

**United States Department of Labor
Employees' Compensation Appeals Board**

M.K., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Fort Lauderdale, FL, Employer**

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**Docket No. 10-830
Issued: January 3, 2011**

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 February 3, 2010 appellant filed a timely appeal from an August 19, 2009 decision of the Office of Workers' Compensation Programs regarding a wage-earning capacity determination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether the Office properly determined that the selected position of receptionist properly represented appellant's wage-earning capacity as of August 30, 2009.

On appeal, counsel asserts that the selected receptionist position exceeded her medical restrictions.

FACTUAL HISTORY

The Office accepted that on June 28, 1999 appellant, then a 34-year-old distribution clerk, sustained a left shoulder strain, impingement with bursitis, adhesive capsulitis and cervical radiculitis when she pulled on a stuck file cabinet drawer. She returned to limited duty on

April 13, 2000. The Office also accepted that on May 9, 2000 appellant sustained a left shoulder sprain, villonodular synovitis of the left upper arm and aggravation of a herniated cervical disc when pulling tubs of mail. Appellant stopped work on May 9, 2000 and did not return.¹ She received compensation for total disability on the daily and periodic rolls beginning in July 2000.

Dr. Alan M. Lazar, an attending Board-certified orthopedic surgeon, treated appellant beginning in May 2000 for left shoulder impingement with bursitis. He performed arthroscopic decompression of the left shoulder on April 4, 2002. Dr. D. Barry Lotman, a Board-certified orthopedic surgeon and second opinion physician, opined in November 2001 that appellant's shoulder pain was due to a preexisting herniated C6-7 disc. The Office found a conflict between Dr. Lazar and Dr. Lotman regarding the nature of her condition and selected Dr. Franklin Reyes, a Board-certified orthopedic surgeon, as impartial medical examiner. In a May 23, 2002 report, Dr. Reyes attributed appellant's symptoms to idiopathic degenerative disc disease. He noted that she could perform full-time modified duty.

Based on Dr. Reyes' opinion, the Office referred appellant for vocational rehabilitation. On August 2, 2002 Dr. Lazar approved an offered modified clerk position. In a March 27, 2003 letter, he opined that, based on surveillance video obtained by the employing establishment,² appellant could return to full-time work with no restrictions.³ Appellant did not return to work at the employing establishment.⁴

Beginning in November 2007, appellant was followed by Dr. Rahul V. Deshmukh, an attending Board-certified orthopedic surgeon. In reports through February 2008, Dr. Deshmukh diagnosed shoulder pain.⁵ He opined that appellant could work eight hours a day with no reaching, pulling, pulling, lifting or climbing.

In an April 7, 2008 report, Dr. John E. Carey, an attending Board-certified anesthesiologist, diagnosed disc herniations and osteophytes from C3 to C7. He administered periodic cervical facet injections.

On August 8, 2008 the Office obtained a second opinion report from Dr. Vaughan Frigon, a Board-certified orthopedic surgeon, who reviewed the medical record and statement of

¹ The employing establishment terminated appellant on August 11, 2000 due to unacceptable conduct after surveillance showed her engaging in activities inconsistent with her medical restrictions.

² The employing establishment's inspection service conducted video surveillance of appellant from December 12, 2002 to March 3, 2003, showing her using her left arm to lifting luggage and a bicycle, use a bicycle pump and reach above shoulder level to close the trunk of her car.

³ By notice dated April 15, 2003 and finalized May 16, 2003, the Office terminated appellant's compensation benefits as based on Dr. Lazar's opinion. It vacated the termination by February 23, 2004 decision, finding that it improperly relied on Dr. Lazar's opinion and not that of Dr. Reyes. The Office reinstated compensation retroactively.

⁴ The Office obtained periodic second opinion reports from several Board-certified orthopedic surgeons: on May 20, 2003 from Dr. John M. Flinchbaugh; on August 25, 2004 from Dr. Steven Lancaster and on January 10, 2007 from Dr. Douglas P. Hein. Each physician found appellant able to perform full-time limited-duty work.

⁵ A January 9, 2008 left shoulder arthrogram showed a probable partial tear of the supraspinatus tendon.

accepted facts provided by the Office. On examination, Dr. Frigon found mild limitation of cervical and left shoulder motion and a positive impingement sign in the left shoulder. He diagnosed a left infraspinatus tendon tear and multilevel degenerative cervical disc disease. Dr. Frigon opined that the May 9, 2000 injuries had not resolved. He noted that appellant could work eight hours a day with permanent restrictions against reaching above shoulder level with the left arm. Dr. Frigon limited lifting, pulling and pushing to 20 pounds.

As the medical evidence established that appellant was not totally disabled for work, the Office referred her for vocational rehabilitation. On January 7, 2009 a vocational rehabilitation counselor performed a transferable skills analysis, noting her work experience as a store manager, supervisor and clerk. Appellant signed a job development plan on February 20, 2009, with employment goals of clerical office work.

In a March 17, 2009 report, Dr. Eric W. Scott, a Board-certified neurosurgeon, to whom appellant was referred by Dr. Carey, diagnosed cervical spondylostenosis from C4 to C7. Dr. Carey administered nerve block injections through June 2009.

In April 22, 2009 reports, Dr. Deshmukh restricted appellant to working six hours a day, with no reaching above the shoulder and lifting limited to five pounds. He opined that she required additional left shoulder surgery as prolonged conservative treatment had not improved the accepted conditions. Dr. Deshmukh requested that the Office authorize a left rotator cuff repair, distal clavicle excision and subacromial decompression. On May 1, 2009 the Office approved the proposed surgery.

On June 9, 2009 the vocational rehabilitation counselor performed a labor market survey for four clerical occupations, including receptionist, Department of Labor, *Dictionary of Occupational Titles* #237.367-038. The position was classified as sedentary, with occasional lifting, carrying, pushing and pulling up to 10 pounds. Entry level positions were reasonably available in appellant's commuting area with wages of \$360.00 a week. The counselor noted that she had the necessary job skills to perform an entry level receptionist position.

On June 10, 2009 the Office approved a 90-day job placement plan. Appellant did not follow through with job leads provided by the counselor.

By notice dated July 16, 2009, the Office proposed reducing appellant's wage-loss compensation based on her ability to earn \$360.00 a week in the selected position of receptionist. It found that position to be suitable work. The Office afforded appellant 30 days to submit additional evidence or argument.

Appellant responded by August 12, 2009 letter, contending the job was beyond Dr. Deshmukh's medical restrictions and that she was awaiting left shoulder surgery. She submitted an August 12, 2009 report from Dr. Deshmukh noting that she would soon undergo left shoulder surgery and could not push, pull or lift any weight. Appellant also provided reports from Dr. Carey dated through July 21, 2009 noting nerve block and trigger point injections.

By decision dated August 19, 2009, the Office reduced appellant's compensation effective August 30, 2009 under sections 8106 and 8115 of the Federal Employees' Compensation Act, based on her ability to earn \$360.00 a week in the selected position of

receptionist. It found that the additional evidence submitted did not establish that she was medically unable to work as a receptionist. The Office accorded the weight of the medical opinion to Dr. Frigon. It noted that appellant remained entitled to medical benefits for treatment of the accepted conditions.

LEGAL PRECEDENT

Under section 8115(a) of the Act,⁶ wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. Generally, wages actually earned are the best measure of a wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.⁷ The formula for determining loss of wage-earning capacity based on actual earnings, developed in the Board's decision in *Albert C. Shadrick*,⁸ has been codified by regulations at 20 C.F.R. § 10.403. Office procedures provide that a determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity should be made after an employee has been working in a given position for more than 60 days.⁹ The amount any compensation paid is based on the wage-earning capacity determination and it remains undisturbed until properly modified.¹⁰

ANALYSIS

The Office accepted that June 28, 1999 and May 9, 2000 work incidents caused a left shoulder strain with adhesive capsulitis, bursitis and impingement syndrome, aggravation of preexisting degenerative disc disease and cervical radiculitis. Appellant underwent arthroscopic decompression of the left shoulder on April 4, 2002.

Following vocational rehabilitation and a 90-day job placement plan, the Office issued an August 19, 2009 decision reducing appellant's wage-loss compensation based on the selected position of receptionist. The Board finds that this reduction was improper as the medical evidence establishes a conflict in medical opinion as to appellant's work restrictions.

The Office found the selected receptionist position to be suitable work based on the medical opinion of Dr. Frigon, a Board-certified orthopedic surgeon and second opinion physician. As of August 8, 2008, Dr. Frigon found appellant able to work full time with lifting limited to 20 pounds and no reaching above shoulder level with the left arm. Based on these limitations, the Office developed a vocational rehabilitation plan, resulting in the selection of the receptionist position, a sedentary job with occasional lifting up to 10 pounds.

⁶ 5 U.S.C. §§ 8101-8193, 8115(a).

⁷ *Hayden C. Ross*, 55 ECAB 455 (2004).

⁸ *Albert C. Shadrick*, 5 ECAB 376 (1953).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993).

¹⁰ See *Sharon C. Clement*, 55 ECAB 552 (2004).

Following issuance of a proposed notice of reduction of compensation, appellant contended that the selected position exceeded limitations given by Dr. Deshmukh, an attending Board-certified orthopedic surgeon, who explained on April 22, 2009 that she required repeat arthroscopy of the left shoulder and could not lift more than five pounds. The Office approved the requested surgery on May 1, 2009. On August 12, 2009 Dr. Deshmukh noted that appellant was unable to lift any weight pending the approved left shoulder surgery. By August 19, 2009 decision, the Office reduced her compensation, relying on Dr. Frigon's August 8, 2008 restrictions. It did not address the outstanding surgery authorization or restrictions provided by Dr. Deshmukh.

The Board finds that a conflict in medical opinion exists between Dr. Deshmukh and Dr. Frigon on appellant's capacity to perform the duties of the selected position. The Office did not properly consider the conflict in medical limitations in determining her ability to perform the selected position.¹¹ Therefore, it did not meet its burden of proof in reducing appellant's wage-loss compensation based on the selected position of receptionist.

On appeal, appellant contends that the selected receptionist position exceeded her medical restrictions. As stated, the Office did not properly consider her medical limitations.

CONCLUSION

The Board finds that the selected position of receptionist did not properly represent appellant's wage-earning capacity as of August 30, 2009. The case is returned to the Office for reinstatement of appropriate compensation retroactive to August 30, 2009.

¹¹ *John D. Jackson*, 55 ECAB 465 (2004).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 19, 2009 is reversed.

Issued: January 3, 2011
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