to eight hours per day by July 2004.[2]

On May 25, 2004 the Office referred appellant to Dr. Katharine J. Leppard, a physiatrist, for a second opinion examination. In a report dated May 26, 2004, Dr. Randolph W. Pock, a Board-certified psychiatrist, diagnosed panic disorder and major depression due to appellant's employment injury and sexual harassment at work. On May 27, 2004 the Office referred appellant to Dr. Steven Martin, a Board-certified psychiatrist, for an opinion on whether she sustained an emotional condition due to her employment injury.

In a report dated June 14, 2004, Dr. Leppard reviewed the history of injury and listed findings on examination. She diagnosed chronic right knee pain status post surgery, complaints of right shoulder and right ankle pain with unremarkable findings on examination and generalized myalgias and arthralgias possibly due to an underlying medical condition. Dr. Leppard opined that appellant's knee condition was related to her employment but that her other complaints were unrelated to the work injury. She found that appellant could work full time with no lifting, pushing or pulling over 10 pounds or operating a motor vehicle at work. Dr. Leppard advised that appellant could not kneel, squat, climb and could occasionally twist and bend. She concluded that appellant could sit for eight hours per day and walk and stand for one hour per day.

On June 30, 2004 Dr. Martin diagnosed pain syndrome, major depression due to chronic pain and adjustment disorder. He attributed appellant's depression to her employment injury and sexual harassment at the employing establishment. Dr. Martin found that she could work four hours per day at her usual job and that her depression "should not limit her work."

Based on Dr. Martin's report, the Office accepted appellant's claim for depressive disorder. On September 10, 2004 Dr. Pock concurred with Dr. Martin's assessment. In an October 1, 2004 work restriction evaluation, he opined that appellant could work four hours per day within the restrictions set forth by Dr. Teal. On September 22, 2004 Dr. John D. Sanidas, a Board-certified surgeon, concurred with Drs. Martin and Leppard regarding appellant's work restrictions. He indicated that appellant could work eight hours per day with restrictions, including no lifting over 10 pounds. Dr. Sanidas asserted that she could not operate a motor

[1] By decision dated September 5, 2003, the Office found that appellant did not establish a recurrence of disability on June 15, 2003 due to her February 24, 2003 employment injury.

[2] In a report dated May 11, 2004, Dr. Barry A. Ogin, a Board-certified physiatrist,, concurred with Dr. Teal's work restrictions.

vehicle at work but could operate a motor vehicle to and from work. He noted that appellant required a five-minute break each hour for standing and walking.

On December 17, 2004 the Office referred appellant for vocational rehabilitation. In a report dated January 8, 2005, the rehabilitation counselor described appellant's education and work history. Appellant received an Associate of Applied Science Degree in Business Management in 1992, completed 25 additional hours of college in an undergraduate criminal justice program and had a paralegal certificate. The rehabilitation counselor stated:

> "[Appellant] reports good computer skills including knowledge and experience utilizing Microsoft Word and Excel software, Peachtree (accounting) as well as limited knowledge of Powerpoint. She is able to navigate the Internet and utilizes a home computer. [Appellant] is also familiar with Lexus Software, a conglomeration of legal cases."

Appellant worked as a casual mail clerk from 1996 to 2003, a paralegal from 2000 to 2001 and as a customer contract representative with the Internal Revenue Service from 1999 to 2000 performing accounting and customer calls regarding an employment tax. She performed temporary office and clerical positions in 2000 and worked as an admissions screener/administrative assistant from 1995 to 1997. Appellant also worked as a freelance paralegal, a customer service representative and bank teller. The rehabilitation counselor noted that appellant was "bright and articulate" and had "good administrative, customer service, accounting and paralegal skills."

Appellant underwent vocational testing on January 24, 2005. The rehabilitation counselor who performed the testing found that appellant could work as an accounting clerk with no further training. On March 31, 2005 the rehabilitation counselor identified the position of accounting clerk as within appellant's physical and vocational abilities. A job classification from the Department of Labor, *Dictionary of Occupational Titles*, provided that the job was sedentary and required only occasional lifting up to 10 pounds. The rehabilitation counselor indicated that appellant met the vocational requirements as she had an Associate's Degree and "several years work experience in bookkeeping and accounting." She opined that the position was reasonably available either full or part time within the appropriate geographical area.

In August 2005 appellant received a job offer to work as an administrative assistant. On September 5, 2005 she informed the Office that she experienced debilitating back pain on August 21, 2005. Appellant indicated that she could not drive without pain. She wanted to begin a home-based business.

Appellant began work as an administrative assistant in private employment on September 6, 2005 but "was sent home after two hours due to pain behavior…." A physician's assistant treated her on September 19, 2005 for chronic low back pain and found that she could not drive due to pain medication. On September 28, 2005 Dr. Gareth E. Shemesh, a Board-certified internist and physiatrist, indicated that appellant should avoid repetitive bending and twisting of the low back and take frequent breaks. On October 11, 2005 the rehabilitation counselor noted that appellant had bus transportation available within a four block walk from her home.

The Office informed appellant on October 13, 2005 that the medical evidence was insufficient to show that she could not drive due to her employment injury. In a closure report dated April 11, 2005, the rehabilitation counselor identified the positions of customer service representative, accounting clerk and clerk typist/office assistant as within appellant's capabilities. She concluded:

> "Based upon the vocational evaluation results coupled with compiled research, it is my professional opinion that the targeted jobs are suitable and reasonably available on a part[-]time basis within the Denver labor market for an individual such as [appellant]. These jobs are within commuting distance of the injured worker's residence. They are available to persons with [her] work restrictions, acquired level of training and experience."

On March 7, 2006 the Office expanded acceptance of appellant's claim to include right patella chondromalacia. On March 7, 2006 the Office notified her that it proposed to reduce her compensation on the grounds that she had the capacity to earn wages as an accounting clerk working 20 hours per week. The Office provided appellant 30 days to submit additional evidence or argument if she disagreed with the proposed action.

On March 23, 2006 appellant, through her attorney, disagreed with the proposed reduction of her compensation. Counsel noted that Dr. Leppard found that appellant could only perform sedentary employment. He also contended that she could not drive due to pain medication and could not take public transportation due to her physical limitations. Counsel maintained that appellant was not vocationally qualified to work as an accounting clerk. He maintained that she did not have several years of experience in bookkeeping and accounting, as found by the rehabilitation counselor.

By decision dated April 14, 2006, the Office reduced appellant's compensation effective April 16, 2006 based on its finding that she could perform the constructed position of accounting clerk for 20 hours per week.

In a report dated May 25, 2006, Dr. Shemesh diagnosed status post February 24, 2003 employment injury with persistent knee pain due to stage III-IV chondromalacia, depression and other nonemployment-related musculoskeletal complaints. On June 13, 2006 Dr. Pock noted that appellant had undergone vocational rehabilitation. He related that an evaluation of her work restrictions was necessary to evaluate her current status. Dr. Pock diagnosed panic disorder and major depression. He attributed appellant's depression to her physical limitations and pain. Dr. Pock asserted that "the combination of her depression, pain, physical limitations and reliance on medications, including narcotics, leave her unable to work." In a progress report dated June 23, 2006, Dr. Shemesh provided pain management for appellant's employment-related knee pain from chondromalacia.

On November 22, 2006 appellant, through her attorney, requested an oral hearing.[3] At the hearing held on November 6, 2006 counsel contended that appellant was unable to perform sedentary employment. He argued that appellant did not have the work experience or specific

[3] By letter dated October 16, 2006, appellant related that she had begun a business out of her home.

vocational preparation to work as an accounting clerk. Counsel asserted that the rehabilitation counselor did not provide evidence regarding the number of available part-time positions within the appropriate commuting area. Appellant related that she took a course on the fundamentals of accounting at college and worked at the Internal Revenue Service as a customer contact representative answering questions on unemployment taxes. She discussed the position description of an accounting clerk and asserted that she did not have the experience or knowledge necessary to perform the duties. Appellant maintained that she could not take public transportation due to her limitations on walking.

In a November 20, 2006 letter, counsel reiterated that appellant did not have the physical or vocational capacity to work as an accounting clerk. He submitted progress reports from Dr. Shemesh dated September and November 2006. Dr. Shemesh listed findings on examination and provided recommendations for pain management. On September 28, 2005 he found restrictions on twisting and bending due to a nonemployment-related back condition.

By decision dated January 10, 2007, the Office hearing representative affirmed the April 14, 2006 decision.

## ***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.[4] 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 or circumstances which may affect wage-earning capacity in his or her disabled condition.[5]

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, *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.[6] 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*[7] will result in the percentage of the employee's loss of wage-earning capacity.

[4] *T.O.*, 58 ECAB ___ (Docket No. 06-1458, issued February 20, 2007).

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

[6] *James A. Birt*, 51 ECAB 291 (2000).

[7] 5 ECAB 376 (1953); codified by regulation at 20 C.F.R. § 10.403.

## ***ANALYSIS***

Appellant received compensation for total disability beginning December 26, 2003 due to her accepted employment conditions of multiple strains/sprains and right patella chondromalacia. The Board finds that the Office properly referred her for vocational rehabilitation as the medical evidence established that she was no longer totally disabled due to residuals of her employment injury. Appellant's attending physician, Dr. Teal, found on April 15, 2004 that she could perform sedentary employment for four hours a day and could increase to eight hours a day over time. On June 14, 2004 Dr. Leppard found that appellant could perform full-time employment with restrictions on lifting, pushing or pulling over 10 pounds or operating a motor vehicle at work. She further determined that appellant could sit for eight hours per day and walk and stand for one hour per day. On June 30, 2004 Dr. Martin diagnosed pain syndrome and major depression due in part to the work injury. He found that appellant could work at her usual employment for four hours per day. On September 10, 2004 Dr. Pock concurred with Dr. Martin's assessment of her work restrictions due to her emotional condition. On September 22, 2004 Dr. Sanidas agreed with the assessment by Dr. Martin and Dr. Leppard of appellant's physical limitations.

The Office properly found that appellant had the capacity to perform the duties of an accounting clerk for four hours per day. The position is classified as sedentary and requires only occasional lifting up to 10 pounds, which is within the restrictions set forth by her physicians. While appellant alleged that she was unable to drive, she did not submit any rationalized medical evidence supporting her contention. On September 19, 2005 a physician's assistant indicated that appellant was not able to drive because of her pain medication. However, a physician's assistant is not a "physician" as defined by section 8102(2) of the Act.[8] Therefore, this report is of no probative value.

In assessing the claimant's ability to perform the selected position, the Office must consider not only physical limitations but also take into account work experience, age, mental capacity and educational background. The rehabilitation counselor determined that appellant had the skills necessary to perform the position of accounting clerk based on her Associate's Degree in business management and her work history. She further found that the position was reasonably available on both a full and part-time basis within the appropriate geographical area. As the rehabilitation counselor is an expert in the field of vocational rehabilitation, however, the Office may rely of his or her opinion in determining whether the job is vocationally suitable and reasonably available.[9] Appellant argued that she did not have the qualifications to perform the position. She maintained that she did not have several years of experience in bookkeeping and accounting. A review of the rehabilitation counselor's report, however, shows that appellant reported experience in accounting software and while working for the Internal Revenue Service. The Board finds that the Office considered the proper factors, including the availability of suitable employment, her physical limitations and employment qualifications in determining that the position of accounting clerk represented her wage-earning capacity. The Office properly

[8] *See* 5 U.S.C. § 8101(2); *Allen C. Hundley*, 53 ECAB 551 (2002).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(b)(2) (December 1993).

determined appellant's loss of wage-earning capacity in accordance with the formula developed in *Shadrick* and codified at 20 C.F.R. § 10.403.[10] The Office properly found that the position of accounting clerk reflected her wage-earning capacity effective April 16, 2006.

Subsequent to the Office's reduction of her compensation, appellant submitted a June 13, 2006 report from Dr. Pock who diagnosed panic disorder and major depression. Dr. Pock attributed the depression to appellant's physical limitations and pain. He asserted that she was unable to work due to a combination of her work restrictions, depression, pain and use of narcotic medication. Dr. Pock, however, did not provide sufficient rationale for his opinion that appellant was unable to work, particularly in view of his prior finding that she was capable of working within the restrictions of Dr. Teal and his concurrence with the opinion of Dr. Martin that she had no psychiatric limitation on work.[11] Consequently, his opinion is insufficient to show that appellant as unable to perform the duties of an accounting clerk effective April 16, 2006.

Appellant further submitted progress reports dated May to November 2006 from Dr. Shemesh, who provided pain management. As the physician did not, however, address the relevant issue of disability due to her employment injury, his reports are of little probative value.[12]

## ***CONCLUSION***

The Board finds that the Office properly reduced appellant's compensation benefits effective April 16, 2006 based on its finding that she had the capacity to earn wages in the selected position of accounting clerk.

[10] *See supra* note 8. The Office divided appellant's employment capacity to earn wages of $269.50 a week by her current pay rate of the position held when injured of $429.32 per week to find a 63 percent wage-earning capacity. The Office multiplied the pay rate at the time of injury of $429.32 by the 63 percent wage-earning capacity percentage. The resulting amount of $270.47 was subtracted from appellant's date-of-injury pay rate of $429.32 which provided a loss of wage-earning capacity of $158.85 per week. The Office then multiplied this amount by the appropriate compensation rate of two-thirds which yielded $105.90. The Office found that cost-of-living adjustments increased this amount to $113.25, or $453.00 every four weeks.

[11] *See Cecelia M. Corley*, 56 ECAB 662 (2005) (a medical opinion not fortified by rationale is of diminished probative value).

[12] Appellant submitted new evidence on appeal; however, the Board has no jurisdiction to review evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated January 10, 2007 and April 14, 2006 are affirmed.

Issued: April 14, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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