U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JEWEL G. BRAGG and DEPARTMENT OF JUSTICE,
BUERAU OF PRISONS, Terminal Island, CA

Docket No. 98-2149; Submitted on the Record;
Issued November 16, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs properly reduced appellant's compensation to reflect her wage-earning capacity as a telephone operator; and (2) whether the Office properly determined appellant's pay rate for compensation purposes.

In this case, the Office accepted that on July 7, 1974 appellant, then a 31-year-old correctional officer, sustained multiple bruises, right and left shoulder strains, chest, left arm, left hip, left knee, left ankle and lumbar strains as a result of falling down a flight of stairs in the performance of duty. Following her initial injury, she was disabled for work from July 7 to 24, 1974 and then intermittently through April 19, 1976. Appellant sustained a recurrence of disability from July 10, 1976 to January 15, 1977 and returned to work on June 16, 1977. She was subsequently transferred to another facility, where she worked as a recreation specialist from 1979 to May 22, 1982, when she left the employing establishment to take a position in private industry. On August 3, 1982 appellant filed a claim for occupational disease alleging that she had developed neck and back conditions causally related to factors of her prior federal employment. This claim was accepted for cervical and lumbar spine sprains. The Office also accepted that appellant has nonwork-related lupus erythematosus. She continued to work in private industry, as a security guard and a department store salesperson, until March 10, 1987 when she underwent lumbar laminectomy and excision causally related to her accepted conditions. Appellant stopped working and began receiving temporary total disability compensation effective January 1, 1987. Following a period of vocational rehabilitation, the Office initially reduced appellant's compensation by decision dated November 5, 1996, on the grounds that appellant had the wage-earning capacity of a part-time clerk. The Office based this decision on the March 6 and May 25, 1995 reports from independent medical specialists Barry Friedman, a Board-certified orthopedic surgeon, and Raymond I. Press, a Board-certified rheumatologist, indicating that appellant was capable of returning to sedentary work, with restrictions, at least four hours a day. In a decision dated April 28, 1997, the November 5, 1996 decision was vacated and the case remanded by an Office hearing representative, who found that the physical requirements of the selected part-time clerk position exceeded the physical

restrictions set by Drs. Friedman and Press. Appellant's compensation for temporary total disability was reinstated and vocational rehabilitation efforts resumed.

In a decision dated June 11, 1998, following a period of additional medical and factual development, the Office reduced appellant's compensation on the grounds that she was capable of performing the selected position of telephone operator.

The Board has reviewed the record and finds that the Office properly reduced appellant's compensation in this case.

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 in such benefits.[1]

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, wage-earning capacity is determined with due regard to the nature of injury, degree of physical impairment, usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect the employee's wage-earning capacity in his or her disabled condition.[2]

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's *Dictionary of Occupational Titles* 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. Once this selection is made, a determination of wage rate and availability in the labor market should be made through contact with the state employment service or other applicable service.[3] 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.[4]

With respect to appellant's medical restrictions, the Board finds that the weight of the evidence rests with an Office referral physician, Dr. Gerald W. Cady, a Board-certified orthopedic surgeon. In a report dated October 30, 1997, Dr. Cady provided a history and results on examination, and listed his impressions as: (1) status post hemilaminectomy L5-S1, on the left in 1987 with ongoing low back pain, bilateral hip pain and bilateral leg pain; (2) medial and lateral meniscal tears as shown on magnetic resonance imaging from 1995; (3) chronic cervical

[1] *Carla Letcher*, 46 ECAB 453 (1995).

[2] *See Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); *see also* 5 U.S.C. § 8115(a).

[3] *See Dorothy Lams*, 47 ECAB 584 (1996); *James R. Verhine*, 47 ECAB 460 (1996); *Dennis D. Owen*, 44 ECAB 475 (1993).

[4] 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.303.

strain; and (4) partial fibrous ankylosis right shoulder. He stated that only the status post laminectomy was attributable to appellant's employment-related injury, but opined that appellant was precluded from performing the job of a telephone operator due to her overall status, stating:

> "This patient has work restrictions precluding prolonged sitting or standing, bending, stooping or twisting. She also has nonwork-related restrictions from reaching with her right arm and repeated bending or twisting of her cervical spine.
>
> "I believe that these restrictions actively preclude her from being able to perform either of the jobs as receptionist or telephone operator. It is my opinion that the limitations as listed preclude the patient from performing any productive job occupation. The limitations of no prolonged sitting, standing, lifting, bending and stooping are related to the diagnosis of status post hemilaminectomy at L5-S1."

As Dr. Cady's opinion that appellant was precluded from working due to her "overall status," included her various medical conditions which arose subsequent to the work injury, the Office asked him to provide a supplemental report clarifying his opinion as to whether appellant had any disabling residuals from the work injury or from any preexisting conditions. In a supplemental report dated February 26, 1998, he stated that appellant did not have any diagnoses which preexisted her 1974 employment injury and that based on the residuals of the accepted work-related condition and any preexisting medical condition, he felt appellant was capable of performing the duties of a telephone operator for four hours a day, and further opined that these duties could be performed within appellant's physical restrictions of no prolonged sitting, standing, bending, stooping or twisting. Dr. Cady concluded that appellant had no physical restriction attributable to preexisting conditions. He completed a work restriction evaluation (Form OWCP-5) indicating that appellant could work 4 hours per day with a 10-pound lifting restriction and would require 15-minute breaks each hour.

Dr. Cady's report represents the weight of probative evidence as to appellant's medical restrictions. The remainder of the medical evidence is of diminished probative value regarding the issue presented. In a March 13, 1996 report, Dr. F.L. Roy Hulse, a general practitioner and treating physician, stated that he had interviewed appellant and reviewed medical records and in his opinion, appellant is totally disabled and incapable of gainful employment. Dr. Hulse did not examine appellant and did not further explain his statement or offer any rationale for his conclusions, and there is no indication on what objective evidence, if any, his opinion is based. In an October 10, 1996 report, Dr. John A. Lafata, a Board-certified internist and treating physician, diagnosed diffuse pain syndrome involving the cervical and upper thoracic musculature and spine, which he stated was probably a chronic pain syndrome of the lower back, and "perhaps" degenerative joint disease of the left hip. Dr. Lafata did not offer any opinion relating these conditions to the employment injuries or otherwise establish an employment-related disability.

The record also contains several recent opinions from Dr. Thomas A. Waltz, a Board-certified neurological surgeon and treating physician. In a July 11, 1995 report, Dr. Waltz stated that, based on her history and on her reports that it was too painful for her to work or attend rehabilitation, appellant is fully disabled. He did not offer any objective finding to support his conclusions. In a November 25, 1996 report, Dr. Waltz noted his findings on physical

examination and stated that the "suggestion" is that appellant has cervical spondylosis with perhaps signs of nerve compression and recommended physical therapy, and repeat magnetic resonance imaging. He did not provide an opinion as to appellant's ability to perform the position of a telephone operator four hours a day. Finally, in his most recent report of record dated May 29, 1998, Dr. Waltz stated that appellant had been under his care for some considerable time for predominantly lumbar spondylosis, and also suffered from cervical spondylosis and headaches from that problem. The physician concluded that appellant is "fully disabled from any meaningful work because of the chronicity and severity of her pain syndrome," but did not offer any rationalized opinion as to why appellant could not perform the sedentary position of telephone operator four hours a day.

The weight of the medical evidence is determined by the opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested, and the medical rationale expressed in support of the opinion.[5] Medical conclusions unsupported by rationale are of diminished probative value.[6] Accordingly, the Board finds that the Office properly determined that appellant was partially disabled based on the well-rationalized report of Dr. Cady. The record indicates that the selected position of telephone operator is a sedentary position with occasional lifting of up to 10 pounds. There is no indication that the position is outside appellant's physical restrictions.

An Office wage-earning capacity specialist indicated that the selected position was reasonably available in appellant's commuting area and that availability was confirmed by a labor market survey and contact with the state employment service. A rehabilitation counselor also found that the selected position of telephone solicitor was available in appellant's area and paid $5.25 to $8.00 per hour.

The record indicates, therefore, that due regard was given to the factors enumerated in 5 U.S.C. § 8115(a) in selecting the position of telephone solicitor as representative of appellant's wage-earning capacity.

The Board further finds that appellant's compensation was properly reduced to reflect her wage-earning capacity in accordance with the principles set forth in *Shadrick*.[7] The initial step is to divide the pay rate of the selected position by the current pay rate for the date-of-injury job. In this case, the Office used as the pay rate of the selected position $125.00 per week[8] and $586.74 as the current pay rate for the date-of-injury job,[9] which is in accord with the evidence of record. The Office then multiplies the resulting percentage (21 percent) by the pay rate on May 22, 1982, the date disability for her regular employment began, in this case $453.08 per week, subtracts

[5] *Anna C. Leanza*, 48 ECAB 115 (1996).

[6] *Vicky L. Hannis*, 48 ECAB 538 (1997); *Jacquelyn L. Oliver*, 48 ECAB 232 (1996).

[7] *Supra* note 4.

[8] This figure represents 20 hours a week at $6.25 an hour.

[9] This figure represents the current salary for a GS 7 step 5, $581.85, plus .0084 percent for night differential pay.

this amount from the current pay rate for the date-of injury job and multiplies the result by 75 to calculate the amount of compensation. In this case, the Office did make a careful analysis of the appropriate numbers based on the evidence of record and the Board finds that the *Shadrick* formula was properly applied in this case.

The decision of the Office of Workers' Compensation Programs dated June 11, 1998 is hereby affirmed.

Dated, Washington, DC
November 16, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member