

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VIRGINIA M. HRABAR and DEPARTMENT OF DEFENSE,
DEFENSE LOGISTICS AGENCY, New York, NY

*Docket No. 00-1806; Submitted on the Record;
Issued October 23, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly adjusted appellant's compensation effective June 30, 1997 based on her ability to earn wages as a correspondence clerk.

On December 31, 1985 appellant, then a 29-year-old quality assurance specialist, sustained a lumbosacral strain, bilateral knee contusions, torn medial meniscus and patella chondromalacia of the right knee and cervical strain with radiculopathy due to a fall at work.¹ On March 16, 1987 she underwent an arthroscopy and medial meniscectomy of her right knee. The Office paid compensation for the appropriate periods of disability.

Appellant participated in a vocational rehabilitation program between 1993 and 1995 and, by decision dated June 19, 1995, the Office adjusted her compensation effective July 23, 1995 based on her capacity to earn wages as a general office clerk. By decision dated and finalized on September 6, 1996, an Office hearing representative reversed the Office's June 19, 1995 decision on the grounds that the Office had not shown appellant was physically capable of working as a general office clerk.

In January 1997, the Office again referred appellant for participation in a vocational rehabilitation program. On March 10, 1997 she indicated that she would not sign a proposed vocational rehabilitation plan on the grounds that she was totally disabled, could not drive and was scheduled for foot surgery in April 1997. By letter March 11, 1997, the Office advised appellant of its preliminary determination that she had failed to participate in vocational rehabilitation efforts. By decision dated June 30, 1997, the Office reduced her compensation to zero effective that date on the grounds that she failed to show good cause for refusing to continue her participation in the vocational rehabilitation efforts.

¹ Appellant stopped work on January 2, 1986.

By decision dated August 13, 1999 and finalized January 31, 2000, an Office hearing representative set aside the Office's reduction of appellant's compensation to zero effective June 30, 1997.² He found that the case was not in posture for decision and remanded the case to the Office for calculation of appellant's "loss of wage-earning capacity" based upon a "selected position" and payment of retroactive compensation based on a "constructed loss of wage-earning capacity," to be followed by a *de novo* decision.

By decision dated March 24, 2000, the Office adjusted appellant's compensation effective June 30, 1997 based on its determination that her wage-earning capacity was represented by the selected position of correspondence clerk. The Office determined that appellant had the physical and vocational ability to perform the position of correspondence clerk.

The Board finds that the Office properly reduced appellant's compensation effective June 30, 1997 based on her ability to earn wages as a correspondence clerk.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.³ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁴

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, her wage-earning capacity is determined with due regard to the nature of her injury, her degree of physical impairment, her usual employment, her age, her qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect her wage-earning capacity in her disabled condition.⁵ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.⁶ The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.⁷

² The Office hearing representative determined that appellant failed to show good cause for refusing to continue participation in vocational rehabilitation efforts. He noted, however, that the Office had not adequately determined what appellant's wage-earning capacity probably would have been in the absence of her failure to continue her participation in the vocational rehabilitation efforts.

³ *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

⁴ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁵ *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C § 8115(a).

⁶ *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

⁷ *Id.* The commuting area is to be determined by the employee's ability to get to and from the work site; *see Glen L. Sinclair*, 36 ECAB 664, 669 (1985).

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office or 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 labor market, that fits that employee's capabilities with regard to her 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 the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.⁸

In the present case, the Office adjusted appellant's compensation effective June 30, 1997 based on her ability to earn wages in the selected position of correspondence clerk. The Office initially sought to reduce appellant's compensation to zero effective June 30, 1997 based on her failure to continue her participation in vocational rehabilitation efforts.⁹ However, the Office ultimately reduced appellant's compensation effective June 30, 1997 based on its determination that her wage-earning capacity was represented by the selected position of correspondence clerk.

The Board finds that the medical evidence shows that appellant was physically capable of performing the selected position of correspondence clerk. The medical opinion of Dr. Ian Blair Fries, a Board-certified orthopedic surgeon to whom the Office referred appellant, establishes that appellant could perform the position.

In a report dated November 4, 1996, Dr. Fries diagnosed cervical spondylosis, chronic cervical pain, chronic low back pain, left calcaneal pain and possible left cervical radiculopathy. Dr. Fries indicated that appellant exhibited few objective findings which would support her pain complaints; he stated that appellant's claim of total disability was not supported by the medical evidence of record. He noted that there were no atrophied muscles in appellant's back or upper extremities and no evidence of neurological deficit of her lower extremities.¹⁰ In a form report dated October 31, 1996, Dr. Fries indicated that appellant could work eight hours per day in a sedentary position. In reports dated January 6 and 11, 1997, Dr. Fries determined that appellant could work eight hours per day in her regular job as a quality control specialist, a position which was essentially sedentary in nature and required lifting up to 10 pounds.¹¹

The selected position of correspondence clerk involves the preparation of outgoing correspondence and the reading of incoming correspondence. This essentially sedentary position

⁸ See *Dennis D. Owen*, 44 ECAB 475, 479-80 (1993); *Wilson L. Clow, Jr.*, 44 ECAB 157, 171-75 (1992); *Albert C. Shadrick*, 5 ECAB 376 (1953).

⁹ See generally 5 U.S.C. § 8113(b); 20 C.F.R. § 10.519.

¹⁰ Dr. Fries discussed appellant's accepted right patella chondromalacia condition, but noted that appellant had minimal complaints relating to her knee.

¹¹ The Office provided Dr. Fries with a description of the duties of her regular position as a quality assurance specialist. He noted that appellant was prevented from engaging in extended walking, standing and bending. Dr. Fries indicated that by characterizing a duty as "extended" he meant that it was performed "possibly for the entire workday."

requires lifting of 10 pounds and frequent handling and reaching. The Board has carefully reviewed the work restrictions recommended by Dr. Fries and notes that they are well within the requirements of the correspondence clerk position. The correspondence clerk position does not require extended walking, standing and bending.¹²

Appellant asserted that she was unable to drive, but the medical evidence does not show that she could not perform such driving within her commuting area. She claimed that surgery performed on her left foot on May 14, 1997 rendered her totally disabled, but the record does not show that this surgery prevented her from being able to work as a correspondence clerk after June 30, 1997, the date her compensation was adjusted. In fact, medical notes from mid to late June 1997 show that appellant was not experiencing any significant pain or tenderness in her left foot.

A vocational rehabilitation counselor determined that appellant was able to perform the position of correspondence clerk and that state employment services showed the position was available in sufficient numbers so as to make it reasonably available within appellant's commuting area in June 1997. The Office properly relied on the opinion of the rehabilitation counselor that appellant was vocationally capable of performing the correspondence clerk position.¹³

The Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment, age and employment qualifications, in determining that the position of correspondence clerk represented appellant's wage-earning capacity.¹⁴ The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of correspondence clerk and that such a position was reasonably available within the general labor market of her commuting area. Therefore, the Office properly reduced appellant's compensation effective June 30, 1997 based on her capacity to earn wages as a correspondence clerk.

¹² In a form report dated February 25, 1997, Dr. William A. Halligan, an attending Board-certified orthopedic surgeon, checked a "no" box indicating that appellant could not work eight hours per day. He did not indicate how many hours per day appellant could work, did not provide any objective findings and did not otherwise explain his apparent opinion on appellant's ability to work. In a report dated March 12, 1997, Dr. Halligan noted that appellant's main complaints related to her neck and low back, but he did not include any discussion of her ability to work. Therefore, his reports are of limited probative value with respect to appellant's ability to work. See *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (finding that a medical opinion not fortified by medical rationale is of little probative value).

¹³ The record reveals that appellant performed clerical duties for more than 10 years.

¹⁴ See *Clayton Varner*, 37 ECAB 248, 256 (1985).

The March 24, 2000 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
October 23, 2002

Michael J. Walsh
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member