

depression with psychotic features. Appellant received wage-loss compensation for total disability for the period August 9, 1997 to November 8, 1998.¹ In May 1999 she was terminated from the employing establishment. The Office advised appellant that her compensation for total disability would resume on June 5, 1999 and she received appropriate compensation benefits.²

By letters dated September 27, October 3 and 7, 2005, the Office referred appellant for a second opinion examination to determine whether she had residuals of the accepted conditions. The Office requested a determination as to whether appellant could perform the duties of an insurance clerk or a data entry clerk. The Office referred appellant to Dr. Charles Graham, a Board-certified orthopedic surgeon. The Office also referred appellant for a second opinion, together with a statement of accepted facts, a set of questions and the medical record, to Dr. Tarakumar Reddy, a Board-certified psychiatrist.

In an October 25, 2005 report, Dr. Reddy noted appellant's history of injury and treatment and conducted an examination. He diagnosed appellant with major depression which he indicated was in partial remission. Dr. Reddy opined that appellant's prognosis was good for depression, with continued treatment. He advised that she was in remission regarding her depressive symptoms with treatment and advised that appellant was capable of working as a clerk full time.

In a report dated October 27, 2005, Dr. Graham reviewed appellant's history of injury and treatment and advised that she continued to have residuals from her November 1993 employment injury, including lost range of motion and some weakness in the extremity. He also noted that appellant could physically perform the position of an insurance clerk or a data entry clerk. Dr. Graham opined that appellant was able to perform work for eight hours per day with restrictions. He completed a work capacity evaluation and provided restrictions which included sitting for no more than six hours per day, walking and standing for no more than two hours, no reaching and no twisting with the right hand. They included no more than two hours of repetitive movements with the right hand, wrists and elbow, and no more than 10 pounds and two hours of pushing, pulling, or lifting. Dr. Graham advised that appellant would require 15-minute breaks every hour.

The Office also received several reports from appellant's treating physician, Dr. Manoochehr Khatami, a Board-certified psychiatrist and neurologist. In a December 12, 2005 report, Dr. Khatami noted that he saw appellant on October 25, 2005 to assure that she was safe and would not harm herself. On March 1, 2006 he noted that appellant was still depressed and her condition remained the same. In a March 29, 2006 progress note, Dr. Khatami indicated that appellant's husband had died and she was grieving. He noted that appellant was depressed and experiencing pain.

On January 6, 2006 the Office referred appellant to a vocational rehabilitation counselor for an initial interview and vocational assessment of her skills and abilities. The rehabilitation

¹ Appellant received a schedule award on November 16, 1998 for eight percent permanent impairment to the right arm. The record reveals that appellant was incarcerated from January 19, 1999 for five months due to bank fraud.

² The record also reflects that, in September 2002, appellant started a trucking company with her mother, which she continued to pursue until May 2004.

counselor met with appellant and began assessing her vocational aptitude. In a March 1, 2006 report, Dr. Khatami assessed appellant's "functional capacity/impairments" as mild. In a memorandum dated April 7, 2006, the Office noted that the vocational rehabilitation counselor recommended that appellant's status be changed to placement with new employers. The Office also indicated that the counselor had identified two jobs that appellant was able to perform that were available in the area. They were identified in the Department of Labor's *Dictionary of Occupational Titles* (DOT), as data entry clerk, DOT No. 203.582-054 earning \$354.80 per week and administrative clerk DOT No. 219.362-010 earning \$365.00 per week.

By letter dated April 7, 2006, the Office advised appellant that she would receive 90 days of job placement assistance to help her reach her goal and return to employment in her new career. Appellant was advised that her compensation would be reduced based on the wage-earning capacity of \$18,980.00 per year, even if she was not employed at that time.

In a June 9, 2006 disability certificate, Dr. Fazila Saddiqi, a Board-certified psychiatrist and treating physician, diagnosed major depressive disorder and opined that appellant could not return to work until June 30, 2006. He provided a June 27, 2006 disability certificate advising that she could not return to work until August 1, 2007.

On July 17, 2006 the Office noted that placement services were authorized for 90 days but that appellant did not secure a job. Through contact with the vocational counselor, the Office determined that the constructed position of an administrative clerk was suitable to appellant's restrictions and reasonably represented her wage-earning capacity. In an April 6, 2006 job classification report, the vocational counselor identified an administrative clerk position listed as DOT No. 219.362-010, and provided information concerning the position descriptions, the availability of the positions within appellant's commuting area and pay ranges within the geographical area, as confirmed by state officials. She determined that this position conformed with appellant's medical restrictions, background, education and experience. The rehabilitation counselor noted that no prior experience was required and that appellant was a high school graduate, had completed three years of college and earned an information technology support professional certification. She also noted that in 2001 appellant was found capable of performing the duties of an office clerk. The rehabilitation counselor documented a reasonable labor market for an administrative clerk position and noted that it was available in sufficient numbers so as to make it reasonably available within appellant's commuting area with a weekly wage of \$365.00 per week. She also provided a job description for the position which was comprised of sedentary requirements related to compiling and maintaining records of business transactions and office activities and clerical duties.

On July 19, 2006 the Office notified appellant that it proposed to reduce her wage-loss compensation as the medical and factual evidence established that she was only partially disabled and had the capacity to earn wages as an administrative clerk at the rate of \$365.00 per week. Appellant was advised that the vocational rehabilitation counselor had found that, based upon her experience, education, medical restrictions and a labor market survey, she was employable as a telephone sales representative. The Office informed appellant that the counselor documented that administrative clerk positions were reasonably available in her commuting area and that the entry pay level for the position was \$365.00 per week. Appellant was advised that the physical requirements of the position were sedentary in nature. The Office found that the

physical requirements were consistent with her work restrictions provided by Drs. Graham and Reddy.

In an August 4, 2006 report, Dr. Saddiqi diagnosed major depressive disorder and advised that appellant could not work. He opined that appellant's estimated return to work date was October 6, 2006.

By letter dated August 15, 2006, appellant alleged that she was totally disabled and unable to work. She also alleged that "no one is hiring, unless you can do warehouse work or maid work cleaning up hotels."

By decision dated August 21, 2006, the Office reduced appellant's compensation based on her ability to work as an administrative clerk, which was found to be medically and vocationally suitable. The Office found that appellant had not submitted sufficient evidence to establish that she was totally disabled for work.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.³

Section 8115(a) of the Federal Employees' Compensation Act,⁴ provides in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent her wage-earning capacity. Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.⁵ If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, her wage-earning capacity is determined with due regard to the nature of her injury, her degree of physical impairment, her usual employment, her age, her qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect her wage-earning capacity in her disabled condition.⁶ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.⁷ The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee

³ *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

⁴ 5 U.S.C. § 8115.

⁵ *Hubert F. Myatt*, 32 ECAB 1994 (1981); *Lee R. Sires*, 23 ECAB 12 (1971).

⁶ *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

⁷ *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

lives.⁸ In determining an employee's wage-earning capacity, the Office may not select a makeshift or odd lot position or one not reasonably available on the open labor market.⁹

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 or to an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor's DOT or otherwise available in the open labor market, that fits that employee's capabilities with regard to her physical limitation, 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.¹⁰ 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.¹¹

In determining an employee's wage-earning capacity based on a position deemed suitable, but not actually held, the Office must consider the degree of physical impairment, including impairments resulting from both injury-related and preexisting conditions, but not impairments resulting from post injury or subsequently acquired conditions. Any incapacity to perform the duties of the selected position resulting from subsequently acquired conditions is immaterial to the loss of wage-earning capacity that can be attributed to the accepted employment injury and for which appellant may receive compensation.¹²

ANALYSIS

The Board finds that the medical evidence establishes that appellant is capable of performing the duties required for the selected position of administrative clerk. The medical evidence includes an October 27, 2005 report from Dr. Graham, a Board-certified orthopedic surgeon to whom the Office referred appellant, noted that appellant had some lost range of motion and some weakness in the extremity, but opined that she could physically perform the position of an insurance clerk or a data entry clerk, for eight hours per day with restrictions. Dr. Graham completed a work capacity evaluation and provided restrictions for appellant.¹³ The duties of the selected position conform with the recommended limitations. Appellant also, based on an Office referral, saw Dr. Reddy, a Board-certified psychiatrist on October 25, 2005. Dr. Reddy determined that appellant had major depression but that it was in partial remission, and her prognosis remained good with continued treatment. He advised that appellant was capable of working as a clerk full time.

⁸ *Id.*

⁹ *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

¹⁰ *Karen L. Lonon-Jones*, 50 ECAB 293, 297 (1999).

¹¹ *Id.* See *Shadrick*, 5 ECAB 376 (1953); see also 20 C.F.R. § 10.403.

¹² *John D. Jackson*, 55 ECAB 465 (2004).

¹³ As previously noted, the restrictions included: sitting for no more than six hours per day, walking and standing for no more than two hours; no reaching or twisting with the right hand; no more than two hours of repetitive movements with the right hand, wrists and elbow; and no more than 10 pounds and two hours of pushing, pulling, or lifting. Dr. Graham advised that appellant would require 15-minute breaks every hour.

Although appellant submitted several reports from Drs. Khatami and Saddiqi, these reports do not support that she was unable to perform the duties of the selected position due to her employment conditions or any preexisting conditions. Dr. Khatami provided numerous treatment notes in which he noted that appellant was depressed and advised that her condition remained the same. He also noted that appellant's depression was related in part, to the death of her husband, and that she was experiencing pain. Dr. Khatami's notes did not attribute total disability due to her accepted depression. Furthermore, he did not provide any opinion finding that appellant could not perform the duties of the offered job. While Dr. Saddiqi opined that appellant had major depressive disorder and could not return to work, he offered no medical reasoning to support his stated conclusion. He did not explain why appellant could not return to work or remained disabled due to residuals of her emotional condition. The Board has long held that medical opinions not containing rationale on causal relation are entitled to diminished probative value.¹⁴ The Board finds that the weight of medical evidence establishes that appellant is no longer totally disabled and can perform the sedentary duties of an administrative clerk.

The Office referred appellant for vocational rehabilitation counseling and on April 6, 2006, the vocational rehabilitation counselor determined that she had identified two jobs that appellant would be capable of performing and which were available in the area. One of these positions was an administrative clerk DOT No. 219.362-010 with weekly earnings of \$365.00. The Office vocational rehabilitation counselor determined that appellant was able to perform the position of an administrative clerk. She provided a job description which was comprised of sedentary requirements comprised of compiling and maintaining records of business records and office activities, as well as clerical duties and determined that the position fell within appellant's medical restrictions. The rehabilitation counselor also noted that appellant was a high school graduate, had completed three years of college and had earned an information technology support professional certification. She also noted that, in 2001, appellant had also been found capable of performing the duties of an office clerk. The rehabilitation counselor noted that the position was available in sufficient numbers so as to make it reasonably available within appellant's commuting area and that the wage of the position was \$365.00 per week.

When placement services did not yield employment for appellant, the Office, after providing appellant notice, reduced appellant's compensation on August 21, 2006 based on her capacity to earn wages as an administrative clerk. The Board finds that the Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment and age and employment qualifications, in determining that the position of administrative clerk represented her wage-earning capacity.¹⁵ The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of administrative clerk and that such a position was reasonably available within the general labor market of appellant's commuting area. The Office therefore properly determined that the position of administrative clerk reflected appellant's wage-earning capacity and, using the *Shadrack* formula,¹⁶ reduced her compensation effective August 21, 2006.

¹⁴ See *Carolyn F. Allen*, 47 ECAB 240 (1995).

¹⁵ *James M. Frasher*, 53 ECAB 794 (2002).

¹⁶ 5 ECAB 376 (1953); see also 20 C.F.R. § 10.403.

Appellant asserted that the only positions in the area were for maids and warehouse workers; however, she has not submitted any evidence to support her assertion and thus, there is no evidence to support that such positions were not reasonably available in the general labor market.

CONCLUSION

The Board finds that the Office met its burden of proof in reducing appellant's compensation based on its determination that the constructed position of an administrative clerk represented her wage-earning capacity effective August 21, 2006.

ORDER

IT IS HEREBY ORDERED THAT the August 21, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 14, 2007
Washington, DC

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

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

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