United States Department of Labor
Employees' Compensation Appeals Board

T.D., Appellant	)	
and	)	
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, OHARE INTERNATIONAL AIRPORT, Chicago, IL, Employer	)	**Docket No. 09-1635** **Issued: March 3, 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 June 8, 2009 appellant filed an appeal from decisions of the Office of Workers' Compensation Programs dated October 31, 2008 and May 6, 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 capacity to earn wages in the constructed position of order clerk.

On appeal, appellant's attorney asserts that the decisions are contrary to fact and law.

FACTUAL HISTORY

On May 2, 2006 appellant, then a 39-year-old part-time transportation security officer, filed a Form CA-1, traumatic injury claim, alleging that she injured her back that day moving bins and

bags.[1] She stopped work and has not returned. The Office accepted that she sustained employment-related sprains of the lumbar region and lumbosacral joint, lumbar disc displacement and sciatica. Appellant was placed on the periodic rolls.

An October 13, 2006 functional capacity evaluation (FCE) advised that appellant could physically do more than was demonstrated during testing and showed that she had the ability to perform physical demands at the sedentary to light level secondary to pain, decreased range of motion, decreased strength and muscle spasms in the lower back. In a December 19, 2006 work capacity evaluation, Dr. John Stamelos, an attending Board-certified orthopedic surgeon, advised that appellant had reached maximum medical improvement and could work eight hours a day with permanent restrictions to her physical activity.[2] The employing establishment was unable to accommodate her work restrictions.

In February 2007, the Office referred appellant to Elizabeth Watson, a vocational rehabilitation counselor. Appellant underwent pain management, supervised by Dr. Howard S. Konowitz, Board-certified in anesthesiology, internal medicine and pain medicine, who noted improved, but continued, low back pain. On April 5, 2007 Dr. Konowitz advised that appellant's work status had been addressed based on the October 13, 2006 functional capacity evaluation.[3] On April 25, 2007 Ms. Watson identified the positions of sorter (clerical) and order clerk (clerical) as within the sedentary strength category, with occasional lifting of 10 pounds and no climbing, balancing, stooping, kneeling, crawling or crouching. She advised that the positions were reasonably available in the local labor market at a weekly wage of $497.20 each. Appellant successfully completed computer and security training and in October 2007 began a job search.

Dr. Konowitz submitted reports in which he described appellant's treatment regimen and advised that she was progressing. In a report dated January 17, 2008, Dr. Robert W. Molnar, an osteopath and associate of Dr. Konowitz, advised that she reported that her low back pain had recently worsened and that she was seeking time off from seeking a job. He provided physical examination findings and advised that positive Waddell's testing demonstrated symptom magnification throughout the examination.

On February 6, 2008 Ms. Watson identified the position of security guard as within the light strength category and advised that the position was reasonably available in the local labor market at a weekly wage of $424.00 to $680.00 weekly. Appellant worked in a flower shop from March 10 to April 23, 2008 and then resumed a job search.

By letter dated September 26, 2008, the Office proposed to reduce appellant's wage-loss compensation based on her capacity to earn wages as an order clerk, noting that the permanent restrictions identified by Dr. Stamelos in his December 19, 2006 report were the best representation

[1] Appellant worked from 5:00 to 11:30 a.m. five days a week.

[2] Sitting, walking and standing were restricted to 30 minutes at a time; reaching to 1 hour, with no reaching above the shoulder, twisting, bending, stooping or driving; 4 hours pushing and pulling 10 pounds; and 4 hours lifting 20 pounds with 15-minute breaks every 2 hours.

[3] On April 4, 2007 Andrea Iantorno-Buckley, a nurse practitioner and associate of Dr. Konowitz, completed a work capacity evaluation in which she advised that appellant had restrictions based on the functional capacity evaluation and could work eight hours a day of sedentary to light work.

of her work capabilities. On October 1, 2008 Ms. Watson updated the labor market survey information for the positions of order clerk and sorter, noting that each was within the sedentary strength category and advised that the positions were reasonably available in the local labor market at a weekly wage of $553.00 and $529.00 respectively.

By decision dated October 31, 2008, the Office reduced appellant's compensation benefits based on her capacity to earn wages as an order clerk, which yielded a zero loss of wage-earning capacity.

On November 4, 2008 appellant, through her attorney, requested a hearing that was held on February 10, 2009. At the hearing she testified that she was now working 29 to 30 hours a week as a security guard with an hourly wage of $9.25. Appellant's attorney argued that, as appellant was working, the wage-earning capacity determination should be based on her actual earnings. After the hearing appellant submitted pay stubs showing part-time employment from October 12, 2008 to March 14, 2009.

By decision dated May 6, 2009, an Office hearing representative found that appellant's actual part-time earnings did not fairly and reasonably represent her wage-earning capacity and affirmed the October 31, 2008 decision.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[4] 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.[5]

Section 8115 of the Federal Employees' Compensation Act[6] and Office regulations provide that wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity or the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, usual employment, age, qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect his or her wage-earning capacity in the disabled condition.[7]

The Office must initially determine a claimant's medical condition and work restrictions before selecting an appropriate position that reflects his or her wage-earning capacity. The medical evidence upon which the Office relies must provide a detailed description of the condition.[8]

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

[5] 20 C.F.R. §§ 10.402, 10.403; *John D. Jackson*, 55 ECAB 465 (2004).

[6] 5 U.S.C. §§ 8101-8193.

[7] 5 U.S.C. § 8115; 20 C.F.R. § 10.520; *John D. Jackson, supra* note 5.

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

Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.[9]

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 for selection of a position listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open market, that fits that 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 open labor market should be made through contact with the state employment service or other applicable service.[10] 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.[11]

In determining an employee's wage-earning capacity based on a position deemed suitable, but not actually held, the Office must consider the degree of physical impairment, including impairments resulting from both injury related and preexisting conditions, but not impairments resulting from post injury or subsequently acquired conditions. Any incapacity to perform the duties of the selected position resulting from subsequently acquired conditions is immaterial to the loss of wage-earning capacity that can be attributed to the accepted employment injury and for which appellant may receive compensation.[12]

ANALYSIS

Appellant sustained employment-related injuries to the lumbar spine on May 2, 2006 and was placed on the periodic compensation rolls. An October 13, 2006 FCE demonstrated that she had the ability to perform the physical demands at the sedentary to light strength level. In a December 19, 2006 work capacity evaluation, Dr. Stamelos advised that appellant had reached maximum medical improvement and could work for eight hours a day. He imposed permanent restrictions to her physical activity. In April 2007, Dr. Konowitz, appellant's pain management specialist, advised that he agreed with the FCE findings. The weight of the medical evidence establishes that appellant is no longer totally disabled. The Office properly referred her for vocational rehabilitation.[13] Appellant completed computer and security training programs and, other than a brief period of employment in a flower shop, did not secure employment by September 26, 2008, when the Office proposed to reduce her compensation based on her ability to earn wages as an order clerk.

[9] *John D. Jackson, supra* note 5.

[10] *James M. Frasher, supra* note 4.

[11] The formula for determining loss of wage-earning capacity based on actual earnings, developed in *Albert C. Shadrick*, 5 ECAB 376 (1953), has been codified at 20 C.F.R. § 10.403 of the Office's regulations. The Office calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury job. *See J.C.*, 58 ECAB 700 (2007).

[12] *John D. Jackson, supra* note 5.

[13] 5 U.S.C. § 8104(a); *see Ruth E. Leavy*, 55 ECAB 294 (2004).

The order clerk position is classified as sedentary with occasional lifting up to 10 pounds and no climbing, balancing, stooping, kneeling, crawling or crouching. These physical requirements are within the restrictions set forth by the FCE, affirmed by Dr. Konowitz, and by Dr. Stamelos. Ms. Watson, the vocational rehabilitation specialist, found that the vocational requirements of the position were commensurate with appellant's education, training and experience and determined the prevailing wage of the position and its reasonable availability in the open labor market in appellant's commuting area. Appellant did not respond to the September 26, 2008 notice. By decision dated October 31, 2008, the Office applied the *Shadrick* formula and reduced her wage-loss compensation to zero based on her ability to earn wages as an order clerk.

Appellant testified at the hearing that she was working part time as a security guard and submitted pay stubs to show that she began working on October 12, 2008. The medical evidence of record, however, establishes that she has the capacity to work full time at the sedentary strength requirement of the order clerk position. Appellant did not submit any medical evidence indicating that she is not capable of performing eight hours of sedentary duty daily.

The Board finds that the Office considered the proper facts such as availability of the clerk position and appellant's physical limitations in determining that the full-time order clerk position represented her wage-earning capacity. Appellant's actual earnings in the security guard position did not fairly and reasonably represent her wage-earning capacity as the position was part time. The medical evidence establishes that she had the requisite physical ability, skill, training and experience to perform the full-time sedentary position of order clerk.[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 full-time position of order clerk represented her wage-earning capacity[15] and the position was reasonably available within the general labor market of her commuting area, the Office properly determined that the position of order clerk reflected her wage-earning capacity and using the *Shadrick* formula,[16] properly reduced her compensation on October 31, 2008.[17]

CONCLUSION

The Board finds that the Office met its burden of proof in reducing appellant's wage-earning capacity based on her ability to earn wages in the full-time constructed position of order clerk.

[14] *M.A.*, 59 ECAB ____ (Docket No. 07-349, issued July 10, 2008).

[15] *T.O.*, 58 ECAB 377 (2007).

[16] *Supra* note 11. In this case, the Office determined that appellant's salary on May 2, 2006, the date of injury, was $439.87 per week, that the current adjusted pay rate for her job was $462.99 per week; and that she was capable of earning $497.20 per week as an order clerk. It then determined that appellant had a zero percent loss of wage-earning capacity. The Board notes that the weekly wage for an order clerk reported by Ms. Watson on April 25, 2007 was $497.20. On October 1, 2008 Ms. Watson updated the labor market survey for an order clerk. At that time the reported weekly wage was $553.00. The Office based its October 31, 2008 wage-earning capacity determination on the April 25, 2007 weekly wage of $497.20 rather than the $553.00 weekly wage reported on October 1, 2008. The Board deems this error harmless as the use of the former figure would not affect the outcome of reducing appellant's compensation to zero.

[17] *James Smith*, 53 ECAB 188 (2001).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 6, 2009 and October 31, 2008 are affirmed.

Issued: March 3, 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