

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RITA HALL and DEPARTMENT OF HEALTH, EDUCATION & WELFARE,
SOCIAL SECURITY ADMINISTRATION, Philadelphia, PA

*Docket No. 02-956; Submitted on the Record;
Issued March 6, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation benefits based on her capacity to earn wages as an information clerk.

Appellant, a 48-year-old benefit authorizer, filed a notice of occupational disease on June 5, 1990 alleging that she developed carpal tunnel syndrome due to factors of her federal employment. The Office accepted her claim for bilateral carpal tunnel syndrome on August 17, 1990. The Office authorized surgery for right carpal tunnel release performed on May 16, 1990. The Office entered appellant on the periodic rolls on May 18, 1993. On September 20, 1996 and May 17, 1999 the Office authorized repeat surgery. Appellant underwent additional surgery on June 18, 1999.

The Office proposed to reduce appellant's compensation benefits on December 11, 2000 based on her capacity to perform the duties of an information clerk. By decision dated March 30, 2001, the Office reduced her wage-loss compensation benefits based on the constructed earnings in this position.

Appellant requested an oral hearing and by decision dated November 29, 2001, the hearing representative affirmed the Office determination that appellant could perform the duties of an information clerk and modified the March 30, 2001 decision to reflect wages of \$322.80 rather than \$330.40 per week in that position. The hearing representative determined that appellant was entitled to compensation in the amount of \$260.25 per week.

The Board finds that the Office properly reduced appellant's compensation benefits based on her capacity to earn wages as an information clerk.

Section 8115 of the Federal Employees' Compensation Act¹ provides that wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and

¹ 5 U.S.C. §§ 8101-8193, 8115.

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 her disabled condition.²

The Office referred appellant for a second opinion evaluation with Dr. Richard J. Mandel, a Board-certified orthopedic surgeon. In his October 4, 1999 report, Dr. Mandel stated that appellant's left carpal tunnel syndrome was not due to factors of her employment and opined that she was capable of work of a sedentary nature avoiding repetitive grasping, pushing and pulling with both hands and avoiding constant or frequent typing.

Appellant's attending physician, Dr. Marwan A. Wehbe, a Board-certified orthopedic surgeon, completed a report on October 15, 1999 and recommended that appellant undergo a left carpal tunnel release. He stated that appellant's condition was causally related to her cumulative trauma from her work and opined that she could not return to her date-of-injury position of typist.

Section 8123(a) of the Act³ provides, "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." Due to the conflict of medical opinion evidence regarding causal relationship between appellant's left hand condition and factors of her federal employment, the Office properly referred appellant to Dr. Howard Caplan, a Board-certified surgeon, for an impartial medical examination.

In his July 6, 2000 report, Dr. Caplan performed a physical examination and diagnosed carpal tunnel syndrome on the left. He opined that appellant's symptoms were related to her 1987 cumulative injuries to her median nerves and thus to factors of her federal employment. Dr. Caplan completed a work restriction evaluation and indicated that appellant could work for eight hours a day as long as no repetitive use of her hands was involved. He indicated that appellant had restrictions on reaching, pushing, pulling and lifting as well as repetitive movements of the wrists and elbows. Dr. Caplan stated that appellant was restricted to no repetitive use of either hand.

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 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 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.

² *James Henderson, Jr.*, 51 ECAB 268 (2000).

³ 5 U.S.C. §§ 8101-8193, 8123(a).

Finally, application of the principles set forth in *Albert C. Shadrick*⁴ will result in the percentage of the employee's loss of wage-earning capacity. The basic range of compensation paid under the Act is 66 2/3 percent of the injured employee's monthly pay.⁵

The vocational rehabilitation counselor noted appellant's cooperation with rehabilitation efforts, but recommended that her case be closed on May 16, 2000. The vocation rehabilitation counselor indicated that the position of information clerk was within appellant's physical and vocational abilities and was reasonably available in her commuting area. The average wages for this position are \$322.80 per week.

On October 17, 2000 the Office requested that Dr. Caplan review this position and offer his opinion as to whether appellant could perform the duties of an information clerk. In a report dated November 13, 2000, Dr. Caplan stated that assuming that there was minimal repetitive activity involved in the position of information clerk, appellant could perform the position.

In response to the Office's notice of proposed reduction of compensation, appellant's attorney objected to the position of information clerk on the grounds that it would require repetitive work using the arms and hands. The vocational rehabilitation counselor completed an addendum to his report dated February 20, 2001. The vocational rehabilitation counselor stated that he observed information clerks in the performance of their duties and that the job did not require repetitive use of the hands or wrists. The information clerks assisted customers with directions and other questions as well as writing out gift certificates. He stated that the positions started on a part-time basis leading to a full-time position. The starting pay was between \$6.00 and \$7.50 per hour.

In the present case, the evidence of record establishes that appellant is physically capable of performing the work of an information clerk, as Dr. Caplan reviewed the position and stated that as long as there was minimal repetitive activity required it was within appellant's work capacity. The vocational rehabilitation counselor further researched the duties of the position and concluded that there were no requirements for repetitive use of the hands or wrists.

The evidence also establishes that the selected position of information clerk is reasonably available based on the May 16, 2000 report of the vocational rehabilitation counselor establishing that he confirmed that there were job openings for that position and that the weekly salary for a information clerk was \$322.80 per week. The Board notes that appellant's statements at the hearing establish that she was unable to obtain work as an information clerk. The fact, however, that the evidence of record establishes that appellant was not able to obtain work as an information clerk does not establish that the work was not reasonably available in the area or that it does not reasonably represent her wage-earning capacity. The fact that appellant was not able to secure a job does not establish that the work is not available or suitable. If the evidence establishes that jobs in the selected position are reasonably available, the selection of such a position is proper even though the employee has been unsuccessful in obtaining work or she has submitted documents from individual employers who indicated they did not have a

⁴ 5 ECAB 376 (1953).

⁵ *Karen L. Lonon-Jones*, 50 ECAB 293, 297 (1999).

position for her.⁶ Moreover, the hearing representative properly calculated appellant's wage-earning capacity based on the difference between her weekly wage at the time of the recurrence of disability, \$582.00 and the weekly wage of an information clerk, \$322.80, using the *Shadrick* formula. The Office, therefore, met its burden of proof in reducing appellant's compensation based on her wage-earning capacity as an information clerk.

The decision of the Office of Workers' Compensation Programs dated November 29, 2001 is hereby affirmed.

Dated, Washington, DC
March 6, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

⁶ *Id.* at 298.