United States Department of Labor
Employees' Compensation Appeals Board

I.N., Appellant	)	
and	)	**Docket No. 09-823**
	)	**Issued: December 7, 2009**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Newark, NJ, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 6, 2009 appellant filed a timely appeal from a January 15, 2009 merit decision 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 the case.

ISSUE

The issue is whether the Office properly reduced appellant's compensation effective January 18, 2009 based on its finding that she had the capacity to earn wages in the constructed position of an identification clerk.

FACTUAL HISTORY

On September 21, 2004 appellant, then a 54-year-old passenger screener, sustained injury when a chair rolled out from under her while she was sitting at an x-ray machine resulting in bruising and swelling of her right knee. On January 27, 2005 she filed a claim for an October 4,

2004 recurrence of medical condition (Form CA-2a). Appellant claimed that her knee became swollen and that she could not stand for long periods of time due to pain. She also alleged that her balance and gait were affected by her employment injury. On October 18, 2004 appellant accepted a light-duty sedentary position at the employing establishment. The Office accepted her claim for a right knee contusion and a tear of the right medial meniscus and authorized arthroscopy.

On April 26, 2005 appellant filed a claim for a recurrence of disability (Form CA-2a) beginning April 17, 2005 alleging that due to new procedures at the employing establishment there were no positions available for employees who had reached maximum medical improvement. She was unable to stand or lift and experienced intermittent pain. Appellant stopped work on April 17, 2005. On June 3, 2005 the Office accepted the recurrence claim. Appellant submitted several claims for wage-loss compensation (Forms CA-7) covering the period April 17 through June 25, 2005. On July 7, 2005 the Office placed her on the periodic rolls.

By letter dated July 7, 2005, the Office requested that appellant provide an updated physician's narrative report detailing her current condition and work capacities.

In a work capacity evaluation dated August 2, 2005, Dr. John Dellorso, a Board-certified internist, stated that appellant was unable to work in her regular position. He provided restrictions limiting walking to 20 minutes an hour, standing to 15 minutes an hour, stooping to 5 minutes an hour and squatting to 5 minutes an hour. Appellant was completely restricted from kneeling and climbing and could not lift over 15 pounds. Dr. Dellorso indicated that appellant could work eight hours a day with the restrictions. He noted that the restrictions were permanent unless she underwent surgery and that her condition could change with surgery. In a January 11, 2006 work capacity evaluation, Dr. Dellorso revisited appellant's work restrictions. He added further limitations restricting all repetitive motion with the wrist and all squatting.

On March 31, 2006 the Office referred appellant for vocational rehabilitation. On May 11, 2006 appellant underwent vocational testing. In a May 15, 2006 vocational evaluation report, the rehabilitation counselor described the results of the vocational testing. She stated that appellant had 10 years work experience in security, was bilingual and had two years of college education. The vocational counselor also reviewed her work restrictions and identified several potential occupational positions for which appellant was qualified. In a June 28, 2006 plan, the vocational counselor identified the positions of receptionist, security clerk and customer service representative and order clerk as job placement goals for appellant.

By letter dated July 19, 2006, the Office notified appellant that it had reviewed the vocational rehabilitation plan and found the position of a customer service representative, with wages of $26,000.00 a year, to be within her limitations. It advised that she would receive assistance for 90 days to obtain a position. After 90 days, regardless of whether or not appellant was employed, it would reduce her wage-loss compensation based on her capacity to earn $26,000.00 per year.

In a November 24, 2006 closure report, the rehabilitation counselor advised that appellant was unsuccessful in finding a position and that there was no explanation as to why a successful

placement did not occur. She noted that it did not appear from the job logs that appellant followed-up with employers and there were intermittent problems with her telephone and answering service.

In a medical report dated January 29, 2008, Dr. Alka J. Patel, a Board-certified internist, reviewed appellant's history and the circumstances of the 2004 work injury. He reported chronic pain at appellant's right knee at a level of 6 out of 10. Dr. Patel diagnosed right knee contusion and strain. He provided work limitations including no lifting, pushing or pulling over five pounds, no squatting, kneeling, climbing stairs or ladders, no climbing and that appellant must wear a brace.

In a February 5, 2008 work capacity evaluation, Dr. Dellorso provided work restrictions including no walking or standing for more than 20 minutes an hour, no bending or stooping for more than 5 minutes an hour, no lifting over 10 pounds and a total limitation on squatting, kneeling or climbing. He indicated that appellant could work eight hours a day within the provided restrictions.

On May 30, 2008 the rehabilitation counselor submitted an updated labor market survey and job classifications for the positions of identification clerk, receptionist customer service representative. She found that the position of identification clerk was in demand in appellant's commuting area at an average pay rate of $520.00 per week. The counselor indicated that the identification clerk position was sedentary with physical requirements including frequent reaching, handling and fingering but no climbing, stooping, kneeling, crouching or crawling. She advised that appellant was qualified for the position as she had eight years work experience in the security field, with experience in initiating background security checks and training. Appellant further possessed clerical skills and was bilingual.

On August 1, 2008 the Office notified appellant of a proposed reduction of her compensation based on its determination that she was able to work in the constructed position of identification clerk. It provided her 30 days to submit evidence or argument concerning her ability to earn wages. Appellant submitted an August 11, 2008 letter contending that the employing establishment would not rehire her and that she applied for employment at several different companies with no success.

On November 20, 2008 the Office issued a revised proposed reduction of compensation based on its determination that she was able to work in the constructed position of identification clerk at a weekly rate of $520.00. It found that, on the date of disability, April 17, 2005, she earned $619.98 per week and that the current weekly salary for the same grade and step was $646.50 per week. The Office proposed a reduction of compensation to $345.00 per week. It provided appellant 30 days to submit evidence or argument concerning her wage-earning capacity.

In a December 1, 2008 letter, appellant reiterated that it was difficult to find a position due to the economy but that she had submitted several applications.

By decision dated January 15, 2009, the Office reduced appellant's wage-loss compensation to $345.00 a week, effective January 18, 2009, based on its finding that she was able to work in the constructed position of identification clerk.

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] 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,[3] 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 her 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] The fact that an employee has been unsuccessful in obtaining work in the selected position does not establish that the work is not reasonably available in her commuting area.[7]

When the Office makes a medical determination of partial disability and 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 Occupation Titles* or otherwise available in the open labor market, that fits the 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

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

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

[3] 5 U.S.C. §§ 8101-8193.

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

[5] *See Albert L. Poe*, 37 ECAB 684 (1986); *David Smith*, 34 ECAB 409 (1982).

[6] *Id*.

[7] *See Leo A. Chartier*, 32 ECAB 652 (1981).

the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.[8]

ANALYSIS

The Office accepted that appellant sustained a right knee contusion and a tear of the right medial meniscus as a result of the September 21, 2004 employment injury. Appellant experienced a recurrence of her condition on October 4, 2004 and accepted a light-duty position with the employing establishment. Subsequently, the Office accepted that she sustained a recurrence of disability on April 17, 2005 after her light-duty position ended. It placed appellant on the periodic rolls on July 7, 2005 and referred her to vocational rehabilitation, where she received vocational placement assistance for over 90 days. The issue is whether the Office properly reduced her monthly compensation, effective January 18, 2009, based on its finding that she had the capacity to earn wages in the constructed position of an identification clerk.

As appellant did not have actual earnings which fairly and reasonably represented her wage-earning capacity, the Office properly selected a constructed position for determination of wage-earning capacity.[9] The Office selected the position of identification clerk, which is classified as a sedentary position with physical requirements including frequent reaching, handling and fingering but no climbing, stooping, kneeling, crouching or crawling. The medical evidence supports a finding that appellant had the physical capacity to perform the duties of the position. In a January 29, 2008 medical report, Dr. Patel provided work restrictions, including no lifting, pushing or pulling over five pounds, no squatting, kneeling, climbing stairs or ladders, and that appellant must wear a brace. Further, in a February 5, 2008 work capacity evaluation, Dr. Dellorso provided work restrictions, including no walking or standing for more than 20 minutes an hour, no bending or stooping for more than 5 minutes an hour, no lifting over 10 pounds and a total restriction on squatting, kneeling or climbing. As the physical requirements for the identification clerk position are within these prescribed limitations, the medical evidence supports that appellant is capable of performing the position.

In assessing appellant's ability to perform the selected position, the Office must consider not only the physical limitations but also take into account her work experience, age, mental capacity and educational background.[10] In this case, the rehabilitation counselor found that appellant had the skills necessary to perform the position of identification clerk based on her eight years of work experience in the security field and experience initiating background security checks and training. Appellant possessed clerical skills and is bilingual. The counselor also found that the position was in demand in appellant's commuting area with weekly wages of $520.00. The Board finds that the Office considered the proper factors, such as availability of suitable employment, appellant's physical limitations and employment qualifications in determining that the position of identification clerk represented her wage-earning capacity.[11]

[8] *See Dennis D. Owen*, 44 ECAB 475 (1993); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992). *See also Albert C. Shadrick*, 5 ECAB 376 (1953).

[9] *See John E. Cannon*, 55 ECAB 585 (2004).

[10] *E.C.*, 59 ECAB ___ (Docket No. 07-1634, issued March 10, 2008).

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

The evidence of record establishes that appellant had the requisite physical ability, skill and training to perform the position and that such a position was reasonably available within the general labor market of appellant's commuting area.

The Board also finds that the Office properly determined appellant's wage-earning capacity in accordance with the formula developed in *Albert C. Shadrick*[12] and codified at section 10.403 of the Office's regulations.[13] The Office found that appellant's salary on April 17, 2005, the date her disability recurred, was $619.98 per week; that the current adjusted pay rate for her job was $646.50 per week; and that she was currently capable of earning $520.00 per week, the weekly rate of an identification clerk. The Office then calculated that appellant had an 80 percent wage-earning capacity, or a 20 percent loss of wage-earning capacity, which resulted in an adjusted wage-earning capacity of $495.98 per week. It concluded that based on a two-thirds percent rate, appellant's new compensation rate was $82.67 per week. The Office adjusted the rate based on the consumer-price index to $88.50 per week and calculated that her net compensation for each four-week period would be $354.00. The Board finds that the Office correctly applied the *Shadrick* formula and therefore properly found that the position of identification clerk reflected appellant's wage-earning capacity effective January 18, 2009.

On appeal, appellant contends that she was specifically informed that as long as she was not working she would continue to receive compensation. By letter dated July 19, 2006, the Office notified her that she would receive vocational placement assistance for 90 days and that after this time, regardless of whether or not she was employed, it would reduce her wage-loss compensation based on her capacity to earn wages in a constructive position. Contrary to appellant's argument on appeal, the Office did not reduce her wage-loss compensation based on her refusal of a job offer of identification clerk. Rather, the reduction of compensation was based on the fact that she had the ability to earn wages as an identification clerk. The Office properly followed its procedures in cases where vocational rehabilitation is unsuccessful by identifying a position that is deemed suitable but not actually held, which is within appellant's physical limitations, reasonably available in her commuting area and for which she was vocationally qualified.[14] Here, with the aid of a vocational rehabilitation counselor, the Office identified the position of identification clerk and reduced appellant's wages accordingly.

Moreover, appellant contends that she applied for jobs but was unable to obtain the position due to her age. Section 8115(a) of the Act provides that, if actual earnings of the employee do not fairly and reasonably represent her wage-earning capacity or if the employee has no actual earnings, then the wage-earning capacity as appears reasonable under the circumstances as determined by a number of factors, including age.[15] Congress has, therefore, determined that age alone should not determine wage-earning capacity. Rather, it has established a reasonableness standard, taking into account the nature of the injury, the degree of

[12] 5 ECAB 376 (1953).

[13] 20 C.F.R. § 10.403.

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity Based on Constructed Position*, Chapter 2.814.8 (December 1993).

[15] 5 U.S.C. § 8115(a).

physical impairment, usual employment, age, qualification for other employment, availability of suitable employment and other factors or circumstances which may affect wage-earning capacity.[16] The Board finds that the Office has appropriately considered the required factors, including age. There is no evidence of record that establishes that age alone renders appellant unqualified for employment as an identification clerk.

Finally, appellant stated that she has not received medical treatment from her treating physician and is now unable to pay her medical bills. The Office's January 15, 2009 decision only reduced her wage-loss compensation. It did not terminate appellant's medical benefits. Appellant is still entitled to medical treatment related to the employment injury.

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation, effective January 18, 2009, based on its finding that she had the capacity to earn wages as an identification clerk.

ORDER

IT IS HEREBY ORDERED THAT the January 15, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 7, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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

[16] *See id*. *See also P.S.*, Docket No. 06-1029 (issued March 26, 2007).