United States Department of Labor
Employees' Compensation Appeals Board

M.D., Appellant	)	
and	)	**Docket No. 08-1543**
	)	**Issued: August 4, 2009**
DEPARTMENT OF AGRICULTURE, FOOD SAFETY INSPECTION SERVICE, Moorefield, WV, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 6, 2008 appellant, through her attorney, filed a timely appeal of the November 26, 2007 and April 18, 2008 merit decisions of the Office of Workers' Compensation Programs, reducing her compensation based on a constructed wage-earning capacity determination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this appeal.

ISSUE

The issue is whether the Office properly reduced appellant's compensation effective November 25, 2007 based on its determination that the constructed position of retail sales clerk represented her wage-earning capacity.

FACTUAL HISTORY

On September 13, 2000 appellant, then a 29-year-old poultry inspector, filed an occupational disease claim alleging that on July 2, 2000 she first became aware of tendinitis in her left shoulder. On September 13, 2000 she first realized that her shoulder condition was

caused by using both hands to inspect chickens. Appellant was placed off work for four weeks by an attending physician. When she returned to work, her left shoulder condition worsened. Appellant stopped work on July 3, 2000 and returned to work on July 31, 2000. The Office accepted her claim for left shoulder sprain and impingement.

Appellant worked intermittently until October 26, 2001 when she stopped work for an authorized arthroscopy with acromioplasty. The Office paid her compensation. On January 27, 2003 appellant underwent a second authorized left shoulder acromioplasty. On May 28, 2003 Dr. Bernard Hirsch, an attending Board-certified orthopedic surgeon, released her to work eight hours per day. He restricted appellant from lifting more than 15 pounds above the waist and performing repetitive motion of the wrist and elbow.

On June 16, 2003 the Office referred appellant to a vocational rehabilitation counselor. Appellant underwent short-term training in medical office administration, but subsequently changed to computer technology training.

In a September 3, 2003 treatment note, Dr. Hirsch stated that appellant had reached maximum medical improvement. On September 22, 2003 he restricted her from lifting more than 30 pounds and extensive overhead or outstretched arm use.

On August 1, 2005 appellant returned to part-time work, 20 hours per week as a bookstore clerk at Kent State University in Ohio with wages of $8.55 per hour.[1] On January 20, 2006 the Office closed her vocational rehabilitation case file on the grounds that she had returned to part-time work, 22 hours per week with wages of $8.70 per hour.

On April 25, 2007 the Office referred appellant, together with the case record, a statement of accepted facts and a list of questions to be addressed, to Dr. Karl V. Metz, a Board-certified orthopedic surgeon, for a second opinion medical examination. In a June 19, 2007 medical report, Dr. Metz reviewed a history of appellant's employment injuries and medical treatment. He noted her part-time employment as a bookstore clerk, 25 to 30 hours per week. Dr. Metz also noted appellant's complaints of popping and grinding in the left shoulder. Appellant related that weather changes caused pain. She experienced weakness in her left shoulder when frequently using it, difficulty with pushing, pulling, holding and driving and mild discomfort when she attempted to lie on her shoulder. On physical examination, Dr. Metz reported diminished range of motion of the left shoulder. He found some discoloration, swelling and increased warmth about the left shoulder. Dr. Metz noted arthroscopy scars and an 8.5 centimeter anterior sagittal operative scar. He also noted appellant's complaints of tenderness with palpation over the acromioclavicular (AC) interval, the anterior and lateral subacromial bursa and the AC joint and slight tenderness over the bicipital groove. Dr. Metz found no obvious deformity of the left clavicle compared to the right. Circumferential measurements of the arms were equal. Impingement maneuvers were moderately painful. There was no instability. Motor testing was graded at 5/5. Posterior elevation of the left thumb was to the level of the T9 spinous process and on the right to T7. Water pour testing was negative.

[1] The record reveals that, following the completion of appellant's computer/clerical training on April 22, 2005, she experienced difficulty in finding a job in this field.

Dr. Metz stated that a September 13, 2000 x-ray revealed a normal left shoulder. A March 6, 2002 x-ray of the left shoulder was unremarkable. A September 21, 2001 magnetic resonance imaging (MRI) scan of the left shoulder demonstrated degenerative changes, a possible labral tear and tendonosis of the surpaspinatus tendon. Dr. Metz diagnosed a sprain and impingement syndrome of the left shoulder. He stated that, at the time of surgery, appellant sustained a partial tear of the left rotator cuff. Dr. Metz opined that her ongoing positional discomfort of the left shoulder, mild limitation of range of motion and residual mild chronic rotator cuff tendonosis were secondary to the accepted employment-related conditions. He stated that appellant did not suffer from a preexisting left shoulder condition. Dr. Metz opined that she was not capable of returning to work as a poultry inspector due to the repetitive nature and positioning of the upper extremities which were required by the position; however, she could perform the duties of a retail sales clerk 40 hours per week. In a June 19, 2007 work capacity evaluation, Dr. Metz advised that appellant had reached maximum medical improvement and that she could work eight hours per day with restrictions. He restricted her to sitting, walking and standing six to eight hours per day, reaching below shoulder level one to three hours per day and pushing, pulling and lifting up to 20 pounds. Appellant could not reach above the shoulder or climb. Dr. Metz recommended that she take breaks.

On August 1, 2007 the Office reopened appellant's vocational rehabilitation file. On August 6, 2007 a vocational rehabilitation counselor identified the position of retail sales clerk as being within her physical limitations, vocational skills and geographical area. The retail sales clerk position, as listed in the Department of Labor, *Dictionary of Occupational Titles* (DOT), was classified as a sedentary light position. The physical requirements included lifting up to 20 pounds occasionally and 10 pounds frequently, occasional stooping and crouching, and frequent reaching, handling, fingering and talking. No climbing, balancing, kneeling or crawling was required. The vocational rehabilitation counselor found that appellant's performance on vocational testing and her two years of training in preparation for entry into the private sector met the specific vocational preparation. He listed the average weekly earnings of a retail sales clerk as $418.80 per week. The vocational rehabilitation counselor determined that the position was available in sufficient numbers on a full-time basis in appellant's commuting area based on a labor market survey.

In an October 22, 2007 notice, the Office advised appellant that it proposed to reduce her wage-loss compensation because the medical and factual evidence of record established that she was no longer totally disabled. It found that she had the capacity to earn the wages of a retail sales clerk. Appellant was provided 30 days to submit additional evidence or argument in support of any objection to the proposed reduction. She did not respond within the allotted time.

By decision dated November 26, 2007, the Office reduced appellant's compensation benefits effective November 25, 2007. Based on the formula in *Albert C. Shadrick*,[2] the Office determined that her compensation would be reduced to $429.36 every four weeks. Appellant's salary on the date her disability began on July 2, 2000 was $504.65 a week and the current adjusted pay rate for her job on the date of injury was $638.29 a week as of September 13, 2007.

[2] 5 ECAB 376 (1953).

She was found currently capable of earning $418.18 per week,[3] the pay rate of a retail sales clerk. The Office determined that appellant had a 66 percent wage-earning capacity or 34 percent loss of wage-earning capacity, which resulted in an adjusted wage-earning capacity of $333.07 per week, or a loss of wage-earning capacity of $171.58 per week. The Office concluded that, based upon a three-fourths compensation rate, appellant's new compensation rate was $128.69 per week, increased by cost-of-living adjustments to $149.50 per week.

In a letter dated December 5, 2007 appellant, through her attorney, requested an oral hearing before an Office hearing representative.

By decision dated April 18, 2008, an Office hearing representative affirmed the November 26, 2007 reduction of appellant's wage-loss compensation based upon the constructed position of retail sales clerk. He found that the constructed position complied with the restrictions set forth by Dr. Metz.

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

[3] It appears that the Office inadvertently stated that appellant was capable of earning $418.18 per week as a retail sales clerk in its November 26, 2007 decision as it noted in its accompanying worksheet that she was capable of earning $418.80 per week. The Board finds that this error is harmless as there is no change in the Office's finding that appellant had a 66 percent wage-earning capacity.

[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).

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 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 accepted left shoulder condition. She stopped work at the employing establishment following a second left shoulder surgery on January 27, 2003. In finding that appellant was physically capable of performing the duties of a retail sales clerk as of November 25, 2007, the Office relied on the June 19, 2007 report and work capacity evaluation of Dr. Metz, an Office referral physician. Dr. Metz found that, although appellant was incapable of returning to her regular duties, she could work 40 hours per week with restrictions as a retail sales clerk. In a work capacity evaluation, he stated that appellant had reached maximum medical improvement and that she could work eight hours per day with restrictions. Dr. Metz restricted her to walking and standing six to eight hours, reaching below shoulder level one to three hours per day, pushing, pulling and lifting up to 20 pounds no reaching above the shoulder or climbing.

The Board finds that Dr. Metz's opinion is sufficiently were rationalized to establish that appellant is medically capable of working full time in the constructed position at sedentary light duty that does not require reaching above the shoulder, climbing, and pushing, pulling and lifting more than 20 pounds. The weight of the medical evidence is represented by Dr. Metz's June 19, 2007 report.

The vocational rehabilitation counselor determined that appellant was able to perform the position of retail sales clerk. He opined that, based on her experience, training and a labor market survey, she was well qualified for the position of retail sales clerk and that sufficient

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

[9] *See William H. Woods*, *supra* note 4; *Shadrick*, *supra* note 2.

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

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

positions were reasonably available in her commuting area and met the physical restrictions established by Dr. Metz.

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 retail sales clerk position represented appellant's wage-earning capacity.[12] The weight of the evidence establishes that appellant had the requisite physical ability, skill, and experience to perform the duties of retail sales clerk 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 *Shadrick* formula and codified at section 10.403 of the Office's regulations.[13] The Office found that appellant's salary when her disability began was $504.65 per week, that the current adjusted pay rate for her job on the date of injury was $638.29 and that she was currently capable of earning $418.80 per week, the rate of the retail sales clerk. It then determined that she had a 66 percent wage-earning capacity, which resulted in an adjusted wage-earning capacity of $333.07. The Office then determined that appellant had a loss of wage-earning capacity of $171.58 per week. It concluded that, based on a three-fourths rate, appellant's new compensation rate was $128.69 per week (adjusted by cost-of-living adjustments to $149.50) and that her net compensation for each four-week period would be $429.36. The Board finds that the Office correctly applied the *Shadrick* formula to determine the position of retail sales clerk reflected appellant's wage-earning capacity effective November 25, 2007.[14]

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation effective November 25, 2007 based on its determination that the constructed position of retail sales clerk represented her wage-earning capacity.

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

[13] 20 C.F.R. § 10.403.

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

ORDER

IT IS HEREBY ORDERED THAT the April 18, 2008 and November 26, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 4, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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