

August 18, 1996 she received compensation for temporary total disability because of her left foot condition.

The Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. Stanley Baer, a Board-certified orthopedic surgeon, for an evaluation of the physical limitations resulting from her work-related disability and any restrictions attributable to preexisting conditions. In a report dated October 25, 1999, Dr. Baer stated that it was his feeling appellant was not totally disabled for work:

“The OWCP-5 form is completed and is attached with this report. The patient, in my opinion, is capable of participating in vocational rehabilitation for activities which would not require her to any prolonged standing or walking. I do not believe she would have difficulty with sitting activities. Regarding limitations from the work-related disability and also to preexisting conditions, these would limit the patient’s ability to stand and walk, climb, squat or kneel. She could not stand for more than 30 minutes at a time or more than 3 hours per day.”¹

On February 21, 2002 the Office referred appellant to vocational rehabilitation services and advised that Dr. Baer’s report represented the weight of the medical evidence. The rehabilitation counselor discussed a direct placement plan with appellant, noting that the objectives of cashier, telemarketer and dispatcher would be appropriate in view of her work history, skills and the preclusions outlined by Dr. Baer. Appellant underwent a three-day work tolerance screening beginning May 7, 2002. The final report concluded: “She at best appears able to tolerate ‘sedentary’ level of employment as defined by The Department of Labor. However, her ability to tolerate full[-]time work is highly doubtful.”

After placement efforts failed, the rehabilitation counselor determined that appellant was able to perform the constructed position of dispatcher, the job description of which appears in the Department of Labor’s, *Dictionary of Occupational Titles* (4th ed. 1991): “Receives orders for services, repairs, adjustments, installations, etc. and relays requests by telephone or radio to appropriate employees for completion. Keeps records of requests and orders.” The position is classified as sedentary with a maximum lifting of 10 pounds. It demands reaching, handling, fingering, feeling, talking and hearing. Work is performed inside 75 percent or more of the time. The position requires specific vocational preparation from 30 days to 3 months. The rehabilitation counselor confirmed with the state employment service representative in Sacramento that the job was being performed in sufficient numbers so as to make it reasonably available to appellant within her commuting area. The counselor also confirmed a weekly wage of \$360.00 from Mr. Rooter Plumbing of San Francisco.

On August 8, 2002 the Office issued a notice of proposed reduction of compensation. The Office found that appellant was able to earn the wages of a dispatcher, a position that reasonably represented her wage-earning capacity.

On October 8, 2002 the Office rehabilitation specialist reported that appellant’s response to the proposed reduction did not invalidate the finding that the constructed position of

¹ The OWCP-5 form to which Dr. Baer referred is not found in the case record.

dispatcher reasonably represented her wage-earning capacity. The specialist noted that the position included some recordkeeping but that data entry was not a significant component of the job, which primarily involved telephonic rather than written communication. The specialist also noted that the work tolerance screening in May 2002, did not indicate that appellant was incapable of occasional or intermittent hand and finger activity, such as the dispatcher job would entail: “The report does state that the claimant was ‘able to perform “sedentary” level of work’ as defined by the Department of Labor.” The rehabilitation specialist reported that the medical evidence of record appeared consistent with the finding that the dispatcher position reasonably represented appellant’s wage-earning capacity.

In a decision dated November 15, 2002, the Office reduced appellant’s compensation effective December 1, 2002 on the grounds that she was capable of performing the duties of a dispatcher.

Appellant requested an oral hearing before an Office hearing representative and submitted the April 11, 2003 report of Dr. Janice Murota, her attending orthopedist, who described the congenital deformities of appellant’s hands and feet and had a negative opinion of appellant’s ability to work:

“A discussion informally with the hand surgeon in this department has shown that there is no surgical cure to release the deformity in her hands. I agree with Dr. Fagan of the Podiatry Department that she has some subtle neuromuscular problem that is clearly progressing slowly and is severely disabling. She was observed [during the work tolerance screening in May 2002,] to be very slow in her ability to use a computer. I agree with her assessment that she would not be able to perform work even as a dispatcher in today’s competitive job market. It is my opinion that it is unrealistic to expect [appellant] to be able to obtain a job and support herself. She has expressed her regret her [sic] disability and I think she is sincere when she states she would much prefer to be able to work. It is my opinion that the progressive nature of her symptoms in her hands and feet, especially her left foot, coupled with her industrial accident and further secondary problems in the left foot and subsequently the left hip make it unrealistic to expect [her] to obtain and maintain a job even as a dispatcher.”

After a hearing on July 29, 2003 the Office issued a decision on November 19, 2003 affirming the reduction of appellant’s compensation. The Office found that the physical requirements of the position of a dispatcher were compatible with her physical limitations and were deemed consistent with the physical activities that appellant could perform “as listed by Dr. Baer.”

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.²

² *Harold S. McGough*, 36 ECAB 332 (1984).

Section 8115(a) of the Federal Employees' Compensation Act provides that in determining compensation for partial disability, the wage-earning capacity of an employee is determined by her actual earnings, if her actual earnings reasonably represent her wage-earning capacity. If the actual earnings of the employee do not reasonably represent her wage-earning capacity or if the employee has no actual earnings, appellant's wage-earning capacity as appears reasonable under the circumstances 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.³

When the Office makes a medical determination of partial disability and of the 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 labor market, that fits the employee's capabilities in light of 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 *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.⁴

ANALYSIS

When the Office referred appellant to vocational rehabilitation services on February 21, 2002 it advised that the report of Dr. Baer, the Office referral physician, represented the weight of the medical evidence. But Dr. Baer's report, which was dated October 25, 1999, was over two years old. By the time the Office issued its November 15, 2002 final decision reducing appellant's compensation, Dr. Baer's evaluation of appellant was over three years old. The Board has held that the Office must base its determination of wage-earning capacity on a reasonably current medical evaluation.⁵

In *Anthony Pestana*⁶ the Office made its wage-earning capacity determination almost five years after the claimant's most recent thorough physical examination and evaluation. The Board found that the Office failed to meet its burden of proof to justify a reduction in the claimant's compensation benefits by failing to demonstrate that the selected position reasonably represented his wage-earning capacity consistent with his current work tolerance limitations. In *Ellen G. Trimmer*⁷ the Board found that the Office did not meet its burden of justifying the reduction of the claimant's compensation for temporary total disability. The Office had based its determination on an August 4, 1975 work tolerance limitations report by the claimant's attending

³ 5 U.S.C. § 8115(a)

⁴ *Hattie Drummond*, 39 ECAB 904 (1988); see *Albert C. Shadrick*, 5 ECAB 376 (1953).

⁵ *Carl C. Green, Jr.*, 47 ECAB 737, 746 (1996).

⁶ 39 ECAB 980, 987 (1988).

⁷ 32 ECAB 1878, 1882 (1981).

physician. By the time the Office decided in July 1977, that the claimant was no longer disabled, the report was almost two years old and the passage of time had lessened its relevance.

In the present case, Dr. Baer's October 25, 1999 report on appellant's physical limitations grew stale by the time the Office reduced her compensation. The passage of time lessened its relevance on the nature and extent of her current limitations. After the Office reduced her compensation, appellant submitted an April 11, 2003 report from Dr. Murota, that demonstrated the danger of relying on distant medical evaluations. Dr. Murota explained that appellant had a severely disabling congenital condition that was clearly progressing slowly. It was the progressive nature of the symptoms in her hands and feet, among other things, that made it unrealistic, in Dr. Murota's opinion, to expect appellant currently to maintain a job, even as a dispatcher. Because preexisting and injury-related medical conditions and their resulting physical limitations can change over time, "due regard" to the factors specified in section 8115 of the Act requires a reasonably current medical evaluation.

As Dr. Baer's evaluation of appellant was not reasonably current, the Office did not establish that the constructed position of dispatcher was consistent with her current work tolerance limitations. The Office did not give due regard to the factors specified in section 8115 of the Act and therefore did not discharge its burden of proof to justify the reduction of appellant's compensation. The Board will reverse the Office's November 19, 2003 decision.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to justify the reduction of appellant's compensation on the grounds that she had the capacity to earn wages in the constructed position of dispatcher. The medical evidence on which the Office relied was too old to establish relevant work limitations.

ORDER

IT IS HEREBY ORDERED THAT the November 19, 2003 decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 4, 2004
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member