United States Department of Labor
Employees' Compensation Appeals Board

R.H., Appellant	)	
and	)	**Docket No. 10-807**
	)	**Issued: January 4, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Hemet, CA, 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
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 28, 2010 appellant filed a timely appeal from the August 5, 2009 merit decision of the Office of Workers' Compensation Programs reducing her compensation. 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 effective August 31, 2008 based on its determination that the constructed position of customer complaint clerk represented her wage-earning capacity.

On appeal appellant contends that the selected position was not reasonably available in the community in which she resided and the vocational rehabilitation counselor's labor market survey included a job that exceeded her medical restrictions.

FACTUAL HISTORY

On February 14, 2003 appellant, a 52-year-old window clerk, filed a traumatic injury claim alleging that she injured her left arm while pulling out a cash drawer. Her home address was identified as follows: "616 So. 'D' Street, Imperial, California 22251; Mailing address:

P.O. Box 1142, San Jacinto, C[alifornia]." Appellant's reporting office was identified as Hemet, California. Her claim was accepted for closed fracture of the left thumb and left radial styloid tenosynovitis, de Quervain's disease.

Appellant returned to modified part-time duty on June 11, 2003. She stopped working on June 12, 2003 and was placed on the periodic rolls. On September 13, 2003 appellant was terminated by the employing establishment on the grounds that she misrepresented her inability to work pursuant to her claim with the Office. She continued to receive compensation on the periodic rolls.[1]

Appellant was treated by Dr. Leslie Kim, a Board-certified orthopedic surgeon, for ongoing symptoms related to her accepted condition, including left radial wrist and hand pain. In an April 29, 2005 report, Dr. Kim noted that the regular physical demands of appellant's job as a mail clerk included constant standing, occasional kneeling, intermittent bending, frequent lifting, constant twisting, constant walking, constant pushing, constant pulling, occasional squatting, frequent grasping and lifting up to a maximum weight of approximately 20 pounds. Examination revealed decreased left nondominant grips strength, as measured with a Jamar dynamometer; decreased left forearm supination; left radial styloid tenderness and positive Finkelstein's sign; normal left wrist range of motion; normal neurologic examination; normal joint stability. Three current x-rays of the left wrist showed widening of the scapholunate joint space. Dr. Kim diagnosed chronic left wrist de Quervain's tenosynovitis and abnormal forearm rotation post childhood fracture resulting from her accepted injury. He opined that appellant could probably perform work that did not require repetitive or forceful gripping, grasping, manipulating or wrist movements on the left side. On August 15, 2005 Dr. Kim reiterated his diagnoses. He reported that appellant's wrist pain level had decreased, along with an increase in activity. Wrist range of motion was normal. Appellant demonstrated good flexion, extension, radial deviation and ulnar deviation of the left wrist. There was slight tenderness around the left radial styloid. Finkelstein's sign was minimally positive. Hand neurologic examination was negative, and there were no gross motor or sensory deficits demonstrated. Dr. Kim released appellant to modified duty, with restrictions precluding repetitive left wrist movements and lifting, grasping or pulling greater than 10 to 15 pounds with the left upper extremity.

In July 2005, appellant was referred to vocational rehabilitation. In a February 16, 2006 letter, the Office informed her that it had determined that the duties of customer complaint clerk or general clerk were within the medical restrictions provided by her physician. Appellant was advised that she would be provided with 90 days of placement services so that she might obtain one of the identified positions and that, whether or not she was actually employed, the Office would likely reduce her compensation based on her ability to earn the wages of a customer complaint clerk or general clerk. The vocational rehabilitation plan provided for additional skills training as a customer complaint clerk, which she completed in June 2006.

In a letter dated March 31, 2007, appellant's representative informed the Office that she was living in Imperial California, rather than in the Riverside area, and that the job search should be conducted in that location.

[1] In a May 13, 2004 decision, the Office terminated appellant's benefits on the grounds that she had no further residuals from the accepted injury. By decision dated April 22, 2005, an Office hearing representative reversed the May 13, 2004 decision and reinstated compensation for lost wages.

On November 14, 2007 a labor market survey was conducted in the Riverside County area for the positions of customer service and clerk typist. A total of 20 employers were contacted and 11 openings were identified. Physically, the positions were identified as sedentary, with one employer indicating that the position was light. All employers felt that appellant's background would make her a suitable applicant. The rehabilitation counselor found that the results indicated a favorable labor market for both positions.

In a letter dated November 19, 2007, the Office asked Dr. Kim to provide a report as to appellant's current condition and recommendations for work restrictions. The record does not contain a response from Dr. Kim.

In a November 20, 2007 closure memorandum, the vocational rehabilitation counselor stated that appellant had been unsuccessful in her efforts to obtain a position as a customer complaint clerk Department of Labor, *Dictionary of Occupational Titles (DOT)* #241.367-014. Duties included: investigating customer complaints; examining records; conversing or corresponding with customer and other company personnel to obtain facts regarding customer complaints; keying some information into computer to obtain computerized records; and tracing missing merchandise; investigating overdue and damaged shipments. The position was classified as sedentary, which is defined by a 10-pound lifting/pushing/pulling tolerance and constitutes the most physically restrictive category of the Department of Labor, *DOT*. The counselor stated that the position was identified based on medical restrictions provided by Dr. Kim, which included no lifting, pushing and pulling activities in excess of 10 pounds. She indicated that appellant's less than optimal level of initial investment in the placement plan significantly compromised the eventual outcome of the process. The counselor opined that the targeted jobs were reasonably available in sufficient numbers in injured workers' local labor market and remained vocationally and medically appropriate.

In a February 5, 2008 letter, appellant's representative informed the Office that appellant had relocated from San Jacinto, California to an address in Imperial, California.

The Office referred appellant to Dr. Thomas Sabourin, a Board-certified orthopedic surgeon, for a second opinion examination. Dr. Sabourin was provided position descriptions for general clerk and customer complaint clerk and was asked to provide an opinion on whether appellant was capable of performing the duties of those positions. In a May 13, 2008 report, he diagnosed de Quervain tenosynovitis, and a preexisting injury to the left forearm with straightening of the normal radial bow and limited supination due to interosseus contracture. Dr. Sabourin opined that appellant had very minimal residuals of the accepted first dorsal condition, namely a very mild Finkelstein test. Pursuant to her preexisting injury, appellant had a reduction and inability to fully supinate the wrist and forearm. Dr. Sabourin opined that appellant could work, provided that she was restricted from performing repetitive motions with her left arm more than three hours a week, or pushing, pulling and lifting more than 20 pounds more than three hours a week.

After reviewing the job description of customer complaint clerk and general clerk, Dr. Sabourin opined that "the general clerk probably uses the wrist and forearm too much whereas a customer complaint clerk job would be fully within the claimant's capabilities of performing work."

In a May 29, 2008 report, the vocational consultant provided the results of a labor market survey, which was completed for the position of customer complaint clerk in the Hemet/Riverside area. A total of 15 employers were contacted; each of the 10 employers agreed to discuss the position and provide information. Five openings were identified. The job was described as sedentary, with one employer indicating that the position was light. Salary range was from $9.00 per hour to $15.32 per hour. The employers felt appellant's background would make her a suitable applicant. The vocational consultant determined that appellant had the physical capacity to perform the customer complaint clerk position, which she found to be reasonably available in sufficient numbers within appellant's commuting area. She noted that appellant had not yet secured employment.

On July 14, 2008 appellant was advised that the Office proposed to reduce her compensation based on her capacity to perform the duties of customer complaint clerk at the rate of $480.00 per week. The Office found that the physical requirements of the position did not exceed her work tolerance limitations and that the position was medically and vocationally suitable and fairly and reasonably represented her wage-earning capacity. It stated that appellant's salary on March 14, 2003, the date she was injured, was $823.23 per week; that the current adjusted pay rate for her job was $961.88 per week; and that she was currently capable of earning $480.00 per week, the rate of an entry level customer complaint clerk. The Office then determined that appellant had a 50 percent wage-earning capacity, which resulted in an adjusted wage-earning capacity of $ 411.62 per week. It concluded that, based upon a 75 percent rate, her new compensation rate was $308.71, increased by the cost of living to $353.00 per week, and that her net compensation for each four-week period would be $1,412.00. Appellant was provided 30 days to submit additional evidence or argument regarding her wage-earning capacity.

Appellant submitted a July 2, 2008 report from Dr. Christopher C. Lai, a Board-certified orthopedic surgeon, who treated her for complaints of pain in her left wrist and elbow. Examination of left wrist showed no swelling, erythema or ecchymosis. Appellant was slightly tender to palpation on the thumb extensors. Finkelstein's was negative, but she noted subjective significant discomfort with active extension of the thumb. Wrist extension was to 50 degrees, flexion 50 degrees, supination 40 degrees and pronation 90 degrees. Appellant was able to make a full fist. She had negative Tinel's, Phalen's and compression test at her left hand. Sensation was grossly intact to the left upper extremity. Dr. Lai diagnosed de Quervain's, left thumb and stiffness, left wrist. He recommended "follow-up in a few weeks for what may be a final visit," noting that he would obtain x-rays of the wrist at that time. Dr. Lai recommended work restrictions, which included no repetitive motion of the elbow and no repetitive pushing, pulling or lifting more than three hours a day.

In a statement dated August 11, 2008, appellant disagreed with the proposed termination of benefits. She noted that the vocational rehabilitation counselor addressed the availability and suitability not only of the position of customer complaint clerk, but also the position of general clerk, which she argued was not within her physical capabilities. Appellant also contended that the decision was inappropriately based on job availability in Riverside County, California, instead of Imperial County, California, where she returned to live in June 2006. She stated that Imperial County had an unemployment rate of 23 percent, as compared to Riverside County which had an unemployment rate of 8 percent. Appellant speculated that there were probably fewer than 10 job openings each year within Imperial County for the job of customer complaint

clerk. She asserted that she was unable to find a suitable job in Riverside County before she moved and the availability of jobs in her current residence was 98 percent less than the report states. Appellant also noted that the starting salary for a customer complaint clerk would be significantly less in Imperial County than it would be in Riverside County. She also contended that the counselor's report was based on stale data that was more than two years old.

In an August 21, 2008 decision, the Office finalized the wage-earning capacity determination effective August 31, 2008. It found that as appellant had voluntarily relocated to an area where the unemployment rate was 23 percent, the labor market survey was appropriately based on job availability in the Riverside area, where the injury occurred.

On September 15, 2008 appellant requested a hearing before an Office hearing representative.

In a July 21, 2008 report, Dr. Lai stated that appellant's condition was permanent and stationary and opined that she had a two percent permanent impairment to her left upper extremity. On October 8, 2008 he reported that appellant experienced pain in the left wrist with activities. Appellant was tender along the thumb extensors and had a positive Finkelstein's test and limited range of motion of her wrist. Dr. Lai recommended work restrictions, which included lifting no more than 20 pounds; performing no repetitive activities; and no lifting, pushing or pulling with the left arm.

On February 12, 2009 the employing establishment stated that appellant had been terminated on February 12, 2004 for misrepresenting her medical condition and lying during an interview with a postal inspector. It also noted that there was no evidence that she had attempted to secure employment, either in Riverside or in Imperial, California.

The record contains a transcript of June 20, 2005 proceedings in the Superior Court of California, County of Riverside relating to charges of fraud against appellant. The Honorable Ronald L. Taylor found that there was no evidence of specific intent to defraud.

At the January 8, 2009 hearing, appellant reiterated her argument that the position of customer complaint clerk was not reasonably available in sufficient numbers within her commuting area of Imperial California. She also contended that the labor market survey was based on the availability of a general clerk position, which was determined to be outside her physical capabilities. Appellant stated that she had lived with a relative in the area in which she underwent vocational rehabilitation because her trial for fraud was in that area. After the trial, she returned to her residence in Imperial, California. Appellant argued that Imperial was a rural community and jobs were not readily available in that area. Thus, she believed the decision of the Office was in error as it was based upon a labor market survey for the San Bernardino/Riverside basin.

By decision dated August 5, 2009, the Office hearing representative affirmed the wage-earning capacity determination. He found that appellant had maintained a residence at or near the Riverside area until 2008 and that her choice to move to Imperial, California should not change her entitlement to compensation.

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.[2] 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 and circumstances which may affect wage-earning capacity in his or her disabled condition.[3]

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 Department of Labor, *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. Once this selection is made, a determination of wage rate and availability in the labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in *Albert C. Shadrick*,[4] will result in the percentage of the employee's loss of wage-earning capacity.[5]

The Office must initially determine appellant's medical condition and work restrictions before selecting an appropriate position that reflects her vocational wage-earning capacity. The Board has stated that the medical evidence upon which the Office relies must provide a detailed description of appellant's condition.[6] Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.[7]

ANALYSIS

The Office determined that the selected position of customer complaint clerk represented appellant's wage-earning capacity as of August 31, 2008, based upon Dr. Sabourin's May 13, 2008 report, which outlined her work restrictions. The Board finds that the Office properly reduced appellant's compensation based on her ability to perform the duties of a customer complaint clerk.

The position of customer complaint clerk was characterized as sedentary, which is defined by a 10-pound lifting/pushing/pulling tolerance and constitutes the most physically

[2] *David W. Green*, 43 ECAB 883 (1992).

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

[4] 5 ECAB 376 (1953).

[5] *James A. Birt*, 51 ECAB 291 (2000); *Francisco Bermudez*, 51 ECAB 506 (2000).

[6] *See William H. Woods*, 51 ECAB 619 (2000); *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

[7] *John D. Jackson*, 55 ECAB 465 (2004); *Carl C. Green, Jr.*, 47 ECAB 737, 746 (1996).

restrictive category of the Department of Labor, *DOT*. Duties included investigating customer complaints; examining records, and conversing or corresponding with customer and other company personnel to obtain facts regarding customer complaints; keying some information into computer to obtain computerized records; tracing missing merchandise; investigating overdue and damaged shipments. The Board finds the physical requirements of the customer complaint clerk position to be within appellant's restrictions

Dr. Kim's medical restrictions precluded lifting, grasping or pulling greater than 10 to 15 pounds with the left upper extremity or repetitive left wrist movements. Dr. Lai recommended restrictions included lifting no more than 20 pounds; performing no repetitive activities; and no lifting, pushing or pulling with the left arm. Dr. Sabourin, the Office's second opinion physician, recommended that appellant be restricted from performing repetitive motions with her left arm more than three hours a week, or pushing, pulling and lifting more than 20 pounds more than three hours a week. After reviewing the job description of customer complaint clerk and general clerk, he opined that the customer complaint clerk job was fully within the appellant's capabilities; whereas the general clerk probably was not. Appellant has not submitted any evidence to establish that she is not capable of performing the duties of the constructed position. The Board finds that the medical evidence of record establishes that she was capable of performing the duties of the sedentary position of customer complaint clerk.

Appellant contends that the vocational counselor's report was erroneously based on her ability to perform the duties of a position that exceeded her abilities, namely the duties of general clerk. The Office's decision, however, did not reduce her compensation based on the general clerk position. Rather, the Office reduced appellant's benefits based upon its finding that she was capable of performing the duties of customer complaint clerk.

Appellant also argues that the labor market survey was inappropriately performed in Riverside County, rather than Imperial County, where she resided at the time of the determination, and that the selected position was not reasonably available in her commuting area. She stated that Imperial County had an unemployment rate of 23 percent, as compared to Riverside County which had an unemployment rate of 8 percent. Appellant speculated that there were probably fewer than 10 job openings each year within Imperial County for the job of customer complaint clerk and that the starting salary for a customer complaint clerk would be significantly less in Imperial County than it would be in Riverside. The Board finds that the labor market survey was properly performed in Riverside County.

Generally, when an employee has moved away from the area where she was employed at the time of her employment injury, her loss of wage-earning capacity should be determined on the basis of employment opportunities in the area where she resides at the time that the determination is made, rather than in the area where she lived when injured.[8] However, when a person voluntarily takes herself away from general job opportunities by moving to an isolated locality with few such opportunities, the determination should be made as though she still lived in her area of residence when injured.[9] Appellant stated on her CA-1 that she worked in Hemet, California, which is located in Riverside County, at the time of the 2003 injury. Although she

[8] *Lloyd R. Allen*, 24 ECAB 112 (1972); *Sidney Kawalick*, 19 ECAB 272 (1968).

[9] *Sylvanus B. Jones*, 29 ECAB 896 (1978); *Romeo Micallef*, 29 ECAB 213 (1978).

indicated that her home address was located in Imperial, California, appellant provided a mailing address in San Jacinto, California, which is also located in Riverside County. It is not disputed that she commuted to work in Hemet on a daily basis. Therefore, it is reasonable to assume that she resided within the Riverside commuting area. Appellant also testified that she continued to live with a relative in the Riverside area while undergoing vocational rehabilitation due to events surrounding her trial for fraud, and that she moved to Imperial, California following the trial because she was unable to find a job in Riverside. The Board notes, however, that the Office was not notified of appellant's relocation to Imperial until March 31, 2007, although her fraud trial occurred on June 20, 2005. The Board finds that appellant voluntarily relocated to Imperial, California following the period of her vocational rehabilitation, thereby reducing her opportunity to obtain a position as a customer complaint clerk. As appellant removed herself from general job opportunities by moving to an isolated locality with few such opportunities, the determination should be made as though she still lived in Riverside.[10] Therefore, in this case, the labor market survey was properly performed in Riverside and established that the position of customer complaint clerk was reasonably available in the commuting area.

Appellant also contended that the counselor's report was based on stale data that was more than two years old. The Board finds appellant's contention to be incorrect. On February 16, 2006 the Office informed appellant that it had determined that the duties of customer complaint clerk or general clerk were within the medical restrictions provided by her physician. The vocational counselor performed labor market surveys, dated November 17, 2007 and May 29, 2008, which identified prospective job opportunities. The data upon which the consultant's recommendation was based was reasonably current when the Office made its wage-earning capacity determination on August 21, 2008.

The Office considered the proper factors, such as availability of employment and appellant's physical limitations, usual employment, age and employment qualifications, in determining that the customer complaint clerk position represented her wage-earning capacity.[11] The evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the duties of customer complaint clerk as of August 31, 2008, and that such a position was reasonably available within the general labor market of her commuting area.

The Board also finds that the Office properly determined appellant's loss of wage-earning capacity in accordance with the formula developed in *Albert C. Shadrick*[12] and codified at section 10.403 of the Office's regulations.[13] The Office stated that her salary on March 14, 2003 the date she was injured was $823.23 per week; that the current adjusted pay rate was $961.88 per week; and that she was currently capable of earning $480.00 per week, the rate of an entry-level customer complaint clerk. The Office then determined that appellant had a 50 percent wage-earning capacity, which resulted in an adjusted wage-earning capacity of $411.62 per week. The Office concluded that, based upon a 75 percent rate, appellant's new compensation rate was $308.71, increased by the cost of living to $353.00 per week, and that her net

[10] *Id.*

[11] *Loni J. Cleveland*, 52 ECAB 172 (2000).

[12] 5 ECAB 376 (1953).

[13] 20 C.F.R. § 10.403.

compensation for each four-week period would be $1,412. 00. The Board finds that the Office correctly applied the *Shadrick* formula and therefore properly found that the position of customer complaint clerk reflected appellant's wage-earning capacity effective August 31, 2008.[14]

CONCLUSION

The Board finds that the Office properly reduced appellant's compensation effective August 31, 2008, based on its determination that the constructed position of customer complaint clerk represented her wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the August 5, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 4, 2011
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[14] *Elise L. Price*, 54 ECAB 734 (2003); *Stanley L. Plotkin*, 51 ECAB 700 (2000).