

in April 1996 and did not return.¹ Appellant's case was placed on the periodic compensation rolls in May 1996.

Appellant sought treatment for neck and upper extremity conditions. In chart notes from November 1995 to April 1996, Dr. Robert T. Pero, an attending physician Board-certified in occupational medicine and preventative health, diagnosed herniated C4-5 and C5-6 cervical discs, myofascial pain, bilateral cumulative trauma disorder of the upper extremities, bilateral wrist tendinitis and neuralgia.² In an April 11, 1996 report, Dr. Pero recommended a sedentary work level, with permanent limitations on flexing or extending the cervical spine, lifting, reaching, grasping and repetitive motion. He recommended frequent breaks. Dr. Pero opined that all these limitations were attributable to the accepted cervical and trapezial strains.

As Dr. Pero determined that appellant could work part time, the Office referred her for vocational rehabilitation services in June 1996. In January 1997, the Office approved a vocational rehabilitation plan in which appellant would obtain a master's degree in clinical counseling.³ She graduated in May 1999.

Appellant's case was put in placement status on May 18, 1999. In reports from May to September 1999, the vocational rehabilitation counselor stated that he was unable to find her a position. The state law governing counseling licenses changed in 1998 to require a supervised, post-master's internship of 2,000 to 3,000 hours. As appellant was not licensed, she could earn only \$20,000.00 a year as an entry level paraprofessional. However, the entry level, paraprofessional positions for which she qualified required her to restrain unruly clients, which was beyond her physical limitations.

In a September 30, 1999 closure report, the vocational rehabilitation counselor stated that appellant was "very highly motivated" in her attempts to find work. However, appellant was not licensed, she would "not be employable within those agencies with the salary previously identified, between \$26,000.00 and \$32,000.00 per year." She could earn only \$20,000.00 a year. The counselor noted that appellant's "facial grimacing due to pain and inability to shake hands due to radiating neck, shoulder and arm pain" were also obstacles to hiring. In October 29 and 31, 1999 reports, the counselor stated that market wages for entry-level unlicensed therapists were \$10.95 an hour. He found such positions reasonably available within appellant's commuting area. The counselor identified the position of counselor or clinical therapist, Department of Labor's *Dictionary of Occupational Titles* (DOT) No. 045.107.050. The position required intermittent fine motor activity and was described as sedentary.

¹ In statements of earnings and employment (Form EN1032) dated January 7, 2004 to January 27, 2006, appellant noted annual earnings from \$111.02 to \$155.34 working one hour a month as a church liturgy preparer. In 2005, she also earned \$23.48 in royalties from authoring a book.

² March 16, 1995 x-rays showed moderate C5-6 spondylosis. A November 1, 1995 cervical magnetic resonance imaging (MRI) scan showed a midline disc herniation at C4-5 and a broad-based "subligamentous disc herniation at C5-6 with central and left foraminal stenosis."

³ In a February 6, 1997 file memorandum, a claims examiner stated that she was "very concerned" about the vocational rehabilitation plan as she had not previously approved it. She contended that the plan was inappropriate as it cost over \$20,000.00 and would not end until September 1999, when appellant would be almost 55.

By notice dated April 28, 2000, the Office advised appellant that it proposed to reduce her wage-loss compensation based on her ability to earn \$11.00 an hour or \$22,880.00 a year in the selected position of clinical counselor. It noted that it based the medical determination on Dr. Pero's April 11, 1996 report.

In a May 26, 2000 letter, appellant's attorney contended that the selected counselor position was not medically or vocationally suitable. He submitted a December 28, 1999 vocational assessment by Martin L. Rauer, a certified rehabilitation counselor, who opined that appellant was qualified only as a "minimum wage," entry-level paraprofessional. Counsel submitted documents showing that in 1999 appellant applied for and was rejected from more than 100 positions.

Appellant also submitted an October 27, 1998 report from Dr. Jack L. Rook, an attending Board-certified psychiatrist. Dr. Rook diagnosed cervical and trapezial myofascial pain syndrome, cumulative trauma disorder in both arms and cervical disc herniations at C4-5 and C5-6. He restricted appellant to working six hours continuously, followed by a two-hour break, then two hours of work. He limited lifting to 10 pounds and proscribed repetitive upper extremity activities. Dr. Rook opined that appellant's condition and restrictions were entirely work related.

By decision dated June 1, 2000, the Office reduced appellant's wage-loss compensation based on her ability to earn wages as a clinical counselor of \$11.00 an hour or \$22,880.00 a year. It found that the selected position was medically and vocationally appropriate.

Appellant then requested a hearing, which was held on December 4, 2000. At the hearing, she asserted that medical reports after April 1996 showed that the entry level positions for which she qualified required physically restraining and assisting clients, tasks beyond her medical limitations.

By decision dated and finalized February 7, 2001, an Office hearing representative affirmed the June 1, 2000 decision. The Office found that the selected counselor position was within Dr. Pero's April 11, 1996 restrictions and remained reasonably available within appellant's commuting area.

In a February 5, 2002 letter, appellant requested reconsideration. She asserted that the Office used labor market surveys for full-time positions whereas she was limited to part-time work. Appellant submitted a January 10, 2002 report from Dr. Christopher B. Ryan, an attending Board-certified psychiatrist, who opined that her chronic cervical strain, herniated cervical discs and bilateral wrist tendinitis were aggravated if not caused by operating a microscope at work for prolonged periods. Dr. Ryan also diagnosed a movement disorder of undetermined etiology.

The Office obtained a March 4, 2002 second opinion report from Dr. Jeffrey M. Hrutkay, a Board-certified orthopedic surgeon. Dr. Hrutkay limited appellant to working four hours a day.

By nonmerit decision dated April 15, 2002, the Office denied reconsideration on the grounds that the evidence submitted in support of the request was repetitious and immaterial.

In a May 28, 2002 letter, appellant requested reconsideration. She submitted an April 14, 2002 rehabilitation report by Louis C. Phillips, a vocational specialist, who found that the Office's reemployment plan was not viable as appellant was unlicensed.

By decision dated August 8, 2002, the Office denied appellant's request for reconsideration as untimely filed and because it did not present clear evidence of error.

Appellant then filed an appeal with the Board.⁴ By order issued November 19, 2003, the Board granted the Director's October 30, 2003 motion and set aside the April 15 and August 8, 2002 decisions. The Board noted that the Office did not accord proper weight to Dr. Rook's opinion and that the wage-earning capacity determination was based on a medical report more than four years old. The case was remanded for further action.

In a January 13, 2004 report, Dr. Rook noted a deterioration of appellant's gait, balance and upper extremity dexterity. He found her able to work four hours a day in a sedentary capacity. Dr. Rook ordered a January 29, 2004 cervical MRI scan showing advanced disc degeneration at C5-6 causing mild cord flattening and C6-7 disc herniation with central canal stenosis.⁵

On April 5, 2004 the Office referred appellant to Dr. Peter S. Quintero, a Board-certified psychiatrist and neurologist, for a second opinion examination. The medical record and a statement of accepted facts were provided for his review. In a May 27, 2004 report, Dr. Quintero noted diffuse weakness and awkwardness in the upper extremities, a "markedly unsteady gait requiring the use of a wheeled walker for ambulation" and a bilaterally positive Babinski's sign. He diagnosed right trapezial muscle spasm, degenerative arthritis of the cervical spine with multiple bulging discs and cervical stenosis with secondary cervical myelopathy. Dr. Quintero opined that the accepted cervical and trapezial spasms worsened "underlying cervical arthritis, bulging discs and subsequent cervical myelopathy." He opined that appellant's symptoms continued to be related to the accepted injuries. Dr. Quintero found that she could perform full-time sedentary work as a counselor. He allowed very limited repetitive movements of the wrists and elbows. In a July 8, 2004 supplemental report, Dr. Quintero opined that appellant's cervical arthritis was permanently aggravated by work factors, including the position of her head, neck and shoulders, causing a worsening of the bulging cervical discs, progressing to cervical myelopathy. He described the condition as "permanent and irreversible."

In a July 19, 2004 chart note, Dr. Rook noted Dr. Quintero's opinion that appellant could work as a counselor for eight hours a day. Dr. Rook opined that she was "not capable of working more than four hours per day."

The Office reopened the vocational rehabilitation effort. In a July 31, 2004 report, a vocational rehabilitation counselor opined that appellant could obtain entry-level counseling work. The counselor noted that the previously selected marriage and family counselor position

⁴ Docket No. 02-2241.

⁵ March 2, 2004 electrodiagnostic studies showed mild bilateral carpal tunnel syndrome. April 6, 2004 studies showed abnormal evoked potentials at the cauda equina.

required two years post-degree supervised experience, in addition to passing a specialized examination. On August 5, 2004 an Office vocational rehabilitation specialist approved the previously selected positions of clinical counselor and marriage and family counselor, with a market wage of \$11.57 an hour in appellant's commuting area.

In an August 11, 2004 letter, appellant contended that she could not work as a counselor as she had to use a wheeled walker in addition to previous restrictions.

By decision dated September 21, 2004, the Office vacated the April 15 and August 8, 2002 decisions and affirmed the June 1, 2000 decision. It found that Dr. Quintero's opinion represented the weight of the medical evidence. The Office further found that counseling positions remained reasonably available.

In a March 24, 2005 letter, appellant requested reconsideration. She submitted a functional capacity evaluation performed December 14 to 16, 2004 demonstrating subsedentary functioning, with extremely limited upper extremity movement, no repetitive neck movements, no standing or walking for more than five minutes continuously. Appellant required significant accommodations to perform sedentary counseling activities. In a January 25, 2005 letter, Dr. Rook affirmed the accuracy of the functional capacity evaluation. He stated that appellant could not carry anything due to an unstable gait. Dr. Rook agreed that she could sit for up to six hours a day if she changed positions frequently. Standing and walking were "very limited."

By decision dated December 2, 2005, the Office denied modification as the evidence submitted was insufficient to warrant modification. It found that the weight of the medical evidence rested with Dr. Quintero.

In a March 3, 2006 letter, appellant requested reconsideration. She submitted new medical evidence. In a December 29, 2005 report, Dr. Rook opined that the accepted injuries caused chronic pain, limiting appellant to a subsedentary physical demand level. He concluded that she was incapable of engaging in competitive employment. In a March 7, 2006 report, Dr. Rook opined that the accepted injuries caused herniated cervical discs, spinal cord distortion, and cervical and thoracic paraspinal spasm. He found that as appellant functioned only at the subsedentary level, she could not perform the counseling position at the sedentary demand level. Appellant could not maintain static head positioning or effectively use her upper extremities.

By decision dated May 19, 2006, the Office denied modification on the grounds that the evidence submitted was insufficient to warrant modification of the prior decision. It found that Dr. Rook's reports did not establish a worsening of appellant's condition such that she should no longer perform the selected counseling position. The Office further found that the December 2004 functional capacity evaluation showed that appellant could perform the selected position. Therefore, she had not met the requirements for modifying the loss wage-earning capacity.⁶

⁶ Following issuance of the May 19, 2006 decision, appellant submitted additional evidence. The Board may not consider evidence for the first time on appeal that was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c).

LEGAL PRECEDENT -- ISSUE 1

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of benefits.⁷ Under section 8115(a), wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent his or her wage-earning capacity, or if the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his or her usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect wage-earning capacity in his or her disabled condition.⁸

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 of wage rate and availability in the 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*,⁹ will result in the percentage of the employee's loss of wage-earning capacity.¹⁰

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a cervical strain and chronic trapezius strain. After her attending physician found her able to work part time, the Office referred appellant for vocational rehabilitation. In compliance with an Office-approved vocational rehabilitation plan, appellant earned a master's degree in clinical counseling in May 1999. However, she did not secure employment despite her diligent efforts. The vocational rehabilitation counselor explained that appellant could not obtain work in the originally selected position at \$26,000.00 to \$32,000.00 a year as state law changed to require counselors to be licensed, entailing a 2,000- to 3,000-hour supervised post-master's internship.

The Office then identified the selected position of counselor or clinical therapist, DOT No. 045.107.050, as medically and vocationally appropriate. It reduced appellant's wage-loss compensation effective June 1, 2000 based on her ability to perform the selected counseling position. On reconsideration, a vocational rehabilitation counselor noted on July 31, 2004 that the originally selected position of marriage and family counselor required two years of post-degree experience and passing an examination. Appellant had neither the requisite experience

⁷ *David W. Green*, 43 ECAB 883 (1992).

⁸ *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

⁹ 5 ECAB 376 (1953).

¹⁰ *James A. Birt*, 51 ECAB 291 (2000); *Francisco Bermudez*, 51 ECAB 506 (2000).

nor examination. Yet, the Office affirmed or declined to modify the June 1, 2000 determination that she could work as a clinical counselor in decisions dated September 21, 2004, December 2, 2005 and May 19, 2006.

The Board finds that the Office did not properly determine that appellant was capable of obtaining employment as a clinical counselor or therapist. The Office did not address the fact that she lacks the internship and licensure required to successfully compete for and obtain these positions. As noted by the vocational rehabilitation counselor, employers required licensure. Without addressing this element in appellant's vocational background, the Office has failed to establish that she has the appropriate qualifications to compete for the counseling positions available in her commuting area.

The Board notes that the Office's failure to modify appellant's vocational rehabilitation plan after the change in state law is contrary to the goals and purpose of vocational rehabilitation. Vocational training should provide the injured worker with the knowledge and skills needed to perform the occupation selected by the vocational rehabilitation counselor.¹¹ Although appellant earned a master's degree in counseling, she could not work as a counselor as she was not licensed. Accordingly, the Office has failed to establish that the position of clinical counselor represents her wage-earning capacity.

The Board further finds that the Office failed to establish that the selected counseling position was within appellant's medical restrictions. A December 2004 functional capacity evaluation demonstrated that she could work only at a subsecondary level. Dr. Rook, an attending Board-certified physiatrist, confirmed that appellant could function only at a subsecondary level, with significant limitations in upper extremity movements, sitting, standing and walking. However, the selected counseling position required a sedentary demand level, greater than appellant's physical capacities. Also, Dr. Rook opined that she could work only four hours a day, but the selected counseling position and wage data were premised on full-time work.

The Board notes that Dr. Quintero, a Board-certified neurologist and psychiatrist and second opinion physician, opined that appellant could function at a sedentary demand level for eight hours a day. Dr. Quintero's opinion thus, conflicts with that of Dr. Rook regarding her level of functioning and ability to work full time. Section 8123(a) of the Federal Employees' Compensation Act provides that, if there is disagreement between the physician making the examination for the government and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.¹² However, rather than recognizing and resolving this conflict under section 8123(a) of the Act, the Office affirmed or declined to modify the June 1, 2000 reduction of appellant's compensation relying only on Dr. Quintero's opinion. Thus, the Board finds that the Office did not properly develop the medical evidence in determining her ability to perform the selected position.

¹¹ *Ralph A. Nettles*, 54 ECAB 463 (2003)

¹² 5 U.S.C. § 8123(a). *See also John D. Jackson*, 55 ECAB 465 (2004).

The Board finds that the Office failed to establish that the selected counseling position was within appellant's medical or vocational capacities. The Office did not meet its burden of proof to reduce appellant's wage-loss compensation based on her ability to perform the selected position. Therefore, the wage-earning capacity determination must be reversed and the case returned to the Office for prompt payment of all appropriate compensation. The second issue regarding the denial of modification of the wage-earning capacity determination is moot.

CONCLUSION

The Board finds that the Office did not meet its burden of proof in reducing appellant's compensation based on the selected position of clinical counselor. The case is returned to the Office for payment of all appropriate compensation, including retroactive compensation from June 1, 2000 onward. The Board further finds that as the loss of wage-earning capacity determination was improper, the second issue is moot

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 19, 2006 and December 5, 2005 are reversed.

Issued: January 26, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board