

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

N.V., Appellant)

and)

U.S. POSTAL SERVICE, OAKLAND)
PROCESSING & DISTRIBUTION CENTER,)
Oakland, CA, Employer)

Docket No. 13-1533
Issued: December 18, 2013

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 19, 2013 appellant filed a timely appeal from a December 20, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) regarding a loss of wage-earning capacity determination. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUE

The issue is whether OWCP properly reduced appellant's compensation benefits effective May 1, 2012 based on her capacity to earn wages in the constructed position of information clerk.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted new evidence on appeal. The Board lacks jurisdiction to review evidence for the first time on appeal.

On appeal, appellant contends that she is unable to work eight hours a day in an office clerical position that requires the use of a computer. She states that her four hours of training at a computer learning center caused tendinitis in her right wrist to flare up and pain in her elbow, shoulder and neck. Appellant also states that she developed tendinitis in her left arm and trigger finger on her right thumb during training. She contends that she was not allowed to perform her job due to her disabilities. Appellant further contends that her right wrist tendinitis condition has not been cured or treated.

FACTUAL HISTORY

On November 9, 2000 appellant, then a 46-year-old distribution clerk, filed an occupational disease claim alleging that on December 17, 1994 she first became aware of her right shoulder, upper back, arm and elbow and neck conditions. She also alleged that on October 20, 2000 she first realized that her conditions were caused by her federal employment. Appellant stated that since 1991 she had tendinitis in her right wrist and pain, which traveled to her right elbow, upper arm and back, shoulder, shoulder blades and neck due to repetitive motion of her arm while casing mail and reaching overhead for eight hours a day.

OWCP accepted the claim for right shoulder, upper arm and cervical strains, right elbow and right rotator cuff tendinitis and impingement.

On October 14, 2005 appellant returned to work in a modified mail processing clerk position at the employing establishment.

On August 29, 2006 Dr. David Wren, Jr., an attending orthopedic surgeon, advised that appellant could perform modified-duty work with restrictions that included no lifting, carrying, pushing and pulling more than five pounds and no overhead work.

On June 25, 2007 Dr. Robert S. Ferretti, a Board-certified orthopedic surgeon and OWCP referral physician, performed a second opinion examination and advised that appellant could continue performing full-time modified work with restrictions that included no prolonged repetitive reaching, overhead level shoulder work, lifting more than 5 pounds and pushing or pulling more than 10 pounds using the right upper extremity.

Appellant filed a claim alleging that she sustained a recurrence of disability on January 2, 2010 when the employing establishment withdrew her limited-duty work assignment. OWCP placed her on the periodic rolls and paid appropriate total disability compensation.

In reports dated April 2 and August 17, 2010, Dr. Wren advised that appellant could not perform her regular work duties, but she could work eight hours per day with certain restrictions. Appellant was limited to lifting and carrying no more than 5 to 10 pounds on an intermittent basis and sitting, standing and walking six to eight hours a day on a continuous or an intermittent basis. She was also limited to kneeling, bending and stooping two to four hours a day, twisting, pushing and pulling three to four hours a day, simple grasping and fine manipulation four to six hours a day and reaching above the shoulder two to four hours a day on an intermittent basis. Appellant could not perform repetitive overhead work or operate machinery. She was advised to avoid prolonged typing.

On September 28, 2010 OWCP referred appellant for vocational rehabilitation services. Appellant met with a vocational rehabilitation counselor on January 3, 2011. The vocational rehabilitation counselor determined that she could be reemployed as a customer complaint clerk or information clerk. The duties of the information clerk position required answering inquiries from persons entering the establishment; providing information regarding activities conducted at the establishment and location of departments, offices and employees within the organization and services such as, laundry and valet services in the hotel and receive and answer requests for information from company officials and employees; informing a customer of the location of store merchandise in the retail establishment; and calling employees or officials to the information desk to answer inquiries and keep a record of questions asked. This job was classified as sedentary with no climbing, balancing, stooping, kneeling, crouching, crawling, fingering, feeling, tasting, smelling, far acuity, depth perception, accommodation, color vision or field of vision. The position required occasional reaching and handling and frequent talking, hearing and near acuity. The strength level was listed as sedentary, which involved occasional lifting up to 10 pounds.

The vocational rehabilitation counselor determined that appellant would meet the specific vocational preparation upon successful completion of proposed computer operations coursework as she would possess the needed computer and customer service skills to seek employment as an information clerk. She also determined that the job was performed in sufficient numbers to be reasonably available within appellant's commuting area. The vocational rehabilitation counselor noted that 10 employers in appellant's commuting area were hiring. She found that the salary for an entry level information clerk was \$10.00 per hour with one employer reporting \$11.00 per hour. The vocational rehabilitation counselor also found that, according to the Employment Development Department of California, the 25 percent percentile salary was \$12.02 per hour and the median salary was \$14.73 per hour and a 9.8 percent employment growth of the position was predicted through 2018 with a reported anticipation of 252 annual openings.

Appellant completed computer operations training on August 12, 2011 and subsequently a 90-day placement period, but did not obtain employment.

In an August 16, 2011 letter, appellant requested that OWCP approve medical treatment for her recurrent right wrist tendinitis and newly developed discomfort and pain in her left wrist and tendinitis in her right thumb that was caused by using a keyboard during her computer training course. On August 30, 2011 OWCP requested that she submit a rationalized medical report from a treating physician to establish that she sustained the claimed conditions as a consequence of her computer training course.

By letter dated March 29, 2012, OWCP proposed to reduce appellant's compensation benefits based on her capacity to earn wages as an information clerk.

In a May 1, 2012 decision, OWCP reduced appellant's wage-loss benefits, based on her capacity to earn wages as an information clerk. It applied the principles identified in *Albert C.*

Shadrick,³ finding a new wage-earning capacity of 38 percent and reduced her compensation, accordingly, effective May 1, 2012.

On May 21, 2012 appellant requested an oral hearing before an OWCP hearing representative.

In a December 20, 2012 decision, an OWCP hearing representative affirmed the May 1, 2012 decision. She found that the medical and factual evidence of record established that appellant was capable of performing the selected information clerk job. The hearing representative also found that while appellant contended that she sustained various symptoms as a result of her computer training for the selected position she did not submit rationalized medical evidence to establish that she was unable to perform the information clerk position.

LEGAL PRECEDENT

Section 8115 of FECA⁴ provides 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 an employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of her injury, the degree of physical impairment, his or her usual employment, his or her age, his or her qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect his or her wage-earning capacity in her disabled condition.

When OWCP 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 OWCP 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 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. Finally, application of the principles set forth in *Shadrick*⁵ will result in the percentage of the employee's loss of wage-earning capacity. The basic rate of compensation paid under FECA is 66 2/3 percent of the injured employee's monthly pay.⁶

ANALYSIS

OWCP accepted that appellant sustained right shoulder, upper arm and cervical strains, right elbow and right rotator cuff tendinitis and right shoulder impingement while in the performance of duty. The medical evidence in the record establishes that she could return to

³ 5 ECAB 376 (1953); 20 C.F.R. § 10.403(d).

⁴ 5 U.S.C. §§ 8101-8193, 8115.

⁵ *Supra* note 3; 20 C.F.R. § 10.403.

⁶ *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

work with restrictions. Dr. Wren, an attending physician, opined that, while appellant could not perform her regular work duties, she could work eight hours a day with restrictions. He determined that she could lift and carry 5 to 10 pounds on an intermittent basis; sit, stand and walk six to eight hours a day on a continuous or an intermittent basis; and kneel, bend and stoop two to four hours a day, twist, push and pull three to four hours a day, perform simple grasping and fine manipulation four to six hours a day and reach above the shoulder two to four hours a day on an intermittent basis. Dr. Wren stated that appellant could not perform repetitive overhead work or prolonged typing or operate machinery. On January 3, 2011 appellant met with the vocational rehabilitation counselor who identified two jobs that she could perform that were reasonably available. One of these positions was information clerk. The Board finds that the selected position of information clerk was medically and vocationally suitable.

The position of information clerk is within appellant's physical abilities as it is classified as sedentary work requiring occasional lifting of no more than 10 pounds, reaching and handling; frequent talking, hearing and near acuity; and no climbing, balancing, stooping, kneeling, crouching, crawling, fingering, feeling, tasting, smelling, far acuity, depth perception, accommodation, color vision or field of vision. The vocational rehabilitation counselor determined that appellant met the specific vocational preparation as she underwent and successfully completed computer operations training. Further, the job was available in sufficient numbers so as to make it reasonably available to claimant in her commuting area. The vocational rehabilitation counselor documented openings in the area in her report. The hourly rate for an entry level position was \$10.00 and the median hourly rate for the position was \$14.73 based on information from the California state employment department. The vocational rehabilitation counselor noted the department's prediction of 9.8 percent employment growth of the information clerk position through 2018 with a reported anticipation of 252 annual openings. The fact that appellant was unable to obtain an information clerk position does not establish that the work is not reasonably available in her commuting area.⁷

The Board finds that OWCP considered the proper factors, such as vocational training and availability of the information clerk position, to determine that the position represented appellant's wage-earning capacity. The position was within the restrictions as set forth by Dr. Wren. OWCP followed the established procedures under the *Shadrick*⁸ decision in calculating appellant's loss of wage-earning capacity. The Board finds that OWCP properly determined that appellant was medically and vocationally capable of working in the position of information clerk. It properly adjusted appellant's monetary compensation to reflect her capacity to earn wages in the constructed position.

Appellant alleged before OWCP and on appeal before the Board that she cannot work eight hours a day in a clerical position that required her to use a computer. She claim that her right wrist tendinitis flared up and she experienced pain in her elbow, shoulder and neck and developed tendinitis in her left arm and trigger finger on her right thumb as a result of using a keyboard during her vocational computer training. Appellant, however, did not submit any medical evidence showing that she could not physically perform the information clerk position.

⁷ See *Leo A. Chartier*, 32 ECAB 652, 657 (1981).

⁸ *Supra* note 3.

Further, the Board notes that Dr. Wren, appellant's own attending physician, merely recommended that she avoid prolonged typing.

However, appellant may request modification of the wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

CONCLUSION

The Board finds that OWCP properly reduced appellant's compensation benefits effective May 1, 2012 based on her capacity to earn wages in the constructed position of information clerk.

ORDER

IT IS HEREBY ORDERED THAT the December 20, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 18, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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