

disability in August and September 1997. She stopped work on September 14, 1997 and did not return.¹

On July 26, 2007 the Office referred appellant to Dr. William A. Somers, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated August 15, 2007, Dr. Somers described appellant's work history, reviewed the results of diagnostic studies and listed detailed findings on physical examination. He found that her lumbar sprain had resolved but that she also sustained herniated lumbar discs and an aggravation of lumbar degenerative disc disease due to her June 23, 2007 work injury. Dr. Somers explained that appellant's initial diagnosis was correct but not complete and that her work injury caused "herniated discs superimposed on degenerative disc disease." He recommended an electromyogram (EMG) and a back rehabilitation program. In an accompanying work restriction evaluation, Dr. Somers found that appellant could work 8 hours a day with restrictions on sitting up to 4 hours a day in 20-minute increments, walking up to 2 hours a day in 20-minute increments and standing up to 2 hours a day in 20-minute increments. He further found that she could not twist, bend, squat, knee or climb but could lift 10 pounds and push and pull up to 20 pounds for one hour a day.

On November 19, 2007 the Office accepted that appellant sustained an employment-related herniated lumbar disc and an aggravation of degenerative lumbar disc disease. On November 27, 2007 it referred her to a rehabilitation counselor for vocational rehabilitation.

In an initial evaluation dated November 20, 2007, Dr. Paul B. Shu, a Board-certified orthopedic surgeon, discussed appellant's history of injury. He diagnosed lumbar and cervical degenerative disc disease and lumbar spinal stenosis.²

In a vocational assessment dated December 14, 2007, the rehabilitation counselor discussed appellant's work history as a seasonal retail salesperson earlier that year and as a general office clerk in 1980. He noted that Dr. Somers found that appellant could sit, stand and walk for 20 minutes at a time with a total of 4 hours of sitting and 2 hours of standing and walking in an 8-hour day. The rehabilitation counselor referred her for a vocational analysis with a psychologist.³

In a vocational report dated April 17, 2008, the rehabilitation counselor identified the positions of retail sales association, office assistant and data entry operator as within appellant's capabilities. He recommended a 90-day direct placement plan with a new employer. The

¹ By decision dated May 1, 2002, the Office terminated appellant's compensation effective May 1, 2002 based on its finding that the weight of the evidence, as represented by the impartial medical examiner, established that her work-related disability ceased. On November 25, 2002 a hearing representative vacated the May 1, 2002 decision after finding that there was insufficient evidence that the impartial medical examiner was properly selected.

² Dr. Shu submitted a progress report dated July 8, 2008.

³ Appellant underwent vocational testing on January 23, 2008.

Department of Labor's *Dictionary of Occupational Titles* (DOT) describes the duties of a data entry clerk as follows:

“Operates keyboard or other data entry device to enter data into computer or onto magnetic tape or disc for subsequent entry: Enters alphabetic, numeric, or symbolic data from source documents into computer, using data entry device, such as keyboard or optical scanner and following format displayed on screen. Compares data entered with source documents, or reenters data in verification format on screen to detect errors. Deletes incorrectly entered data, and reenters correct data. May compile, sort, and verify accuracy of data to be entered. May keep record of work completed.”

In a July 25, 2008 vocational rehabilitation report, the rehabilitation counselor discussed appellant's prior work experience as an office clerk and in data entry before she began working for the employing establishment. He noted that she wanted to relocate and recommended closure of vocational rehabilitation services.

In a job classification dated August 9, 2008, the rehabilitation counselor advised that the position of data entry clerk was sedentary and reasonably available within appellant's commuting area at a weekly wage of \$440.00. The specific vocational preparation required for the position was three to six months.

On October 30, 2008 the Office notified appellant that it proposed to reduce her wage-loss compensation based on its finding that she had the capacity to earn wages as a data entry clerk. It determined that Dr. Somer's opinion established that she had the physical capacity and vocational skills necessary to work as a data entry clerk.

In a duty status report dated October 27, 2008, Dr. Shu found that appellant could work sitting, standing and walking two to four hours a day and lifting up to 10 pounds continuously and 20 pounds intermittently.⁴ In a letter to the Office dated October 30, 2008, he diagnosed disabling lumbar degenerative disc disease. Dr. Shu found that appellant could work within the limitations listed on prior forms.

By decision dated December 16, 2008, the Office reduced appellant's compensation effective October 30, 2008 finding that the constructed position of data entry clerk represented her wage-earning capacity.

In a report dated December 30, 2008, Dr. Shu reviewed the Office's reduction of appellant's compensation. He reviewed her sitting and standing limitations of two to four hours and advised that she could not sit or stand for eight hours continuously during a workday but could sit and stand with breaks. In a January 5, 2009 work restriction evaluation, Dr. Shu indicated that appellant could work eight hours per day with restrictions on sitting, walking and

⁴ In a progress report dated November 12, 2008, Dr. Lawrence J. Yenni, a Board-certified orthopedic surgeon, diagnosed bilateral shoulder pain with a possible injury to the biceps labral complex on the right and bilateral impingement signs. He recommended physical therapy and injections.

standing of two to four hours, limited twisting, bending and stooping and intermittent lifting under 20 pounds.⁵

On January 7, 2009 appellant requested an oral hearing.⁶ At the hearing, held on May 20, 2009, she alleged that she had cervical problems from her work injury. Appellant also questioned whether she was qualified to work as a data entry operator. She asserted that there were few jobs that could accommodate her sitting and standing requirements.

By decision dated August 14, 2009, the hearing representative affirmed the December 16, 2008 wage-earning capacity determination.

On appeal appellant contends that she lacks the vocational training to perform the duties of a data entry clerk. She noted that she last worked in the field 23 years earlier when computers had black and white screens. Appellant contends that the rehabilitation counselor did not consider the results of her achievement testing in January 2008 and failed to provide her with retraining in accordance with Office regulations.

LEGAL PRECEDENT

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of benefits.⁷ Under section 8115(a), 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 his or her wage-earning capacity, or if 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, his or her usual employment, age, qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect wage-earning capacity in his or her disabled condition.⁸

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 DOT 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.⁹ 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

⁵ The record contains progress reports from Dr. Shu dated May 26, 2009.

⁶ In a report dated June 9, 2009, Dr. Christopher Lin, a Board-certified physiatrist, treated appellant for complaints of pain in her low back, left buttock, legs, neck, right arm and right hand subsequent to a 1997 work injury. He diagnosed lumbar and cervical pain with radiculopathy. In a report dated June 30, 2009, Dr. Shu noted that appellant had an EMG study with essentially normal findings.

⁷ *T.O.*, 58 ECAB 377 (2007).

⁸ *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

⁹ *Mary E. Marshall*, 56 ECAB 420 (2005); *James A. Birt*, 51 ECAB 291 (2000).

applicable service. Finally, application of the principles set forth in *Albert C. Shadrick*¹⁰ will result in the percentage of the employee's loss of wage-earning capacity.

ANALYSIS

The Office accepted that appellant sustained lumbar sprain, a herniated lumbar disc and an aggravation of degenerative lumbar disc disease due to a June 23, 1997 employment injury. The medical evidence from both her attending physician, Dr. Shu and the Office referral physician, Dr. Somers, established that she was no longer totally disabled; consequently, the Office properly referred her for vocational rehabilitation. The rehabilitation counselor identified the position of data entry clerk as within appellant's physical and vocational capacity.

The medical evidence is insufficient to support a finding that the position of data entry clerk is 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.¹¹ The Office referred appellant to Dr. Somers for a second opinion examination. In a report dated August 15, 2007, Dr. Somers diagnosed herniated lumbar discs and an aggravation of lumbar degenerative disc disease due to her employment injury. He found that appellant could work eight hours a day with restrictions on sitting up to four hours a day for 20 minutes at a time and walking and standing up to 2 hours a day for 20 minutes at a time. Dr. Somers additionally asserted that appellant could lift 10 pounds and push and pull 20 pounds for one hour a day but could not twist, bend, squat, knee or climb.

The Office based its finding that appellant could perform the duties of a data entry clerk primarily on the opinion of Dr. Somers, the second opinion specialist. As noted, however, Dr. Somers found that she could only sit up to a maximum of four hours a day. The DOT describes the duties of the data entry clerk position as entering data into a computer or onto a disc and deleting, compiling and verifying the accuracy of data. The rehabilitation counselor did not explain how appellant could perform the sedentary duties of a data entry clerk outlined in the DOT in view of Dr. Somers' finding that she could sit up no more than four hours a day.

Additionally, there is insufficient medical evidence addressing whether appellant could perform the duties of the position. Dr. Shu found that she could work full time with limitations on sitting, walking and standing of two to four hours a day. On December 30, 2008 he explained that appellant could not perform continuous sitting or standing but could work full time with breaks. Dr. Shu did not identify the duration of the breaks or provide a specific opinion regarding whether she could work as a data entry clerk. The rehabilitation counselor failed to explain how appellant could work as a data entry clerk in view of her sitting limitations and the medical evidence does not sufficiently establish that she can perform the duties of the position. The Board finds that appellant's capacity to work as a full-time data entry clerk is not established. The Office did not meet its burden of proof to reduce her compensation benefits based on the selected position of data entry clerk.

¹⁰ 5 ECAB 376 (1953); codified by regulation at 20 C.F.R. § 10.403.

¹¹ See *Maurissa Mack*, 50 ECAB 498 (1999); *Robert Dickinson*, 46 ECAB 1002 (1995).

CONCLUSION

The Board finds that the Office improperly reduced appellant's compensation effective December 21, 2008 based on its finding that she had the capacity to work as a data entry clerk.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 14, 2009 is reversed.

Issued: May 21, 2010
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