United States Department of Labor
Employees' Compensation Appeals Board

C.J., Appellant	)	
and	)	
DEPARTMENT OF HOUSING & URBAN DEVELOPMENT, FAIR HOUSE ENFORCEMENT CENTER, Atlanta, GA, Employer	)	**Docket No. 07-598** **Issued: November 1, 2007**

Appearances:
Adam J. Conti, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 27, 2006 appellant, through counsel, filed a timely appeal from a September 22, 2006 decision of an Office of Workers' Compensation Programs' hearing representative who affirmed a wage-earning capacity decision dated December 9, 2005. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether the Office met its burden of proof in reducing appellant's compensation effective December 25, 2005 based on its determination that the constructed position of tourist information assistant represented her wage-earning capacity.

FACTUAL HISTORY

On July 24, 1997 appellant, then a 47-year-old supervisory equal employment specialist, filed an occupational disease claim alleging that in June 1997 she first realized her carpal tunnel syndrome was employment related.[1] The Office accepted the claim for carpal tunnel syndrome and authorized bilateral carpal tunnel release, with right carpal tunnel surgery performed on April 18 and August 1, 2000 and right wrist triangular fibrocartilage complex debridement on January 7, 2003. Appellant stopped work on March 27, 2000. By letter dated June 21, 2000, the Office placed her on the periodic rolls for temporary total disability.

On June 24, 2004 Dr. Joseph J. Hoffman, a second opinion specialist, reported that appellant was capable of working eight hours with permanent restrictions. He diagnosed bilateral carpal tunnel syndrome with residual synovitis and tendinitis. Dr. Hoffman opined that appellant continued to have residuals of her accepted carpal tunnel which limits her activity. He opined that he would be unable to perform any position requiring repetitive movement of the wrists and hands or any heavy lifting. Dr. Hoffman noted that appellant "appears to have significant psychological overlay," which he was not qualified to evaluate, "but would limit her return to her previous employment." The restrictions included no repetitive movements of the wrist or elbows, pushing, pulling and lifting up to 10 pounds for eight hours, up to two hours of reaching above the shoulders, up to four hours of reaching and no climbing. Dr. Hoffman noted no limitation as to operating a motor vehicle for eight hours a day.

On April 21, 2005 Steven Marrinson, Ph.D, a treating clinical psychologist, diagnosed severe major depressive incident and opined that appellant was temporarily totally disabled. He reported that she "had a severe relapse of her depressive symptoms" following receipt of correspondence from the Office. Dr. Marrinson stated that appellant was unable to perform the duties of the selected positions of telephone sales representative or reservation agent due to her psychiatric condition.

On April 21, 2005 Dr. Frank R. Joseph, an attending Board-certified orthopedic surgeon, reviewed Dr. Hoffman's report and had "no major disagreement" with his opinion. A physical examination revealed positive bilateral Phalen's test and positive left side Tinel's sign and that appellant's "[h]ands are well healed." On September 15, 2005 Dr. Joseph indicated that appellant was capable of working with restrictions which included no overtime, no lifting more than 10 pounds and limited use of the upper extremities.

Efforts to find a suitable position for appellant at the employing establishment were unsuccessful. On October 7, 2004 the Office referred her for vocational rehabilitation counseling. The vocational counselor worked with appellant, but was unsuccessful in obtaining employment.

In a July 14, 2005 report, Yvonne B. Parker, the vocational counselor, listed appellant's functional limitations as no repetitive movements of the wrist or hands, no heavy lifting more than 15 pounds on a repetitive basis. She found a position within appellant's medical and vocational capacities as a tourist information assistant, Department of Labor, *Dictionary of*

[1] Appellant was removed from the employing establishment effective July 26, 2003.

Occupational Titles (DOT) No. 237.367-050. Ms. Parker noted that this position was within the sedentary range of activities which required occasional lifting of up to 10 pounds. Physical duties included no climbing, fingering, handling, reaching, crawling, kneeling, stooping or balancing. Duties of the position included greeting tourists on the telephone and in person, providing information on tourist attractions and answering questions, assisting in planning itineraries for tourists, advising tourists of traffic regulations, selling hunting and fishing licenses, providing information on hunting, camping and fishing regulations and composing letters responding to inquiries, maintaining sales, personnel license and other records and contacting hotel, resort operators and motels by telephone or letter to obtain advertising literature. Ms. Parker noted that appellant's previous work experience would meet the 30 days to 3 months specific vocational preparation. She listed the average weekly wage earnings of a tourist information assistant as $8.50 per hour. Ms. Parker noted that the position was available in sufficient numbers so as to make it reasonably available to appellant within her commuting area.

In a letter dated July 18, 2005, the Office found that the plan developed for appellant's return to work as a tourist information assistant was within her physical limitations. Appellant was informed that she would receive 90 days of assistance to locate a position and at the end of this period, her compensation would be reduced.

In a letter dated July 27, 2005, appellant contended that she was unable to perform the position of tourist information assistant. She noted that she was unable to drive to work every day as driving aggravated her condition.

In a September 15, 2005 report, Dr. Joseph diagnosed work-related depression, bilateral carpal tunnel release, left cubital tunnel syndrome and right wrist triangular fibrocartilage complex debridement. A physical examination revealed positive Tinel's sign on the right, well healed hands and bilateral trace tenderness and swelling. He indicated that appellant had permanent work restrictions of no lifting more than 10 pounds, no overtime and limited use of both upper extremities.

On October 28, 2005 the vocational rehabilitation file for appellant was closed following unsuccessful placement. The Office's rehabilitation specialist noted that it had been confirmed with the rehabilitation counselor that the position of tourist information assistant, with an annual salary of $17,200.00, was sufficiently available in appellant's commuting area.

On November 8, 2005 the Office proposed a reduction in appellant's wage-loss compensation based on her capacity to earn wages as a tourist information assistant at $330.77 per week. The constructed position was based upon her experience, education, medical restrictions and a labor market study. Appellant was qualified for the position and sufficient positions were reasonably available in her commuting area. Utilizing the wage-earning capacity computation Form CA-816, the Office determined that appellant's compensation would be reduced to $3,008.00 every four weeks. It indicated that her salary, when her disability began was $1,310.15 per week; that the current adjusted pay rate for appellant's job on the date of injury was $1,553.12; and that she was capable of earning $330.77 per week, the rate of the tourist information assistant. The Office determined that appellant had a 21 percent wage-earning capacity, which resulted in an adjusted wage-earning capacity of $275.13. It determined

that she had a loss of wage-earning capacity of $1,053.02. The Office concluded that, based on a 66 and 2/3 percent rate, her new compensation rate was $690.01 per week (adjusted by cost-of-living adjustments to $752.00). It requested that appellant submit additional evidence or argument within 30 days if she disagreed with the proposed action.

In a letter dated December 1, 2005, appellant's counsel disagreed with the proposal to reduce her compensation and requested an additional 30 days to submit evidence.

By decision dated December 9, 2005, the Office finalized the reduction in appellant's compensation effective December 25, 2005 based on her ability to earn wages as a tourist information assistant in the amount of $330.77 per week.

In a letter dated December 11, 2005, appellant noted that she has been treated by Dr. Marrinson for anxiety and severe depressive episodes, which the Office had ignored. She alleged that she received no vocational rehabilitation and was unable to use a computer or typewriter. Appellant also alleged that her condition was aggravated by daily driving. She contended that her permanent restrictions preclude any repetitive upper extremity, wrist or arm movement and she has pain and problems writing.

On December 16 and 19, 2005 appellant requested a hearing before an Office hearing representative, which was held on June 29, 2006.

On December 22, 2005 Dr. Joseph noted that appellant's permanent work restrictions remained unchanged. In a March 16, 2006 report, he opined that appellant was totally disabled. Dr. Joseph diagnosed work-related depression, bilateral carpal tunnel release, left cubital tunnel syndrome and right wrist triangular fibrocartilage complex debridement. A physical examination revealed bilateral negative Phalen's test, left cubital canal positive Tinel's sign and well-healed previous incisions. Subjective complaints included, "multiple functional complaints[,] [p]ersistent depression" and increased bilateral cubital tunnel complaints.

In a March 31, 2006 vocational rehabilitation closure report, Ms. Parker noted the efforts undertaken for appellant's vocational rehabilitation. She stated that she had contacted the Georgia Department of Labor which verified that the position of tourist information assistant was readily available in appellant's commuting area.

Subsequent to the June 29, 2006 hearing, appellant submitted additional evidence. On April 11, 2005 Dr. Marrinson opined that appellant was totally disabled due to "unresolved issues regarding her employment" at the employing establishment, "which led her to complete psychiatric decompensation several years ago." He opined that she was unable to return to work with the employing establishment at this time.

In a January 25, 2006 report, Dr. Joseph stated that he had been treating appellant since 2001 for a 1996 employment injury and she has permanent restrictions due to the injury.

In a June 15, 2006 report, Dr. Joseph diagnosed work-related depression, bilateral carpal tunnel release, left cubital tunnel syndrome and right wrist triangular fibrocartilage complex debridement. He stated that he had reviewed the position of tourist information assistant and that the position "does not appear appropriate for [appellant] and is not approved."

By decision dated September 22, 2006, the Office hearing representative affirmed the reduction of appellant's wage-loss compensation based upon the constructed position of tourist information assistant.[2] He found that appellant's depression was a subsequently acquired condition and was immaterial to the determination of whether she was capable of performing the position of constructed position of tourist information assistant.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[3] An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.[4]

Section 8115 of the Act[5] and Office regulations provide that wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity or 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, usual employment, age, qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect the wage-earning capacity in his or her disabled condition.[6]

The Office must initially determine a claimant s medical condition and work restrictions before selecting an appropriate position that reflects his or her wage-earning capacity. The medical evidence upon which the Office relies must provide a detailed description of the condition.[7] Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.[8]

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, *Dictionary of Occupational Titles* or otherwise available in the open market, that fits that employee's

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[2] The Board notes that following the September 22, 2006 decision by the Office hearing representative, the Office received additional evidence. However, the Board may not consider new evidence on appeal. *See* 20 C.F.R. §§ 501.2(c); *Donald R. Gervasi*, 57 ECAB ___ (Docket No. 05-1622, issued December 21, 2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

[3] *T.T.*, 58 ECAB ___ (Docket No. 06-1674, issued January 29, 2007); *James M. Frasher*, 53 ECAB 794 (2002).

[4] 20 C.F.R. §§ 10.402, 10.403; *John D. Jackson*, 55 ECAB 465 (2004).

[5] 5 U.S.C. § 8115.

[6] 5 U.S.C. § 8115; 20 C.F.R. § 10.520; *John D. Jackson*, *supra* note 4.

[7] *William H. Woods*, 51 ECAB 619 (2000).

[8] *John D. Jackson*, *supra* note 4.

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 open labor market should be made through contact with the state employment service or other applicable service.[9] Finally, application of the principles set forth in *Albert C. Shadrick*[10] 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 impairment results from both injury-related and preexisting conditions, but not impairments resulting from post injury or subsequently acquired conditions.[12] 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.[13]

ANALYSIS

The Board finds that the Office properly determined that the constructed position of tourist information assistant represents appellant's wage-earning capacity. The Office adjusted her compensation on the grounds that she was capable of performing the duties of the constructed tourist information assistant.

The August 17, 2004 report and work capacity evaluation by Dr. Hoffman, a second opinion physician, and Dr. Joseph's April 21, 2005 report established that appellant was no longer totally disabled and could perform sedentary work. As appellant was unable to obtain employment through vocational rehabilitation efforts, the Office determined that the constructed position of tourist information assistant represented her wage-earning capacity. The constructed position was identified as sedentary and did not require reaching as a required function of the position. It conformed to the restrictions listed by both Drs. Hoffman and Joseph. The weight of the medical evidence is represented by the August 17, 2004 report by Dr. Hoffman and the reports dated April 21 and September 15, 2005 by Dr. Joseph, which found that appellant could perform sedentary work.

Other evidence received prior to the reduction of compensation does not establish that the constructed tourist information assistant position was not medically or vocationally suitable. In both his reports, Dr. Marrinson indicated that appellant was totally disabled due to her severe depression. The Board notes that the record establishes that appellant's psychiatric condition was acquired subsequent to the accepted carpal tunnel syndrome. As previously noted, any incapacity to perform the duties of the selected position resulting from subsequently acquired

[9] *James M. Frasher*, *supra* note 3.

[10] 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.403.

[11] *J.W.*, 58 ECAB ___ (Docket No. 06-1874, issued March 22, 2007).

[12] *Sherman Preston*, 56 ECAB ___ (Docket No. 05-721, issued June 20, 2005).

[13] *John D. Jackson*, *supra* note 4.

positions is immaterial to the loss of wage-earning capacity which can be attributed to the accepted employment injury.[14]

Subsequent to the reduction of her compensation appellant submitted reports dated December 22, 2005, January 25, March 16 and June 15, 2006 by Dr. Joseph. The December 22, 2005 and January 25, 2006 reports indicate that appellant has permanent work restrictions. These reports do not support appellant's contention that she was incapable of performing the position of tourist information assistant. In his March 16, 2006 report, Dr. Joseph concluded that appellant was totally disabled. On June 15, 2006 he stated that he had reviewed the position of tourist information assistant and concluded that it was not approved as the position was inappropriate for appellant. Dr. Joseph provided no rationale in either the March 16 or June 15, 2006 report explaining why appellant was totally disabled and, thus, they are entitled to little probative value.[15] He did not indicate whether he reviewed a description of the constructed tourist information assistant beyond noting that it was not approved. Further, he did not explain why the accepted employment-related condition prevented appellant from performing the duties of the constructed position. An explanation as the cause of his total disability is important as the record contains evidence of a subsequently acquired condition.[16]

The medical evidence, therefore, established that appellant was physically capable of performing the tourist information assistant position.

Appellant's vocational rehabilitation counselor determined that she was able to perform the position of tourist information assistant. She opined that, based on her experience, education, medical restrictions and a labor market survey, appellant was well qualified for the position of tourist information assistant and that sufficient positions were reasonably available in her commuting area.

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 tourist information assistant position represented appellant's wage-earning capacity.[17] The weight of the evidence establishes that appellant had the requisite physical ability, skill and experience to perform the duties of tourist information assistant and that such a position was reasonably available within the general labor market of her commuting area.

The Office properly determined appellant's loss of wage-earning capacity in accordance with the formula developed in the *Shadrick* decision[18] and codified at 20 C.F.R. § 10.403. It calculates an employee's wage-earning capacity in terms of percentage by dividing the

[14] *See John D. Jackson*, *supra* note 4.

[15] *Richard A. Neidert*, 57 ECAB ___ (Docket No. 05-1330, issued March 10, 2006).

[16] Any incapacity to perform the duties of a selected position resulting from subsequently acquired conditions are immaterial to the loss of wage-earning capacity that can be attributed to the accepted employment injury and for which appellant may receive compensation. *See John D. Jackson*, *supra* note 4.

[17] *Loni J. Cleveland*, 52 ECAB 171 (2000).

[18] *Albert C. Shadrick*, *supra* note 10.

employee's earnings by the current pay rate for the date-of-injury job.[19] The Office noted that appellant's salary when her disability began was $1,310.15 per week; that the current adjusted pay rate for her job on the date of injury was $1,553.12 and that she was currently capable of earning $330.77 per week, the rate of the tourist information assistant. It then determined that she had a 21 percent wage-earning capacity, which resulted in an adjusted wage-earning capacity of $275.13. The Office then determined that appellant had a loss of wage-earning capacity of $1,035.02 per week. It concluded that, based on a 66 and 2/3 percent rate, appellant's new compensation rate was $690.01 per week (adjusted by cost-of-living adjustments to $752.00). The Board finds that the Office correctly applied the *Shadrick* formula and, therefore, properly found that the position of tourist information assistant reflected appellant's wage-earning capacity effective December 25, 2005.[20]

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation effective October 30, 2005 based on its determination that the constructed position of tourist information assistant represented her wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 22, 2006 is affirmed.

Issued: November 1, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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

[19] 20 C.F.R. § 10.403(c).

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