

In a work capacity form dated September 24, 2003, Dr. Pierre Herding, appellant's Board-certified neurologist, restricted her to two hours of reaching, zero hours of reaching above

the shoulder, zero hours of repetitive movements in her wrist and elbow, two hours of pushing, pulling and lifting and two hours of driving a motor vehicle. In a March 29, 2004 report, he indicated that appellant was restricted from any repetitive movements of her wrist or elbow as well as pushing and pulling since these aggravated her shoulder, neck and carpal tunnel syndrome. In a May 13, 2004 report, Dr. Herding indicated that appellant had been formerly evaluated with persistent pain in her shoulder and neck due to cervical spondylosis, a rotator cuff tear and carpal tunnel syndrome. He noted that on physical examination appellant continued to describe the same difficulties with pain upon abduction of the shoulder, numbness of the hand in the median nerve distribution and decreased range of motion in the cervical spine, particularly on the right side.

Efforts to find a suitable position for appellant at the employing establishment were unsuccessful. On February 26, 2004 the Office referred her to vocational rehabilitation counseling. The vocational counselor worked with appellant, but was unsuccessful in obtaining employment.

In an April 23, 2004 report, the vocational counselor listed appellant's functional limitations as lifting restricted to the sedentary range, sitting one place restricted; unable to kneel, crouch or crawl, unable to use hands and arms in repetitive motions below average numerical and spatial aptitude; below average dexterity skills; and poor reading comprehension and arithmetic skills. One of the positions that the vocational rehabilitation specialist recommended as within appellant's medical and vocational capacities was that of information clerk/greeter, *Dictionary of Occupational Titles* (DOT) No. 237.367-022. He noted that this position was within the sedentary range of activities. The vocational counselor listed the average weekly wage earnings of an information clerk as \$294.00. On that same date, he completed a form noting that the position was available in sufficient numbers so as to make it reasonably available to appellant within her commuting area.

By letter dated May 3, 2004, the vocational counselor asked appellant's treating physician, Dr. Herding, if the position of information clerk was suitable. A copy of the position description for information clerk was enclosed. On May 13, 2004 Dr. Herding replied that appellant was capable of performing this position. In a medical report of the same date, he stated that appellant continued to describe pain upon abduction of her shoulder, numbness of the hand in the median nerve root distribution and decreased range of motion of the cervical spine, particularly on the right.

On December 8, 2004 the Office proposed a reduction in appellant's wage-loss compensation based on her capacity to earn wages as an information clerk at \$294.00 per week.

In a medical report dated January 4, 2005, Dr. Herding certified that appellant's medical condition has not materially changed since her initial visit to his office on July 13, 2000.

By decision dated January 14, 2005, the Office made the proposed termination of benefits final. The Office noted that appellant had not responded to the notice of proposed termination within 30 days.

On February 8, 2005 appellant requested a hearing. On February 11, 2005 this was changed to a request for a written review of the record.

By decision dated September 30, 2005, the hearing representative affirmed the January 14, 2005 decision reducing appellant's compensation benefits.

On February 28, 2006 appellant's claim was accepted for bilateral carpal tunnel syndrome.

On May 22, 2006 appellant requested reconsideration. She contended that there were no available positions as an information clerk due to her restrictions. Appellant submitted a May 25, 2006 report from Dr. Herding who stated that he had addressed her work restrictions in October 2005 and, at that time, found that she was capable of sitting, standing, walking, bending, squatting, kneeling and twisting, as well as utilizing her feet to operate foot controls. However, Dr. Herding stated that he had indicated that appellant was prohibited from climbing, performing normal hand functions or fine manipulations, reaching or working above her shoulders or performing repetitive activities. He also noted that operating a vehicle was limited to two hours daily. Dr. Herding concluded, "These restrictions essentially preclude any form of employment."

By decision dated July 26, 2006, the Office denied modification of the September 30, 2005 decision.

### **LEGAL PRECEDENT**

Once the Office makes 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.<sup>1</sup> 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 and circumstances which may affect wage-earning capacity in his or her disabled condition.<sup>2</sup>

When the Office makes a medical determination of partial disability and of specific 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* (DOT) or otherwise available in the open labor market, that fits the employee's capabilities with regard to her physical limitation, education, age and 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

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<sup>1</sup> *T.O.*, 58 ECAB \_\_\_\_ (Docket No. 06-1458, issued February 20, 2007); *David W. Green*, 43 ECAB 883 (1992).

<sup>2</sup> *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

service or other applicable service.<sup>3</sup> Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.<sup>4</sup>

### ANALYSIS

The Board finds that the Office determined that the constructed position of information clerk represents appellant's wage-earning capacity. The Office adjusted appellant's compensation on the grounds that she was capable of performing the duties of the constructed information clerk position. On March 24, 2004 Dr. Herding, appellant's treating physician, indicated that appellant was restricted to two hours of reaching, zero hours of reaching above the shoulder and zero hours of repetitive movements in her wrist and elbow and two hours of pushing, pulling and lifting and two hours of driving a motor vehicle. The vocational rehabilitation expert found that the sedentary position of information clerk was suitable to appellant's medical restrictions. He forwarded a position description of the position to Dr. Herding for his review on March 13, 2004. Dr. Herding found that appellant was capable of performing the position. No medical evidence has been presented establishing that appellant is not able to perform the job of information clerk. Based on the finding that the position was reasonably available in appellant's commuting area, the Office applied the *Shadrick* formula and reduced her wage-loss compensation. Accordingly, the Board finds that the Office properly reduced appellant's compensation to reflect her wage-earning capacity as an information clerk. Subsequently, in a May 25, 2006 report, Dr. Herding indicated that as of October 2005 that appellant was capable of sitting, standing, walking, bending, squatting, kneeling and twisting, but was prohibited from climbing, performing normal hand functions or fine manipulations reaching or working above her shoulders or performing repetitive activities. He indicated that this would essentially preclude appellant from any form of employment. However, these restrictions are not different from those first recommended by Dr. Herding who does not explain why he determined that appellant could work as an information clerk in May 2004 but was unable to do so as of October 2005. The Office considered the proper factors, such as availability of employment and appellant's physical limitations, usual employment, age and education qualifications, in determining that the information clerk position represented appellant's wage-earning capacity.<sup>5</sup> Accordingly, the Office properly determined that the position of information clerk represented appellant's wage-earning capacity effective January 14, 2005.

The Office properly determined appellant's loss of wage-earning capacity in accordance with the formula developed in *Shadrick*<sup>6</sup> and codified at section 10.403.<sup>7</sup> In this regard, the Office indicated that appellant's salary on July 28, 1998, the date of the injury, was \$733.02 per week, that the current adjusted pay rate for her job on the date of injury was \$872.26 per week and that she was currently capable of earning \$294.00 per week, the pay rate of an information

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.* See *Albert C. Shadrick*, 5 ECAB 376 (1953); see also 20 C.F.R. § 10.403.

<sup>5</sup> *Loni J. Cleveland*, 52 ECAB 171 (2000).

<sup>6</sup> *Supra* note 4.

<sup>7</sup> 20 C.F.R. § 10.403.

clerk. The Office then determined that appellant had a 34 percent wage-earning capacity (\$294.00 divided by \$872.26), which was then multiplied by \$733.02 to equal \$249.22 per week. The Office went on to determine that appellant had a loss of wage-earning capacity of \$483.80 by subtracting \$249.22 from \$733.02. The Office then multiplied \$483.80 by 3/4, as appellant had dependents, which amount to a compensation rate of \$362.85 per week. The Office found that, based on the current consumer price index, appellant's current adjusted compensation rate was \$412.50 per week. The Board finds that the Office's application of the *Shadrick* formula was proper.

### **CONCLUSION**

The Board finds that the Office properly reduced appellant's compensation based on her capacity to earn wages in the constructed position of information clerk.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated July 26, 2006 and September 30, 2005 are affirmed.

Issued: May 7, 2007  
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