United States Department of Labor
Employees' Compensation Appeals Board

LORRAINE E. SUPCHAK, Appellant	)	
and	)	**Docket No. 03-1667**
	)	**Issued: December 30, 2003**
DEPARTMENT OF HEALTH & HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION, WILKES-BARRE DATA OPERATIONS CENTER, Wilkes-Barre, PA, Employer	)	

Appearances:
Lorraine E. Supchak, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On June 18, 2003 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated October 17, 2002. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office met its burden of proof in reducing appellant's compensation based on its determination that the position of receptionist represented appellant's wage-earning capacity.

FACTUAL HISTORY

In the present case, the Office accepted that on January 22, 1992 appellant, then a 48-year-old file clerk, sustained injuries to her neck and shoulder when, while in the performance of duty, she was first struck by a falling file box and then twisted to avoid further injury. She

stopped work on January 23, 1992 and did not return. The Office accepted appellant's claim for cervical disc herniations at C5-C6-C7 and a left shoulder strain and authorized surgical laminectomy and discectomy which was performed on March 18, 1992.

On May 1, 2001, after appellant failed to adequately respond to the Office's requests for an updated medical report from her treating physician,[1] the Office referred appellant, together with a statement of accepted facts and a list of questions to be answered, to Dr. Stephen F. Latman, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated June 27, 2001, Dr. Latman stated that he had reviewed the statement of accepted facts and noted that there was no medical evidence available for his review. He listed his findings on physical examination and x-ray, agreed with the accepted diagnoses of herniated discs at C5-C6-C7, causally related to appellant's employment injury and stated that appellant needed no ongoing medical treatment. With respect to appellant's ability to work, Dr. Latman stated that appellant could work 8 hours a day, with restrictions on pushing or pulling up to 60 pounds for more than 3 hours a day and lifting up to 20 pounds more than 3 hours a day.

On July 20, 2001 the Office referred appellant for vocational rehabilitation services. On June 11, 2002, through the efforts of the vocational rehabilitation counselor, appellant returned to work as a part-time clerk, with the potential for full-time work, with Diamond Triumph Auto Glass. On June 13, 2002 the Office reduced appellant's compensation benefits based on her actual wages. On August 2, 2002, however, appellant quit her job due to a personality conflict with her supervisor.

On August 5, 2002, at the request of the Office, Carmine Abraham, an Office rehabilitation counselor, identified the job of receptionist as one of three jobs that were within appellant's physical restrictions, that she was qualified for and was reasonably available.[2] The job duties of a receptionist were described, in part, as: receives callers at the establishment, determines the nature of their business and directs them to their destination. The physical requirements were described as sedentary with occasional lifting up to 10 pounds. Occasional was defined as up to one-third of the time. The position also called for: no climbing, balancing, stooping, kneeling, crouching, crawling, feeling, tasting, smelling, far acuity, depth perception, accommodation, color vision or field of vision; frequent reaching, handling, talking, hearing and near acuity; and occasional fingering. The position did not require exposure to any environmental extremes, such as heat, cold or dampness and the work environment was listed as quiet. The rehabilitation counselor confirmed that both full-time and part-time receptionist positions were available within appellant's commuting area and that the full-time positions paid $348.80 a week. In addition, the position of receptionist was described as specific vocational preparation (SVP) level four, requiring three to six months of preparation. In her initial report dated January 22, 2003, Ms. Abraham stated that, while appellant had demonstrated the ability to

[1] With the exception of a bone density test performed on October 19, 2000 and some laboratory tests performed between September 11 and November 1, 2000, all of the medical evidence of record dates from 1992, 1993 and 1994.

[2] In the instant case, the rehabilitation counselor also identified the positions of order clerk and customer complaint clerk as suitable positions for appellant.

perform at SVP level three[3] and the identified receptionist position was level four, "with the appropriate training by an employer, she should be capable of performing job duties associated with this position." In her updated report dated August 5, 2002, Ms. Abraham stated that appellant "demonstrates a SVP level of three which indicates semi-skilled work activity. This [receptionist] position has a SVP level of four which is also semi-skilled work. Therefore, [appellant] should have little difficulty performing the job duties of this position."[4]

In a notice of proposed reduction of compensation dated August 28, 2002, the Office found that the position of receptionist was medically suitable, as it was within the restrictions set forth by Dr. Latman. The Office found that the position was classified as sedentary, that appellant had the training and background to perform the job and the availability of the job, including part-time work, had been confirmed. The Office, therefore, proposed to reduce appellant's compensation to reflect her wage-earning capacity as a receptionist. The Office gave appellant 30 days to respond.

By decision dated October 17, 2002, the Office reduced appellant's compensation on the grounds that the position of receptionist represented her wage-earning capacity. The Office noted that appellant had not responded to its notice of proposed reduction of compensation.

LEGAL PRECEDENT

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injuries and the degree of physical impairment, his or her usual employment, the employee's age and vocational qualifications and the availability of suitable employment.[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 or wage rate and availability in the open market should be made through contact with the state employment service or other applicable services. Finally, application of the principles set forth in the *Alfred C. Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.[6]

[3] Appellant had performed work as a file clerk II, a cashier-checker and a phlebotomist, all of which are classified as SVP level three. In addition, appellant completed a one-year typing course and attended a two-week entry level computer course.

[4] The Board notes that, while the rehabilitation counselor prepared a report identifying numerous positions to which appellant's skills would be transferable, the selected receptionist position is not among the positions identified.

[5] *See James A. Birt*, 51 ECAB 291 (2000); *James R. Verhine*, 47 ECAB 460 (1996); 5 U.S.C. § 8115(a).

[6] *See Ronald Litzler*, 51 ECAB 588 (2000)*; Hattie Drummond*, 39 ECAB 904 (1988); *Albert C. Shadrick*, 5 ECAB 376 (1953).

ANALYSIS

Appellant was referred for vocational rehabilitation in 2001. As a result of vocational rehabilitation efforts, appellant returned to work on June 11, 2002, in a part-time clerical position with Diamond Triumph Auto Glass. On August 2, 2002, however, appellant quit her job due to a personality conflict with her employer. Where vocational rehabilitation is unsuccessful, the rehabilitation counselor will prepare a final report, which lists two or three jobs which are medically and vocationally suitable for the employee and proceed with information from a labor market survey to determine the availability and wage rate of the position.[7] Therefore, the rehabilitation counselor prepared a labor market survey dated August 6, 2002 in which she identified the position of receptionist, indicated that both full-time and part-time positions were available in appellant's current commuting area and that the wage of the position was $8.72 per hour or $348.80 per full week. The rehabilitation counselor noted that appellant was qualified to work in the position of receptionist and that the position was within the medical restrictions established by appellant's physicians.

In this case, the most recent physical restrictions are those provided by Dr. Latman, the Office second opinion physician, who stated, in a report dated June 27, 2001 and an accompanying work-capacity evaluation form dated June 14, 2001, that appellant was capable of working 8 hours a day, with restrictions on pushing or pulling up to 60 pounds for more than 3 hours a day and lifting up to 20 pounds more than 3 hours a day. Appellant has submitted no other reports indicating that she had greater restrictions than those imposed by Dr. Latman. The receptionist position was described as sedentary with occasional lifting up to 10 pounds. Therefore, the weight of the evidence of record establishes that appellant had the requisite physical ability to perform the position of receptionist, eight hours a day. The record also provides that such a position was reasonably available within the general labor market of appellant's commuting area.

However, the Board finds that the Office failed to properly consider whether appellant was capable by virtue of her educational and vocational background and mental capacity to perform the duties of a receptionist. The job description of a receptionist, as set forth in the *Dictionary of Occupational Titles*, states that the position is SVP level four, requiring three to six months of preparation.[8] Specific Vocational Preparation is defined as the amount of lapsed time required by a typical worker to learn the techniques, acquire the information and develop the facility needed for average performance in a specific job-worker situation. This training may be acquired in a school, work, military, institutional or vocational environment. It does not include the orientation time required of a fully qualified worker to become accustomed to the special conditions of any new job. Specific vocational training includes: vocational education, apprenticeship training, in-plant training, on-the-job training and essential experience in other jobs.[9] In this case, there is no indication whatsoever that appellant, who has held jobs only at SVP level three, is qualified to perform the SVP level 4 receptionist position. In addition, while

[7] *Dorothy Jett*, 52 ECAB 246 (2001).

[8] Department of Labor, *Dictionary of Occupational Titles*, 237.367-038.

[9] *Id.*.

the rehabilitation counselor noted in her report that appellant could perform the duties after receiving training by her employer, there is no indication in the record that on-the-job training is necessarily available for this position. Therefore, the totality of the evidence of record puts into doubt appellant's ability to perform the duties required of a receptionist.[10]

The Office should redetermine appellant's loss of wage-earning capacity, taking into account both her physical capacity and her work experience and educational background.

CONCLUSION

The Board has reviewed the record and finds that the wage-earning capacity determination in this case was improper.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 17, 2002 is hereby reversed.

Issued: December 30, 2003
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[10] *See Francisco Bermudez*, 51 ECAB 506 (2000).