United States Department of Labor
Employees' Compensation Appeals Board

G.R., Appellant	)	
and	)	**Docket No. 08-493**
	)	**Issued: January 28, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Jacksonville, FL, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 10, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' October 18, 2007 merit decision concerning her wage-earning capacity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly reduced appellant's compensation effective November 16, 2006 based on her capacity to earn wages as a cashier.

FACTUAL HISTORY

The Office accepted that on August 7, 1993 appellant, then a 33-year-old distribution clerk, sustained a lumbar strain, displacement of a lumbar intervertebral disc without myelopathy and left hip contusion due to slipping on a tray and falling to the ground at work. It also accepted that she sustained bilateral carpal tunnel syndrome due to her repetitive work duties

prior to early 1996.[1] On September 13, 1999 appellant received a schedule award for a 20 percent permanent impairment of each arm. The Office paid her compensation for periods of partial and total disability.

In a March 29, 2004 report, Dr. Steven Lancaster, a Board-certified orthopedic surgeon, who served as an Office referral physician, determined that appellant was capable of light-duty work on a full-time basis. In November 2004, the Office directed appellant to participate in a vocational rehabilitation program. In a February 18, 2005 decision, it suspended appellant's compensation on the grounds that she refused to participate in vocational rehabilitation efforts. In an August 11, 2005 decision, an Office hearing representative affirmed this decision.

In late August 2005, appellant began to cooperate in the development of a vocational rehabilitation plan and her Office compensation was restored for temporary disability effective May 11, 2005. It was determined that she would participate in a certificate program designed to prepare her for employment as an administrative assistant, general office clerk, appointment clerk or related clerical occupation. The Office abandoned the rehabilitation plan after it determined that medical evidence showed that appellant was not physically capable of completing the program. On March 21, 2006 Dr. Mark C. Hofmann, an attending Board-certified physical medicine and rehabilitation physician, found that appellant could twist, bend or stoop for one hour per day, engage in repetitive wrist motion for one hour per day and lift push or pull up to 20 pounds for one hour per day.[2]

Appellant's vocational rehabilitation counselor determined that, based on her prior employment history in retail sales, she was employable as a cashier.[3] The position involved such duties as receiving payment for goods and services and operating a cash register and electronic data processing equipment. It required lifting, pushing or pulling up to 20 pounds and primarily involved movement of the fingers rather than the wrists. A labor market survey showed that the cashier position was reasonably available in her commuting area.[4] On May 11, 2006 the Office sent Dr. Hofmann a description of the cashier position, including its physical requirements and asked him to address whether appellant was capable of performing the duties of the position for eight hours per day. On May 16, 2006 Dr. Hofmannn indicated that appellant was capable of performing the duties of the cashier position for eight hours per day.

On June 8, 2006 Dr. Hofmann reported findings of his physical examination of appellant, noting that she had a positive Tinel's sign over her right wrist but not her left wrist. He stated that appellant had mild diffuse antalgic weakness in her upper extremities, greatest over her left

[1] Appellant was terminated from employing establishment in early 1996. On July 17, 2001 she underwent right carpal tunnel release surgery which was authorized by the Office.

[2] On April 20, 2006 Dr. Hofmann stated that appellant had full range of motion of her right shoulder and noted that, although she exhibited guarding of her left shoulder, she had essentially full passive motion of this shoulder. Appellant had no focal motor deficits, except for decreased grip strength in her hands and decreased sensation in her median nerves.

[3] The actual name of the position is listed as "Cashier II" in the Department of Labor's *Dictionary of Occupational Titles*, but the position will be referred to as "cashier."

[4] The entry-level wage for the cashier position was $7.15 and median-level wages were $9.12 per hour.

hand. Dr. Hofmann noted that the March 21, 2006 work restrictions remained in effect and that she would be able to perform the limited duties of the cashier position.

On July 18, 2006 Dr. Kenneth Hentschel, an attending Board-certified neurologist, diagnosed bilateral carpal tunnel syndrome (mild on the right and mild-moderate on the left), chronic pain syndrome and probable mild ulnar neuropathy of the elbows. In an August 7, 2006 work capacity evaluation form, Dr. Jewel R. Scarlett, an attending Board-certified internist, diagnosed bilateral carpal tunnel syndrome with resultant bilateral ulnar neuropathy and indicated that appellant was totally disabled. An August 23, 2006 functional capacity evaluation report showed that appellant was capable of lifting, pushing or pulling up to 20 pounds and could use her hands to grasp for five hours per day.

In a September 26, 2006 letter, the Office advised appellant of its proposal to adjust her compensation based on her ability to work in the constructed position of cashier.[5] It found that she was capable of working in the constructed position of cashier for eight hours per day and could earn $286.00 per week. The Office provided appellant with 30 days to submit evidence and argument if she disagreed with this proposed wage-earning capacity determination. In an October 24, 2006 letter, appellant argued that the August 7, 2006 report of Dr. Scarlett established that appellant could not perform the cashier position.

In November 16, 2006 decision, the Office reduced appellant's compensation effective that date on the grounds that she was capable of working in the constructed position of cashier for eight hours per day. It noted that the opinion of Dr. Hofmann established that she could perform the position and included calculations showing how her compensation would be reduced based on its wage-earning capacity determination.

Appellant submitted several reports dated between late 2006 and mid 2007 in which Dr. Joel Lavina, an attending Board-certified family practitioner, diagnosed bilateral carpal tunnel syndrome, ulnar neuropathy and chronic pain from cervical osteoarthritis. On July 18, 2007 Dr. Lavina stated that appellant had undergone physical and vocational rehabilitation and "could not tolerate the activities" of the cashier position.

In an October 18, 2007 decision, the Office denied modification of its November 16, 2006 decision, noting that Dr. Lavina's opinion lacked medical rationale.

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.[6] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[7]

[5] Appellant had been unsuccessful in the 90-day job search she conducted with the help of her vocational rehabilitation counselor.

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

[7] *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

Under section 8115(a) of the Federal Employees' Compensation Act, 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 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.[8] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[9] 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.[10]

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's *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits that 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 the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.[11]

ANALYSIS

The Office accepted that on August 7, 1993 appellant sustained a lumbar strain, displacement of a lumbar intervertebral disc without myelopathy and left hip contusion due to slipping on a tray and falling to the ground at work. It later accepted that she sustained bilateral carpal tunnel syndrome due to her repetitive work duties prior to early 1996. The Office paid her compensation for periods of partial and total disability.

The Office received information from several physicians who found that appellant was not totally disabled for work and had a partial capacity to perform work for eight hours per day subject to specified work restrictions. Appellant's vocational rehabilitation counselor then determined that appellant was able to perform the position of cashier and that state employment services showed that the position was available in sufficient numbers so as to make it reasonably available within her commuting area. The Office properly relied on the opinion of the rehabilitation counselor that appellant was vocationally capable of performing the cashier position.

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

[9] *Albert L. Poe*, 37 ECAB 684, 690 (1986), *David Smith*, 34 ECAB 409, 411 (1982).

[10] *Id.*

[11] *See Dennis D. Owen*, 44 ECAB 475, 479-80 (1993); *Wilson L. Clow, Jr.*, 44 ECAB 157, 171-75 (1992); *Albert C. Shadrick*, 5 ECAB 376 (1953).

A review of the evidence reveals that appellant is physically capable of performing the cashier position. On May 11, 2006 the Office sent Dr. Hofmann, an attending Board-certified physical medicine and rehabilitation physician, a description of the cashier position asked him to indicate whether appellant was capable of performing the duties of the position for eight hours per day. On May 16, 2006 Dr. Hofmannn indicated that appellant was capable of performing the duties of the cashier position for eight hours per day. On March 21, 2006 he had found that appellant could twist, bend or stoop for one hour per day, engage in repetitive wrist motion for one hour per day and lift push or pull up to 20 pounds for one hour per day. These restrictions would not prevent appellant from performing the cashier position.[12]

Appellant submitted an August 7, 2006 form report from Dr. Scarlett, an attending Board-certified internist, who diagnosed bilateral carpal tunnel syndrome with resultant bilateral ulnar neuropathy and indicated that he was totally disabled. This report, however, is of limited probative value on the relevant issue of the present case in that Dr. Scarlett did not provide any medical rationale in support of her conclusion on appellant's ability to work.[13] She did not provide detailed medical findings or explain how appellant's specific medical condition prevented her from performing any work. Appellant submitted several reports dated between late 2006 and mid 2007 in which Dr. Lavina, an attending Board-certified family practitioner, diagnosed bilateral carpal tunnel syndrome, ulnar neuropathy and chronic pain from cervical osteoarthritis. On July 18, 2007 Dr. Lavina stated that appellant had undergone physical and vocational rehabilitation and "could not tolerate the activities" of the cashier position. However, he did not describe the duties of the cashier position and explain how specific medical findings prevented appellant from performing them.

The Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment, age and employment qualifications, in determining that the position of cashier represented her wage-earning capacity.[14] The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of cashier and that such a position was reasonably available within the general labor market of her commuting area. Therefore, the Office properly reduced appellant's compensation effective November 16, 2006 based on her capacity to earn wages as a cashier.

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation effective November 16, 2006 based on her capacity to earn wages as a cashier.

[12] The record contains several reports from the first half of 2006, in which Dr. Hofmann noted that appellant had limited residuals of her accepted employment injuries. On June 8, 2006 Dr. Hofmann indicated that the March 21, 2006 work restrictions remained in effect and noted that appellant would be able to perform the limited duties of the cashier position.

[13] *See Leon Harris Ford*, 31 ECAB 514, 518 (1980) (finding that a medical report is of limited probative value on a given medical matter if it contains a conclusion which is unsupported by medical rationale).

[14] *See Clayton Varner*, 37 ECAB 248, 256 (1985).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' October 18, 2007 decision is affirmed.

Issued: January 28, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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