

**United States Department of Labor
Employees' Compensation Appeals Board**

B.S., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
Grand Rapids, MI, Employer**

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**Docket No. 09-2000
Issued: July 16, 2010**

Appearances:

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 3, 2009 appellant, through her attorney, filed a timely appeal from October 21, 2008 and April 17, 2009 merit decisions of the Office of Workers' Compensation Programs reducing her compensation based on its determination of 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 case.¹

ISSUE

The issue is whether the Office properly reduced appellant's compensation effective October 21, 2008 based on its finding that she had the capacity to work as a full-time pharmacy technician.

¹ For Office decisions issued prior to November 19, 2008, a claimant had one year to file an appeal. An appeal of Office decisions issued on or after November 19, 2008 must be filed within 180 days of the decision. 20 C.F.R. § 501.3(e) (2008).

FACTUAL HISTORY

This case is before the Board for the second time. In a November 26, 2003 decision, the Board affirmed an August 11, 2003 decision denying appellant's claim that she sustained bilateral epicondylitis causally related to factors of her federal employment.² The findings of fact from the prior decision are hereby incorporated by reference.

On August 16, 2004 appellant requested reconsideration and submitted additional medical evidence. By decision dated August 31, 2004, the Office vacated its August 11, 2003 decision and accepted the claim for bilateral lateral epicondylitis.

On August 31, 2005 Dr. Steven J. Naum, a Board-certified plastic surgeon, found that appellant could work with limitations on lifting over 5 to 10 pounds and avoiding "heavy repetitive gripping and grasping activities." Dr. Naum determined that a recent functional capacity evaluation established that she could perform clerical work.

On July 17, 2006 the Office referred appellant for a second opinion examination. In a report dated August 16, 2006, Dr. Joseph E. Burkhardt, an osteopath, diagnosed bilateral lateral epicondylitis and possible bilateral radial tunnel syndrome. He found that appellant could work lifting no more than two pounds or performing repetitive work with the upper extremity pending diagnostic studies. On October 6, 2006 Dr. Burkhardt reviewed an electromyogram and nerve conduction study and found no objective basis for any work restrictions.

The Office determined that a conflict in medical opinion arose between Dr. Burkhardt and Dr. Naum regarding whether appellant had continued work restrictions. On January 8, 2007 it referred her to Dr. Perry Greene, a Board-certified orthopedic surgeon, for an impartial medical examination. In a report dated January 23, 2007, Dr. Greene diagnosed employment-related bilateral tennis elbow. He found that appellant could not perform her usual employment or other sedentary work. Dr. Greene noted that she had a muscular problem that required further evaluation. In an April 10, 2007 addendum, he opined that appellant could work "at a sedentary job several hours a day" pending additional diagnostic studies. Dr. Greene stated:

"If sedentary work [was] available, she could work 40 hours a week, eight hours a day, five days a week or more, but she should not be doing intensive work with her upper extremities.

"I think her accepted diagnosis of bilateral epicondylitis is not sufficient for [appellant's] diagnosis, as evidenced by the fact that the surgical treatment did not help her left arm at all.

"I did feel at the time she had her surgery that she had conditions over and above the left tennis elbow as the cause of her symptoms, which has not resolved."

² Docket No. 03-212 (issued November 26, 2003). On April 22, 2003 appellant, then a 40-year-old transportation security screener, filed a traumatic injury claim alleging that she sustained a left bicep and elbow injury on April 14, 2003. Based on her identification of the work factors that caused her condition, the Office developed the claim as an occupational disease claim for bilateral epicondylitis.

In a work restriction evaluation dated April 30, 2007, Dr. Greene found that appellant could work eight hours per day with limited repetitive movements of the wrists and elbows and pushing, pulling and lifting no more than 15 pounds.

On August 6, 2007 the Office referred appellant to a rehabilitation counselor for vocational rehabilitation.³ On August 27, 2007 the rehabilitation counselor noted that appellant had a high school diploma and a criminal justice certificate from community college. She identified surveillance system monitor and receptionist as possible positions.

On December 15, 2007 the rehabilitation counselor identified the position of pharmacy technician as within appellant's physical demands and vocational abilities. She noted that the Department of Labor, *Dictionary of Occupational Titles (DOT)* job classification provided that the position of pharmacy technician was light work requiring lifting up to 20 pounds occasionally and 10 pounds frequently. The rehabilitation counselor found, however, that the selected position was within appellant's restrictions as two pharmacists at Walgreens reported that lifting was limited to 15 pounds and frequent lifting less than 5 pounds. She further found that the position was reasonably available within the commuting area.

On March 13, 2008 appellant informed the Office that she had accepted a position as a pharmacy technician at Convenience, Value, Service (CVS) beginning March 11, 2008 working 35 to 39 hours per week.

On April 4, 2008 the Office requested that Dr. Greene reevaluate appellant and discuss whether she was capable of working as a pharmacy service associate. It provided him with the position description of a pharmacy service associate at CVS.

On April 9, 2008 the rehabilitation counselor notified the Office that CVS had reduced appellant's work schedule to 31 hours per week because of her complaints of pain.

In a report dated May 7, 2008, Dr. Greene noted that appellant worked 30 to 40 hours per week in customer service filling prescriptions and greeting customers. He stated:

"Fifteen months ago I made a suggestion that [appellant] see someone familiar with muscular diseases. Perhaps she should be seen by a rheumatologist to see if she has any systemic component for her problem. Otherwise, I really do not have a good idea as to why she should have these bilateral subjective complaints for so long, without any real change in this period of time. I still think appellant is a candidate for diagnostic testing.

"It would not do any good to see a pain clinic at this time, but I would suggest she get off some of the narcotics.

³ The Office had previously referred appellant for vocational rehabilitation in 2005. She obtained a position working for a mortgage company from May 9 to June 21, 2006 but stopped because the position required extensive driving.

“As far as I am concerned, she can continue to do the work of a Pharmacy Technician trainee, because she does not have to do any lifting over 15 pounds, and no repetitive motion.”

Dr. Greene found that appellant’s subjective complaints of tenderness in the upper extremities were not employment related. He opined that she had no residuals due to her April 14, 2003 work injury. Dr. Greene asserted that she was capable to working as a pharmacy service associate full time with no limitations.

On September 9, 2008 the Office notified appellant of its proposed reduction of compensation as she was no longer totally disabled but had the capacity to work as a full-time pharmacy technician earning \$9.00 per hour or \$360.00 per week. The Office found that, while she worked less than 40 hours, the medical evidence established that she could perform the position full time. The rehabilitation counselor verified that two Walgreen’s pharmacists advised that the position required no lifting over 15 pounds and that Dr. Greene had reviewed her job duties and found that she could perform the position. The Office concluded that the selected position of full-time pharmacy technician was medically and vocationally suitable.

On October 8, 2008 appellant disagreed that she could work 40 hours per week and noted that working 30 hours a week was considered full time in her private employment.

By decision dated October 21, 2008, the Office finalized its proposed reduction of compensation effective October 26, 2008. It found that the selected position of a full-time pharmacy technician was vocationally and medically suitable. It found that she had not supported her contention that she was unable to work 40 hours per week.

On October 26, 2008 appellant requested a telephone hearing. At the hearing, held on February 12, 2009, she asserted that the pharmacy considered 30 hours full-time work. Appellant related that she had left her pharmacy technician job at CVS for reasons unrelated to her work injury. Her attorney argued that the Office’s wage-earning capacity should have been based on her actual earnings working 30 hours per week rather than a full-time position.

By decision dated April 17, 2009, the hearing representative affirmed the October 21, 2008 decision after finding that the Office properly reduced her compensation on the grounds that her actual earnings as a pharmacy technician fairly and reasonably represented her wage-earning capacity. She noted that appellant began working for CVS in March 2008. Appellant worked part time until March 13, 2008 but CVS subsequently reduced her hours based on her complaints of pain. The hearing representative found that appellant performed the position for over 60 days and determined that the Office properly reduced her compensation benefits based on her actual earnings.

LEGAL PRECEDENT

Once the Office has made 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.⁴ Under section 8115(a), wage-earning capacity is determined

⁴ *T.O.*, 58 ECAB 377 (2007).

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 or circumstances which may affect wage-earning capacity in his or her disabled condition.⁵

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 Department of Labor, *DOT* or otherwise available in the open market, that fits the employee's capabilities with regard to his or her physical limitations, education, age and prior experience.⁶ 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. Finally, application of the principles set forth in *Albert C. Shadrick*⁷ will result in the percentage of the employee's loss of wage-earning capacity.

ANALYSIS

The Office reduced appellant's compensation effective October 21, 2008 based on its finding that she could perform the selected position of full-time pharmacy technician.⁸ The Office noted that she had actual earnings as a part-time pharmacy technician but found that her actual earnings did not fairly and reasonably represent her wage-earning capacity as the medical evidence established that she could perform the position full time.⁹

The issue of whether an employee has the physical ability to perform a constructed position is primarily a medical question that must be resolved by the medical evidence.¹⁰ The Board finds that the medical evidence does not establish that the selected position of pharmacy technician is within appellant's physical limitations.

The Office selected Dr. Greene to resolve the conflict in medical opinion between Dr. Burkhardt and Dr. Naum regarding appellant's work restrictions. On January 23, 2007 Dr. Greene found that appellant could not perform either her usual employment or sedentary work. He diagnosed bilateral tennis elbow due to her employment and a muscular problem that

⁵ *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

⁶ *Mary E. Marshall*, 56 ECAB 420 (2005); *James A. Birt*, 51 ECAB 291 (2000).

⁷ 5 ECAB 376 (1953); codified by regulation at 20 C.F.R. § 10.403.

⁸ The Board notes that the hearing representative inaccurately determined that the Office reduced appellant's compensation based on her actual earnings.

⁹ It is well established that, if a claimant has actual earnings, the Office cannot use a selected position unless it makes a proper determination that actual earnings do not fairly and reasonably represent wage-earning capacity. *Sherman Preston*, 56 ECAB 607 (2005); *Daniel Renard*, 51 ECAB 466 (2000).

¹⁰ *Robert Dickinson*, 46 ECAB 1002 (1995).

required evaluation. On April 10, 2007 Dr. Greene opined that appellant could work full time in a sedentary position without “doing intensive work with her upper extremities.” He again noted that she had a muscular condition that needed evaluation by a specialist. In a work restriction dated April 30, 2007, Dr. Greene opined that appellant could work eight hours per day pushing, pulling and lifting no more than 15 pounds and performing limited repetitive movements of the elbows and wrists.

As the medical evidence demonstrated that appellant was no longer totally disabled from work, the Office referred her to a vocational rehabilitation counselor who identified the pharmacy technician position as within her physical restrictions and vocational abilities. However, the requirements of the position of pharmacy technician set forth in the Department of Labor, *DOT* exceed appellant’s work restrictions. The Department of Labor, *DOT* classifies the pharmacy technician position as light, with occasional lifting of up to 20 pounds. The rehabilitation counselor acknowledged that the lifting requirement was outside of appellant’s lifting restrictions but indicated that two pharmacists at Walgreens’ stores informed her that lifting at their location was limited to 15 pounds. The opinion of two pharmacists, however, is insufficient to establish that the physical requirements set forth in the Department of Labor, *DOT* were not applicable in evaluating whether the position was within appellant’s work capability.

On April 4, 2008 the Office requested that Dr. Greene discuss whether appellant could perform the duties of a pharmacy service associate and provided him with a position description of her part-time work at CVS. Dr. Greene reviewed the position description, which contained a list of job duties but not the specific physical requirements of the position. He found that she could work full time as a pharmacy technician because it did not require lifting over 15 pounds. Dr. Greene’s opinion that appellant could perform the duties of a pharmacy technician lifting no more than 15 pounds was not based on a complete and accurate description of the physical requirements of the position from the Department of Labor, *DOT*.¹¹ Based on the evidence of record, the Office has not established that the constructed position of full-time pharmacy technician is medically suitable. Therefore, it failed to meet its burden of proof to reduce appellant’s wage-loss compensation.

CONCLUSION

The Board finds that the Office improperly reduced appellant’s compensation effective October 21, 2008 based on its finding that she had the capacity to work as a full-time pharmacy technician.

¹¹ See *Francisco Bermudez*, 51 ECAB 506 (2000).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 17, 2009 and October 21, 2008 are reversed.

Issued: July 16, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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