United States Department of Labor
Employees' Compensation Appeals Board

D.C., Appellant	)	
and	)	**Docket No. 10-582**
	)	**Issued: December 20, 2010**
DEPARTMENT OF COMMERCE,	)	
Dallas, TX, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 30, 2009 appellant filed a timely appeal from the November 25, 2009 merit decision of the Office of Workers' Compensation Programs. 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 met its burden of proof in reducing appellant's compensation based on its determination that the constructed position of a receptionist represented her wage-earning capacity effective June 9, 2009.

FACTUAL HISTORY

On August 3, 2000 appellant, then a 33-year-old enumerator, was injured when her vehicle was rear-ended and she struck her head on the steering column. She sustained injuries to her head and pelvis area. Appellant stopped work on August 4, 2000. The Office accepted the

claim for cervical radiculopathy, head contusion, headache and anterior cruciate ligament tear, and medial meniscus tears of the right knee. Appellant received compensation benefits.[1]

The Office continued to develop the claim and, by letter dated February 21, 2006, referred appellant for a second opinion, along with a statement of accepted facts, a set of questions and the medical record to Dr. Bruce Abrams, a Board-certified orthopedic surgeon. In a March 6, 2006 report, Dr. Abrams noted that appellant would need additional surgery at some point. However, in the interim, he indicated that she could work eight hours a day in a sedentary position. Dr. Abrams recommended no more than four hours of standing with no squatting, climbing or kneeling. He advised that appellant could ambulate with a cane.

In a letter dated May 10, 2006, the Office provided a copy of Dr. Abrams' report to appellant's treating physician, Dr. Donald Knapke, a Board-certified orthopedic surgeon. It requested Dr. Knapke's opinion regarding her ability to work.

On August 4, 2006 the Office referred appellant to a vocational rehabilitation counselor.

In a report dated October 30, 2007, Dr. Knapke opined that appellant could return to work in a sedentary job with restrictions which included intermittent standing, walking, sitting, bending/stooping, twisting, pushing/pulling and simple grasping. He indicated that appellant could not climb or kneel. Dr. Knapke advised that appellant could perform sedentary work, with no prolonged standing and no climbing with the ability to sit or stand as needed.

On November 7, 2007 the Office noted that the rehabilitation counselor should utilize Dr. Knapke's restrictions and develop a plan to search for employment in the private sector within appellant's restrictions. On December 14, 2007 the vocational rehabilitation counselor identified the constructed positions of a receptionist and computer operator as being reasonably representative of appellant's restrictions. The positions were described as sedentary with no physical demands. The vocational rehabilitation counselor identified the positions listed in the Department of Labor, *Dictionary of Occupational Titles*, DOT Nos. 237.367-038 and 213.362-010, and noted that a receptionist would make a weekly pay rate of $400.00 and a computer operator would make a weekly pay rate of $500.00.

In a May 23, 2008 closing report, the vocational rehabilitation counselor noted that appellant had been in her job search in excess of 90 days but was unable to obtain a position even though there were sufficient positions available in her commuting area. She indicated that appellant did not complete her original training but she did attend 10 months of training which would qualify her for the receptionist and computer operator positions. The vocational rehabilitation counselor conducted a labor market survey and found that the positions of receptionist and computer operator were performed in such numbers as to be reasonably available to appellant within her commuting area. For example she noted that there were 492 jobs in the Michigan area pertaining to receptionist positions and 95 annual openings in computer operator positions, with a higher concentration in metropolitan areas such as Detroit.

[1] On May 20, 2004 the Office reduced appellant's compensation to zero based on her capacity to earn wages as a customer service representative. Appellant subsequently underwent authorized surgery and compensation benefits for total disability were reinstated on June 15, 2005.

In a letter dated October 22, 2008, Robert Heitmann, a workers' compensation specialist, with the employing establishment noted that appellant was reemployed as a clerk for the period July 21 to October 17, 2008. He also noted that she believed she was not treated fairly when she was not offered another position after her appointment ended. Mr. Heitmann indicated that appellant demonstrated her ability to work in a full-time sedentary position.

In a March 17, 2009 job classification report, the vocational rehabilitation counselor advised that the receptionist position remained available at an average weekly wage rate of $440.80.

On April 20, 2009 the Office notified appellant that it proposed to reduce her compensation for wage loss due to her accepted injury. It found that the factual and medical evidence established that appellant was no longer totally disabled for work but was instead partially disabled and she had the capacity to earn wages as a receptionist at the rate of $440.80 per week.[2] The Office provided her 30 days to submit evidence or argument concerning her ability to earn wages.

The Office provided a calculation sheet regarding appellant's salary. It indicated that her pay rate when injured on August 3, 2000 was $257.81 per week; the current adjusted pay rate for her job on the date of injury was $347.42 per week, she was currently capable of earning $440.80 per week, the pay rate for a receptionist. The Office determined that appellant had a zero percent wage-earning capacity. Appellant was provided 30 days to submit additional evidence or argument in support of any objection to the proposed reduction.

By decision dated June 9, 2009, the Office reduced appellant's compensation under 5 U.S.C. § 8115 to reflect her capacity to earn wages as a receptionist. It noted that she did not provide any additional evidence or argument.

On June 19, 2009 appellant's representative requested a hearing, which was held on August 12, 2009. During the hearing, appellant alleged that she also sustained a cut in her left eye when she went through the windshield on August 3, 2000. She indicated that she was diagnosed with iridocyclitis which could cause her to lose her left eye. Appellant stated that, in addition to the meniscus tear, she had two knee surgeries. Additionally, she indicated that, because of her right knee injury, her left knee was also compromised because she put more weight on it. Appellant testified that her position with the employing establishment ended because her supervisor told her to go home and take care of her many injuries, including her eye condition. She alleged that the position was withdrawn. Additionally, appellant alleged that the employing establishment withdrew the position. She also alleged that the employing establishment failed to honor her restrictions by placing her at a copying machine but she continued to work in the position because she feared losing her job. Appellant confirmed that she was not working and had applied for social security benefits. She alleged that she was unable to work as a receptionist because she could not see because of her eye.

[2] The Office noted that appellant's position with the employing establishment only lasted 89 days and as such, it could not proceed with a wage-earning capacity decision based upon that position as it did not last 90 days.

On August 10, 2009 the Office received additional evidence which included an October 17, 2008 report from Dr. Knapke, who advised that appellant returned regarding complaints in her right knee. Dr. Knapke noted that she returned to a position that failed to honor her restrictions and she was involved in a "lot of standing, copying papers and lifting heavy files." He diagnosed right knee arthritis and opined that appellant was hesitant to proceed with a knee replacement. Dr. Knapke related that she felt that she could not work. However, he opined that appellant would need a job that would allow sitting and standing options and no prolonged standing. In a report dated October 22, 2008, Dr. Knapke noted that she was seen for complaints of back pain. He noted that appellant related that she did not "feel she could work." Dr. Knapke diagnosed low back pain and noted that he had discussed pain management techniques with her and noted that she was a candidate for a knee replacement in the future.

In a September 2, 2009 letter, Mr. Heitmann noted that appellant was referred to vocational rehabilitation on two occasions. He indicated that her compensation was previously reduced to zero before her knee surgery was authorized and her compensation benefits resumed. Mr. Heitmann also noted that appellant was again referred to vocational rehabilitation and her compensation was reduced to zero based on no loss of wage-earning capacity. He indicated that she was eager to return to work and did not mention any debilitating vision problems or any other physical problems that would prevent her return to sedentary work. Mr. Heitmann advised the Office that appellant worked as a clerk under a 90-day appointment, which was similar to the appointment that she was in when she was injured. He noted that, while she did experience an instance with her knee when she exceeded her restrictions while photocopying documents, this was rectified and she was able to continue in the job. Mr. Heitmann questioned why the Office did not rate appellant on the clerk position, based on the 90-day appointment. He also noted that she filed an Equal Employment Opportunity (EEO) complaint, claiming that she was denied employment due to her partial disability status. Mr. Heitmann provided a copy of his earlier October 22, 2008 letter indicating that appellant was reemployed from July 21 to October 17, 2008. He also provided a copy of an October 23, 2008 letter to her advising her that another position could not be located. In a September 9, 2009 letter, Mr. Heitmann advised that appellant was not fired.

The Office received disability certificates dated June 22, 2009 from Dr. Haranath Policherla, a Board-certified neurologist, who advised that appellant was disabled and unable to work from June 22, 2009 for an "indefinite -- unknown duration." Dr. Policherla diagnosed cervical and lumbar radiculopathy, headaches, depression and anxiety. He advised appellant to see a psychiatrist for her psychological problems.

In a letter dated September 14, 2009, appellant's representative advised the Office that she was willing to have a total knee replacement. He requested that the Office schedule the procedure.

In a November 25, 2009 decision, an Office hearing representative affirmed the prior decision.

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.[3]

Section 8115(a) of the Federal Employees' Compensation Act,[4] provides in determining compensation for partial disability, the wage-earning capacity of an employee is determined by her actual earnings if her actual earnings 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.[5] 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.[6] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[7] 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.[8] 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.[9]

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* or otherwise available in the open labor market, that fits that employee's capabilities with regard to her physical limitation, 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.[10] Finally, application of the principles set forth

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[3] *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984). *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

[4] 5 U.S.C. § 8115.

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

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

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

[8] *Id.*

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

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

in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.[11]

ANALYSIS

Appellant's claim was accepted for cervical radiculopathy, head contusion, headache, and anterior cruciate ligament tear and medial meniscus tears of the right knee. She received disability compensation for appropriate periods.

In an October 30, 2007 report, Dr. Knapke, appellant's treating physician, advised that she could work eight hours a day at a sedentary job. After the Office received evidence that appellant was no longer totally disabled for work, it obtained her specific work restrictions. Appellant accepted a position as a clerk for the period July 21 to October 17, 2008. Thereafter, the employing establishment indicated that they were unable to renew her position. The Office determined that it only lasted 89 days.

The Office requested that the Office rehabilitation counselor select a position based upon Dr. Knapke's restrictions which was available in the open labor market that fit appellant's capabilities in light of her physical limitations, education, age and prior experience. Based on the medically determinable residuals of the accepted employment injury and taking into consideration all significant preexisting impairments and pertinent nonmedical factors, the rehabilitation counselor found that appellant was able to perform the job of receptionist. She confirmed that such work was reasonably available to appellant within her commuting area, and she confirmed an entry-level wage of $400.00 per week. The rehabilitation counselor noted that appellant attended 10 months of training that would qualify her as a receptionist. Subsequently, the weekly wage of $440.80 was confirmed. The Office's rehabilitation counselor is an expert in such matters, so the vocational suitability of the receptionist position is established.[12] The medical suitability of the receptionist position is established by appellant's attending physician who found appellant able to perform sedentary work.

Although Dr. Knapke subsequently saw appellant and submitted reports dated October 17 and 22, 2008 in which he related that she did not feel she could work, he did not opine that she was unable to work. He reiterated his opinion that she would need a job that would allow sitting, and standing options and no prolonged standing. Thus, these reports do not support that appellant was unable to perform the receptionist position.

Appellant also provided disability certificates from Dr. Policherla, who opined that she was disabled from June 22, 2009 for an "indefinite -- unknown duration." No explanation or rationale was offered as to how he arrived at this conclusion and he did not specifically address her ability to work in the receptionist position.[13]

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[11] *Id. See Shadrick*, 5 ECAB 376 (1953).

[12] *See Lawrence D. Price*, 54 ECAB 590 (2003).

[13] *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

The Board also notes that appellant cited her eye condition as a reason for inability to perform the receptionist condition. The eye condition, however, has not been accepted by the Office and there are no reports from a physician explaining how the eye condition would prevent her from performing the receptionist position.

The Board finds that the Office followed standardized procedures and gave due regard to relevant factors in determining appellant's wage-earning capacity as appears reasonable under the circumstances. The evidence establishes that her employment injury no longer totally disables her for work. Appellant is capable of earning entry-level wages as a receptionist. The Board finds that the Office met its burden to reduce her monetary compensation and will affirm the Office's November 25, 2009 decision.

The Board also finds that the Office properly determined appellant's wage-earning capacity in accordance with the formula developed in *Albert C. Shadrick*[14] and codified at section 10.403 of the Office's regulations.[15] The Office found that appellant's salary on August 3, 2000, the date her disability occurred was $257.81 per week; that the current adjusted pay rate for her job was $347.42 per week; and that she was currently capable of earning $440.80 per week, the weekly rate for a receptionist. It then calculated that she had a zero percent wage-earning capacity, or a zero percent loss of wage-earning capacity. The Board finds that the Office correctly applied the *Shadric*k formula and therefore properly found that the constructed position of receptionist reflected appellant's wage-earning capacity effective June 9, 2009.

Consequently, the Office met its burden of proof to establish that the constructed position of receptionist reflected appellant's wage-earning capacity effective June 9, 2009.

CONCLUSION

The Board finds that the Office met its burden of proof in reducing appellant's compensation based on its determination that the constructed position of a receptionist represented her wage-earning capacity effective June 9, 2009.

[14] 5 ECAB 376 (1953).

[15] 20 C.F.R. § 10.403.

ORDER

IT IS HEREBY ORDERED THAT the November 25, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 20, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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