United States Department of Labor
Employees' Compensation Appeals Board

J.W., Appellant	)	
and	)	**Docket No. 09-1800**
	)	**Issued: June 21, 2010**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Charleston, SC, Employer	)	

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 6, 2009 appellant filed a timely appeal from the Office of Workers' Compensation Programs' January 28, 2009 wage-earning capacity determination and a June 10, 2009 decision that denied her request for a hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether the Office met its burden of proof to reduce appellant's compensation based on its determination that the selected position of sales clerk, cosmetics and toiletries, represented her wage-earning capacity effective February 15, 2009; and (2) whether the Office properly denied her request for a hearing.

FACTUAL HISTORY

On April 11, 2006 appellant, then a 28-year-old transportation security screener, felt a sharp pain in her low back while pulling a cart full of loaded boxes while in the performance of

duty. Appellant was placed on limited duty and then stopped work on October 31, 2006. The Office accepted the claim for subluxation of the lumbar spine and closed lumbar dislocation. Appellant received wage-loss compensation and was placed on the periodic rolls.

In a January 2, 2007 report, Dr. Richard M. Gordon, an attending Board-certified internist, advised that appellant could not return to her date-of-injury position but that she was capable of working eight hours per day with restrictions.

On January 30, 2007 the Office referred appellant to Dr. Gerald D. Schuster, a Board-certified orthopedic surgeon, for a second opinion. In a February 13, 2007 report, Dr. Schuster reviewed appellant's history of injury and medical treatment. He determined that she had residuals of a lumbar strain superimposed on degenerative intervertebral disc disease in the lower lumbar area. Dr. Schuster advised that appellant was not capable of working in her regular position as a transportation security screener but could perform nonheavy lifting activities for eight hours a day. He provided restrictions that included standing for no more than two hours a day; twisting, bending and stooping for no more than one hour a day; pushing, pulling and lifting up to 25 pounds for no more than one to two hours a day. Dr. Schuster prescribed hourly 10-minute breaks.

In a March 19, 2007 file memorandum, the Office noted that the employing establishment was unable to accommodate appellant's work restrictions as set by Dr. Gordon.

On March 29, 2007 the Office referred appellant to a vocational rehabilitation counselor. It noted that the vocational rehabilitation counselor would search for employment in the private sector within appellant's restrictions. In reports dated June 24 and 29, 2007, the vocational rehabilitation counselor determined that appellant was interested in becoming an esthetician and recommended that she enroll in a technical college for two semesters followed by a three-month placement period. Based upon her experience, education, medical restrictions and a labor market survey, appellant would be employable in sales, cosmetics and toiletries.

In a letter dated August 3, 2007, the Office advised appellant that, after she completed her training for return to work as an esthetician, make-up artist, physical integration practitioner, or sales person, she would receive 90 days of placement services. Appellant was advised that her compensation would be reduced based upon the salary of this position at the end of job placement services whether she was employed or not.

In reports dated August 28 and December 9, 2008, the vocational rehabilitation counselor found that appellant had completed the approved training program with the vocational goal of being prepared for the position of cosmetics and toiletries sales person, *Dictionary of Occupational Titles* (DOT No. 262.357.018) with wages of $10.00 per hour.[1] She advised that appellant had completed Office-sponsored training and obtained a certificate in esthetics which prepared her for employment as a make-up artist in sales, cosmetics and toiletries. The vocational rehabilitation counselor advised that appellant had received four months of placement

[1] The counselor noted that a prior labor market survey projected a wage-earning capacity of $11.00 per hour; however, at the end of the placement period, the current labor market survey revealed that the salary was $10.00 per hour.

assistance; however, she was unsuccessful in obtaining employment. She noted that Dr. Schuster's report supported that appellant could perform sedentary work. The vocational rehabilitation counselor found that the jobs remained reasonably available in appellant's commuting area. She provided a job classification report for the position of sales clerk, cosmetics and toiletries, DOT#262.357.018.[2] It noted that the individual would sell:

> "[C]osmetics and toiletries, such as skin creams, hair preparations, face powder, lipstick, and perfume, to customers in department stores or specialty shop: Demonstrates methods of application of various preparations to customer. Explains beneficial properties of preparations and suggests shades or varieties of makeup to suit customer's complexion. May weigh and mix facial powders, according to established formula, to obtain desired shade, using spatula and scale. Performs other duties as described under Salesperson (retail trade; wholesale tr.)"

The vocational rehabilitation counselor noted that the strength requirements were described as light. Physical demands listed for the job included no stooping, crouching or kneeling but frequent reaching and handling. In a memorandum of telephone call dated December 12, 2008, the Office confirmed that appellant had not secured employment and her placement services had ended. It noted that the projected wages were $10.00 per hour, or $400.00 per week, or $20,800.00 per year. The Office also obtained information on appellant's pay rate and pay band.

On December 19, 2008 the Office proposed to reduce appellant's wage-loss compensation as the medical and factual evidence established that she was no longer totally disabled but had the capacity to earn wages in sales, cosmetics and toiletries, DOT No. 237.357-018 at the rate of $400.00 a week. It explained that Dr. Schuster's report, the second opinion physician, was the weight of medical opinion and that the identified position was within the medical limitations he outlined. Appellant was advised that the rehabilitation counselor reported that, based upon appellant's experience, education, medical restrictions, and a labor market survey, she was employable in sales, cosmetics and toiletries. The Office informed appellant that her vocational rehabilitation counselor had documented that such positions were reasonably available in her commuting area and that the entry pay level for the position was $400.00 per week.[3] It provided a calculation sheet indicating that her pay rate when her disability began on October 31, 2006 was $537.76 per week; the current adjusted pay rate for her job on the date of injury was $556.69 per week, she was currently capable of earning $400.00 per week as a sales, cosmetics and toiletries clerk. The Office determined that appellant had a 72 percent wage-earning capacity, which resulted in an adjusted wage-earning capacity of $387.19 per week. It

[2] The vocational rehabilitation counselor also provided job classification information for the position of make-up artist.

[3] The Office noted that the Department of Labor's *Dictionary of Occupational Titles* described the physical requirements as follows: "Light Work -- exerting up to 20 pounds of force occasionally, and/or up to 10 pounds of force frequently, and/or a negligible amount of force constantly (Constantly: activity or condition exists 2/3 or more of the time) to move objects. Physical demand requirements are in excess of those for sedentary work. Even though the weight lifted may be only a negligible amount, a job should be rated light work: (1) when it requires walking or standing to a significant degree; or (2) when it requires sitting most of the time but entails pushing and/or pulling of arm or leg controls; and/or (3) when the job requires working at a production rate pace entailing the constant pushing and/or pulling of materials even though the weight of those materials is negligible."

determined that she had a loss of wage-earning capacity of $150.57 per week. The Office concluded that, based upon a two-thirds compensation rate, appellant's compensation would be $100.38 per week, increased by cost-of-living adjustments to $104.75, per week, or $419.00 every four weeks. Appellant was provided 30 days to submit additional evidence or argument in support of any objection to the proposed reduction.

In a December 28, 2008 letter, appellant advised that she had sought employment in the esthetics field without success. She indicated that her vocational counselor had been of little help in assisting her to find employment and encouraged her to seek employment in fields other than esthetics. Appellant also questioned whether her back condition would allow her to work noting that she could not stand for more than 30 minutes without significant pain. In an October 27, 2008 report, Dr. Timothy Zgleszewski, Board-certified in pain medicine and physiatry, noted appellant's complaint of low back pain and recommended lumbar facet blocks.

By decision dated January 28, 2009, the Office reduced appellant's compensation effective February 15, 2009, based on her ability to work full time in selected positions of sales, cosmetics and toiletries, which was found to be medically and vocationally suitable.

Appellant submitted additional evidence and, in a letter postmarked March 6, 2009, she requested a hearing. In a June 1, 2009 decision, the Office denied the hearing request as being untimely filed.

LEGAL PRECEDENT -- ISSUE 1

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]

Section 8115(a) of the Federal Employees' Compensation Act,[5] provides 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. Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.[6] 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.[7] Wage-earning capacity is a

[4] *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984). *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

[5] 5 U.S.C. § 8115.

[6] *Hubert F. Myatt*, 32 ECAB 1994 (1981); *Lee R. Sires*, 23 ECAB 12 (1971).

[7] *See Pope D. Cox, supra* note 4; 5 U.S.C. § 8115(a).

measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[8] 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.[9] In determining an employee's wage-earning capacity, the Office may not select a makeshift or odd-lot position or one not reasonably available on the open labor market.[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 his physical limitation, 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.[11] Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.[12]

ANALYSIS -- ISSUE 1

The Board finds that the Office did not properly reduce appellant's compensation based on her ability to earn wages in the selected position of a sales clerk, cosmetics and toiletries.

The medical evidence from Dr. Schuster, the second opinion physician, along with her treating physician, established that she was no longer totally disabled; thus, the Office properly referred her for vocational rehabilitation. The rehabilitation counselor found that appellant had the physical and vocational capacity to perform the duties of a sales, cosmetics and toiletries clerk. On appeal, appellant argues that she is unable to work as a sales clerk in cosmetics and toiletries because she was unable to stand more than two hours a day and the position exceeded her restrictions.

The medical evidence is insufficient to support a finding that the position of a sales, cosmetics and toiletries clerk was within appellant's physical limitations. The issue of whether an employee has the physical ability to perform a selected position is primarily a medical question that must be resolved by the medical evidence.[13] The Board notes that Dr. Schuster opined, in his February 13, 2007 report, that appellant was not capable of working as a transportation security screener for eight hours a day, with the exception of "doing nonheavy lifting activities." Dr. Schuster determined that she was capable of working for eight hours a day

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

[9] *Id.*

[10] *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

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

[12] *Id. See Shadrick*, 5 ECAB 376 (1953).

[13] *See Maurissa Mack*, 50 ECAB 498 (1999); *Robert Dickinson*, 46 ECAB 1002 (1995).

with restrictions: of standing, for no more than two hours a day; twisting, bending and stooping, for no more than one hour a day; pushing, pulling and lifting for no more than one to two hours daily, and no more than 25 pounds. He prescribed hourly 10-minute breaks.

The Department of Labor's *Dictionary of Occupational Titles* job classification for position of sales, cosmetics and toiletries clerk, notes that the position is classified as light, with a 20-pound lifting/pushing/pulling limitation, which would fall within the restrictions set forth by Dr. Schuster. However, it does not specifically address whether the position involves standing, twisting or bending, which were limited to no more than one or two hours a day. The Board finds that the evidence of record is unclear as to whether appellant would be able to perform the physical activities of the selected position in light of these restrictions. The weight of the evidence of record is insufficient to establish that appellant had the requisite physical ability to perform the position.

The Office has the burden of proof to justify termination or modification of compensation benefits, and when a position is selected to represent wage-earning capacity, it must show that a claimant has the physical ability to perform the position.[14] Although the second opinion physician noted appellant's work restrictions, the Office did not ask the physician to review the position description to determine whether appellant could perform all of the duties nor did it seek clarification from the vocational rehabilitation counselor regarding the physical demands of the position that were not listed in the Department of Labor's *Dictionary of Occupational Titles* job classification. As it is unclear whether appellant has the capacity to work as a cosmetics and toiletries sales clerk, the Office has not met its burden of proof to reduce her compensation benefits based on this selected position.[15]

CONCLUSION

Because the Office did not establish that the selected position accommodated appellant's physical restrictions, the Board finds that the Office did not meet its burden of proof in reducing appellant's compensation effective February 15, 2009.

[14] *See Bettye F. Wade*, *supra* note 4*; Ella M. Gardner*, *supra* note 4; *see Del K. Rykert*, 40 ECAB 284, 295-96 (1988); *see Pope D. Cox*, *supra* note 4; 5 U.S.C. § 8115(a).

[15] In light of the Board's finding on the first issue, the second issue is moot.

ORDER

IT IS HEREBY ORDERED THAT the January 28, 2009 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 21, 2010
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