U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CARMEN DRAPER and DEPARTMENT OF THE ARMY, WILLIAM BEAUMONT ARMY MEDICAL CENTER, El Paso, TX

Docket No. 00-1475; Submitted on the Record;
Issued February 27, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
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 surveillance system monitor 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 surveillance system monitor represented appellant's wage-earning capacity.

On May 9, 1995 appellant, then a 57-year-old pharmacy technician, filed an occupational disease claim alleging that her carpal tunnel syndrome was caused by factors of her federal employment.

The Office accepted appellant's claim for bilateral tendinitis. Subsequently, the Office expanded the acceptance of appellant's claim to include bilateral carpal tunnel syndrome and bilateral carpal tunnel releases, which were performed on August 15, 1995 and April 9, 1996.

On September 11, 1996 Dr. Alvaro A. Hernandez, a Board-certified orthopedic surgeon and appellant's treating physician, released appellant to perform sedentary work with certain physical restrictions. Appellant returned to work in a modified pharmacy technician position at the employing establishment on October 18, 1996. In a January 15, 1997 letter, Dr. Hernandez noted appellant's complaints regarding the use of her upper extremities and opined that appellant should not return to her previous work activities.

By letter dated July 16, 1997, the employing establishment terminated appellant's employment effective August 1, 1997 due to her inability to perform the duties of her position as a modified pharmacy technician.

On October 31, 1997 the Office referred appellant to a vocational rehabilitation counselor because the employing establishment did not plan to rehire appellant. The rehabilitation

counselor identified the positions of information clerk, gate guard and surveillance system monitor as being within appellant's qualifications and available within her commuting area. On August 10, 1998 Dr. Hernandez reviewed the descriptions of these positions and determined that appellant could only perform the duties of a surveillance system monitor.

In a July 27, 1999 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. The Office further advised appellant that she was only partially disabled and that she had the capacity to earn the wages of a surveillance system monitor. The Office requested that appellant submit additional evidence or argument within 30 days if she disagreed with the proposed action.

By decision dated September 3, 1999, the Office finalized the proposed reduction of compensation effective September 12, 1999.[1]

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[2] Pursuant to section 8115(a) of the Federal Employees' Compensation Act,[3] 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.[4]

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.[5] Finally, application of the

[1] The Board notes that, subsequent to the Office's September 3, 1999 decision, the Office received additional evidence. The Board, however, cannot consider evidence that was not before the Office at the time of the final decision. *See Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35 (1952); 20 C.F.R. § 501.2(c)(1). Appellant may resubmit this evidence and legal contentions to the Office accompanied by a request for reconsideration pursuant to 5 U.S.C. § 8128(a). 20 C.F.R. § 501.2(c).

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

[3] 5 U.S.C. § 8115(a).

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

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

principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.[6]

In this case, the Office relied on Dr. Hernandez's opinion that appellant could perform the duties of a surveillance system monitor. Dr. Hernandez's opinion was based on an August 22, 1996 work hardening discharge summary. This discharge summary indicated appellant's physical restrictions, which included limited lifting, carrying, standing/walking, reaching, gripping and handling. Specifically, appellant could lift bench height only up to 10 pounds occasionally, 5 pounds frequently or 2 pounds constantly. Appellant could carry up to 10 pounds occasionally, 5 pounds frequently or 2 pounds constantly for 15 to 20 feet only. She could stand/walk up to two hours constantly or four hours frequently. Appellant could reach over head up to one hour constantly, two hours frequently or five hours occasionally. She could reach forward up to one hour constantly, two hours frequently or four hours occasionally. Finally, appellant was required to avoid forceful gripping/grasping and limit handling up to seven hours frequently.

The position of surveillance system monitor was a sedentary job that required occasional climbing, balancing, stooping, kneeling, crouching, crawling, reaching, handling and fingering. The Board finds that the selected position falls within appellant's physical limitations. The Board notes that, although appellant was unable to obtain a job as a surveillance system monitor, this does not establish that the work is not reasonably available in the area. The Office is not obligated to actually secure employment for appellant.[7] The vocational rehabilitation counselor indicated that the job of surveillance system monitor was being performed in appellant's area, although not in large numbers.

Further, the Office properly applied the principles set forth in the *Shadrick* decision[8] to determine appellant's loss of wage-earning capacity.

The Board also finds that appellant did not submit sufficient medical evidence, following the Office's decision dated July 27, 1999 and finalized September 3, 1999, to establish that she was not medically capable of performing the surveillance system monitor position.

The pertinent medical issue regarding appellant's capability to perform the selected surveillance system monitor position is whether there has been any change in her condition such that she would no longer be able to perform the position. In order for a physician's opinion to be relevant on this issue, that physician must address the job factors of the selected position. Dr. Hernandez's August 25, 1999 note indicating that appellant was "unable to do previous type work" did not specifically identify the surveillance system monitor position nor address the physical requirements of that position.

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[6] 5 ECAB 376 (1953).

[7] *Samuel J. Chavez*, 44 ECAB 431 (1993); *Dennis D. Owen*, 44 ECAB 475 (1993); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1993); *see also Leo A. Chartier*, 32 ECAB 652 (1981).

[8] *Albert C. Shadrick*, *supra* note 6.

In his August 17, 1999 letter, Dr. Hernandez stated that appellant was unable to tolerate long use of her hands, even holding light objects. However, he did not opine that appellant was so limited in her ability to use her hands that she was incapable of performing the surveillance system monitor position.

Dr. Hernandez's August 30, 1999 letter finding that appellant was unable to return to any type of strenuous activities did not address whether appellant could perform the physical requirements of the surveillance system monitor position.

Accordingly, the Board finds that the Office has met its burden of justifying a reduction in appellant's compensation for total disability.

The September 3, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
February 27, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member