United States Department of Labor
Employees' Compensation Appeals Board

B.O., Appellant	)	
and	)	**Docket No. 07-103**
	)	**Issued: May 2, 2007**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Vandalia, OH, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 16, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' September 15, 2006 merit decision concerning her wage-earning capacity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

ISSUE

The issue is whether the Office properly reduced appellant's compensation effective September 14, 2005 based on her capacity to earn wages as a photofinishing laboratory worker.

FACTUAL HISTORY

On October 21, 2003 appellant, then a 33-year-old transportation security screener, filed a traumatic injury claim alleging that she sustained a low back injury on September 6, 2003 due to lifting bags at x-ray machines. She stopped work on September 6, 2003 and returned to light-duty work for periods thereafter. The employing establishment withdrew light-duty work on November 21, 2003 and appellant has been off work since November 22, 2003. The Office

accepted that she sustained a lumbosacral sprain/strain and paid compensation for periods of disability.

Appellant was approximately one month pregnant at the time of her injury and delivered a baby on April 18, 2004. On June 17, 2004 Dr. Ronald Klein, an attending Board-certified orthopedic surgeon, indicated that appellant did not exhibit any neurological findings in her low back. He considered appellant to have reached maximum medical improvement if her magnetic resonance imaging (MRI) scan testing was negative. The findings of the June 23, 2004 MRI scan testing of appellant's low back showed negative results.

The Office referred appellant to Dr. Rudolf A. Hofmann, a Board-certified orthopedic surgeon, to determine whether she had any disabling residuals of her September 6, 2003 employment injury. On June 10, 2004 Dr. Hofmann determined that appellant continued to have residuals of her September 6, 2003 employment injury which limited her to performing light-duty work. He stated that appellant could work eight hours per day but recommended that she not lift more than 35 pounds or sit for more than one hour at a time. Dr. Hofmann noted that within these restrictions appellant was able to engage in frequent reaching, reaching above the shoulders, twisting and bending at the waist. In an August 5, 2004 supplemental report, he provided a similar opinion that appellant continued to have employment-related disability.

The Office referred appellant to Dr. E. Gregory Fisher, a Board-certified orthopedic surgeon, for further second opinion evaluation. On September 6, 2004 Dr. Fisher indicated that on examination appellant exhibited discomfort of the lumbosacral spine and had marked limitation of motion of the lumbosacral spine. He posited that appellant continued to have residuals of her September 6, 2003 employment injury. Dr. Fisher determined that appellant could work for eight hours per day but could not lift more than 35 pounds and could not engage in crawling, kneeling or repetitive climbing, bending or stooping at the waist.

In reports dated December 16, 2004 and January 6, 2005, Dr. Klein stated that appellant's back condition had reached maximum medical improvement and posited that she was "capable of most job duties" with lifting up to 35 pounds and being allowed to frequently change body positions. He indicated that appellant did not have any objective findings on examination.

Appellant began to participate in vocational rehabilitation efforts and in early December 2004 her vocational rehabilitation counselor determined that she was vocationally able to work as a photofinishing laboratory worker. The counselor indicated that the most recent state labor market survey from 2003 showed that the position was reasonably available in appellant's commuting area and that it paid an average weekly wage of $386.40. The position involved preparing photographic negatives, positives and prints, sorting and managing customer orders, pasting identifying labels on customers' envelopes and computing customer charges from a price list. It required lifting up to 10 pounds frequently, lifting up to 20 pounds occasionally, frequent reaching and occasional stooping, but did not require any climbing, kneeling, crouching or crawling.

The Office determined that there was a conflict in the medical evidence between Dr. Fisher and Dr. Klein regarding appellant's ability to work. The Office referred appellant to

Dr. Roger V. Meyer, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on this matter.

On February 25, 2005 Dr. Meyer provided a history of appellant's back problems and the medical treatment she received. He indicated that appellant reported extreme pain in her lumbosacral spine which extended down into both thighs and hamstring areas. Dr. Meyer indicated that on examination appellant had limited back motion with flexion of 10 to 15 degrees, right bending of 15 degrees and left bending of 10 degrees. He stated that there was no atrophy or sensory loss in appellant's lower extremities, that her gait was normal, that her hips moved well and that she could stand satisfactorily on her heels and toes. Dr. Meyer posited that appellant still had some residuals of the September 6, 2003 employment injury, that the limitation of her back motion was objectively established and that she was not able to work in her regular job as a transportation security screener. He indicated that appellant could perform a job that mainly required sitting, but which allowed her to "get up and move about at will." Appellant could occasionally lift up to 20 pounds and could not bend, stoop or climb. Dr. Meyer posited that appellant had not yet reached maximum medical improvement.

In an accompanying work restriction form, Dr. Meyer stated that appellant could perform the following activities but not on a constant basis: sit for eight hours per day, walk for six hours per day, stand for three hours per day and reach for six hours per day. He indicated that appellant could reach above her shoulders on an occasional basis for one hour per day and lift up to 20 pounds for two hours per day. Dr. Meyer stated that appellant needed to take 20-minute breaks every 2 hours.

In an August 4, 2005 letter, the Office advised appellant that it proposed to reduce her compensation based on its determination that she had the capacity to earn wages as a photofinishing laboratory worker. The Office indicated that appellant's vocational rehabilitation counselor had determined that she was vocationally able to work as a photofinishing laboratory worker and that the position was reasonably available in her commuting area. It noted that the weight of the medical evidence regarding appellant's ability to work rested with the well-rationalized opinion of the impartial medical specialist, Dr. Meyer, and stated that his work restrictions would not prevent appellant from performing the position.

Appellant submitted an August 29, 2005 report in which Dr. Aivars Vitols, an attending osteopath, indicated that she had some limited lumbar motion with spasms. Dr. Vitols stated that appellant complained of constant back pain.

In a September 14, 2005 decision, the Office reduced appellant's compensation effective September 14, 2005 based on her capacity to earn wages as a photofinishing laboratory worker. The Office indicated that the weight of the medical evidence regarding appellant's ability to work continued to rest with the well-rationalized opinion of Dr. Meyer.

Appellant requested a hearing before an Office hearing representative. At the June 29, 2006 hearing, she testified that her back condition prevented her from working as a photofinishing laboratory worker. Appellant also argued that the position would require more standing than Dr. Meyer allowed.

Appellant submitted medical reports, dated between August 2005 and June 12, 2006, in which attending physicians discussed their treatment of her back problems. Several physicians noted that she had extremely limited motion of the lumbosacral spine. In a December 12, 2005 report, Dr. John P. Moore, III, an attending physician specializing in preventive medicine, stated that required trigger point injection in her low back due to residuals of her employment injury. Appellant submitted other reports of Dr. Moore which described the continuing treatment of her back condition through mid 2006.

In a decision dated and finalized September 15, 2006, the Office hearing representative affirmed the Office's September 14, 2005 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.[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, 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.[3] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[4] 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.[5]

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

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

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

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

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

[5] *Id.* The commuting area is to be determined by the employee's ability to get to and from the work site. *See Glen L. Sinclair*, 36 ECAB 664, 669 (1985).

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.[6]

Section 8123(a) of the Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[7] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.[8] In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[9]

ANALYSIS

The Office accepted that appellant sustained a lumbosacral sprain/strain on September 6, 2003 and paid compensation for periods of disability. In early December 2004, appellant's vocational rehabilitation counselor determined that she was vocationally able to work as a photofinishing laboratory worker. The position involved preparing photographic negatives, positives and prints, sorting and managing customer orders, pasting identifying labels on customers' envelopes and computing customer charges from a price list. It required lifting up to 10 pounds frequently, lifting up to 20 pounds occasionally, frequent reaching, and occasional stooping, but did not require any climbing, kneeling, crouching or crawling[10]

The Office referred appellant to Dr. Meyer, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion regarding her ability to work. It determined that Dr. Meyer's opinion constituted the weight of the medical evidence regarding appellant's ability to work and found that it showed that appellant could work as photofinishing laboratory worker. The Office then reduced appellant's compensation effective September 14, 2005 based on her capacity to earn wages as a photofinishing laboratory worker.

The Board notes that the Office properly determined that there was a conflict in the medical evidence regarding appellant's ability to work between Dr. Klein, an attending Board-certified orthopedic surgeon, and Dr. Fisher, a Board-certified orthopedic surgeon, who served as an Office referral physician.[11] In reports dated December 16, 2004 and January 6, 2005,

[6] *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).

[7] 5 U.S.C. § 8123(a).

[8] *William C. Bush*, 40 ECAB 1064, 1975 (1989).

[9] *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

[10] The counselor indicated that the most recent state labor market survey from 2003 showed that the position was reasonably available in appellant's commuting area and that it paid an average weekly wage of $386.40.

[11] *See supra* notes 7 and 8 and accompanying text.

Dr. Klein stated that appellant could work eight hours per day and posited that she was "capable of most job duties" with lifting up to 35 pounds and being allowed to frequently change body positions. In contrast, Dr. Fisher recommended more stringent work restrictions in his September 6, 2004 report. He determined that appellant could work for eight hours per day but could not lift more than 35 pounds and could not engage in crawling, kneeling, or repetitive climbing, bending or stooping at the waist.[12] The Office also properly determined that the weight of the medical evidence regarding appellant's ability to work rested with Dr. Meyer's report as his opinion on this matter was well rationalized.[13] Dr. Meyer explained that appellant's significant limitations on back motion necessitated the restrictions he recommended.

The Board finds, however, that it is not clear whether the work restrictions recommended by Dr. Meyer would allow appellant to perform the position of photofinishing laboratory worker. Dr. Meyer indicated that appellant could perform a job that mainly required sitting, but which allowed her to "get up and move about at will." Appellant could occasionally lift up to 20 pounds and could not bend, stoop or climb. Dr. Meyer stated that appellant could perform the following activities but not on a constant basis: sit for eight hours per day, walk for six hours per day, stand for three hours per day, and reach for six hours per day. He indicated that appellant could reach above her shoulders on an occasional basis for one hour per day and lift up to 20 pounds for two hours per day. Dr. Meyer stated that appellant needed to take 20-minute breaks every 2 hours.

It is not clear from the record that the position of photofinishing laboratory worker would allow appellant to "get up and move about at will" or otherwise stay within the sitting, walking and standing restrictions recommended by Dr. Meyer. The position is not listed as a sedentary position and there is no indication that appellant would have the ability to choose when to alternate between sitting, walking and standing. Moreover, there is no indication from the job description that appellant would be able to observe Dr. Meyer's recommendation that she take 20-minute breaks every 2 hours.

For these reasons, the Office has not shown that appellant is physically able to perform the position of photofinishing laboratory worker. The Office has the burden of proof to justify termination or modification of compensation benefits and when a position is selected to represent wage-earning capacity the Office must show that a claimant has the physical ability to perform the position.[14] The Office did not meet this burden of proof in the present case.

CONCLUSION

The Board finds that the Office improperly reduced appellant's compensation effective September 14, 2005 based on her capacity to earn wages as a photofinishing laboratory worker.

[12] The Office had previously also referred appellant to Dr. Hofmann, a Board-certified orthopedic surgeon, but Dr. Hofmann's restrictions were similar to those of Dr. Klein and the Office determined that additional referral was necessary as Dr. Hofmann did not adequately respond to a request for additional clarification of his opinion.

[13] *See supra* notes 9 and accompanying text.

[14] *See supra* notes 1 through 3 and accompanying text.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' September 15, 2006 decision is reversed.

Issued: May 2, 2007
Washington, DC

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

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

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