United States Department of Labor
Employees' Compensation Appeals Board

B.J., Appellant	)	
	)	**Docket No. 10-801**
and	)	**Issued: December 21, 2010**
DEPARTMENT OF DEFENSE, DEFENSE COMMISSARY AGENCY, Fort Carson, CO, Employer	)	

Appearances:
Timothy Quinn, Esq., for the appellant
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 February 1, 2010 appellant, through her attorney, filed a timely appeal from the October 20, 2009 merit decision of the Office of Workers' Compensation Programs. 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 met its burden of proof to reduce appellant's wage-loss benefits to zero based on her capacity to earn wages as a customer complaint clerk.

On appeal, appellant's attorney contends that the constructed position is not within appellant's medical limitations, that the position is not available in sufficient numbers as to be reasonably available for a person with appellant's restrictions and that the Office did not resolve the conflict between the second opinion physician and the treating physicians over appellant's ability to perform the constructed position.

FACTUAL HISTORY

On October 29, 1997 appellant, then a 46-year-old sales store checker, filed an occupational disease claim alleging that she had a ganglion cyst on her left wrist as a result of her job which involved scanning, lifting and twisting her wrist. On October 13, 1997 she underwent an arthrotomy and synovectomy with ligament reconstruction of her left wrist. On January 13, 1998 the Office accepted appellant's claim for ganglion cyst of the left wrist. On July 13, 1998 appellant filed a claim alleging that her duties of scanning items and twisting and turning caused her to develop mild carpal tunnel syndrome of the right wrist, tennis elbow of the right elbow and nerve damage in the right shoulder. On July 31, 1998 the Office accepted her claim for right lateral epicondylitis, right shoulder sprain and right forearm tendinitis. On May 18, 1999 appellant had an excision of ganglion left wrist. The Office administratively doubled these claims. On March 15, 2005 it accepted lateral epicondylitis, sprains and strains of shoulder and upper arm and enthesopathy of unspecified site.

The Office referred appellant to Dr. Hendrick J. Arnold, a Board-certified orthopedic surgeon, for a second opinion. In a report dated September 10, 2007, Dr. Arnold listed the current clinical diagnosis for her work injury of September 11, 1997 as recurrent ganglion cyst of the left wrist secondary to chronic tendinitis secondary to cumulative trauma. With regard to appellant's work injury of May 10, 1998, he listed her current diagnoses as diffuse myofascial pain syndrome with some nonphysiologic findings such as bone tenderness. Dr. Arnold noted that both of these upper extremity diagnoses are secondary to work-related injury. He noted that appellant continued to have residuals from the ganglion cyst of postsurgical pain and scarring but the cyst was gone. Dr. Arnold noted no residuals from the right shoulder strain and right lateral epicondylitis. He noted that appellant was at maximum medical improvement as of September 15, 2005. In response to the question as to whether appellant could complete the physical requirements of checker, Dr. Arnold opined that she could be employed in any position that did not require repetitive upper extremity motions in either upper extremity. In an attached work capacity evaluation, he indicated that appellant was limited to two hours of reaching above her shoulder and could not perform repetitive movements of her wrists and elbow. Dr. Arnold noted pushing was limited to 30 pounds for one hour, pulling limited to 40 pounds for one hour and lifting limited to 10 pounds for one hour. He noted that appellant should be able to rest her hands for five minutes every hour. In a September 24, 2007 clarifying report, Dr. Arnold noted the range of motion of her shoulder to be normal but noted markedly less grip strength on left side.

On September 14, 2007 the Office accepted appellant's claim for myofascial pain syndrome, right upper extremity.

On January 23, 2008 appellant's treating osteopath, Dr. Vernon Rubick, ordered a functional capacity evaluation. In a February 19, 2008 report, Cheryl Hoxie, a physical therapist, indicated that appellant underwent a functional capacity evaluation. The results indicated that appellant was able to work in a sedentary physical demand level job for eight hours a day. Ms. Hoxie noted that appellant exhibited very poor effort or voluntary submaximal effort which is not necessarily related to pain, impairment or disability. She noted that appellant's static strength tests suggest that her injured area has returned to normal or near normal function.

In a June 27, 2008 report, William Simmons, a vocational rehabilitation specialist, indicated that the following positions were suitable for appellant: customer complaint clerk, with wages of $554.00 a week; and information clerk, with wages of $443.20 per week. He noted that both jobs were sedentary with reaching, handling and fingering involved occasionally or not at all. Mr. Simmons recommended the positions as the physical requirements do not exceed appellant's functional capacities. He also noted that he considered the nature of the injury, the employee's usual employment, age, degree of physical impairment and qualifications as well as availability of employment. Job prospects were listed as excellent. Mr. Simmons determined the salary of the position by taking the hourly median for the position using the May 2006 Metropolitan/Micropolitan Statistical, Area Occupational Employment Survey Statistics for Colorado Springs, Colorado. The attached job description noted that a customer complaint clerk would investigate customer complaints about merchandise, service, billing or credit rating, examine records and notify customer and designated personnel of findings. He or she may key information into a computer to obtain computerized records. The clerk may communicate with customers by telephone, e-mail, fax, regular correspondence or in person. The description noted that most customer service representatives use computers and telephones extensively in their work.

By notice dated September 23, 2008, the Office proposed reducing appellant's wage-loss compensation as she had the capacity to earn wages as a customer complaint clerk at the rate of $554.00 per week. It noted that the wages that she had the capacity to earn were greater than the current pay of the job she held when injured and accordingly it proposed reducing her compensation benefits to zero.[1] The Office allotted appellant 30 days to submit evidence to demonstrate that she was incapable of working.

In a September 26, 2008 report, Dr. Rubick noted that he has seen appellant for many years and at one point she was considered unable to perform the job for which she was trained. He stated that he believed her to be honest in the fact that she did not have the ability to do persistent/consistent work with her medical conditions for the job for which she was trained and has had no luck in the realm of vocational cross training. Dr. Rubick noted that the functional capacity evaluation showed no significant decreased work ability. He opined that all of this had made appellant's situation more confusing. Dr. Rubick recommended that she be referred to a chronic pain manager.

On September 23, 2008 appellant, through her attorney, contended that the job was not suitable. He argued that appellant cooperated with vocational rehabilitation but without success. Counsel contended that no effort was made to place appellant in the job which is the subject of the reduction proposal.

In an October 15, 2008 report, Dr. Rubick noted that appellant had decreased range of motion in her right shoulder, right elbow, left wrist and pain in these areas with resistance. He noted essentially no changes since May 10, 1998. Dr. Rubick stated that appellant was using pain medication and that he did not view her as a surgical candidate.

[1] Appellant was employed as of the date of injury as a GS-3, Step 7 with a date of injury salary of $19,547.00 plus a night differential of $0.94 per hour. The current annual salary for this position is $28,400.00 with a nighttime differential of $1.36 per hour.

In an October 29, 2008 report, Dr. Jack L. Rook, a Board-certified physiatrist, indicated that appellant had cervical and thoracic myofascial pain syndrome; right upper extremity pain and paresthesias; left upper extremity pain and paresthesias; sleep disturbance/controlled with Ambien and right more than left-sided shoulder pain with evidence of impingement. He noted that she continued to be extremely symptomatic. Dr. Rook recommended an electrical study and magnetic resonance imaging (MRI) scan. In a November 11, 2008 report, he reviewed the electrodiagnostic data and noted electrical evidence of mid slowing of both ulnar nerves across the cubital tunnels but noted no electrical evidence of bilateral carpal tunnel syndrome or neurogenic thoracic outlet syndrome. Dr. Rook noted that appellant was unable to complete the MRI scan because she was anxious and uncomfortable. In a December 11, 2008 note, he indicated that her MRI scan showed no evidence of ligamentous injury within her wrist but that the MRI scan of the right wrist was suspicious for a scapholunate tear. Dr. Rook reviewed the job description for customer complaints clerk and opined that he did not believe that appellant could perform the computer and telephone work due to her upper extremity problems.

In a December 5, 2008 note, Bruce Magnuson, a rehabilitation counselor, noted that appellant had excellent customer service background based on reported work history. He noted that the position of customer complaint clerk involved reaching, handling and fingering in the range of 0 to 33 percent of the workday, a level of activity that would not be considered repetitive. Mr. Magnuson also noted that when appellant saw him in the office she wrote detailed notes for 30 to 60 minutes in neat writing with occasional breaks to rest her hands. He further noted that she submitted very neat and legible job search contact lists. In a follow-up e-mail, Mr. Magnuson noted that the use of hands in the proposed position was not repetitive and allowed appellant sufficient time to rest her hands.

By decision dated February 3, 2009, the Office finalized the proposed reduction of compensation and reduced appellant's compensation to zero.

In a January 27, 2009 report, Dr. Rook noted that appellant had a magnetic resonance arthrogram of the right wrist, which was negative for scapholunate ligament tear, triangular fibrocartilage complex tear or lunatotriquetral ligament tear. He noted possible minimal shallow partial thickness tear of the scapholunate ligament associated with widening of that joint that might indicate ligament laxity. However, Dr. Rook noted that appellant does not appear to have surgical pathology within the right wrist. He did find a ganglion in the left wrist. However, Dr. Rook noted that at this time most of appellant's pain was in her shoulders, neck and both upper extremities and appeared to be principally myofascial in etiology.

On February 9, 2009 appellant requested an oral hearing before an Office hearing representative.

In a March 4, 2009 report, Dr. Rubick stated that he reviewed the job description for customer complaints clerk. He opined that appellant would not be able to do this job secondary to the repetitive motion of computer and telephone work required. Dr. Rubick noted that these types of activities aggravated her bilateral upper extremity pain issues and that he therefore does not believe that this would be a suitable job for her. He did not believe that there was any significant improvement in appellant's condition and did not foresee any improvement in her condition for the long term. In a March 13, 2009 work capacity evaluation, Dr. Rubick indicated

that she could only work 1 hour reaching, ½ hour reaching above shoulder and was prohibited from repetitive movements with her wrists and elbows and pushing, pulling or lifting.

In an April 9, 2009 report, Doris J. Shriver, an occupational therapist, reviewed appellant's file at the request of appellant's attorney. She noted that appellant would require 35 minutes more of breaks than the typical employee and also contended that the proposed position required more monitor/keyboard/telephone activity and would not be consistent with the physician's intention of no repetitive movements of the wrists and elbow. Ms. Shriver also contended that appellant's pain was a limiting factor. She opined that, once the combination of limitations is considered, appellant would not likely be employable.

At the hearing held on June 25, 2009, appellant contended that she could not perform the job of customer complaint clerk because the job required keyboarding and use of the telephone and that she could not keyboard for any period of time. She testified that the customer complaint position was not part of her vocational plan and that the counselor did not send her to apply for any customer complaint clerk positions.

By decision dated October 20, 2009, the hearing representative affirmed the February 3, 2009 decision.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[2]

Section 8115(a) of the Federal Employees' Compensation Act[3] provides in determining compensation for partial disability, the wage-earning capacity of an employee is determined by her actual earnings if her actual earnings fairly and reasonably represent her wage-earning capacity. Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.[4] If the actual earnings do not fairly and reasonably represent wage-earning capacity or if the employee has no actual earnings, her wage-earning capacity is determined with due regard to the nature of her injury, her degree of physical impairment, her usual employment, her age, her qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect her wage-earning capacity in her disabled condition.[5] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[6] The job selected for determining wage-earning capacity must be a job

[2] *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Elia M. Gardner*, 6 ECAB 238, 241 (1984). *See Pope D. Cox*, 39 ECAB 143, 148 (1988).

[3] 5 U.S.C. § 8115.

[4] *Hubert F. Myatt*, 32 ECAB 1994 (1981); *Lee R. Sires*, 23 ECAB 12 (1971).

[5] *See Pope D. Cox*, *supra* note 2; 5 U.S.C. § 8115(a).

[6] *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

reasonably available in the general labor market in the commuting area in which the employee lives.[7] In determining an employee's wage-earning capacity, the Office may not select a makeshift or odd-lot position or one not reasonably available on the open labor market.[8]

When the Office 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 the Office or 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 in the open labor market, that fits that employee's capabilities with regard to her physical limitation, 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.[9] Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.[10]

ANALYSIS

The Office accepted appellant's claim for ganglion cyst of the left wrist, right lateral epicondylitis, right shoulder sprain, right forearm tendinitis and myofascial pain syndrome in the right upper extremity. It paid compensation for wage loss. Appellant was referred to vocational rehabilitation counseling, but these efforts proved unsuccessful in that she did not obtain employment. The vocational rehabilitation counselors, Mr. Simmons and Mr. Magnuson, evaluated her physical capabilities and qualifications and determined that she could perform the duties of customer complaint clerk, a job they believed had excellent prospects. In a February 3, 2009 decision, the Office reduced appellant's compensation to zero as it found that her wage-loss capacity was represented by the position of customer complaint clerk.

In contending that the position of customer complaint clerk was not suitable, appellant pointed to her lack of success in obtaining placement with a new employer and the fact that her rehabilitation efforts involved other positions. However, the fact that she did not pursue this particular position with her counselor or did not obtain this position does not invalidate this job representing her wage-earning capacity. Failure to obtain employment does not require the inference of impairment of wage-earning capacity.[11] Furthermore, it is not determinative

[7] *Id.*

[8] *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

[9] *Karen L. Lonon-Jones*, 50 ECAB 293, 297 (1999).

[10] *Id. See Shadrick*, 5 ECAB 376 (1953).

[11] *W.B.*, 61 ECAB ___ (Docket No. 09-1440, issued January 11, 2010); *Ruth Lahr*, 2 ECAB 86 (1948).

whether an actual job offer was forthcoming[12] or whether appellant feels she is at a competitive disadvantage in the open market.

However, the Board finds that the Office has not met its burden of proof to establish that appellant's wage-earning capacity is represented by the position of customer complaint clerk as it has not shown that she had the physical capability to perform this position. Mr. Simmons, in stating that she could perform the position of customer complaint clerk, indicated that the position required reaching, handling and fingering only occasionally or not at all. However, the attached job description noted that most customer service representatives use computers and telephones extensively in their work. It noted that customer representatives frequently enter information into a computer as they are speaking to customers and that other companies have large amounts of data that can be pulled on a computer screen while the representative is talking to the customer. The Board notes that both Dr. Arnold and Dr. Rook have stated that appellant was prohibited from performing repetitive movements of her wrists and elbow. Furthermore, Dr. Rook specifically reviewed the position description for a customer complaint clerk and opined that she could not perform this work as she could not perform the computer and telephone work due to her upper extremity problems. Based on the evidence of record, the Board finds that the Office has not established that the constructed position of customer complaint clerk is medically suitable for appellant. Therefore, it failed to meet its burden of proof to reduce appellant's wage-loss compensation to zero.

CONCLUSION

The Board finds that the Office has not met its burden of proof to reduce appellant's wage-loss benefits to zero based on her capacity to earn wages as a customer complaint clerk.

[12] The fact that appellant was not able to secure a job does not establish that the job is not reasonably available. *Karen L. Lonon-Jones*, *supra* note 9 at 293 (if the evidence establishes that jobs in the selected position are reasonably available, the selection of such a position is proper even though the claimant has been unsuccessful in obtaining work or has submitted documents from individual employers who indicated that they did not have a position for her).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 20, 2009 is reversed.

Issued: December 21, 2010
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