United States Department of Labor
Employees' Compensation Appeals Board

L.C., Appellant	)	
and	)	**Docket No. 08-1538**
	)	**Issued: May 4, 2009**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Fort Worth, 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
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 5, 2008 appellant timely appealed the April 3, 2008 merit decision of the Office of Workers' Compensation Programs, which affirmed a June 12, 2007 wage-earning capacity determination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether the constructed position of automobile rental clerk represents appellant's wage-earning capacity.

FACTUAL HISTORY

Appellant, a 59-year-old former transportation security screener, sustained multiple injuries as a result of a June 30, 2003 employment-related fall. Her accepted conditions include cervical spondylosis with myelopathy, temporomandibular joint disorder, dislocated cervical vertebrae, classical migraine with intractable migraine, aggravation of lumbar disc degeneration,

cervical disc disorder with myelopathy, cervicalgia, complications of bone marrow transplant and unspecified diseases of the jaws.

On September 8, 2005 appellant underwent Office-approved surgery for her cervical condition.[1] On May 4, 2006 her neurosurgeon advised that she could perform full-time, limited-duty work.[2] The following month the Office referred appellant for vocational rehabilitation services.

A June 2, 2006 functional capacity evaluation (FCE) revealed that appellant was at the sedentary to sedentary-light level for lift and carry (13 pounds) and at waist level to ground level (13 pounds). Appellant could occasionally perform pushing at 25 pounds and pulling at 10 pounds. Her sitting tolerance was 20 minutes and her walking tolerance was 10 minutes. The FCE further revealed that appellant was unable to perform shoulder-level and above lifts due to left shoulder pain. It was also noted that appellant had limited cervical range of motion and grip strength. Additionally, repetitive activities were limited to short time frames of 10 to 15 minutes.

In September 2006, a rehabilitation plan was developed with the objective of securing employment as a salesperson, art objects or an automobile rental clerk. No additional training was deemed necessary to secure the identified positions, which offered potential weekly salaries of $446.40 and $623.60, respectively. The Office approved the plan on September 22, 2006 and appellant signed the rehabilitation plan and job search agreement on September 26, 2006. The plan included 90 days of job placement assistance.

Appellant actively participated in the job search process, but by February 2007 she had not secured employment and the Office concluded its vocational rehabilitation efforts. The rehabilitation counselor submitted a final report on February 14, 2007.

On February 28, 2007 the Office asked appellant's treating physician, Dr. Rosenstein, to review the June 2, 2006 FCE as well as the position descriptions of the two selected jobs. Dr. Rosenstein responded on March 21, 2007, indicating that appellant could perform the duties of a salesperson, art objects and an automobile rental clerk. He further noted that appellant's accepted conditions had stabilized and she had reached maximum medical improvement on June 2, 2006.

[1] Dr. Jacob Rosenstein, a Board-certified neurosurgeon, performed a C5-6 anterior cervical microdiscectomy and fusion with instrumentation. Appellant had previously undergone cervical fusions at C3-4 and C6-7.

[2] Dr. Rosenstein's May 4, 2006 duty status report (Form CA-17) indicated that appellant could lift/carry 2 to 4 pounds continuously and 12 pounds intermittently, with a daily limit of a ½ hour. He also noted that appellant could sit continuously for 30 to 40 minutes and intermittently for an hour, with a daily limit of 2 to 4 hours. Appellant could walk continuously for 10 minutes and intermittently for 15 minutes, with a daily maximum of 1 hour. Dr. Rosenstein precluded all climbing. Simple grasping was limited to 20 minutes continuously and 30 minutes intermittently, with a daily limit of 1 to 2 hours if broken up. Lastly, Dr. Rosenstein limited fine manipulation to one to two hours daily. Appellant could perform this task continuously for 30 minutes and intermittently for an hour.

The Office issued a notice of proposed reduction of compensation on April 30, 2007. The proposed action was based on appellant's ability to earn $623.60 per week as an automobile rental clerk.

In a May 14, 2007 letter, appellant objected to the Office's proposed reduction of compensation. She stated that her physical restrictions would not permit her to perform the duties of an automobile rental clerk. Appellant also indicated that, from personal experience applying for jobs at car rental agencies, the hourly pay rate was $7.00 to $8.50, not $15.59 ($623.60 per week). She also voiced concern about the accuracy of the job description provided Dr. Rosenstein. Appellant provided a position description from Advantage Rent a Car, which required the "[a]bility to lift, bend, turn, stoop and pick up luggage and other items weighing between 25 and 60 pounds." The Advantage Rent a Car job also required working in adverse weather conditions and the ability to "[s]it and stand for prolonged periods of time."

The Office subsequently obtained additional information regarding entry-level wages for the position of automobile rental clerk. While the mean hourly wage for the position was $15.59, the entry-level wage was $9.22, which represented a full-time weekly wage of $368.80.

By decision dated June 12, 2007, the Office reduced appellant's wage-loss compensation based on her ability to earn $368.80 a week as an automobile rental clerk.[3] The reduction in compensation was effective July 8, 2007.

Appellant requested an oral hearing, which was held on January 28, 2008. She submitted a June 27, 2007 report from Dr. Rosenstein. Appellant apparently provided Dr. Rosenstein a copy of the Advantage position description. Dr. Rosenstein quoted the requirements of being able to "'lift, bend, turn, stoop, and pick up luggage and other items weighing between 25 and 60 pounds.'" He noted that appellant's condition did not allow her to lift between 25 and 60 pounds. Dr. Rosenstein also indicated that appellant could not do repetitive bending. He stated that appellant could work a "sedentary job." Appellant's restrictions were "no lifting more than 12 pounds and limited bending at the waist." She was also precluded from performing overhead work.

Appellant retained her own vocational consultant, Daniel L. Simone. In an October 18, 2007 report, Mr. Simone explained that the Department of Labor, *Dictionary of Occupational Titles* (DOT) description of an automobile rental clerk's duties was inconsistent with how the job was typically performed. Rather than being a light-duty position, the rental clerk position was customarily performed at the medium level in many companies. As such, Mr. Simone did not believe the position was consistent with the restrictions imposed by Dr. Rosenstein.

In an April 3, 2008 decision, the Office hearing representative affirmed the June 12, 2007 wage-earning capacity determination.

[3] The current weekly wage of appellant's date-of-injury position was $646.52.

LEGAL PRECEDENT

An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.[4] Under 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 his or her wage-earning capacity.[5] If the actual earnings do not fairly and reasonably represent the employee's wage-earning capacity or if the employee has no actual wages, the wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the employee's 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.[6]

The Office must initially determine appellant's medical condition and work restrictions before selecting an appropriate position that reflects appellant's vocational wage-earning capacity. The medical evidence the Office relies on must provide a detailed description of appellant's condition.[7] Additionally, a wage-earning capacity determination must be based on a reasonably current medical evaluation.[8]

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an Office wage-earning capacity specialist for selection of a position listed in the *DOT*, or otherwise available in the open labor market, that fits the employee's capabilities with regard to his or 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.[9] 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.[10]

[4] 20 C.F.R. §§ 10.402, 10.403 (2008); *see Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

[5] 5 U.S.C. § 8115(a) (2006).

[6] *Id.; Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

[7] *Samuel J. Russo*, 28 ECAB 43 (1976).

[8] *Carl C. Green, Jr.*, 47 ECAB 737, 746 (1996).

[9] The job selected for determining wage-earning capacity must be a position that is reasonably available in the general labor market in the commuting area in which the employee lives. *David L. Scott*, 55 ECAB 330, 335 n.9 (2004). Lack of current job openings does not equate to a finding that the position was not performed in sufficient numbers to be considered reasonably available. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(c) (December 1995).

[10] *Albert C. Shadrick*, 5 ECAB 376 (1953); 20 C.F.R. § 10.403(d).

ANALYSIS

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.[11] The Board finds the Office failed to satisfy its burden in the instant case. The automobile rental clerk position is classified as "light" with respect to strength level. The position requires occasional lifting of 20 pounds and frequent lifting of 10 to 25 pounds. There is no climbing, balancing, stooping, kneeling, crouching or crawling. The position also requires frequent reaching, handling and fingering.

With respect to the required strength level, the automobile rental clerk position is inconsistent with Dr. Rosenstein's May 4, 2006 duty status report. At that time, Dr. Rosenstein noted that appellant could lift/carry 2 to 4 pounds continuously and 12 pounds intermittently, with a daily limit of one-half hour. In contrast, the selected position requires occasional lifting of 20 pounds and frequent lifting of 10 to 25 pounds. The automobile rental clerk position is also inconsistent with the results of the June 2, 2006 FCE, which indicated that appellant could perform at the "sedentary to sedentary-light" level for lift and carry (13 pounds) and waist level to ground level (13 pounds).

Although Dr. Rosenstein indicated on March 21, 2007 that appellant could perform the automobile rental clerk job, he did not explain what, if anything, changed over the preceding 10-month period that would allow her to perform at the "light" strength level. He merely placed a checkmark adjacent to a preprinted "yes" on the February 28, 2007 form the Office provided. In his June 27, 2007 report, Dr. Rosenstein reaffirmed that appellant was only capable of performing at the sedentary level. He specifically noted that appellant was restricted to lifting no more than 12 pounds. Based on the evidence of record, the Office has not demonstrated that the constructed position of automobile rental clerk is medically suitable. Therefore, it failed to meet its burden to modify appellant's wage-loss compensation.

CONCLUSION

The Board finds that the position of automobile rental clerk does not represent appellant's wage-earning capacity.

[11] *Curtis Hall*, 45 ECAB 316 (1994).

ORDER

IT IS HEREBY ORDERED THAT the April 3, 2008 decision of the Office of Workers' Compensation Programs is reversed.

Issued: May 4, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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