United States Department of Labor
Employees' Compensation Appeals Board

N.F., Appellant	)	
and	)	**Docket No. 09-1356**
	)	**Issued: April 5, 2010**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Coatsville, PA, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 1, 2009 appellant, through her attorney, filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated February 17, 2009. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office met its burden of proof to reduce appellant's compensation benefits based on her actual earnings as a pharmacy clerk.

FACTUAL HISTORY

This case has previously been before the Board on appeal. Appellant, a 29-year-old nursing assistant, filed a traumatic injury claim on March 4, 1996 alleging that she injured her left wrist moving a patient. The Office accepted her claim for left wrist sprain and fracture of the navicular cystic of the second metacarpal. Appellant returned to full-time work as receptionist on June 18, 2001 and filed a recurrence of disability claim on August 10, 2001. The Board

affirmed the Office's May 23, 2003 denial of this claim on January 12, 2004.[1] The facts and the circumstances of the case as set out in the Board's prior decision are adopted herein by reference.

On December 7, 2004 the Office accepted appellant's claim for the additional conditions of ulnar nerve lesion and neuropathy on the right and median neuropathy of the right forearm and wrist. It entered appellant on the periodic rolls on April 30, 1997.

Appellant's attending physician, Dr. Leonard B. Kamen, an osteopath, completed reports on April 17 and June 4 2007 and diagnosed intractable neck and shoulder pain syndrome following work-related trauma with repetitive stress.

The Office referred appellant for a second opinion evaluation with Dr. Robert Allen Smith, a Board-certified orthopedic surgeon, on June 18, 2007. In his July 9, 2007 report, Dr. Smith provided her history of injury and opined that her clinical examination was relatively benign with no objective pathology. He stated that appellant could work light duty with no repetitive movements of her wrists and elbows and pushing, pulling and lifting no more than 20 pounds for eight hours a day.

Dr. Kamen examined appellant on July 27, 2007 and described weakness in her left upper extremity as well as tension across the neck and shoulder. He found limited range of motion of the left shoulder and loss of strength in the left wrist due to surgery.

The employing establishment developed a limited-duty position for appellant on September 13, 2007 working in the clothing room with no pushing, pulling or lifting over 20 pounds and no repetitive movements of the wrist and elbow. In a letter dated October 5, 2007, appellant stated that she could neither accept nor decline the position until she consulted with her physician. She submitted a note from Dr. Scott M. Fried, an osteopath, dated September 26, 2007, which reported positive Roos testing and Phalen's test as well as bilateral spasm. Dr. Fried recommended physical therapy. Dr. Kamen completed a note on October 8, 2007 and stated that appellant's condition had stabilized.

In a letter dated November 15, 2007, the Office stated that the employing establishment had offered appellant a position as a receptionist which was suitable. It allowed her 30 days to accept the position or offer her reasons for refusal. On December 18, 2007 the Office again informed appellant that the offered position was suitable work and of the consequences of refusing a suitable work position.

Dr. Fried reviewed a work capacity evaluation dated November 20, 2007. In his November 23, 2007 note, he found that appellant was able to write for 1 minute 24 seconds, fold and hang clothes for 1 minute 15 seconds and keyboard for 1 minute 40 seconds. Dr. Fried concluded that appellant could perform sedentary work with a three-pound lifting restriction on the right and two pounds on the left on a nonrepetitive basis. Appellant returned to a pharmacy secretary position on January 22, 2008.

[1] Docket No. 03-2023 (issued January 12, 2004).

Dr. Kamen examined appellant on February 4, 2008 and stated that she was performing data-entry repetitively resulting in increasing swelling and soreness in both hands. He noted that she had previously experienced periods of increased pain without work.

Dr. Fried completed a report on February 21, 2008 and stated that appellant was performing full-time light-duty work at the employing establishment, using the computer all day with use of both the keyboard and the mouse. He stated that the employing establishment had not provided her with voice activated software or a headset. Dr. Fried stated that appellant did not have any breaks and that her symptoms had elevated with increasing pain as the workday progressed.

In a letter dated February 21, 2008, appellant's attorney advised the Office that appellant returned to work as a file clerk in the pharmacy department, which involved typing and repetitive motion. He enclosed the position description and the duties included receiving telephone calls and mail, referring messages appropriately, placing work orders, mailing correspondence and processing refills as well as other unspecified duties. A pharmacy clerk is considered a sedentary position with some walking, lightweight carrying, bending and crouching.

The claims examiner reported on March 10, 2008 that the employing establishment was unable to place appellant as a clothing room clerk. The employing establishment stated, "[Appellant] was previously the clothing room clerk and was very nasty to the Veterans and the volunteers. When she returned the volunteers refused to work with her…." The supervisor refused to take appellant back due to her disposition and relationship with the volunteers. The employing establishment placed her as a pharmacy clerk with a headset and directions not to use the computer until a voice activated program was installed. Appellant's current duties included taking messages and giving them to a coworker who entered the messages into the system.

The employing establishment provided a job description for a program clerk. The duties listed were support to pharmacy service, answering telephones, referring calls, taking messages, opening mail and related duties. The position was classified as sedentary with some walking, standing, bending, carrying of light items and no special physical demands.

Dr. Fried examined appellant on March 18 and 20, 2008 and stated that her symptoms had greatly increased with swelling. He noted that the employing establishment provided her with a headset, but had not installed voice activated software for the computer. Dr. Fried recommended part-time work but the employing establishment refused. He stated that appellant was required to key on the computer and write out messages or face discipline.

The Office found a conflict of medical opinion evidence and referred appellant to Dr. Karl Rosefeld, a Board-certified orthopedic surgeon. In a report dated April 1, 2008, Dr. Rosefeld reviewed her factual and medical history and performed a physical examination. He found no spasm in appellant's neck and interscapular area and no atrophy in her upper extremities. Dr. Rosefeld found observable deficit in her left arm and history of plexopathy and brachial plexus problems with her left upper extremity related to her initial injury. However, he found nothing wrong with appellant's right arm and opined, "[S]he could do everything required of her right arm that a person could do with her right arm. The left arm would be used only for minimal assistance." Dr. Rosefeld stated that she could perform the clothing room position,

which did not entail pushing, pulling or lifting. He found that appellant should not lift over 20 pounds and should not perform repetitive movements of the left wrist and elbow. Dr. Rosefeld also provided a work capacity evaluation and indicated that she work eight hours a day with restrictions. He found that appellant should not reach above the shoulder on the left and indicated that she should not push, pull or lift more than 10 pounds, 5 on the left.

Dr. Kamen reported on May 2, 2008 that appellant was doing quite well despite the fact that she was working. He stated that she was stable within her chronic pain syndrome. Dr. Fried completed a note on May 15, 2008 and stated that appellant required part-time work. He noted that she was the only one working in the pharmacy and that she received 75 calls a day. Dr. Fried stated that, although appellant had a headset for the telephone, she also needed to pick up the receiver to answer the call and that she had not yet received voice activated software. He stated that she was experiencing elevated symptoms on the right.

In a letter dated June 4, 2008, the Office stated that based on Dr. Rosefeld's report appellant was capable of working eight hours a day with restrictions. It opined that she could perform the position of pharmacy clerk with assistance for eight hours a day and that the employing establishment was currently determining if special equipment was necessary for her to perform the position without assistance.

On June 9, 2008 the Office informed appellant that the pharmacy clerk position was suitable as full-time work and informed her of the penalty provisions of 5 U.S.C. § 8126(c). In a separate decision dated June 9, 2008, it stated that the pharmacy clerk position fairly and reasonably represented her wage-earning capacity and found that she worked in this position since January 22, 2008. The Office found that appellant had no loss of wage-earning capacity. Appellant, through her attorney, requested an oral hearing on June 19, 2008.

Dr. Kamen completed a note on June 11, 2008 and stated that due to persistent swelling in her wrists appellant was working only four hours a day. On June 19 and July 17, 2008 Dr. Fried found that she had increased pain at the right radial wrist with intermittent swelling. He noted that appellant was working four hours a day with no voice activated software.

Dr. Fried completed a report on September 24, 2008 and stated that appellant's symptoms were progressively worse and that her symptoms worsened with work activities and increased use including lifting, pushing, pulling, gripping and grasping as well as repetitive activities. He reviewed her July 8, 2008 electromyelogram and diagnosed sympathetically medicated pain syndrome and on the right ulnar neuropathy, radial neuropathy, median neuropathy and on the left median neuropathy, ulnar neuropathy and left radial neuropathy. Dr. Fried stated that appellant's condition had worsened and that she needed a voice activation system. On November 3, 2008 Dr. Fried stated that she could continue her current part-time light-duty position as tolerated.

Appellant submitted a series of notes from Dr. Paul Barone, an osteopath, who examined her on August 20, September 5, 10 and 15, 2008 as well as October 1, 2008 noting her history of injury and diagnosing dysmetabolic syndrome, carpal tunnel syndrome and de Quervain's disease. Dr. Barone indicated that she should not lift or carry and should wear an immobilizer full time.

Appellant's attorney appeared at the oral hearing on November 20, 2008 and stated that appellant never worked in the clothing room position and that she began working four hours a day as a pharmacy clerk on May 19, 2008. Appellant completed a statement on December 19, 2008 and noted that she reported to work on January 22, 2008 expecting to be employed in the clothing room, but was instead assigned as a pharmacy clerk which entailed answering telephone calls, refilling patient medication orders on the computer, writing messages, logging calls and results averaging 150 calls a day. She stated that she worked in this position until March 2008 when Dr. Fried restricted her computer keying. Appellant noted in July 2008 the employing establishment opened a call center, but that she continued working as a clerk four hours a day. In August 2008, her position changed to packaging medication order, opening mail, refilling orders on the computer and confirming orders for patients on the computer.

By decision dated February 17, 2009, the hearing representative affirmed the Office's June 12, 2008 loss of wage-earning capacity determination.

On appeal, appellant's attorney alleged that the Office did not meet its burden of proof to reduce appellant's compensation benefits as she was not medically capable of performing the duties of a pharmacy clerk. He further noted that she did not work as a clothing room clerk and that this position was not within the restrictions imposed by Dr. Rosenfeld.

LEGAL PRECEDENT

Section 8115(a) of the Federal Employees' Compensation Act[2] provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by actual earnings if actual earnings fairly and reasonable represent the wage-earning capacity. Generally, wages actually earned are the best measure of a wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity must be accepted as such measure.[3]

The Office's procedure manual states that when an employee cannot return to the date-of-injury job because of disability due to work-related injury of disease, but does return to alternative employment, the claims examiner must determine whether the earnings in the alternative employment fairly and reasonably represent the employee's wage-earning capacity.[4] The procedure manual provides in relevant part as follows:

> "*Factors Considered.* To determine whether the claimant's work fairly and reasonably represents his or her wage-earning capacity, the claims examiner should consider whether the kind of appointment and tour of duty … are at least equivalent to those of the job held on the date of injury. Unless they are, the [claims examiner] may not consider the work suitable.

[2] 5 U.S.C. §§ 8101-8193, § 8115(a).

[3] *Selden H. Swartz*, 55 ECAB 272 (2004).

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (July 1997).

> "For instance, reemployment of a temporary or casual worker in another temporary or casual [U.S. Postal Service] position is proper, as long as it will last at least 90 days and reemployment of a term or transitional [U.S. Postal Service] worker in another term or transitional position is likewise acceptable."[5]

In addition, the Office's procedure manual provides that the Office can make a retroactive wage-earning capacity determination if appellant worked in the position for at least 60 days, the position fairly and reasonable represented his wage-earning capacity and "the work stoppage did not occur because of any change in his injury-related condition affecting the ability to work."[6]

ANALYSIS

The Board finds that the Office failed to meet its burden of proof in establishing that the position of pharmacy clerk fairly and reasonably represented appellant's wage-earning capacity. Appellant's attending physician, Dr. Fried, an osteopath, supported her partial disability for work due to her accepted employment injuries. He stated that appellant could perform sedentary work with a three-pound lifting restriction on the right and two pounds on the left on a nonrepetitive basis. The Office referred appellant for a second opinion evaluation with Dr. Smith, a Board-certified orthopedic surgeon, who reported that she could perform light-duty work eight hours a day with no repetitive movements of her wrists and elbows as well as limitations on pushing, pulling and lifting. Due to this disagreement regarding appellant's medical restrictions, the Office properly referred her to Dr. Rosefeld, a Board-certified orthopedic surgeon, for an impartial medical evaluation to resolve the disagreement.[7]

Appellant returned to work on January 22, 2008 in a light-duty position as a pharmacy clerk, prior to Dr. Rosefeld's examination on April 1, 2008. The Office did not provide Dr. Rosefeld with this position description and instead asked him to determine if the duties of a clothing room clerk were within appellant's work restrictions. Dr. Rosefeld stated that appellant could perform the clothing room position, which did not entail pushing, pulling or lifting. He found that appellant should not lift over 20 pounds or perform repetitive movements of the left wrist and elbow. Dr. Rosefeld provided a work capacity evaluation and indicated that she work eight hours a day within restrictions including no reaching above the shoulder on the left or pushing, pulling more than 10 pounds or lifting more than 10 pounds on the right, 5 on the left.

[5] Federal (FECA) Procedure Manual, *supra* note 5 Chapter 2.814.7a (July 1997).

[6] Federal (FECA) Procedure Manual, *supra* note 5 Chapter 2.814.7e (July 1997).

[7] The Act provides that if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination. The implementing regulations state that if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician of an Office medical adviser or consultant, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case. 20 C.F.R. § 10.321.

It is not clear from the record whether the position of pharmacy clerk which, appellant performed in part complied with the restrictions provided by Dr. Rosefeld. The duties of this sedentary job included receiving telephone calls and mail, referring messages appropriately, placing work orders, mailing correspondence and processing refills with some walking, lightweight carrying, bending and crouching. The position description does not address whether repetitive movements of the left wrist and elbow would be required in placing work orders, processing refills or referring messages. The Board notes however that the employing establishment provided appellant with a telephone headset and directions not to use the computer until a voice activated program was installed. This suggests that some repetitive data entry duties were required. However, the voice activated computer program had not been installed by March 10, 2008 approximately six weeks after appellant returned to work. At that point appellant's duties included taking messages and giving them to a coworker who entered the messages into the system.

Dr. Fried began to request part-time work for appellant on March 18, 2008 due to aggravation of her symptoms as a result of the pharmacy clerk position. The Office was still investigating whether she required additional accommodations to perform the duties of a pharmacy clerk on June 4, 2008, noting that appellant could work eight hours a day with restrictions and that she could work as a pharmacy clerk with assistance.

The medical evidence does not clearly establish that the position of pharmacy clerk was within appellant's work restrictions as established by Dr. Rosefeld, the impartial medical examiner. The record does not establish that appellant actually performed the duties of this position at any time after her return to work as the employing establishment provided her with temporary assistance for data entry and never actually provided her with the voice activated software so that she could perform the position without assistance. Finally, appellant's attending physician opined that appellant could not perform the duties of this position beginning March 18, 2008 less than 60 days after she returned to work. The Board finds that based on these incongruences in the factual and medical evidence the Office failed to establish that the position of pharmacy clerk fairly and reasonably represented appellant's wage-earning capacity.[8]

CONCLUSION

The Board finds that the Office improperly reduced appellant's compensation benefits based on the finding that her earnings as a pharmacy clerk fairly and reasonably represented her wage-earning capacity.

[8] The Board notes that appellant submitted several reports from Dana Steiner, a physician's assistant. Registered nurses, licensed practical nurses and physician's assistants are not "physicians" as defined under the Act. Their opinions are of no probative value. *Roy L. Humphrey*, 57 ECAB 238, 242 (2005); 5 U.S.C. § 8101(2) of the Act provides as follows: "(2) 'physician' includes surgeons, podiatrists, dentists, clinical psychologist, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law."

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 17, 2009 is reversed.

Issued: April 5, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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