U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of BARBARA J. TAYLOR and U.S. POSTAL SERVICE,
POST OFFICE, Detroit, MI

*Docket No. 98-385; Submitted on the Record;*
*Issued February 7, 2000*

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation benefits effective March 3, 1996, based on her capacity to perform the duties of a surveillance system monitor.

In the present case, the Office accepted that appellant, then a 38-year-old security police officer, sustained employment-related injuries on June 5, 1975 which resulted in a sprain to the right knee, chondromalacia of the right knee, consequential chondromalacia of the left knee and a secondary depression reaction. Appellant stopped work and the Office authorized payment of medical benefits and compensation for temporary total disability from January 11, 1976 through March 2, 1996.

In a December 8, 1993 report and accompanying work restriction evaluation (Form OWCP-5) dated December 12, 1993, Dr. Gregory A. Oliver, an osteopath and appellant's attending physician, stated that appellant was able to work eight hours a day performing duties utilizing upper body movement, voice activity or other activities which did not involve extensive usage of her lower extremities.

By letter dated March 18, 1994, the Office referred appellant for rehabilitation services. In a May 17, 1994 report, the vocational counselor reviewed the results of the vocational testing and set forth some recommendations of sedentary jobs appellant could perform.

A work restriction evaluation dated June 2, 1994, from Dr. Oliver indicated that appellant was only capable of working "less than four hours" a day.

On September 7, 1994 the vocational counselor indicated that vocational evaluation and labor market survey have been completed. Appellant was found to be vocationally qualified to perform the jobs of telephone solicitor, surveillance system monitor and assembler, semi-conductor. These sedentary jobs were found to be compatible with Dr. Oliver's December 12,

1993 and June 2, 1994 work restrictions and were reasonably available on either a full- or part-time basis. New employer job placement services were authorized for 90 days.

In a September 26, 1994 letter, the Office requested Dr. Oliver to discuss appellant's treatment since December 8, 1993, his findings on examinations and to express his opinion regarding appellant's current work tolerance limitations. Dr. Oliver was further asked to clarify why he decreased the number of hours appellant could work from eight in December 1993 to less than four in June 1994.

On August 2, 1995 the vocational rehabilitation counselor submitted a Form CA-66 dated June 14, 1994, finding the job of surveillance system monitor to be available on a full- and part-time basis. The counselor noted that review of the number of job ads in daily newspaper and employer contact indicated reasonable availability according to employment statistics quarterly for Indianapolis, first quarter, 1994 indicated 590 sedentary security guard positions. Despite 90 days of job placement assistance, the counselor noted that appellant remained unemployed. Appellant's lack of success was attributed to a competitive labor market, appellant's belief that she cannot perform full-time work and her gastroesophagal reflux condition, which causes her to burp or belch during interviews.

In response to the Office's request for a response to their letter of September 26, 1994, Dr. Oliver submitted an August 29, 1995 work capacity evaluation form, which indicated that appellant could work 8 hours a day so long as there was no standing for more than 5 minutes per hour, no lifting over 15 pounds at one time, no more than 3 times per hour; no repetitive bending or stooping at all; and no walking over 5 minutes total per hours.

In a December 28, 1995 letter, the vocational rehabilitation counselor stated that the vocational and wage data outlined on the June 14, 1994 Form CA-66 was a current and accurate representation of the Indianapolis, Indiana labor market.

On January 2, 1996 the Office provided appellant with a notice of proposed reduction of compensation, based on her ability to perform the duties of a surveillance system monitor. The Office advised appellant that if she disagreed with the proposed action, she could submit additional factual or medical evidence relevant to her capacity to earn wages.

In a January 8, 1996 letter, appellant provided a narrative statement, in which she disagreed with the proposed decision. Appellant indicated that she could work less than 4 hours a day, would be 60 years old soon and that she did everything her rehabilitation counselor requested her to do, but she could not find a position.

By decision dated February 7, 1996, the Office reduced appellant's compensation, effective March 3, 1996, based on an earning capacity of $236.74 per week in the selected position.

In a February 26, 1996 letter, appellant, through her attorney, requested reconsideration and argued that appellant was not medically suitable for employment as a surveillance system monitor as evidenced by Dr. Oliver's February 14, 1996 medical report. It was also argued that

appellant was not vocationally suitable as evidenced by appellant's exhaustion of job opportunities within the commuting area where she resides.

In a February 14, 1996 OWCP-5 form, Dr. Oliver indicated that appellant could work two hours a day, with no lifting, bending, running, kneeling, twisting or squatting and sitting time limited to one to two hours.

By decision dated May 29, 1996, the Office denied modification of its prior decision finding that the evidence was insufficient to demonstrate that appellant was totally disabled for all work and/or that the selected job of surveillance system monitor did not reasonably reflect her ability to earn wages in the open labor market.

In a letter dated May 22, 1997, appellant, through her attorney, again requested reconsideration and submitted additional evidence.

Medical records from Dr. Oliver from 1991 through October 21, 1996 were provided. However, none of the records reflect any active treatment for the accepted work injury. In an August 23, 1996 medical report addressed to appellant's representative, Dr. Oliver explained that there had been several inconsistencies regarding the extent of work he felt appellant could perform as they were based on brief evaluations of appellant, some x-ray findings and subjective information appellant had provided. Dr. Oliver suggested a full functional capacity evaluation was necessary in order to provide more objective data on appellant's full capacity to work. Based on the results of a January 3, 1997 functional capacity evaluation, he completed a work capacity evaluation dated March 21, 1997 (Form OWCP-5), in which he opined that appellant could work two hours per day, was not limited in sitting, could occasionally perform forward bending while standing and could walk less than one-twelve mile rarely.

A May 16, 1997 vocational evaluation by Stephanie R. Archer, CRC, CCM, VE, concluded that appellant was not able to perform the job of surveillance system monitor and that those jobs do not exist in significant numbers. Ms. Archer stated that appellant has a significant impairment with both knees with significant limitations with standing and walking. She stated that appellant needs to have both legs fully supported while seated and must stand briefly every 30 minutes. Ms. Archer noted the recent functional capacity evaluation found that appellant was very slow in her movements. She opined that in order to fully support her legs while seated, appellant would have to evaluate her legs. Sitting with her legs elevated would cause appellant to have to twist her upper body to be able to work at a desk. Surveillance systems monitors are required to be alert and have at least average ability to respond quickly to situations. Ms. Archer noted that surveillance monitors are required to walk two hours in an eight-hour day. They are not provided chairs, which allow them to move every 30 minutes. They must do desk work that would require appellant to sit in a twisted position. She further stated that even if appellant were able to perform the selected position, this was not reasonable employment as her past work history in security is over 20 years old. Ms. Archer further argued that there were less than 100 sedentary, unskilled surveillance monitor openings during the last 4 quarters in the Indianapolis region and that it was not reasonable to expect that appellant, given her significant impairments and advanced age and with a very remote work history, would gain employment in an occupation where very few jobs exist and no jobs are available in her region.

By decision dated August 19, 1997, the Office denied modification of its prior decision finding that the evidence presented in support of the application was insufficient to warrant modification.

The Board finds that the Office properly reduced appellant's compensation benefits effective March 3, 1996, based on her capacity to perform the duties of a surveillance system monitor.

Once the Office accepts a claim, it has the burden of justifying termination of modification of compensation.[1] If an employee's disability is no longer total, but the employee remains partially disabled, the Office may reduce compensation benefits by determining the employee's wage-earning capacity.[2] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injuries and the degree of physical impairment, his or her usual employment, the employee's age and vocational qualifications and the availability of suitable employment.[3] After the Office makes a medical determination of partial 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's *Dictionary of Occupational Titles* 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 open labor market should be made through contact with the state employment services or other applicable services. Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.[4]

In the present case, the Office selected the sedentary position of surveillance system monitor (*Dictionary of Occupational Titles* No. 379.367-010). The job description indicates that the person: "observes television screens that transmit in sequence views of transportation facilities sites. Pushes hold button to maintain surveillance of location where incident is developing and telephones police or other designated agency to notify authorities of location of disruptive activity. Adjusts monitor controls when required to improve reception and notifies repair service of equipment malfunctions." In a CA-66 form completed on June 14, 1994, the rehabilitation counselor determined that appellant was both physically and vocationally able to perform the duties of this position. He also determined that the position was reasonably available in appellant's commuting area by reviewing the number of job ads in daily newspaper, employer contact and listed the reported weekly wage for the position. In a subsequent December 28, 1995 letter, the rehabilitation counselor confirmed that the labor market had not changed since the survey was performed in June 1994 and, thus, the open labor market study

[1] *Betty F. Wade*, 37 ECAB 556 (1986).

[2] 5 U.S.C. § 8115(a); *see also* 20 C.F.R. § 10.303(a).

[3] *Samuel J. Chavez*, 44 ECAB 431 (1993).

[4] *Albert C. Shadrick*, 5 ECAB 376 (1953).

reflected the current status of the labor market available to appellant at the time the Office determined her wage-earning capacity.

The physical requirements of the position include lifting, carrying, pushing and pulling of up to 10 pounds with 75 percent of the work performed inside. With regards to appellant's physical restrictions, appellant's treating physician, Dr. Oliver, completed a work restriction evaluation (OWCP-5) dated August 29, 1995, in which he indicated that appellant was medically capable of working 8 hours per day with restrictions of no lifting over 15 pounds at a time, no repetitive bending or stooping and no walking or standing more than 5 minutes per hour. This opinion was rendered after the Office inquired why Dr. Oliver decreased the number of hours appellant could work from eight in December 1993 to less than four in June 1994. The selected position appears to be within the physical restrictions imposed by Dr. Oliver. Thereafter, the Office correctly applied the principles set out in *Shadrick*[5] and reduced appellant's continuing compensation to reflect her employment-related loss of wage-earning capacity.

There is no indication that the selected position is outside the physical restrictions imposed by Dr. Oliver. The surveillance system monitor position is a sedentary position and there is no indication that it required physical activity beyond the stated limitations. Although appellant stated that she could work less than four hours a day, the medical evidence on file indicates that she is capable of working full time with restrictions. Moreover, in finding the selected position to be vocationally suitable, the Office gave due regard to the enumerated factors under 5 U.S.C. § 8115(a) in determining that the selected position represented appellant's wage-earning capacity as the rehabilitation counselor took into account appellant's age and the fact that she had not worked in over 20 years. Although appellant argued that she was not able to secure a job offer in the selected position, this does not establish that the work is not reasonably available in the area.[6] Rather, the position must be performed in sufficient numbers within the commuting area to be considered reasonably available. Further, the Board notes that the rehabilitation specialist determined that the selected position was reasonably available in appellant's commuting area at the time the Office rendered its decision. The Board has held that because the rehabilitation specialist is an expert in the field of vocational rehabilitation, the claims examiner may rely on his or her opinion as to whether the job is reasonably available and vocationally suitable. The rehabilitation specialist properly concluded that selected position was performed in such numbers within appellant's Indianapolis commuting area to be considered reasonably available.

The Office also properly considered that appellant had been out of the labor market for many years. The Office evaluated appellant's ability to return to the labor market as an unskilled surveillance system monitor and found that as the position usually required no prerequisite skills, appellant's background in law enforcement would be an advantage for such a position. The Office properly utilized the wage rate for an entry level surveillance system monitor in determining appellant's wage-earning capacity.

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

[6] *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

In view of the foregoing, the Board finds that the Office properly found that appellant was no longer totally disabled as a result of her June 5, 1975 work injury and properly determined that the position of surveillance systems monitor represented appellant's wage-earning capacity.

The subsequent evidence and argument presented are insufficient to demonstrate that appellant is totally disabled or that the selected job of surveillance system monitor does not reasonably reflect her ability to earn wages in the open labor market. Although Dr. Oliver submitted work restriction evaluations (OWCP-5) dated February 14, 1996 and March 21, 1997, in which he indicated that appellant could only work two hours a day with restrictions, the Board notes that Dr. Oliver failed to provide findings upon physical examination or offer any explanation as to how or why appellant's condition had changed since the OWCP-5 dated August 29, 1995 whereby he indicated that appellant could work eight hours a day. Given the fact that Dr. Oliver had previously provided inconsistent reports pertaining to appellant's ability to work, which he acknowledged in his August 23, 1996 medical report, and has not presented a rationalized opinion or explanation as to why appellant can only work two hours, his reports are of diminished probative value and are insufficient to modify the Office's wage-earning capacity decision.

Although in her May 16, 1997 report, Ms. Archer argued that the selected position was not vocationally suitable due to appellant's significant impairments and advanced age, she appears to be offering a medical opinion in her explanation of how appellant would be required to do the work and the fact that appellant's slow movements would lessen her ability to respond to situations which would arise on the job. The Board notes that her opinion has little probative value as Ms. Archer is a certified rehabilitation counselor which is not defined as a "physician" under the Federal Employees' Compensation Act[7] and, thus, her opinion as to the physical requirements appellant is capable of performing or not performing are of little probative value.

Additionally, appellant's attorney's arguments and Ms. Archer's arguments that the selected position is not performed in sufficient numbers are insufficient to modify the prior decision. Appellant's attorney had argued that appellant was not vocationally suitable as evidenced by her exhaustion of job opportunities within the commuting area. In this case, appellant remained unemployed after being provided with a 90-day job placement assistance. As previously noted, the fact that appellant did not secure a job offer in the selected position, does not establish that the work is not reasonably available in the area.[8] She concluded that the selected position was not available in sufficient numbers based on the number of job vacancies available. However, the reasonable availability of the position is based on whether it is performed in sufficient numbers within the commuting area, not on the number of vacancies available. Ms. Archer's arguments pertaining to appellant's advanced age and remoteness of job skills are not substantiated and lacks rationale to support her opinion. Moreover, in commenting that there are no jobs available in appellant's area, Ms. Archer states that the existence and availability of sedentary unskilled surveillance system monitor occupations in the Indiana and

[7] *See Diane Williams*, 47 ECAB 613 (1996).

[8] *See supra* note 6.

Indianapolis economy for the first quarter of 1997 is less than .01 of 1 percent of the jobs in the States' economy. This, however, is a general statement without specific regard to appellant's commuting area. As Ms. Archer fails to demonstrate that the selected position is not reasonably available to appellant or that appellant is not capable of performing the selected position, her May 16, 1997 report is of low probative value.

The decision of the Office of Workers' Compensation Programs dated August 19, 1997 is hereby affirmed.

Dated, Washington, D.C.
February 7, 2000

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member