United States Department of Labor
Employees' Compensation Appeals Board

K.M., Appellant	)	
and	)	**Docket No. 07-2276**
	)	**Issued: May 20, 2008**
DEPARTMENT OF AGRICULTURE, PULASKI COUNTY COOPERATIVE EXTENSION SERVICE, Little Rock, AR, Employer	)	

Appearances:
James W. Stanley, Jr., 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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On September 5, 2007 appellant, through her attorney, filed a timely appeal of a July 16, 2007 merit decision of an Office of Workers' Compensation Programs' hearing representative, which affirmed the finding that the constructed position of customer service representative represented her wage-earning capacity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly reduced appellant's compensation effective August 21, 2006 based on its determination that the constructed position of customer service representative represented her wage-earning capacity.

FACTUAL HISTORY

On September 24, 1996 appellant, then a 46-year-old program assistant, filed a traumatic injury claim alleging that on September 20, 1996 she turned her ankle and fell on her knees as

she got out of her van and stepped up onto the curb to go to a staff meeting. By letter dated February 28, 1997, the Office accepted the claim for right medial meniscal tear and authorized arthroscopic surgery. Appellant stopped work on May 9, 1997. The Office subsequently accepted the claim for aggravation of degenerative arthritis of the right knee and Fulkerson anterior tubercle of the right knee.

The Office received a March 17, 2004 medical report of Dr. Stephen Hudson, an attending Board-certified orthopedic surgeon, which stated that appellant suffered from degenerative joint disease of the right knee.

By letter dated April 5, 2004, the Office requested that Dr. Hudson provide an opinion as to whether appellant had any residuals of her employment-related injuries and restrictions and whether she could return to her date-of-injury position. In a work capacity evaluation dated June 10, 2004, Dr. Hudson stated that although appellant could not perform her regular work duties, she could work eight hours per day with restrictions. She could sit eight hours per day and walk and stand intermittently four hours per day. Appellant could not twist, bend, stoop, squat, kneel or climb. She could push, pull and lift up to 10 pounds.

On July 1, 2004 the Office referred appellant to a vocational rehabilitation counselor based on Dr. Hudson's June 10, 2004 opinion.

The Office received a July 15, 2004 report of Dr. Joseph K. Bissett, an attending Board-certified internist specializing in cardiovascular disease. Dr. Bissett stated that appellant was under his care for heart disease with atrial fibrillation. He had not released her to return to work and stated that she would not be able to participate in vocational rehabilitation at that time.

By letter dated July 28, 2004, appellant's attorney advised the Office that he had instructed her to participate in the initial vocational assessment but, this did not mean that she would participate in vocational rehabilitation.[1] In an August 12, 2004 letter, the Office advised counsel that there was no rationalized medical evidence of record establishing that appellant's cardiac condition prevented her from performing any type of sedentary work.

By letter dated August 19, 2004, the Office requested that Dr. Bissett provide a medical opinion which addressed appellant's heart condition and her ability to perform sedentary work.

On August 23, 2004 the Office received Dr. Hudson's August 16, 2004 report which stated that appellant needed a total knee replacement. He noted that the surgery could not be scheduled until it was approved by her cardiologist.

The Office received an August 24, 2004 report of Dr. Richard Harper, an attending ophthalmologist. Dr. Harper stated that appellant had cataracts. She had undergone surgery in the right eye on April 14, 2004 and that her visual acuity was 20/20 in the right eye and 20/25 in the left eye. Dr. Harper opined that appellant's cataracts condition could be related to her steroid use.

[1] Appellant first met with the vocational rehabilitation counselor on July 30, 2004.

On August 30, 2004 the Office received Dr. Bissett's August 19, 2004 report. Dr. Bissett noted appellant's family history of cardiomyopathy which she had been diagnosed as having along with multiple episodes of atrial fibrillation. He opined that she was permanently and totally disabled due to cardiomyopathy. Dr. Bissett stated that she could develop atrial fibrillation at any time, hypotension and syncope.

On March 15, 2006 the vocational rehabilitation counselor identified the position of customer service representative as being within appellant's physical limitations, vocational skills and geographical area.[2] The customer service representative position, as it appeared in the Department of Labor, *Dictionary of Occupational Titles* (DOT), was classified as a sedentary position. The position required interviewing applicants and recording interview information into a computer for water, gas, electric, telephone or cable television system service. It further required talks with customers by telephone or in person and receipt of orders for installations, turn-on, discontinuance or change in service. The position required filling out contract forms, determining charges for service requested, collecting deposits, preparing change of address records and issuing discontinuance orders using a computer. The solicitation of the sale of new or additional services, adjustment of complaints concerning billing or service rendered and referral of complaints of service failures such as, low voltage or low pressure to designated departments for investigation were permitted. The position also permitted visits to customers at their place of residence to investigate conditions preventing completion of service-connection orders and to obtain contract and deposit when service was being used without a contract. Discussion of cable television equipment operation with a customer over the telephone to explain equipment usage and to troubleshoot equipment problems was allowed. The physical requirements included sedentary strength that involved lifting up to 10 pounds occasionally, reaching, handling, feeling and near acuity often, fingering occasionally and talking and hearing constantly. No climbing, balancing, stooping, kneeling, crouching, crawling, tasting/smelling, far acuity, depth perception, accommodation, color vision and field of vision were required. The vocational rehabilitation counselor found that appellant's prior work experience and college degree would meet the five to six months specific vocational preparation. The vocational rehabilitation counselor listed the average weekly earnings of a customer service representative as $12.47 per hour or $498.80 per week. She stated that the position was available in sufficient numbers on a full-time basis and in appellant's commuting area based on a labor market survey.

In a July 19, 2006 notice, the Office advised appellant that it proposed to reduce her compensation because the medical and factual evidence of record established that she was no longer totally disabled. The Office found that she had the capacity to earn the wages of a customer service representative. Based on the formula developed in *Albert C. Shadrick*,[3] the Office determined that appellant's compensation would be reduced to $498.80 every four weeks. It indicated that appellant's salary on the date her disability began effective March 21, 1997, was $303.60 per week; that the current adjusted pay rate for her job on the date of injury was $519.24 per week effective March 16, 2006 and that she was currently capable of earning $498.80 per week, the pay rate of a customer service representative. The Office determined that appellant

[2] The vocational rehabilitation counselor also identified the position of production coordinator as being within appellant's physical limitations, vocational skills and geographical area.

[3] 5 ECAB 376 (1953).

had a 96 percent wage-earning capacity, which resulted in an adjusted wage-earning capacity of $291.46 per week. It determined that she had a loss of wage-earning capacity of $12.14 per week. The Office concluded that, based upon a three-fourths compensation rate, appellant's new compensation rate was $9.11 per week, increased by cost-of-living adjustments to $44.00 per week. Appellant was provided 30 days to submit additional evidence or argument in support of any objection to the proposed reduction.

In a July 23, 2006 letter, appellant disagreed with the proposed action, stating that she did not have the vocational skills to perform the duties of a customer service representative, that none of the employers she contacted could accommodate her restrictions and that she was totally disabled due to her right ankle and heart conditions.

In a July 24, 2006 report, Dr. Bissett reiterated his prior diagnosis and opinion regarding appellant's disability. He stated that she had periods of irregular rhythm with increased heart rate. Appellant also experienced continuing pain and difficulty with weight bearing on her right knee and ankle. She was currently walking in a cast and had been advised to undergo total knee replacement. Dr. Bissett noted the September 1996 employment-related right knee condition and stated that the limitation of motion and discomfort resulted in traumatic arthropathy.

By decision dated August 21, 2006, the Office finalized the reduction of appellant's compensation benefits effective that date. In a letter dated August 27, 2006 appellant, through her attorney, requested an oral hearing before an Office hearing representative.

Appellant submitted Dr. Hudson's reports covering intermittent dates from May 25, 2006 to April 23, 2007, which stated that she had a healing lateral malleolus fracture, post-degenerative arthritis and laxity of the right knee. A February 5, 2007 report of Dr. Darpan Bansal, a Board-certified internist, stated that appellant had atrial fibrillation that was possibly secondary to atrioventricular node reentry tachycardia (AVNRT).

At a May 5, 2007 telephonic hearing, appellant described her work duties as a program assistant. She also testified that she had a history of an irregular heart beat since approximately 1988. As part of appellant's vocational rehabilitation counseling, she enrolled in computer classes but, three to four weeks later, she underwent additional surgery on her right knee. She only received credit for one class in medical terminology. Appellant had been advised by Dr. Hudson and Dr. Bissett to refrain from driving. Dr. Hudson recommended a total knee replacement but Dr. Bissett would not provide authorization for this surgery. Appellant described her symptoms related to her right knee and ankle and heart. She testified that she could not perform the duties of the stressful customer service representative position due to her cardiac condition.

By decision dated July 17, 2007, an Office hearing representative affirmed the August 21, 2006 reduction of appellant's wage-loss compensation based upon the constructed position of customer service representative. The hearing representative found that no evidence had been submitted establishing that she suffered from cardiac conditions prior to her September 20, 1996 accepted employment injuries. The hearing representative also found that the Social Security Administration's decision finding that appellant was totally disabled was immaterial.

LEGAL PRECEDENT

Once the Office has made a determination that an employee 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.[4]

Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent her wage-earning capacity. 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 injuries and the degree of physical impairment, her usual employment, the employee's age and vocational qualifications and the availability of suitable employment.[5] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[6] 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 lives.[7]

After the Office makes a medical determination of partial disability and of special work restrictions, it may refer the employee's case to an Office wage-earning capacity specialist for selection of a position listed in the DOT or otherwise available in the open market, that fits the employee's capabilities with regard to her physical limitations, education, age and prior experience. Once this selection is made, determination of wage rate and availability in the open labor market should be made through contact with the state employment services or other applicable services.[8] Finally, application of the principles set forth in *Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.[9] This has been codified by the regulations in 20 C.F.R. § 10.403(c).

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.[10] Any incapacity to perform the duties of the selected position resulting from subsequently acquired conditions is

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[4] *William H. Woods*, 51 ECAB 619 (2000); *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

[5] *Samuel J. Chavez*, 44 ECAB 431 (1993).

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

[7] *Id.* The commuting area is to be determined by the employee's ability to get to and from the work site. *See Glen L. Sinclair*, 36 ECAB 664, 669 (1985).

[8] *Karen L. Lonon-Jones*, 50 ECAB 293, 297 (1999).

[9] *See William H. Woods*, *supra* note 4; *Albert C. Shadrick*, *supra* note 3.

[10] *Sherman Preston*, 56 ECAB 607 (2005).

immaterial to the loss of wage-earning capacity that can be attributed to the accepted employment injury and for which appellant may receive compensation.[11]

ANALYSIS

Appellant received compensation for total disability due to her right medial meniscal tear, aggravation of degenerative arthritis of the right knee and Fulkerson anterior tubercle of the right knee. She stopped work on May 9, 1997. In finding that appellant was physically capable of performing the duties of a customer service representative, as of August 21, 2006, the Office relied on the June 10, 2004 work capacity evaluation of Dr. Hudson, an attending physician, who found that, although appellant was incapable of performing her regular duties, she could work eight hours per day with restrictions. Dr. Hudson stated that appellant could sit eight hours per day and walk and stand intermittently four hours per day. He restricted her from twisting, bending, stooping, squatting, kneeling and climbing. Appellant, could push, pull and lift up to 10 pounds.

The Board finds that Dr. Hudson's work capacity evaluation establishes that appellant was no longer totally disabled and could perform sedentary work with restrictions. The constructed position was identified as sedentary and did not require twisting, bending, stooping, squatting, kneeling, climbing and pushing, pulling and lifting more than 10 pounds. The weight of the medical evidence is represented by the June 10, 2004 work capacity evaluation of Dr. Hudson which found that appellant could perform sedentary work.

Other evidence received prior to the reduction of compensation does not establish that the constructed customer service representative position was not medically or vocationally suitable. Dr. Bissett's reports stated that appellant was totally disabled for work due to cardiomyopathy with artrial fibrillation. Dr. Harper opined that appellant's cataracts condition was possibly related to her steroid use. The Board notes that appellant's claim has not been accepted for a heart or cataracts condition and is thus her burden of proof to establish causal relationship. Neither Dr. Bissett nor Dr. Harper addressed the issue of whether the diagnosed heart and eye conditions were caused or aggravated by the September 20, 1996 employment-related injuries. As previously noted, any incapacity to perform the duties of the selected position resulting from subsequently acquired conditions is immaterial to the loss of wage-earning capacity which can be attributed to the accepted employment injury.[12]

Subsequent to the reduction of her compensation appellant submitted Dr. Bansal's February 5, 2007 report, which found that her atrial fibrillation was possibly secondary to AVNRT. As previously stated, appellant's claim has not been accepted for a heart condition and Dr. Bansal's report fails to address whether the accepted employment injury caused or aggravated her heart condition. Consequently, his report is immaterial to the loss of wage-earning capacity which can be attributed to the accepted employment injury.[13] The Board

[11] *John D. Jackson*, 55 ECAB 465 (2004).

[12] *Id.*

[13] *Id.*

finds that the medical evidence established that appellant was physically capable of performing the customer service representative position.

The vocational rehabilitation counselor determined that appellant was able to perform the position of customer service representative. She opined that, based on her experience, education and a labor market survey, appellant was well qualified for the position of customer service representative 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 customer service representative position represented her wage-earning capacity.[14] The weight of the evidence establishes that appellant had the requisite physical ability, skill and experience to perform the duties of customer service representative and that such a position was reasonably available within the general labor market of her commuting area.

The Board finds that the Office properly determined appellant's loss of wage-earning capacity in accordance with the formula developed in *Shadrick*[15] and codified at section 10.403 of the Office's regulations.[16] The Office indicated that appellant's salary when her disability began was $303.60 per week; that the current adjusted pay rate for her job on the date of injury was $519.24 and that she was currently capable of earning $498.80 per week, the rate of the customer service representative. It then determined that she had a 96 percent wage-earning capacity, which resulted in an adjusted wage-earning capacity of $291.46. The Office then determined that appellant had a loss of wage-earning capacity of $12.14 per week. It concluded that, based on a three-fourths rate, appellant's new compensation rate was $9.11 per week (adjusted by cost-of-living adjustments to $44.00). The Board finds that the Office correctly applied the *Shadrick* formula and, therefore, properly found that the position of customer service representative reflected appellant's wage-earning capacity effective August 21, 2006.[17]

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation effective August 21, 2006 based on its determination that the constructed position of customer service representative represented her wage-earning capacity.

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

[15] *See Albert C. Shadrick, supra* note 3.

[16] 20 C.F.R. § 10.403.

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

ORDER

IT IS HEREBY ORDERED THAT the July 16, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 20, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board