United States Department of Labor
Employees' Compensation Appeals Board

LYNN KOPSIE, Appellant	)	
and	)	**Docket No. 05-1848**
	)	**Issued: June 13, 2006**
DEPARTMENT OF AGRICULTURE, MEAT & POULTRY INSPECTION SERVICE, Philadelphia, PA, Employer	)	

Appearances:
Gordon Reiselt, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 7, 2005 appellant, through counsel, filed a timely appeal of a decision of the Office of Workers' Compensation Programs dated July 15, 2005 which denied modification of a loss of wage-earning capacity determination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether the Office properly reduced appellant's compensation effective March 4, 2003 based on its determination that the selected position of manager, quality control represented her wage-earning capacity; and (2) whether the Office properly denied modification of appellant's March 4, 2003 wage-earning capacity determination.

FACTUAL HISTORY

On August 14, 2000 appellant, a 49-year-old slaughter food inspector, filed a traumatic injury claim alleging that on that date she injured her left hand, forearm and fingers and her right

palm while inspecting chicken carcasses. The Office accepted the claim for bilateral trigger fingers and left medial epicondylitis. By letter dated December 5, 2000, appellant was placed on the periodic rolls for temporary total disability.

A September 12, 2000 functional capacity evaluation determined that appellant was capable of medium physical demands on lifting; sitting or standing for eight hours with no restrictions; six hours of frequent long distance walking; occasional grasping and fine manipulation up to two and a half hours; five and a half hours of frequent bending, crouching, climbing stairs, crawling, kneeling, squatting or stooping; and eight hours of constant repetitive and foot balancing. The report determined that appellant was unable to perform the duties of her date-of-injury job.

In a September 14, 2000 progress note, Dr. Charles F. Leinberry, a treating Board-certified orthopedic and hand surgeon, reported that appellant was only able to handle four to five poultry carcasses per minute and "if this was not available part time [appellant] cannot perform [the] *job*!" (Emphasis in the original.) He noted that this restriction was for the next four months.

A second functional capacity evaluation was performed on January 25, 2001. It reported that appellant was capable of medium lifting from chair to floor lifting; sitting or standing for eight hours with no restrictions; six hours of frequent long distance walking; occasional grasping and fine manipulation up to two and a half hours; up to five and a half hours of frequent bending, crouching, climbing stairs, crawling, kneeling, squatting or stooping; and up to eight hours of constant repetitive and foot balancing.

In a January 29, 2001 report, Dr. A. Lee Osterman, a treating Board-certified orthopedic surgeon, diagnosed overuse tendinitis. With regard to work activities, he opined "the functional capacity evaluation both of September 2000 and January 2001 reflect her activity levels."

On March 8, 2001 appellant was referred to vocational rehabilitation.

In a memorandum dated March 27, 2002, a rehabilitation counselor advised that appellant had the necessary vocational and physical skills to perform the jobs of manager, industrial cafeteria and manager, quality control and that these jobs were performed in sufficient numbers so as to make them reasonably available within her commuting area. The positions were classified as light strength levels which involved occasional lifting of up to 20 pounds and frequent lifting of up to 10 pounds.

On September 26, 2002 the Office issued a notice of proposed reduction of compensation, finding that appellant had the wage-earning capacity of a manager, quality control at $555.58 per week. The Office noted that she had experience as a baker, chemist, food inspector, packer and food director and her Bachelor of Science degree qualified her for the position. The physical requirements of the position included no lifting more than 20 pounds, previous work experience and education and "[t]he work is inside 100 percent or more of the time." The Office determined that appellant's compensation would be reduced to $388.00 every four weeks based on the formula developed in *Albert C. Shadrick*.[1] The Office indicated that her

[1] 5 ECAB 376 (1953).

salary on August 14, 2000, the date of her injury, was $638.29 per week, that the current adjusted pay rate for her job on the date of injury was $696.27 per week and that she was currently capable of earning $555.58. per week, the pay rate of a manager, quality control ($555.58 divided by $696.27). The Office determined that she had an 80 percent wage-earning capacity, which when multiplied by $638.29 totaled a wage-earning capacity of $510.63 per week. The Office then determined that appellant had a loss of wage-earning capacity of $127.66 by subtracting $510.63 from $638.29. The Office multiplied $127.66 by 3/4 which amounted to a compensation rate of $95.75 per week. The Office found that, based on the consumer price index effective August 14, 2001, appellant's current adjusted weekly compensation rate was $97.00 or $388.00 every four weeks. The Office requested that appellant submit additional evidence or argument within 30 days if she disagreed with the proposed action.

In a letter dated October 19, 2002, appellant disagreed with the proposal to reduce her compensation benefits. She contended that she did not have the vocational preparation as the position required 4 to 10 years of vocational preparation.

In a report dated December16, 2002, the vocational rehabilitation specialist responded to the Office's December 13, 2002 memorandum about the suitability of the position. He noted that appellant's work experience was within the required vocational preparation years. The vocational rehabilitation specialist also noted:

> "[T]he vocational tester recommended a number of job category areas [appellant] should be assisted in exploring which would capitalize on her work experience, measured abilities and expressed interests. Manager, quality control DOT [Department of Labor's *Dictionary of Occupational Titles*], Code 012.167-014 was picked as suitable employment objective a recommendation for vocational training. The vocational tests indicated that the jobs categories listed appear to be suitable as they do not require more than occasional reaching, handling, fingering or feeling which are in keeping with the work restrictions outlined."

In concluding, the vocational rehabilitation specialist opined that appellant met the vocational requirements for the position of manager, quality control based upon her transferable skills, education, medical evidence and vocational testing results.

By decision dated March 4, 2003, the Office finalized the reduction of appellant's compensation benefits.

In a letter dated March 17, 2003, appellant objected to the reduction in her compensation.

By decision dated June 4, 2003, the Office denied modification of the March 4, 2003 decision.

On August 15, 2003 the Office received a July 17, 2003 report by Dr. Leinberry, who noted he had not seen appellant "for a while now" and opined that "her carpal tunnel and other symptoms are related to the work that she did intensively with repetitive use."

On August 18, 2003 the Office received an August 8, 2003 report by Dr. David J. Abraham. He diagnosed bilateral shoulder bursitis, cervical spinal stenosis at C5-6 and C6-7 and

"subtle findings of spinal cord myelomalacia on the magnetic resonance imaging (MRI) scan with cervical myelopathy." A physical examination revealed a negative Tinel's sign, negative Phalen's test, positive Spurling sign, positive shoulder examination and negative shoulder abduction relief.

On September 30, 2003 the Office received a September 15, 2003 report by Dr. Scott M. Fried, a treating osteopathic Board-certified orthopedic surgeon. A physical examination revealed positive Tinel's sign, "supraclavicual Tinel's bilaterally with upper arm radiation," positive median nerve radially and proximally and positive right forearm radial nerve. Dr. Fried diagnosed repetitive strain injury due to her employment-related tenosynovitis, "[t]raumatically-induced radial and median neuropathy, right side greater than left with ulnar neuritis bilaterally" and brachial neuritis. He opined:

> "There is no doubt a direct cause and effect relationship between the repetitive activity that [appellant] performed at the USDA and her current and ongoing symptoms. [She] has evidence of ongoing tenosynovitis in her hands and this is directly and causally related to [appellant's] aggressive gripping activities as well as repetitive hand wrist and arm activities. [Appellant] subsequently developed cumulative trauma involving her forearms and subsequently [her] brachial plexus with regular reaching and grasping activities."

With regards to appellant's ability to work, Dr. Fried stated that she was capable of performing sedentary and nonrepetitive work.

On May 3, 2004 the Office received an April 28, 2004 letter from appellant's counsel requesting reconsideration and submitted evidence in support of her request. The evidence included a February 5, 2004 work capacity evaluation, a December 1, 2003 electroneuromyographic evaluation; a July 7, 2003 MRI scan; a copy of the job description for manager, quality control and reports dated March 24 and April 12, 2004 and a February 18, 2004 review of the February 5, 2004 work capacity evaluation by Dr. Fried.

The February 5, 2004 work capacity evaluation revealed that Dr. Fried's consulting physical therapist determined that appellant was capable of working with restrictions. The restrictions include sitting 15 to 30 minutes at a time up to 4 hours per day; standing 30 minutes at a time up to 1 hour per day; walking 15 to 30 minutes up to 1 hour per day; occasional stooping/bending; no squatting, climbing, crawling, reaching above shoulder level, balancing and kneeling and no lifting or carrying. The report indicated that she was capable of performing both light[2] and sedentary[3] work. In concluding, the report recommended "trial of sedentary to light employment" with no carrying or lifting.

[2] Light work was classified as "20 pounds maximum lifting, carrying 10-pound articles frequently and most jobs involving sitting with a degree of pushing and pulling."

[3] Sedentary work was classified as "10 pounds maximum lifting and/or carrying articles. Walking/standing on occasion."

In a March 24, 2004 report, by Dr. Fried reviewed the position of manager, quality control and concluded that appellant was capable of performing the duties of the position which required her interacting, speaking and seeing other employees. However, Dr. Fried found the fingering, handling and reaching requirements were not defined and "[t]hese activities would need to be limited to minimal" and reaching or handling was problematic for appellant. He then concluded, "[a]s this job stands it cannot be approved" since "[f]urther definition as to exactly which activities are performed on this basis needs to be given."

In his April 12, 2004 report, Dr. Fried diagnosed bilateral repetitive strain injury due to appellant's employment-related tenosynovitis, "[t]raumatically-induced radial and median neuropathy, right side greater than left with ulnar neuritis bilaterally" and brachial neuritis. With regards to appellant's ability to perform the position of manager, quality control, Dr. Fried stated:

> "Job descriptions have been tendered, including quality control manager as well as other jobs that are repetitive hand, wrist and arm in nature. [Appellant] is incapable of performing these activities. She has ongoing dysfunction and disability in her arms and has strict sedentary capabilities only. [Appellant] may not perform these jobs and to send her back to these will no doubt exacerbate her to the point where she would require operative intervention."

By decision dated June 28, 2004 and reissued on July 15, 2005,[4] the Office denied modification of its March 4, 2003 decision.

LEGAL PRECEDENT -- ISSUE 1

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages.[5] Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.[6]

Section 8115(a) of the Federal Employees' Compensation Act[7] provides that, if actual earnings of the employee do not fairly and reasonably represent her wage-earning capacity or if the employee has no actual earnings, the wage-earning capacity as appears reasonable under the circumstances is determined with due regard to: (1) the nature of the injury; (2) the degree of

[4] On July 26, 2004 appellant, through counsel, filed an appeal with the Board, which was docketed as No. 04-1918. As the case record before the Board did not contain the March 4, 2003 loss of wage-earning capacity determination or any documentation from the year 2003, the Board issued an order remanding case for reconstruction and proper assemblage of the record and issuance of an appropriate decision to protect appellant's appeal rights. *See* Docket No. 04-1918 (issued March 17, 2005). During the pendency of the first appeal and subsequent to the appeal, additional evidence was associated with the case record that has not been considered by the Office and, therefore, may not be considered by the Board for the first time on appeal. 20 C.F.R. § 501.2(c).

[5] *See* 20 C.F.R. §§ 10.403, 10.520.

[6] *Id*; *see Katherine T. Kreger*, 55 ECAB ___ (Docket No. 03-1765, issued August 13, 2004).

[7] 5 U.S.C. § 8115(a).

physical impairment; (3) her usual employment; (4) age; (5) her qualifications for other employment; (6) the availability of suitable employment; and (7) other factors or circumstances which may affect wage-earning capacity in his or her disabled condition.[8]

ANALYSIS -- ISSUE 1

The Office determined that the selected position of manager, quality control represented appellant's wage-earning capacity based upon the September 23, 2000 and January 25, 2001 functional capacity evaluations and by Dr. Osterman's January 29, 2001 report demonstrating that appellant could perform light-duty work. The notice of proposed reduction of compensation was dated September 26, 2002 and the reduction of compensation became effective March 4, 2003.

The Board finds that the Office properly reduced appellant's compensation based on her ability to perform the duties of a manager, quality control. The Office adjusted her compensation, effective March 4, 2003, on the grounds that appellant was capable of performing the selected position of manager, quality control. A treating physician, Dr. Osterman, provided a September 29, 1998 work restriction report in which he advised that appellant could perform light-duty work with no repetitive activity with the upper extremities and restricted lifting to 20 pounds. A November 12, 2001 work capacity evaluation found that she was not totally disabled and could work eight hours per day with light physical demands.

Appellant's vocational rehabilitation counselor determined that appellant was able to perform the position of manager, quality control and that state employment services showed the position was available in sufficient numbers so as to make it reasonably available within her commuting area. The Office rehabilitation specialist advised that her prior work experience and her educational background qualified appellant for position of manager, quality control.

The Office considered the proper factors, such as availability of employment and appellant's physical limitations, usual employment, age and employment qualifications, in determining that the manager, quality control position represented her wage-earning capacity.[9] The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the manager, quality control position and that such a position was reasonably available within the general labor market of her commuting area.

Finally, the Office properly determined appellant's loss of wage-earning capacity in accordance with the formula developed in *Shadrick*[10] and codified at section 10.403.[11] In this regard, the Office indicated that her salary on August 14, 2000, the date of her injury, was $638.29 per week, that the current adjusted pay rate for her job on the date of injury was $696.27

[8] 5 U.S.C. § 8115(a); *Sherman Preston*, 56 ECAB ___ (Docket No. 05-721, issued June 20, 2005); *Loni J. Cleveland*, 52 ECAB 171 (2000).

[9] *Loni J. Cleveland*, *supra* note 8.

[10] *Supra* note 1.

[11] 20 C.F.R. § 10.403.

per week and that she was currently capable of earning $555.58 per week, the pay rate of a manager, quality control. The Office then determined that appellant had an 80 percent wage-earning capacity ($555.58 divided by $696.27), which when multiplied by $638.29 totaled $510.63 per week. The Office went on to determine that appellant had a loss of wage-earning capacity of $127.66 by subtracting $510.63 from $638.29. The Office then multiplied $127.66 by 3/4, as appellant had dependents, which amounted to a compensation rate of $95.75 per week. The Office found that, based on the current consumer price index, appellant's current adjusted compensation rate was $97.00 per week or $388.00 every four weeks. The Board finds that the Office's application of the *Shadrick* formula was proper and, therefore, it properly found that the position of manager, quality control reflected her wage-earning capacity effective March 4, 2003.[12] As the Office properly based her wage-earning capacity, effective March 4, 2003, the burden shifted to her to show that the award should be modified.

LEGAL PRECEDENT -- ISSUE 2

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was, in fact, erroneous.[13] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[14]

The Office's procedure manual provides that if a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss.[15] The procedure manual further indicates that, under these circumstances, the claims examiner will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity decision.[16]

ANALYSIS -- ISSUE 2

Subsequent to the March 4, 2003 loss of wage-earning capacity decision, appellant submitted a July 17, 2003 report by Dr. Leinberry, an August 8, 2003 report by Dr. Abraham, a February 5, 2004 work capacity evaluation, a December 1, 2003 electroneuromyographic evaluation; a July 7, 2003 MRI scan, a copy of the job description for manager, quality control and reports dated September 15, 2003, March 24 and April 12, 2004 and a February 18, 2004 review of the February 5, 2004 work capacity evaluation by Dr. Fried. In his reports, Dr. Fried

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[12] *Elsie L. Price*, 54 ECAB 734 (2003); *Stanley B. Plotkin*, 51 ECAB 700 (2000).

[13] *Stanley B. Plotkin*, *supra* note 12; *Tamra McCauley*, 51 ECAB 375 (2000).

[14] *Harley Sims, Jr.*, 56 ECAB ___ (Docket No. 04-1916, issued February 8, 2005); *Stanley B. Plotkin*, *supra* note 12.

[15] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995). *See Mary E. Marshall*, 56 ECAB ___ (Docket No. 04-1048, issued March 25, 2005).

[16] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995). *See Harley Sims, Jr.*, *supra* note 14.

concludes that appellant cannot perform the duties of manager, quality control as she is limited to sedentary duties and the position is classified as light strength. The physical restrictions listed by him, as detailed in a February 5, 2004 work capacity evaluation include, sitting 15 to 30 minutes at a time up to 4 hours per day; standing 30 minutes at a time up to 1 hour per day; walking 15 to 30 minutes up to 1 hour per day; occasional stooping/bending; no squatting, climbing, crawling, reaching above shoulder level, balancing and kneeling and no lifting or carrying. Dr. Fried also opined that appellant "developed cumulative trauma involving her forearms" and brachial plexus due to the "regular reaching and grasping activities" of her date-of-injury position. The reports by him and the February 5, 2004 work capacity evaluation are supportive of appellant's argument that she sustained a material change in the nature and extent of her accepted work condition.

Proceedings under the Act are not adversary in nature, nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence to see that justice is done.[17] In the instant case, although the reports of Dr. Fried contain rationale insufficient to discharge appellant's burden that her condition had worsened or changed, they constitute substantial evidence in support of her claim and raise an unrefuted inference of causal relationship sufficient to require further development of the case record by the Office.[18] There is no probative opposing medical evidence in the record for this period.

On remand the Office should develop the medical evidence as appropriate to obtain a rationalized opinion regarding whether appellant's modification of the March 4, 2003 loss of wage-earning capacity decision is warranted. Following such further development of the case record as it deems necessary, the Office should issue a *de novo* decision.

CONCLUSION

The Board finds that the Office properly determined that the position of manager, quality control reflects appellant's wage-earning capacity effective March 4, 2003, the date it reduced her compensation benefits. However, the Board finds that this case is not in posture for a decision as to whether modification of appellant's wage-earning capacity determination is warranted.

[17] *William B. Webb*, 56 ECAB ___ (Docket No. 04-1413, issued November 23, 2004).

[18] *John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978); *see also Cheryl A. Monnell*, 40 ECAB 545 (1989); *Bobby W. Hornbuckle*, 38 ECAB 626 (1987) (if medical evidence establishes that residuals of an employment-related impairment are such that they prevent an employee from continuing in the employment, she is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 15, 2005 is affirmed in part, set aside in part and the case remanded to the Office for proceedings consistent with this opinion.

Issued: June 13, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board