United States Department of Labor
Employees' Compensation Appeals Board

S.G., Appellant	)	
and	)	**Docket Nos. 07-938 and 07-1493**
DEPARTMENT OF LABOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, Dallas, TX, Employer	)	**Issued: October 11, 2007**

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 21, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated November 17, 2006. This appeal was docketed as No. 07-938. On May 9, 2007 appellant filed a timely appeal of a February 2, 2007 Office merit decision. This appeal was docketed as No. 07-1493. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly denied modification of a June 7, 2006 wage-earning capacity determination; and (2) whether the Office properly determined appellant's current pay rate for the date-of-injury position as of July 12, 2005.

FACTUAL HISTORY

The case has been before the Board on prior appeals. In a November 12, 2004 decision, the Board reversed an October 21, 2003 Office decision terminating compensation on the

grounds that appellant refused an offer of suitable work.[1] By decision dated January 17, 2007, the Board remanded the case for further development on a rate of pay issue.[2] The Board noted that it was unclear how the Office determined the current pay rate for the date-of-injury position. The history of the case is contained in the Board's prior decisions and is incorporated herein by reference.

Appellant returned to a light-duty position at three hours per day on July 12, 2005. On April 3, 2006 appellant returned to a full-time position as a receptionist. By decision dated June 7, 2006, the Office determined that the actual earnings in the receptionist position fairly and reasonably represented her wage-earning capacity.[3]

The record contains a hospital emergency room report indicating that appellant was admitted on June 21, 2006 and treated for swollen lymph nodes. In a note dated July 13, 2006, Dr. Javier Valadez, an internist, indicated that appellant was unable to work due to a cervical strain and hypertension. Dr. Valadez reported that appellant was released to work as of July 17, 2006.

In a report dated July 18, 2006, Dr. Craig Callewart, an orthopedic surgeon, provided results on examination and diagnosed status post anterior cervical 4-5 decompression and fusion with cage on November 7, 2002 and left volar ganglion.[4] He stated that appellant had been off work due to high blood pressure. In a July 18, 2006 note, Dr. Callewart indicated that appellant should remain off work as diagnostic testing was pending. The record contains a cervical magnetic resonance imaging (MRI) scan dated July 21, 2006.

On August 2, 2006 appellant filed a recurrence of disability claim (Form CA-2a), reporting a date of recurrence of June 21, 2006 and a work stoppage as of July 13, 2006. Appellant stated that she went to the emergency room on June 21, 2006.

In a note dated August 11, 2006, Dr. Callewart indicated that appellant had been off work for three to four weeks. He indicated that appellant would be released to work four hours per day.

By decision dated November 17, 2006, the Office denied the claim for compensation. The Office found that the evidence was not sufficient to establish a modification of the wage-earning capacity determination or to establish a recurrence of disability as of July 13, 2006.

By decision dated February 2, 2007, the Office made a determination with respect to appellant's entitlement to compensation on July 12, 2005 when she returned to work at three hours per day. In applying the *Shadrick* formula, the Office found that the date of injury was

[1] Docket No. 04-341 (issued November 12, 2004).

[2] Docket No. 06-129 (issued January 17, 2007).

[3] Appellant did not request review of this decision.

[4] The accepted conditions in this case are bilateral carpal tunnel syndrome, cervical strain and displacement of C5-6 disc.

July 31, 1997, when appellant was last exposed to the identified employment factors. The Office indicated that appellant was at that time a GS (General Services) Grade 7, Step 8 employee and the current pay rate as of July 12, 2005 for that grade and step was $834.25 per week.

LEGAL PRECEDENT -- ISSUE 1

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.[5] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[6]

ANALYSIS -- ISSUE 1

The Office issued a wage-earning capacity determination on June 7, 2006. Appellant thereafter, filed a recurrence of disability claim commencing July 13, 2006. The initial issue is whether the wage-earning capacity determination should be modified.[7] Appellant has not argued that the original determination was erroneous. She asserts that the medical evidence shows that she was disabled. In this regard, however, the medical evidence is not sufficient to establish a material change in the nature and extent of the employment-related condition.

Appellant indicated that she received emergency room treatment on June 21, 2006 but the record does not contain probative evidence with respect to treatment for an employment-related condition on June 21, 2006. The record indicated that appellant stopped working on July 13, 2006 and was treated by Dr. Valadez on that date. Dr. Valadez briefly referred to cervical strain and hypertension, without providing detail. He did not provide a history and a reasoned opinion establishing a change in an employment-related condition of July 13, 2006. Dr. Callewart reported on July 18, 2006 that appellant had been off work due to high blood pressure. He did not discuss an employment-related condition and provide a reasoned medical opinion establishing a material change in the condition. There is no medical evidence of record that is sufficient to establish a modification of the wage-earning capacity determination as of July 13, 2006.

The Board notes that, even if the evidence is not sufficient to warrant a modification of a wage-earning capacity determination, the evidence may be sufficient to establish a limited period of disability.[8] As appellant was working a light-duty job, she must show a change in the nature and extent of the injury-related condition.[9] The evidence is not sufficient to establish a

[5] *Sue A. Sedgwick*, 45 ECAB 211 (1993).

[6] *Id.*

[7] *See Katherine T. Kreger*, 55 ECAB 633 (2004).

[8] *Id.*

[9] *Terry R. Hedman*, 38 ECAB 222 (1986).

recurrence of disability on July 13, 2006. As noted above, the medical evidence was of limited probative value and did not show a change in the employment-related condition.

Based on the evidence of record, therefore, appellant has not established an employment-related disability commencing July 13, 2006. The Office properly determined that modification of the wage-earning capacity determination was not warranted and appellant had not established a recurrence of disability as of July 13, 2006.

LEGAL PRECEDENT -- ISSUE 2

When a claimant has earnings, the Office may reduce continuing compensation in accord with the *Shadrick*[10] formula. The formula has been codified at 20 C.F.R. § 10.403. The Office first calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury job; the wage-earning capacity in terms of dollars is computed by multiplying the pay rate for compensation purposes by the percentage of wage-earning capacity, and the resulting dollar amount is subtracted from the pay rate for compensation purposes to obtain the loss of wage-earning capacity.

ANALYSIS -- ISSUE 2

The Office's February 2, 2007 decision was issued following the Board's January 17, 2007 decision remanding the case with respect to the proper calculation under *Shadrick.* The Board noted that there were time periods at issue: August 31, 2004 to April 1, 2005 and the period commencing July 12, 2005. The Office indicated that in its February 2, 2007 decision it was addressing the period commencing July 12, 2005 and they would address the August 31, 2004 to April 1, 2005 period in a separate decision.

As noted above, the *Shadrick* formula requires a comparison between current actual earnings and the current pay rate for the date-of-injury job. The Board indicated in its January 17, 2007 decision that there was confusion regarding the date-of-injury, as the Office reported the date of injury to be October 1, 1996. On the May 21, 1997 claim form appellant had reported that she became aware of the condition in October 1996. As the Board noted, if appellant continues to be exposed to the identified employment factors, the date of injury would be the date of last exposure.[11]

On remand the Office noted that appellant had stopped working on July 31, 1997 when she underwent left carpal tunnel release surgery. On October 2, 1997 she underwent right carpal tunnel release and then returned to part-time light-duty work on November 13, 1997. Therefore, the record does support a finding that the date of last exposure to the identified employment factors was July 31, 1997. A claim for compensation dated July 30, 1997 indicated that appellant was at that time a GS Grade 7, Step 8 employee, earning $31,728.00 annually. Accordingly, the current pay rate for the date-of-injury job as of July 12, 2005 would be the pay

[10] *Albert C. Shadrick,* 5 ECAB 376 (1953). *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment, Determining Wage-Earning Capacity*, Chapter 2.814.7(d) (June 1996).

[11] *Barbara A. Dunnavant*, 48 ECAB 517 (1997).

rate for a GS Step 7, Grade 8 employee in appellant's locality on July 12, 2005. The record indicates that this would be $43,381.00 annually or $834.25 per week.

The Board, therefore, finds that the Office properly explained its calculations and applied the *Shadrick* formula with respect to an offset of compensation for actual earnings as of July 12, 2005. The date of injury is July 31, 1997 and the Office determined that the current pay rate for the date-of-injury job based on the evidence of record.

CONCLUSION

Appellant did not establish that a modification of the June 7, 2006 wage-earning determination was warranted. With respect to the offset of compensation based on actual earnings commencing July 12, 2005, the Office properly determined the date of injury and current pay rate for the date-of-injury position.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 2, 2007 and November 17, 2006 are affirmed.

Issued: October 11, 2007
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