

**United States Department of Labor
Employees' Compensation Appeals Board**

S.B., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
TRANSPORTATION SECURITY
ADMINISTRATION, Los Angeles, CA, Employer**

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**Docket No. 08-2157
Issued: July 21, 2009**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 31, 2008 appellant filed a timely appeal from a May 5, 2008 merit decision of the Office of Workers' Compensation Programs concerning her wage-earning capacity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

ISSUE

The issue is whether the Office properly reduced appellant's benefits to zero effective May 11, 2008 based on its determination that the constructed position of customer services clerk represented her wage-earning capacity.

FACTUAL HISTORY

On December 8, 2003 appellant, then a 45-year-old transportation security screener, filed an occupational disease claim (Form CA-2) alleging that on May 1, 2003 she began experiencing hand pain, numbness and swelling from lifting bags to tables and from wandering. On September 22, 2003 she stated that she previously underwent carpal tunnel surgery on her right

hand in 1996 and began experiencing the same problems with her left hand in May 2003. The Office accepted appellant's claim for bilateral carpal tunnel syndrome.¹

Appellant stopped work on March 15, 2004 because the employing establishment could not accommodate her work restrictions. She returned to light duty from May 2 through 15, 2004. On June 2, 2004 appellant underwent left carpal tunnel release and she returned to full duty on July 26, 2004.

In a medical report dated August 13, 2004, Dr. Yoav Gershon stated that appellant had difficulty performing full duty without restrictions. He provided new work restrictions, including no forceful gripping and a maximum lifting and carrying capacity of 25 pounds, and stated that the restrictions will likely become permanent with the next visit. Dr. Gershon opined that appellant would require vocational rehabilitation as she was unable to resume her usual and customary duties.

In a September 3, 2004 medical report, Dr. Gershon diagnosed bilateral carpal tunnel syndrome and opined that appellant's work as a baggage screener was the probable cause of the condition. He stated that she reached a permanent and stationary condition on September 3, 2004 and was permanently precluded from performing heavy lifting over 25 pounds. Physical examination and nerve conduction studies found loss of grip strength and median nerve entrapment at the wrist. Dr. Gershon reiterated that appellant was unable to resume her usual and customary duties and was a candidate for vocational rehabilitation.²

By letter dated October 12, 2005, the employing establishment noted that appellant had reached permanent and stationary medical conditions, preventing her from performing her usual and customary duties. It notified the Office that it could no longer accommodate her permanent work restrictions.

In a July 18, 2005 medical report, Dr. Dana R. Johnson, Board-certified in family medicine, diagnosed bilateral carpal tunnel syndrome, status post carpal tunnel release, and intermittent numbness at the bilateral wrists. She provided work restrictions of no lifting over 25 pounds but found that appellant could work modified duty. Diagnostic tests performed on August 11, 2005 revealed findings consistent with mild-to-moderate median neuropathy of the wrists consistent with carpal tunnel syndrome. On May 31, 2007 Dr. Johnson repeated the work restrictions.

On January 19, 2006 the Office referred appellant to a rehabilitation counselor for vocational rehabilitation. The rehabilitation counselor reviewed appellant's education, transferable skills, prior work history and work restrictions of no lifting over 25 pounds. She

¹ The Office initially denied appellant's claim for fact of injury on February 25, 2004.

² By decision dated January 10, 2005, the Office awarded appellant a schedule award for 10 percent permanent impairment of the right upper extremity and 10 percent permanent impairment of the left upper extremity. Appellant began receiving payment for her schedule award on January 27, 2005. On January 23, 2006 she stopped receiving payment for her schedule award so that she could receive wage-loss compensation. By telephone memorandum dated April 24, 2008, the Office notified appellant that she was eligible to obtain payment for the remainder of her schedule award after termination of her wage-loss compensation.

noted that appellant had a high school education with an additional year of community college general class work and that she had many transferable skills. The rehabilitation counselor developed a rehabilitation plan, based on labor market research and a vocational assessment test. She identified the positions of bank teller and customer service representative/complaint clerk as vocational goals.

By letter dated October 19, 2007, the Office notified appellant that it reviewed the rehabilitation plan and found that the positions identified were within her work limitations. It advised that she had a probable wage-earning capacity of \$25,000.00 per year and that her compensation would likely be reduced by this amount at the end of the rehabilitation program regardless of whether she gained employment.

In a closure report dated February 22, 2008, the rehabilitation counselor noted that appellant did not obtain employment due to an inconsistent and less than proactive approach to the job seeking process. She submitted job classifications for the positions of teller and customer service clerk, which required only light physical requirements with no lifting, pushing or pulling over 20 pounds. The rehabilitation counselor found that appellant was physically capable of performing these positions within the restrictions provided by Dr. Johnson of a 25-pound weight restriction for lifting.

By letter dated April 3, 2008, the Office proposed to reduce appellant's wage-loss compensation to zero on the basis that she had the capacity to earn \$673.00 per week as a customer services clerk. It discussed the job requirements for the positions of customer services clerk, finding that the physical requirements were within the 25-pound lifting restriction specified by Dr. Johnson. Based on the research provided by the rehabilitation counselor, the Office determined that the entry level wages for a customer services clerk averaged \$673.00 a week and the entry level wages for a bank teller averaged \$675.00 a week. Based on appellant's pay on the date of disability of \$565.90 plus \$35.37 night differential, the current salary of appellant's date-of-injury position of \$612.07 per week plus \$38.26 night differential and her ability to earn \$673.00 per week as a customer services clerk, the Office found that appellant had no loss in wage-earning capacity. It advised appellant to submit additional evidence or argument regarding her wage-earning capacity within 30 days. Appellant did not respond.

By decision dated May 5, 2008, the Office reduced appellant's compensation to zero, effective May 11, 2008, due to her capacity to earn \$673.00 per week as a customer services clerk.

LEGAL PRECEDENT

Section 8115(a) of the Federal Employees' Compensation Act³ provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by her actual earnings if her actual earnings fairly and reasonably represent her wage-earning capacity.⁴ If the actual earnings do not fairly and reasonably represent wage-

³ 5 U.S.C. § 8115(a).

⁴ *Id.*; *Loni J. Cleveland*, 52 ECAB 171, 177 (2000).

earning capacity or the employee has no actual earnings, her wage-earning capacity is determined with due regard to the nature of her injury, the degree of physical impairment, her usual employment, her age, her qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect her wage-earning capacity in her disabled condition.⁵

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 *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits that employee's capabilities with regard to 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. Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.⁶

ANALYSIS

The Board finds that the Office met its burden of proof to establish that appellant's wage-earning capacity was represented by her ability to work in the constructive position of a customer services clerk effective May 11, 2008.

On July 18, 2005 Dr. Johnson appellant's treating physician, diagnosed bilateral carpal tunnel syndrome and provided work restrictions of no lifting over 25 pounds but found that appellant was capable of working modified duty. In a subsequent medical report dated May 31, 2007, he found that appellant had reached permanent and stationary status and provided the same restrictions of no lifting over 25 pounds. These restrictions were consistent with those provided by Dr. Gershon in medical reports dating back to August 13, 2004.

The Board finds that the medical evidence establishes that appellant is partially disabled with lifting restrictions of 25 pounds. As the identified positions of customer services clerk requires only light physical requirements with no lifting, pushing or pulling over 20 pounds, the medical evidence supports that appellant has the physical capacity to perform the duties of the position.⁷

In assessing the claimant's ability to perform the selected position, the Office must consider not only physical limitations but also take into account her work experience, age, mental capacity and educational background.⁸ In the instant case, the rehabilitation counselor

⁵ 5 U.S.C. § 8115; 20 C.F.R. § 10.520; *John D. Jackson*, 55 ECAB 465, 471 (2004); *Robert H. Merritt*, 11 ECAB 64, 65 (1959).

⁶ *N.J.*, 59 ECAB ____ (Docket No. 07-45, issued November 14, 2007); *Wilson L. Clow, Jr.*, 44 ECAB 157, 171-75 (1992); *Albert C. Shadrick*, 5 ECAB 376 (1953).

⁷ *See M.A.*, 59 ECAB ____ (Docket No. 07-349, issued July 10, 2008).

⁸ *See John E. Cannon*, 55 ECAB 585 (2004).

found that appellant had the skills necessary to perform the position of customer services clerk based on her vocational assessment test results, high school education and previous work experience. He also found that the position was reasonably available within the commuting area with wages of \$673.00 a week. The Board finds that the Office considered the proper factors, such as availability of suitable employment, appellant's physical limitations and employment qualifications, in determining that the position of customer services clerk represented her wage-earning capacity.⁹ The weight of the evidence of record establishes that appellant had the requisite skill, physical ability and training to perform the position and that such a position was reasonably available within the general labor market of appellant's commuting area.

The Board finds that the Office properly determined appellant's loss of wage-earning capacity in accordance with the formula developed in *Albert C. Shadrick*¹⁰ and codified at 20 C.F.R. § 10.403.¹¹ The Office stated that her earning salary on the date of disability was \$565.90 plus \$35.37 night differential, or \$601.27 per week; that the current adjusted pay rate for her job was \$612.07 plus \$38.26 night differential, or \$650.33 per week; and that she was currently capable of earning \$673.00 per week as a customer service clerk.¹² The Office properly concluded that appellant did not have a loss of wage-earning capacity.

CONCLUSION

The Board finds that the Office properly reduced appellant's benefits to zero effective May 11, 2008 based on its determination that the constructed position of customer services clerk represented her wage-earning capacity.

⁹ *See id.*

¹⁰ *See supra* note 6.

¹¹ 20 C.F.R. § 10.403. *See also M.A.*, *supra* note 7.

¹² Night differentials should be included when determining wage-earning capacity. *Joseph Haley*, 46 ECAB 639 (1995).

ORDER

IT IS HEREBY ORDERED THAT the May 5, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 21, 2009
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