

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JANET S. LEDFORD and U.S. POSTAL SERVICE,
GENERAL MAIL FACILITY, Houston, TX

*Docket No. 00-1977; Submitted on the Record;
Issued August 2, 2001*

DECISION and ORDER

Before DAVID S. GERSON, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation benefits effective April 25, 1999 based on her ability to perform the duties of a retail sales manager.

The Office accepted that appellant, then a 37-year-old letter sorting machine operator, sustained bilateral thoracic outlet syndrome while in the performance of duty on or before April 20, 1995.¹ Appellant stopped work on April 20, 1995 and did not return, resigning from the employing establishment effective January 30, 1996. She submitted periodic treatment reports from May 1995 onward.

In a May 8, 1996 form report, Dr. T. Drake McDonald, an attending Board-certified neurologist, opined that appellant could work 8 hours per day, with lifting limited to 40 pounds and sustained work involving her arms for no more than 4 hours without a break. Dr. McDonald checked boxes indicating that appellant could perform repetitive motions of the wrist and elbow. He noted that the restrictions would be effective for six months.

In a June 13, 1997 report, Dr. Martin Fischer, a Board-certified orthopedic surgeon and second opinion physician, opined that appellant could work 8 hours per day if lifting were limited to fewer than 20 pounds, with no raising her arms above her head.

In a March 31, 1998 report, Dr. Fischer reviewed the medical record and examined appellant. He opined that appellant was able to work 8 hours per day with lifting limited to 20 pounds, reaching no more than once an hour and no overhead reaching. Dr. Fischer checked boxes indicating that appellant was able to perform repetitive motions of the wrist and elbow.

Appellant received an associate degree in retail and marketing in May 1998.

¹ The Office also accepted that appellant sustained bronchitis, resolved by November 17, 1994, due to dust at the employing establishment.

In a June 8, 1998 report, Dr. Terence Fitzgerald, a clinical psychologist, diagnosed somatoform pain disorder based on history and examination.

In a July 27, 1998 report, Lisa Stevenson, a rehabilitation counselor providing services to the Office, stated that appellant had appropriate experience and qualifications to perform the position of a retail sales manager. Ms. Stevenson noted that appellant had experience in customer service as a postal window clerk and her associate degree in retail marketing. Ms. Stevenson also noted that the results of vocational interest and aptitude testing indicated that appellant would perform well as a store manager.

In an August 12, 1998 report, an Office rehabilitation specialist approved 90 days of placement assistance with the goal of reemploying appellant as a retail sales manager.

In an August 26, 1998 letter, the Office advised appellant that the position of “manager sales/retail”² was within her physical limitations and that labor market surveys indicated an entry level wage of \$20,020.00 a year. The Office noted that appellant’s compensation would likely be reduced based on her ability to earn wages as a retail sales manager.

On August 28, 1998 appellant was in a motor vehicle accident and sustained injuries to her neck and back.

In a February 3, 1999 report, an Office rehabilitation specialist noted that appellant’s neck and back injuries related to the August 28, 1998 made it difficult for her to participate in placement activities. Ms. Stevenson stated that the position of retail store manager (DOT #185.167-046) was consistent with appellant’s experience, training and medical limitations and was reasonably available within her commuting area with wages of \$423.00 a week. According to the Department of Labor’s *Dictionary of Occupational Titles*, the position involved “light” physical demands, with “frequent” handling and fingering and “occasional” reaching.

By notice dated February 8, 1999, the Office proposed to reduce appellant’s wage-loss compensation based on her ability to earn wages as a retail sales manager. The Office noted that Dr. Fischer’s reports represented the weight of the medical evidence.

In a March 1, 1999 letter, appellant asserted that she was not vocationally qualified or medically able to perform the duties of a retail or sales manager. Appellant asserted that she had no customer service experience at the employing establishment, that she did not have the required coursework, that the physical demands of the job were not within her medical restrictions and that Ms. Stevenson did not provide her with job leads. Appellant also submitted position descriptions from a state government employment commission, indicating that salaries for retail managers were less than \$423.00 a week. The Office referred appellant’s March 1, 1999 letter and associated documents to Ms. Stevenson for comment.

On March 17, 1999 appellant underwent a right carpal tunnel release.³

² Department of Labor’s *Dictionary of Occupational Titles*, (DOT #185.167-046).

³ There is no claim of record for carpal tunnel syndrome or indication that the Office has accepted the condition

In a March 24, 1999 letter, Ms. Stevenson stated that appellant listed experience as a customer service trainer and window clerk at the employing establishment from 1987 to 1989 and that this experience constituted transferable job skills. She noted that the placement office of the community college where appellant pursued her associate degree in retail marketing asserted that the degree was appropriate preparation for a managerial post in retail, marketing or business administration. Ms. Stevenson reiterated that a labor market survey of appellant's commuting area showed that the position was reasonably available. The rehabilitation counselor commented that although the Department of Labor's *Dictionary of Occupational Titles*, indicated that the retail sales manager position required two to four years of vocational preparation, appellant's associate degree in retail and marketing was appropriate for a "manager track" position. Ms. Stevenson noted that the state Labor Market Information Division provided data showing that the entry-level wage for the position was slightly more than \$423.00 per week.

By decision dated April 28, 1999, the Office reduced appellant's wage-loss compensation effective April 25, 1999, based on her wage-earning capacity as a retail sales manager.⁴

Appellant disagreed with this decision and in a May 11, 1999 letter requested an oral hearing, which was held on November 16, 1999.

At the hearing, appellant reiterated the arguments presented in her March 1, 1999 letter. Appellant asserted that she had not taken mathematics courses in trigonometry and statistics, which the Department of Labor's *Dictionary of Occupational Titles*, job description listed as required. She also alleged that she could not perform the frequent handling and fingering the position entailed. Appellant submitted a letter from the manager of Colonel's Pantry, a store at which she worked for a brief period, asserting that she was unable to perform the cashiering duties required for her to advance to a managerial position.

Appellant also submitted September 22 and November 3, 1999 slips from Dr. Fischer stating that she was "unable to do repetitive motion occupation permanently," or "any job involving repetitive motion of the upper extremities. Appellant provided salary data from the state unemployment insurance commission indicating that managerial wages were slightly less than \$423.00 per week.

By decision dated February 9, 2000 and finalized February 14, 2000, an Office hearing representative found that the position of retail or sales manager "reasonably represent[ed]" appellant's wage-earning capacity at \$423.00 per week. The position was within appellant's medical restrictions because no repetitive motion was required and appellant's associate degree was appropriate vocational preparation for the position. The hearing representative further found that the rehabilitation counselor's assessment of the prevailing wage rate was entitled to great

as occupationally related.

⁴ The Office found that appellant's weekly pay rate was \$689.46, with an adjusted earning capacity of \$392.99, resulting in a loss of wage-earning capacity of \$297.47 per week. Appellant's new compensation rate effective April 25, 1999 was \$773.80 every four weeks.

weight because it was prepared by an expert in that field and was, therefore, superior to appellant's interpretation of such data.

The Board finds that the Office properly reduced appellant's compensation benefits effective April 25, 1999, based on her ability to perform the duties of a retail sales manager.

Section 8115 of the Federal Employees' Compensation Act⁵ provides that 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 the employee has no actual earnings, her wage-earning capacity is determined with due regard to the nature of her injury, the degree of physical impairment, her usual employment, her age, her qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect her wage-earning capacity in his disabled condition.⁶

When the Office makes a medical determination of partial disability and specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office 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 that employee's capabilities with regard to his 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. 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. The basis range of compensation paid under the Act is 66 2/3 percent of the injured employee's monthly pay.⁸

The medical record establishes that appellant is physically capable of performing the retail or sales manager position. Dr. Fischer, a Board-certified orthopedic surgeon, determined that appellant was only partially disabled due to the accepted bilateral thoracic outlet syndrome. In a report dated March 31, 1998, he found that appellant could work 8 hours per day with lifting limited to fewer than 20 pounds, reaching no more than once an hour and no overhead reaching. Also, he indicated that appellant was able to perform repetitive motions of the wrists and elbows. Although the Office based its April 28, 1999 decision on this report, medical reports as early as May 8, 1996 indicate that appellant was medically able to work eight hours a day with restrictions against heavy lifting and overhead reaching and that she was able to perform repetitive motion of the wrists and elbows.⁹

⁵ 5 U.S.C. §§ 8101-8193, 8115.

⁶ *Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

⁷ 5 ECAB 376 (1953).

⁸ *Karen L. Lonon-Jones*, 50 ECAB ____ (Docket No. 97-155, issued March 18, 1999).

⁹ In a May 8, 1996 report, Dr. McDonald, an attending Board-certified neurologist, opined that appellant was able to work 8 hours per day, with lifting limited to 40 pounds. He checked boxes indicating that appellant could perform repetitive motions of the wrist and elbows. In a June 13, 1997 report, Dr. Fischer opined that appellant could work 8 hours per day with lifting limited to 20 pounds and no overhead reaching.

On the basis of Dr. Fischer's opinion, the Office referred appellant for job placement services to Ms. Stevenson. The rehabilitation counselor then determined that the position of retail sales manager was within appellant's physical limitations and was available in suitable numbers to make it reasonably available to appellant within her commuting area. The Office rehabilitation specialist then reviewed the position description and appellant's limitations as provided by Dr. Fischer and determined that based on the employment injury alone appellant could perform the duties of the position.

At the hearing, appellant asserted that she is not physically capable of performing the retail or sales manager position. To support this argument, she submitted September 22 and November 3, 1999 slips from Dr. Fischer, the second opinion physician, stating that she was "unable to do repetitive motion occupation permanently," or "any job involving repetitive motion of the upper extremities. She also submitted a note from a store manager stating that appellant was unable to perform the duties of a cashier, experience that was needed to promote her to a management position.

However, Dr. Fischer's reports are insufficient to establish that appellant was medically unable to perform the retail sales manager position. Appellant sustained a series of nonoccupational injuries and conditions. First between Dr. Fischer's March 31, 1998 report, stating that she was able to perform repetitive motion and his September 22, 1999 report when he opined that she could not. She was diagnosed with somatoform pain disorder on June 8, 1998. On August 28, 1998 appellant injured her neck and back in a car accident and on March 17, 1999 she underwent right carpal tunnel release.

The Office is not required to consider medical conditions arising subsequent to the work-related injury or disease in determining whether a position constitutes an employee's wage-earning capacity.¹⁰ Dr. Fischer did not state explicitly that appellant was disabled from any task due to the accepted bilateral thoracic outlet syndrome. Therefore, his opinion regarding the suitability of the retail manager position is insufficiently rationalized to establish any inability to perform that position.¹¹

Second, the position of retail or sales manager entailed "frequent" handling and fingering, but nothing in the position description in the Department of Labor's *Dictionary of Occupational Titles*, requires repetitive motion. The store manager's note is vague regarding that nature of appellant's difficulties with the cashier duties. Also, any dispositive opinion regarding appellant's inability to perform the position must be medical in nature. Thus, the store manager's opinion is of no probative value.¹² Therefore, the record establishes that appellant is physically able to perform the work of a retail manager and that the position is reasonably available.

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- *Claims, Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(b) (December 1995).

¹¹ *Lucrecia M. Nielsen*, 42 ECAB 583 (1991).

¹² See *James A. Long*, 40 ECAB 538 (1989); *Susan M. Biles*, 40 ECAB 420 (1988) (where the Board held that the statement of a layperson is of not competent evidence on the issue of causal relationship).

Moreover, the Office properly calculated appellant's wage-earning capacity based on the difference between her weekly wages at the time of the onset of disability, \$689.46 and the weekly wage of a retail manager, \$423.00, using the *Shadrick* formula.¹³ At the hearing, appellant contended that her interpretation of wage data from state employment offices indicated that retail managers earned less than \$423.00 per week. However, appellant asserted at the hearing that she had insufficient education to perform a managerial position because she had not taken statistics or advanced mathematics courses. Thus, appellant attests that she is not an expert in statistical interpretation. The rehabilitation counselor is such an expert and the Board finds that Ms. Stevenson's February 3, 1999 labor market survey is sufficient to establish that \$423.00 per week was the correct wage for the Office to have used in its *Shadrick* calculation.

Therefore, the Office met its burden of proof in reducing appellant's compensation based on her wage-earning capacity as a retail sales manager.

The February 9, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
August 2, 2001

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member

¹³ See *Albert C. Shadrick*, *supra* note 7.