U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARSINA OLSCHEWSKI and U.S. POSTAL SERVICE,
DEWEY STATION, Rochester, NY

Docket No. 99-1308; Submitted on the Record;
Issued May 8, 2001

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation based on its determination that the selected position of data entry clerk represented appellant's wage-earning capacity.

The Board has duly reviewed the case record and finds that the Office properly reduced appellant's compensation based on its determination that the selected position of data entry clerk represented appellant's wage-earning capacity.

On September 17, 1993 appellant, then a 24-year-old mail carrier, filed a traumatic injury claim (Form CA-1), alleging that on September 16, 1993 she sustained a sore neck and shoulder when a car hit the front left side of her truck and pushed it about 10 feet.[1]

The Office accepted appellant's claim for cervical strain and thoracic strain.[2]

In a December 6, 1996 notice of proposed reduction of compensation, the Office advised appellant that it proposed to reduce her compensation because the factual and medical evidence of record established that she was no longer totally disabled and that she had the capacity to earn the wages of a data entry clerk. The Office also advised appellant to submit additional evidence or argument within 30 days if she disagreed with the proposed action.

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[1] Appellant was separated from the employing establishment as of October 1, 1993.

[2] On March 17, 1994 appellant filed a claim (Form CA-2a) alleging that she sustained a recurrence of disability on October 28, 1993. By decision dated June 24, 1994, the Office found the evidence of record insufficient to establish that appellant sustained a recurrence of disability causally related to her September 16, 1993 employment injury. In letters dated January 11 and February 14, 1995, appellant, through her counsel, requested reconsideration of the Office's decision. By decision dated June 2, 1995, the Office accepted appellant's recurrence claim.

By decision dated January 21, 1997, the Office reduced appellant's compensation based on her capacity to earn wages as a data entry clerk. In a February 15, 1997 letter, appellant requested reconsideration of the Office's decision.

In a June 2, 1997 decision, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that her request neither raised substantive legal questions nor included new and relevant evidence. On September 25, 1997 appellant requested reconsideration of the Office's decision.

By decisions dated October 2 and 16, 1997 and December 29, 1998, the Office denied appellant's request for modification based on a merit review of the claim.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[3] Pursuant to section 8115(a) of the Federal Employees' Compensation Act,[4] 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. If the actual earnings do not fairly and reasonably represent 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 and 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'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.[6] 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.[7]

In the instant case, the Office determined that appellant was no longer totally disabled based on the May 16, 1995 medical report of Dr. Robert Dickerson, a Board-certified orthopedic surgeon and second opinion physician. In his report, Dr. Dickerson found that appellant was totally disabled from her regular work duties due to her September 16, 1993 employment injury, but that appellant could perform light or sedentary work for four hours per day at that time. Dr. Dickerson submitted a work restriction evaluation report (Form OWCP-5) of the same date

[3] *Patricia A. Keller,* 45 ECAB 278 (1993).

[4] 5 U.S.C. § 8115(a).

[5] *See Dorothy Lams,* 47 ECAB 584 (1996).

[6] *See Dennis D. Owen,* 44 ECAB 475 (1993).

[7] 5 ECAB 376 (1953).

revealing appellant's physical restrictions, which included intermittent sitting, walking, bending, squatting, climbing, kneeling, twisting and standing. Dr. Dickerson stated that appellant could work four hours per day and that she would reach maximum medical improvement on September 16, 1995.

Subsequently, in a September 6, 1995 letter, the Office referred appellant to a vocational rehabilitation counselor based on Dr. Dickerson's opinion. In several reports, the counselor identified positions that fell within appellant's physical abilities and vocational skills, including the position of data entry clerk.

By letter dated May 10, 1996, the Office advised appellant that the position of data entry clerk fell within her work restrictions. The selected position required lifting no more than 10 pounds. It involved sedentary work that took place inside 75 percent or more. The position, data entry clerk, therefore, is within appellant's physical limitations.

The evidence also establishes that the selected position of data entry clerk is reasonably available based on the vocational counselor's August 19, 1996 report that the position was available within appellant's commuting area.

Moreover, the Office properly calculated appellant's wage-earning capacity based on the difference between her weekly wage at the time of the injury, $483.20, and the weekly wage of a data entry clerk, $364.00, using the *Shadrick* formula. The Office, therefore, met its burden of proof in reducing appellant's compensation based on her wage-earning capacity as a data entry clerk.

Further, appellant has not submitted sufficient subsequent medical evidence to modify the Office's wage-earning capacity determination. It is well established that either a claimant or the Office may seek to modify a formal loss of wage-earning capacity determination.[8] In this case, appellant submitted the January 28, 1997 medical report of Dr. Richard C. Dobson, a Board-certified physiatrist and appellant's treating physician. In this report, he noted appellant's continued neck and back pain and her physical limitations. Dr. Dobson further noted that appellant had been notified by the Office that she could return to work as a data entry person. He stated that the data entry position was a classic position that triggers appellant's current syndrome. Dr. Dobson concluded that the position would do nothing except flare up appellant's pain to an even greater extent and prevent her from going back to work. He further concluded that appellant was totally disabled due to her September 16, 1993 employment injury.

Appellant also submitted Dr. Dobson's February 26, 1997 medical report indicating a review of a job description for the position of data entry clerk. Dr. Dobson stated that the position was a classic job for triggering overuse syndromes in the neck and shoulder area with severe pain. He noted that appellant had severe chronic pain syndrome involving the neck and shoulder muscles. Dr. Dobson stated that to place appellant in a job performing data entry and using a computer monitor screen would be cruel and inhumane punishment and would certainly

[8] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination. *Gregory A. Compton*, 45 ECAB 154 (1993); *Stephen C. Belcher*, 42 ECAB 696 (1991).

guarantee that appellant would suffer a worsening of her current condition. He opined that because of the severe chronic pain syndrome, chronic ligamentis sprains in the neck and low back and myofascial pain in the muscles, appellant would not be able to sustain any posture or activity for a sufficient duration to consider her for any reasonably available job.

Additionally, appellant submitted Dr. Dobson's September 28, 1998 medical report. In this report, he noted a history of appellant's September 16, 1993 employment injury and medical treatment, his findings on physical and objective examination and a review of medical records. Dr. Dobson diagnosed severe myofascial pain syndrome with areas of focal recurrent muscle spasm that were objectively measurable on clinical examination and a severe sprain to the ligaments and the disc of the cervical, thoracic and lumbar spine. He opined that appellant's myofascial pain syndrome and disability were permanent in nature and that her condition was causally related to the September 16, 1993 employment injury and to sequential events. Regarding appellant's ability to perform the duties of a data entry clerk, Dr. Dobson stated that this position was known to trigger ongoing neck and back pain in many people. He noted that appellant already had these problems. Dr. Dobson stated that the position would only further exacerbate appellant's muscle spasms and trunk stiffness. He further stated that this would also place appellant at increased risk for falling and suffering even further injury. Dr. Dobson then stated that it was his opinion within a reasonable degree of medical certainty, that appellant would not be able to sustain the activities of a data entry clerk. He noted that appellant could perform some of the individual tasks involved in the job, but she would not be able to sustain the activity for even a few hours a day. Dr. Dobson further noted that appellant definitely would not be able to sustain those activities on a repeated daily basis as would be required for employment.

Although Dr. Dobson opined that appellant could not perform the duties of the position of data entry clerk, he failed to provide any medical rationale explaining how or why appellant could not perform the duties of this position. Further, fear of future injury is not compensable and fear of a recurrence of disability or disability if the employee returns to work is not a basis for compensation.[9] Therefore, Dr. Dobson's medical reports are insufficient to establish appellant's burden.

[9] *See Patricia A. Keller, supra* note 3; *Pat Lazzara*, 31 ECAB 1169 (1980).

The December 29, 1998 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
May 8, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member