United States Department of Labor
Employees' Compensation Appeals Board

R.D., Appellant **and** **DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, Atlanta, GA, Employer**	)	**Docket No. 09-1237** **Issued: February 18, 2010**

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 April 14, 2009 appellant filed a timely appeal from the March 12, 2009 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 case.

ISSUE

The issue is whether the Office properly reduced appellant's compensation to zero effective April 13, 2008 based on her capacity to earn wages as a secretary.

FACTUAL HISTORY

The Office accepted that on July 1, 1999 appellant, then a 61-year-old part-time economic assistant, sustained aggravation of chondromalacia of her left patella due to stepping out of a car at work. It authorized arthroscopic surgery of her left knee which was performed on January 21, 2000. Appellant worked in a secretarial position with the employing establishment from April 2001 to May 2002. She underwent left total knee replacement on June 4, 2002 and left knee revision surgery on July 7, 2003. Both procedures were authorized by the Office. It

was also accepted that appellant sustained a right thumb ligament tear as a consequence of the accepted injury and the Office authorized a surgical repair which was performed on July 26, 2004. Appellant has not returned to work since May 2002.

On November 2, 2005 Dr. Harold H. Alexander, a Board-certified orthopedic surgeon serving as an Office referral physician, found that appellant had good range of motion of her lower extremities and that she complained of left knee pain. He opined that appellant could return to work in a sedentary position. In several reports from early 2006, Dr. Jon E. Minter, an attending osteopath, stated that she had medial collateral ligament laxity of her left knee and that she could not return to work.

The Office determined that a conflict in medical opinion arose between Dr. Alexander and Dr. Minter regarding appellant's ability to work. In order to resolve the conflict, the Office referred her, pursuant to section 8123(a) of the Federal Employees' Compensation Act, to Dr. Daniel Kingloff, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a May 19, 2006 report, Dr. Kingloff stated that on examination appellant appeared to have full extension of her left knee, although it was somewhat difficult to evaluate her secondary to her obesity. There was a minimal amount of medial lateral rocking of her left knee upon extension and there did not appear to be any mid-flexion instability. Dr. Kingloff stated that there did not appear to be any significant anterior or posterior drawer sign in the left knee, but noted that obesity made this test difficult to assess. An x-ray of the left knee taken on May 19, 2006 did not show any significant medial collateral ligament instability that needed any further surgery. In July 18, 2006 reports, Dr. Kingloff determined that appellant could perform limited-duty work for eight hours per day in a sedentary type of job. He stated that she could sit, engage in repetitive motion with her elbows and wrists and reach (including above her shoulders) for eight hours per day. Dr. Kingloff indicated that appellant could only engage in a minimal amount of standing and walking and that she could not lift, push, pull, bend, squat, twist or climb.[1]

Based on the opinion of Dr. Kingloff, appellant was referred for vocational rehabilitation services. She underwent training to upgrade her computer skills which was completed in September 2007.

Appellant received regular care for her lower extremity condition from Dr. Minter. On December 12, 2006 Dr. Minter advised that her physical examination showed signs of medial ligament instability of her left knee. He recommended that appellant undergo additional left knee surgery such as a medial collateral ligament tightening/imprecation and stated, "I do feel that [appellant] is unable to return to work secondary to her ongoing pain and knee instability." On July 3, 2007 Dr. Minter noted that her physical examination continued to show signs of medial ligament instability of her left knee and provided an opinion that she could only work for

[1] Dr. Kingloff stated, "[U]nless there is a problem with her actually getting into her vehicle that transports her and her wheelchair, I do not see any reason why she should not be able to drive to work."

four hours per day. On October 14, 2007 he noted persistent medial ligament instability of the left knee and stated, "[Appellant] is still in extremely limited work duty status."[2]

In October 2007, appellant's rehabilitation counselor, Susan Grant, determined that appellant could work in the constructed position of secretary on a full-time basis. Ms. Grant indicated that state labor surveys showed that the position was reasonably available in appellant's commuting area at a wage of $424.00 per week. The secretary position involved performing such duties as assisting customers, making copies of printed matter, filing paperwork, greeting visitors, keeping and preparing records, entering information into a computer, preparing reports, answering the telephone and coordinating activities. The position was described as sedentary but the job description did not indicate how much standing and walking was required. The physical requirements included occasional reaching, handling, fingering and lifting up to 10 pounds.[3]

On February 21, 2008 the Office issued a notice proposing to reduce appellant's wage-loss compensation benefits to zero because she had the capacity to work on a full-time basis in the constructed position of secretary and earn wages of $424.00 per week. It provided appellant 30 days to present evidence and argument challenging this proposed action. The Office found that the opinion of Dr. Kingloff showed that she was physically capable of performing the secretary position.

Appellant's attorney argued that appellant was not physically capable of working in the constructed position of secretary on a full-time basis and also claimed that she had psychiatric problems which prevented her from working. Appellant submitted a March 13, 2008 report, in which Dr. Jennifer Kelly, an attending clinical psychologist, assessed her psychiatric state and diagnosed such conditions as anxiety, pain and personality disorders.

In an April 11, 2008 decision, the Office reduced appellant's compensation to zero effective April 13, 2008 based on her capacity to earn wages as a secretary.

Appellant, through her attorney, requested a telephonic hearing with an Office hearing representative. At the August 6, 2008 hearing, appellant, through her attorney, argued that her wage-earning capacity should have been based on her work as a part-time economic assistant working an average of 18.2 hours per week. She alleged that the duties of the constructed secretary position exceeded her work restrictions. Appellant asserted that the Office did not meet its burden of proof to show that a secretarial job existed in her commuting area and was available within her work restrictions. Following the telephone hearing, the Office received multiple updated medical reports from appellant's treating physicians.

[2] In a December 7, 2007 report, Dr. Kay Kirkpatrick, an attending orthopedic surgeon, stated that appellant could only perform limited activities with her right hand due to her right thumb condition.

[3] Appellant attempted to find a job as a secretary over a period of more than 90 days but her job search was unsuccessful.

In a March 12, 2009 decision, the Office hearing representative affirmed the Office's April 11, 2008 decision. She indicated that the weight of the medical evidence regarding appellant's ability to work continued to rest with the opinion of Dr. Kingloff.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[4] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[5]

Under section 8115(a) of the 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 injury, her degree of physical impairment, her usual employment, her age, her qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect her wage-earning capacity in her disabled condition.[6] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[7] 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.[8]

In determining wage-earning capacity based on a constructed position, consideration is given to the residuals of the employment injury and the effects of conditions which preexisted the employment injury.[9] In determining wage-earning capacity based on a constructed position, consideration is not given to conditions which arise subsequent to the employment injury.[10]

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

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[4] *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

[5] *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

[6] *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

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

[8] *Id.*

[9] *See Jess D. Todd*, 34 ECAB 798, 804 (1983).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(d) (December 1995).

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.[11]

Section 8123(a) of the Act provides in pertinent part: "If there is 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."[12] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.[13] In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[14]

ANALYSIS

The Office accepted that on July 1, 1999 appellant sustained aggravation of chondromalacia of her left patella. It authorized several surgeries including a left total knee replacement on June 4, 2002 and left knee revision surgery on July 7, 2003. The Office also accepted that appellant sustained a right thumb ligament tear as a consequence of the accepted injury and authorized a surgical repair, which was performed on July 26, 2004. In an April 11, 2008 decision, it reduced her compensation to zero effective April 13, 2008 based on her capacity to earn wages as a secretary.[15]

In determining that appellant was physically capable of working as a secretary on a full-time basis, the Office relied on the May 19 and July 18, 2006 reports of Dr. Kingloff, a Board-certified orthopedic surgeon who served as an impartial medical specialist.[16] In July 18, 2006

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[11] *See Dennis D. Owen*, 44 ECAB 475, 479-80 (1993); *Wilson L. Clow, Jr.*, 44 ECAB 157, 171-75 (1992); *Albert C. Shadrick*, 5 ECAB 376 (1953).

[12] 5 U.S.C. § 8123(a).

[13] *William C. Bush*, 40 ECAB 1064, 1975 (1989).

[14] *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

[15] The secretary position involved performing such duties as assisting customers, filing paperwork, making copies of printed matter, greeting visitors, keeping and preparing records, entering information into a computer, preparing reports, answering the telephone and coordinating activities. The position was described as sedentary but the job description did not indicate how much standing and walking was required. The physical requirements included occasional reaching, handling, fingering and lifting up to 10 pounds.

[16] The Board notes that the Office properly referred the case to Dr. Kingloff after determining that there was a conflict in the medical opinion between Dr. Alexander, a Board-certified orthopedic surgeon serving as an Office referral physician, and Dr. Minter, an attending osteopath, regarding appellant's ability to work. On November 2, 2005 Dr. Alexander opined that she could return to work in a sedentary position. In several reports from early 2006, Dr. Minter, an attending osteopath, stated that appellant had medial collateral ligament laxity of her left knee and posited that she could not return to work.

reports, he stated that appellant could perform limited-duty work for eight hours per day in a sedentary type of job. Dr. Kingloff noted that she could sit, engage in repetitive motion with her elbows and wrists and reach (including above her shoulders) for eight hours per day. He indicated that appellant could only engage in a minimal amount of standing and walking and that she could not lift, push, pull, bend, squat, twist or climb. Based on his reports, appellant was referred for vocational rehabilitation.

The Board finds, however, that the Office did not present sufficient medical evidence to establish that appellant could work as a secretary on a full-time basis. There is medical evidence of record which was received after Dr. Kingloff's assessment in 2006, which indicates that appellant would not be able to perform the level of work required by the constructed secretary position.

On December 12, 2006 Dr. Minter indicated that appellant's physical examination showed signs of medial ligament instability of her left knee. He recommended that she undergo additional left knee surgery such as a medial collateral ligament tightening/imprecation and stated that she was unable to return to work secondary to her ongoing pain and knee instability. Dr. Minter continued to report persistent left knee instability. On July 3, 2007 he indicated that appellant could only work for four hours per day and on October 14, 2007 he noted that she was still in an extremely limited work duty status. As noted above, the Office adjusted appellant's compensation based on its determination that she could work on a full-time basis as a secretary. Moreover, the job description of the constructed secretary position did not clearly indicate how much standing and walking the job required.[17] Therefore, the reports of Dr. Minter, call into question whether appellant could physically perform the duties of the secretary position.[18] The Office did not request that Dr. Kingloff review these reports or provide any opinion on the selected position.

The Office did not meet its burden of proof to establish that appellant had the requisite physical ability to perform the position of secretary on a full-time basis. It did not meet its burden to reduce appellant's compensation effective April 13, 2008 based on her capacity to earn wages as a secretary on a full-time basis.

CONCLUSION

The Board finds that the Office improperly reduced appellant's compensation to zero effective April 13, 2008 based on her capacity to earn wages as a secretary.

[17] There is some indication that appellant used a wheelchair at times, but the job description failed to indicate that such a circumstance could be accommodated.

[18] Dr. Kirkpatrick, an attending orthopedic surgeon, stated on December 7, 2007 that appellant could only perform limited activities with her right hand due to her right thumb condition.

ORDER

IT IS HEREBY ORDERED THAT the March 12, 2009 decision Office of Workers' Compensation Programs is reversed.

Issued: February 18, 2010
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