United States Department of Labor
Employees' Compensation Appeals Board

S.S., Appellant	)	
and	)	**Docket No. 09-295**
	)	**Issued: September 28, 2009**
DEPARTMENT OF THE TREASURY,	)	
Grand Island, NE, Employer	)	

Appearances:
Appellant, pro se
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 November 10, 2008 appellant, through counsel, filed a timely appeal of the August 7, 2008 decision of an Office of Workers' Compensation Programs' hearing representative who affirmed a December 19, 2007 wage-earning capacity determination. Under 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 to reduce appellant's compensation benefits based on her capacity to earn wages in the constructed position of security guard.

On appeal, appellant contends that the Office improperly terminated her compensation based on the constructed position of security guard and that the position was not suitable based on the duties required.

FACTUAL HISTORY

On January 17, 1994 appellant, then a 32-year-old bank examiner, filed an occupational disease claim alleging that repetitive keyboard work caused her to develop bilateral carpal tunnel syndrome. Her condition first began in August 1988. The Office accepted appellant's claim for bilateral carpal tunnel syndrome and authorized surgeries. A right carpal tunnel release was performed on March 31, 1994 and a second right carpal tunnel release was performed on December 9, 1994.

On September 26, 1995 appellant returned to work at part-time limited duty four hours a day, which was increased to six hours per day on January 31, 1996. In April 1997, she stopped work, as limited-duty work was no longer available.

By letter dated May 10, 1999, the Office referred appellant to Dean Venter for vocational rehabilitation counseling. On May 27, 1999 appellant met with Mr. Venter for an initial consultation. Attempts to obtain work where she could use voice activated software to perform her job duties were unsuccessful. In a March 10, 2000 note, Mr. Venter stated that appellant had "not been particularly motivated in the past...." In an August 30, 2000 report, he noted that appellant did not believe that she could work in a retail capacity at a jewelry store because she was unable to pick up small objects. On December 29, 2000 Mr. Venter advised that she did not believe she was employable and had contacted the job service office to advise that she was no longer actively seeking employment. On January 24, 2001 he noted that appellant was quite bitter in that the Office expected a private employer to accommodate her when the government was unwilling to do so. Mr. Venter stated that this had been a "very difficult case where the injured virtually refused any of my assistance and sought work minimally on her terms." He did note that appellant was significantly disabled and was unsure whether she would have better success with more time and effort. No further action was taken and appellant remained on the periodic rolls.

On January 27, 2003 Dr. Frank Lesiak, appellant's treating Board-certified orthopedic surgeon, advised that she could return to employment within work restrictions as outlined in her functional assessment of March 26, 1999.[1]

On May 8, 2006 the Office referred appellant to Dr. Lonnie Mercier, a Board-certified orthopedic surgeon, for on updated examination. In a report dated May 22, 2006, Dr. Mercier reviewed the history of injury and statement of accepted fact. He noted appellant's subjective symptoms of tingling and pain in the median nerve distribution in both hands, that correlated

[1] In the March 26, 1999 assessment, a physical therapist found that appellant had significant functional limitations to the right upper extremity, noting that the hand should only be used for handling, grasping and fine manipulation on a minimal basis (five percent of the workday). The left hand could be used on an occasional basis or for 6 to 33 percent of the workday. The physical therapist did not recommend frequent lifting for either extremity and recommended maximum lifting for the right upper extremity be 7.1 pounds above the shoulder, 17.4 pounds at waist level and 9.3 pounds from floor to waist. He noted that typing with her right hand should be performed no greater than five percent of the workday but that her left hand could perform typing activities up to 33 percent of the day. The physical therapist recommended that appellant be employed in a work hardening program to increase her confidence in using the right and left upper extremities. He further recommended that hand tools not be used greater than 5 percent of the day for the right upper extremity and 33 percent of the day for the left upper extremity.

fairly well with the diagnostic studies of carpal tunnel syndrome. Dr. Mercier found that she could perform the duties of her previous position. He noted that none of the work appeared to be beyond appellant's physical capabilities, although some keyboard work might be difficult for her. Dr. Mercier noted that she had no real objective findings to warrant any limitations which were based primarily on a subjective basis. He completed a work-capacity evaluation advising that appellant could work eight hours a day but limit repetitive movements in her wrists to one to two hours a day and to lifting a maximum of 25 pounds.

On June 8, 2006 the Office again referred appellant for vocational rehabilitation.

On January 23, 2007 Dr. Lesiak noted that appellant presented that date with questions about Dr. Mercier's evaluation. He noted that Dr. Mercier recommended restrictions of no repetitive motion more than one to two hours per day and no lifting over 25 pounds. Dr. Lesiak advised that these restrictions were more strict than the March 1999 functional assessment and that if appellant worked within Dr. Mercier's parameters, she should remain symptom free.

In a March 1, 2007 report, Mr. Venter indicated that he could not find any jobs conforming to appellant's physical limitations with reasonable availability in the central Nebraska labor market. He recommended that the case be either closed or referred to another counselor.

At the Office's request, appellant began vocational rehabilitation with Steven H. Kuhn on March 19, 2007, who performed a clinical interview and vocational assessment on March 23, 2007. On March 29, 2007 Mr. Kuhn reviewed appellant's medical, vocational and psychosocial factors. He noted that she graduated from college with distinction and had received additional training while working for the government. However, appellant had not worked for over 10 years. Given her aptitudes and abilities, it was reasonable to predict that she would be able to learn new tasks necessary to perform work-related activities. Mr. Kuhn reviewed Dr. Mercier's report and the key functional assessment dated March 26, 1999. Due to appellant's medical restrictions, she would most likely require a work site modification that would allow her to modify methods by which tasks were completed. On June 28, 2007 Mr. Kuhn noted that appellant refused to sign the vocational plan presented. In a June 29, 2007 report, he advised that she was vocationally and educationally capable of performing work as a hostess at $295.20 per week or as a security guard at $372.40 per week, positions which were reasonably available within her local commuting area. Mr. Kuhn noted that appellant signed the job placement plan and that placement efforts would begin on July 24, 2007.

By letter dated July 2, 2007, the Office informed appellant that she would be provided 90 days of assistance in finding employment as recommended by Mr. Kuhn.

In an August 8, 2007 report, Mr. Kuhn indicated that from July 24 through August 6, 2007, appellant had contacted seven different employers. He indicated that her statements on interviews to prospective employers about her compensation claim, work restrictions and inability to work since 1997 were less than positive. As she did not obtain employment, he recommended her capacity for work was represented by the position of security guard.

The job description for security guard, as listed in the Department of Labor, *Dictionary of Occupational Titles* (1988), is listed, as follows:

> "Guards industrial or commercial property against fire, theft, vandalism and illegal entry, performing any combination of the following duties: Patrols, periodically, buildings and grounds of industrial plant or commercial establishment, docks, logging camp area or work site. Examines doors, windows and gates to determine that they are secure. Warns violators of rules infractions, such as loitering, smoking or carrying forbidden articles and apprehends or expels miscreants. Inspects equipment and machinery to ascertain if tampering has occurred. Watches for and reports irregularities, such as fire hazards, leaking water pipes and security doors left unlocked. Observes departing personnel to guard against theft of company property. Sounds alarm or calls police or fire department by telephone in case of fire or presence of unauthorized persons. Permits authorized persons to enter department by telephone in case of fire or presence of unauthorized persons. Permits authorized persons to enter property. May register at watch stations to record time of inspection trips. May record data, such as property damage, unusual occurrences and malfunctioning of machinery or equipment, for use of supervisory staff."

This position required no fingering, climbing, balancing, kneeling or crawling and frequent reaching and handling. The position required constant lifting of up to 10 pounds and occasional lifting of up to 20 pounds.

On October 23, 2007 Mr. Kuhn recommended that vocational efforts be closed. He noted that appellant's involvement in the vocational plan was limited as reflected by the number of contacts she made each week and her lack of timeliness following up on the leads provided to her.

On October 30, 2007 the Office issued a proposed notice of reduction of appellant's compensation benefits on the basis that the security guard position was medically and vocationally suitable and represented her wage-earning capacity.

By letter dated November 27, 2007, appellant objected to the proposal to reduce her compensation and indicated that she wanted an oral hearing. She contended, that the duties exceeded her work restrictions and that Mr. Kuhn had provided her with only one lead for a security job position and she went on that interview. Appellant listed security guard positions at a local hospital and shopping mall, but advised that they were neither medically nor vocationally suitable to her. She submitted a position description for the security guard position at the hospital. This position noted the potential for restraint of patients and required infrequent lifting of 75 pounds. The director of security at the mall indicated in his security guard position duties required occasional fingering and that appellant would need to be able to lift 20 pounds.

By decision dated December 19, 2007, the Office reduced appellant's wage-loss compensation benefits effective February 23, 2007, finding that she had the capacity to perform the security guard position.

On January 11, 2008 appellant requested, oral hearing indicating that she did not seek a telephonic hearing.

On a May 14, 2008 Michael Pope indicated that appellant had inquired about a job with Securitas Security Services on January 7, 2008. Appellant noted significant restrictions in the use of her right hand because of a medical condition. She was advised that it was standard for security officers to prepare reports on a daily basis and that it was an essential function of the job that "the employee write reports and frequently input information into a computer, operate a radio, operate a motor vehicle, use a flash light, use a radio and operate fire panels, etc." Mr. Pope noted that appellant would not be able to perform work at his company without accommodations.

The record reflects that appellant was represented by counsel at a telephonic hearing held on May 22, 2008. She testified with regard to what she had been told by her physicians and the restrictions set in her March 26, 1996 functional capacity evaluation Mr. Venter, the former vocational counselor appeared and addressed working with appellant in 2000 and in June 2006. He discussed efforts to obtain voice activated software but, when it did not work out he considered other types of employment. Mr. Venter stated that there were not a lot of job opportunities in central Nebraska that appellant could perform and that he never noted a lack of cooperation on her part. He noted that the Office had directed him to consider security guard positions, but he was "a little reluctant to recommend work as a security guard for someone with any degree of disability because there [i]s that risk of confrontation." Mr. Venter also noted that the position involved taking notes climbing into the back of trailers to inspect them, which was beyond appellant's abilities.

By decision dated August 7, 2008, the Office hearing representative affirmed the December 19, 2007 wage-earning capacity determination.

LEGAL PRECEDENT

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.[2] 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 his or he wage-earning capacity.[3] If the actual earnings do not fairly and reasonably represent his or her wage-earning capacity or if the employee has no actual wages, the wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the employee's usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect wage-earning capacity in his or her disabled condition.[4]

[2] 20 C.F.R. §§ 10.402, 10.403; *see Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

[3] 5 U.S.C. § 8115(a).

[4] *Id.; Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor, *Dictionary of Occupational Titles* or otherwise available in the open market, that fits the employee's 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 labor market should be made through contact with the state employment service or other applicable service.[5] Finally, application of the principles set forth in *Albert C. Shadrick*,[6] will result in the percentage of the employee's loss of wage-earning capacity.[7]

The Office must initially determine appellant's medical condition and work restrictions before selecting an appropriate position that reflects her vocational wage-earning capacity. The Board has stated that the medical evidence upon which it relies must provide a detailed description of appellant's condition.[8] Accordingly, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.[9]

ANALYSIS

The Office accepted appellant's claim for bilateral carpal tunnel syndrome. Although appellant initially returned to work she stopped work in April 1997 and was placed on the periodic rolls in receipt of compensation for total disability. She received vocational evaluation assistance from Mr. Venter in 2000 and 2006 and from Mr. Kuhn in 2007. Mr. Kuhn found that appellant had the physical capacity to work as a security guard. Based on his report and the medical evidence of record, the Office determined that appellant was capable of performing the duties of a security guard and reduced her on December 19, 2007, finding that she had a 34 percent wage-earning capacity in the constructed position.

The Board finds that appellant's wage-earning capacity is represented by the position of security guard.

Appellant contends that the selected position was not reasonably available as the rehabilitation counselor only identified one opening for a security guard. The Board has previously noted that where there is probative evidence of record regarding reasonable availability this evidence will not be contradicted by evidence as to lack of current referrals for the selected position.[10]

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[5] *James M. Frasher*, 53 ECAB 794 (2002).

[6] 5 ECAB 376 (1953).

[7] *Samuel J. Russo*, 28 ECAB 43 (1976).

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

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

[10] *Carla Letcher*, 46 ECAB 452 (1995).

On May 22, 2006 Dr. Mercier, the second opinion physician, completed a work-capacity evaluation advising that appellant could work eight hours a day and should limit repetitive movements in her wrists to one to two hours a day and lifting to a minimum of 25 pounds. Dr. Lesiak, appellant's treating physician, agreed on June 23, 2007 that if appellant worked within Dr. Mercier's limitations, she should remain symptom free. Mr. Kuhn evaluated the position of security guard and determined that, pursuant to the Department of Labor, *Dictionary of Occupational Titles*, it was vocationally suitable to her work limitations. The physical demands of the position included light strength; no climbing, balancing, stooping, kneeling, crouching, crawling or fingering; and frequent reaching and handling. These activities are all within appellant's work restrictions.

Appellant contends that the security guard position description utilized by the Office was from the 1988 Department of Labor, *Dictionary of Occupational Titles* and over 20 years old. The Board finds that appellant's contention that the Department of Labor, *Dictionary of Occupational Titles* is out dated is not persuasive and disregards the medical evidence from Dr. Mercier and Dr. Lesiak, who both opined that she was not totally disabled but had the capacity for work within defined restrictions. The evidence pertaining to the security guard position at her local hospital or mall is not directly relevant to the duties she was found capable of performing in the constructed position, which were listed as light. Similarly, the note from Securitas Security Services that appellant could not perform a security guard position for that company is not persuasive evidence of her inability to perform the duties of the constructed position. Mr. Pope indicated that appellant could not work in this position based on her representation as to the use of her hands. His opinion is not based on the medical evidence from Dr. Mercier and Dr. Lesiak but on appellant's own representations of her capabilities. The Board has held that the mere fact that appellant is not able to secure a job in the selected position does not establish that the work is not available or medically suitable.[11]

Appellant raised several contentions with regard to the March 26, 1999 functional assessment. The Board notes that this assessment was followed by Dr. Mercier's examination of May 22, 2006. Appellant's attending physician, Dr. Lesiak also noted that if she worked within Dr. Mercier's restrictions, she should remain symptom free. The medical evidence clearly establishes her capacity to perform the duties of the selected position.

The Board does note that Mr. Venter, appellant's initial vocational counselor, was unable to find work in her local commuting area. He opinion in a March 1, 2007 report, that appellant was "too severely disabled" and recommended either closing the case or referring the case to a different counselor. As noted, however, her work capacity is a medical question and was supported by the physicians of record. Mr. Venter's opinion is not that of a physician as defined under the Act.[12] At the hearing, Mr. Venter indicated that he did not believe that a security guard position was a safe position for a disabled person. The Board notes that appellant was restricted to eight hours a day with limited repetitive movement in her wrists and no lifting to 25 pounds. No physician advised that she remains "severely" disabled. In his January 24, 2001 report, Mr. Venter indicated that this was a "very difficult case where the injured worker virtually

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

[12] *See James Robinson, Jr*., 53 ECAB 417 (2002).

refused any of my assistance and sought work minimally on her terms." He subsequently contradicted himself at the hearing when he indicated that appellant had been cooperative with the job search. Mr. Venter's opinion on her capacity for work is of diminished weight. The Board gives greater weight to the opinion of Mr. Kuhn that appellant was employable as a security guard.

Appellant contends that the Office found that she could not work as a retail clerk in a jewelry store due to her carpal tunnel syndrome in 2000. Her contention that she remains disabled since that time must be supported by probative medical evidence. Appellant did not provide any report from an attending physician to establish her disability for one security guard position.

Appellant's attacks on the professional integrity of Mr. Kuhn and Office hearing representative are not supported by any evidence of bias.[13] Appellant argued that in discussing the physical requirements of the security guard position, the hearing representative noted that the position required no fingering but later stated that it required frequent fingering. However, when comparing the hearing representative's decision to the job requirements that he was discussing, it is clear that the job description as listed by Mr. Kuhn noted no fingering.[14]

The Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment, age and employment qualifications, in determining that the security guard position represented her wage-earning capacity. The evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the duties and that the position is reasonably available within the general labor market of her commuting area. The Office properly determined that the position of security guard reflected her wage-earning capacity and applied the *Shadrick*[15] formula, to reduce her compensation as of December 31, 2007.

CONCLUSION

The Board finds that the Office met its burden of proof to reduce appellant's compensation benefits based on her capacity to earn wages in the constructed position of security guard.

[13] Appellant noted that she did not perform a telephonic hearing. She was afforded a hearing under section 8124 at which she was represented by counsel and actively participated. The Office retains complete discretion in setting the time and place of the hearing. *See* 20 C.F.R. § 10.617(a).

[14] The hearing representative stated that the position would require, no climbing, balancing, stooping, kneeling, crouching, crawling or fingering and would require frequent reaching and fingering. The job description actually listed no climbing, balancing, stooping, kneeling, crouching, crawling or fingering and frequent reaching and handling.

[15] *Supra* note 7.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 7, 2008 and December 19, 2007 are affirmed.

Issued: September 28, 2009
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