U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALICE M. HARRISON and SENATE, OFFICE OF THE SERGEANT OF ARMS, Washington, DC

Docket No. 01-533; Submitted on the Record;
Issued March 19, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation based on her wage-earning capacity as a customer service representative.

On June 15, 1993 appellant, then a 48-year-old housekeeper, sustained a low back strain superimposed on preexisting degenerative disc disease while in the performance of duty.

In March 1994 the Office referred appellant to a vocational rehabilitation counselor.

In a letter dated March 3, 1994, the employing establishment stated that it had no light-duty work available for appellant.

In a report dated September 1, 1994, Dr. Michael W. Dennis, a neurosurgeon and Office referral physician, indicated that appellant reached maximum medical improvement on that date. He indicated that appellant could work eight hours a day in a sedentary or light-duty position but should avoid back bending, prolonged static positions or lifting or carrying more than 20 pounds. Dr. Dennis recommended an aggressive exercise program.

In a report dated November 8, 1994, Dr. Dennis, stated that appellant had been able to perform light duty as of March 8, 1994.

Effective November 13, 1994 appellant was placed on the periodic compensation rolls to receive compensation for temporary total disability.

In an undated report received by the Office on November 15, 1996, Dr. Charles Mosee, appellant's attending neurosurgeon, stated that appellant had permanent work restrictions due to her employment injury of no lifting over 10 pounds, no pushing, pulling, reaching above her head, excessive bending, stooping, sitting or standing.

Appellant moved to North Carolina and was assigned to a vocational rehabilitation counselor in that state.

In a report dated April 2, 1998, a vocational rehabilitation counselor identified the position of customer service representative,[1] with hourly wages of $11.63 an hour, as suitable for appellant's medical restrictions, past work experience and vocational skills. The position involved talking to customers on the telephone or in person and receiving orders for installation, turning on, discontinuing, or changing service using basic computer skills. The position was described as sedentary with no lifting over 10 pounds.[2] The counselor noted that the position was reasonably available within appellant's commuting area as determined by the State Employment Service and private employers. The counselor noted that appellant had been self-employed as the owner/operator of a cleaning and janitorial service from 1984 to 1992, overseeing the daily operations and supervising up to 27 employees and that previous experience included work as a medical records analyst, rehabilitation clerk and nursing assistant. He noted that appellant had completed coursework in introduction to computers, possessed a personal computer and stated that she had personal computer skills and was presently working on keyboarding speed and accuracy to enhance her marketability. It was noted that specific vocational training for this job could be completed in six months to one year.

On April 19, 1999 a rehabilitation specialist stated that a current review of the customer service representative position indicated that it was reasonably available in appellant's commuting area.

By letter dated May 26, 1999, the Office advised appellant that it proposed to reduce her compensation benefits based on her capacity to earn weekly wages of $465.20 as a customer service representative.

By decision dated July 2, 1999, the Office found that the position of customer service representative was suitable vocationally and medically for appellant and represented her wage-earning capacity.

In a report dated July 16, 1999, Dr. Raphael S. Orenstein stated that a magnetic resonance imaging scan revealed L5-S1 degenerative disc disease and that appellant had pain in her low back, arms and legs. He noted that appellant had a 15-year history of diabetes with severe diabetic peripheral neuropathy. Dr. Orenstein stated that appellant was in pain all the time and did not feel that she could work. He recommended a functional capacity evaluation to determine what type of work she could tolerate.

A report of a functional capacity evaluation performed on July 20, 1999 noted that there were indications of submaximal effort by appellant. The report also noted that she exhibited symptom/disability exaggeration behavior, signs of a nonorganic component to her pain, impairment and disability and a significant number of failed validity criteria which were thought

[1] Department of Labor, *Dictionary of Occupational Titles*, DOT No. 239.362-014.

[2] The counselor indicated that appellant's physician had imposed medical restrictions of no lifting over 10 pounds and no pushing, pulling, reaching above head, excessive bending, stooping, sitting or standing.

to represent a conscious effort to demonstrate a greater level of pain and disability than was actually present and possible conscious malingering.

By letter dated July 21, 1999, appellant requested an oral hearing before an Office hearing representative.

In a report dated September 24, 1999, Dr. Orenstein provided findings on examination and diagnosed chronic low back pain with radiation into the legs and severe diabetic neuropathy with balance deficit. He opined that appellant could perform sedentary work starting at four hours a day and working up to eight hours.

In a report dated February 10, 2000, Dr. Grant W. Jenkins, an internist, stated that appellant had diabetes, hypertension, hypoxia and restrictive lung disease and was totally disabled as of October 1, 1999 due to shortness of breath.

On July 24, 2000 a hearing was held and appellant testified.[3]

In a report dated August 9, 2000, Dr. Jenkins stated that appellant was hospitalized on October 9, 1999 for congestive heart failure, used an oxygen tank on a daily basis, had allergic reactions to smoke, humidity and dust and was unable to stand or walk a long distance without breathing difficulties.

By decision dated and finalized October 10, 2000, the Office hearing representative affirmed the Office's July 2, 1999 decision but modified the decision to reflect appellant's entitlement to the augmented three-fourths compensation rate for employees with dependents.

The Board finds that the Office properly reduced appellant's compensation based on her wage-earning capacity as a customer service representative.

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 in benefits.[4]

Under section 8115(a) of the Federal Employees' Compensation Act,[5] wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent her wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or the employee has no actual earnings, her wage-earning capacity is determined with due regard to the nature of her injury, the degree of physical impairment, her usual employment, age, qualifications for other employment, the availability of

[3] Appellant testified that she had no computer skills. However, as noted above, appellant's rehabilitation counselor had reported that appellant had completed coursework in introduction to computers, possessed a personal computer and stated that she had personal computer skills.

[4] *Carla Letcher*, 46 ECAB 452 (1995).

[5] 5 U.S.C. §§ 8101-8193.

suitable employment and other factors or circumstances which may affect his wage-earning capacity in his disabled condition.[6]

After the Office makes a medical determination of disability and of special 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, *Dictionary of Occupational Titles* or otherwise available on the open market, that fits the employee's capabilities with regard to her physical limitations, education, age and prior experience. Once the selection is made, a determination of wage rate and availability in the open market should be made through contact with the state employment services or other applicable services.[7] Finally, application of the principles in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.[8]

In this case, the Office determined that appellant could physically perform the work of a installation customer service representative based on Dr. Mosee's November 15, 1996 report.[9] Dr. Mosee stated that appellant's work restrictions included no lifting over 10 pounds, no pushing, pulling, and reaching above her head, and no excessive bending, stooping, sitting, or standing. The position of customer service representative, as described in the Department of Labor, *Dictionary of Occupational Titles*, involved talking to customers on the telephone or in person and receiving orders for, turning on, discontinuing, or changing service using basic computer skills. The position was described as sedentary with no lifting over 10 pounds. Appellant, therefore, meets the physical qualifications for a customer service representative.

The Office also properly determined, based on the vocational counselor's job surveys and vocational reports, that the position of customer service representative was reasonably available in appellant's area to someone with appellant's educational background and experience. Following its determination that the selected position of customer service representative was vocationally and medically suitable and reasonably available, the Office properly calculated appellant's wage-earning capacity using the *Shadrick* formula. Under 5 U.S.C. § 8115, the Office properly determined that appellant's wage-earning capacity was represented by the position of customer service representative and met its burden of proof in reducing her compensation to reflect her wage-earning capacity.

[6] *See Wilson L. Clow, Jr.*, 44 ECAB 157, 170-71 (1992); *see also* 5 U.S.C. § 8115(a).

[7] *See Dennis D. Owen*, 44 ECAB 475, 479 (1993).

[8] *Albert C. Shadrick*, 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.303.

[9] Another physician, Dr. Jenkins, indicated that appellant had a disabling lung condition. However, subsequently acquired impairments unrelated to the employment injury are excluded from consideration in the determination of work capacities; *see William Ray Fowler*, 31 ECAB 1817, 1822 (1980).

The October 10, 2000 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
March 19, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member