United States Department of Labor
Employees' Compensation Appeals Board

JOYCE W. THURMAN, Appellant	)	
and	)	**Docket No. 05-1537**
	)	**Issued: December 7, 2005**
SOCIAL SECURITY ADMINISTRATION, Richmond, CA, Employer	)	

Appearances:
Joyce W. Thurman, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 14, 2005 appellant filed a timely appeal of an Office of Workers' Compensation Programs' merit decision dated May 9, 2005, which affirmed the reduction of her compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether Office met its burden of proof in establishing that the constructed position of customer service representative represented appellant's wage-earning capacity.

FACTUAL HISTORY

On November 16, 1994 appellant, then a 62-year-old social insurance representative, filed an occupational disease claim alleging that her carpal tunnel condition and problems with her hands and wrists were causally related to her employment duties. Appellant stopped work on November 3, 1994. The Office accepted her claim for bilateral carpal tunnel syndrome with subsequent surgery and paid appropriate compensation for wage loss. Appellant retired on April 3, 1995 and moved from California to Louisiana.[1]

In August 2000, appellant moved back to California and came under the care of Dr. Anthony J. Zoppi, a Board-certified orthopedic surgeon. In a November 1, 2000 report, Dr. Zoppi noted that appellant was diagnosed with rheumatoid arthritis in 1999. He stated that appellant's carpal tunnel release surgeries were stable and did not require additional treatment other than continued bracing. Dr. Zoppi opined that appellant's ongoing symptoms were more due to her rheumatoid arthritis, which was not work related, and that she remained unable to perform her usual and customary work with repetitive typing and use of her hands due to her carpal tunnel syndrome. In a November 1, 2000 work capacity evaluation, he opined that appellant could work 8 hours a day with no repetitive movements of both wrists, no pushing or pulling more than 10 pounds and must be able to take a 10-minute break every hour. In an October 5, 2001 report, Dr. Zoppi stated that appellant was unable to do repetitive-type work with her hands, especially in view of the progression of her rheumatoid condition. He opined that she was able to do light office-type work without repetitive conditions.

In November 2000, the Office opened appellant's case for rehabilitation services and assigned a rehabilitation counselor to assist appellant's return to a suitable position within her work restrictions. The vocational rehabilitation counselor identified the positions of receptionist, telephone solicitor and information clerk/customer service representative as being within her medical and vocational capabilities and tried to place appellant in those positions. During this program the rehabilitation counselor noted that appellant underwent cataract eye surgery and that appellant believed she was unable to work on a full-time basis due to the pain in her hands and her age. Appellant also indicated a desire to move back to Louisiana.

Rehabilitation services were closed on May 23, 2002 without a successful return to work. The rehabilitation counselor cited nonindustrial eye surgery and age as reasons complicating the return to work effort. In an earlier report dated February 19, 2002, the rehabilitation counselor had identified the position of information clerk/customer service representative (Department of Labor's *Dictionary of Occupational Titles*, DOT No. 237.367-022) to be suitable, both medically and occupationally and reasonably available in appellant's geographic area of Los Angeles, California. The position was listed as sedentary with lifting and carrying up to 10 pounds. The position involved some reaching, handling, feeling and fingering; the ability to see; and the ability to hear and talk. The position required a three- to six-month preparation and had a weekly wage of $320.00 to $400.00.

[1] The record indicates that the Office transferred appellant's case to its Dallas, Texas, office in June 1995.

Appellant relocated to Bernice, Louisiana, in July 2002 and notified the Office of her new address in a July 15, 2002 letter.

In a September 12, 2002 notice of proposed reduction of compensation, the Office advised appellant that it proposed to reduce her wage-loss compensation as the factual and medical evidence established that she was no longer totally disabled. The Office advised appellant that she had the capacity to earn the wages of an information clerk, noting that it chose the lower weekly wage rate of $320.00 for the selected position. Appellant was allowed 30 days to submit additional evidence or argument.

In a September 20, 2002 letter, appellant disagreed with the Office's proposed reduction of compensation. She advised of difficulties due to her rheumatoid arthritis and eye conditions, noting that she had pain, difficulty seeing, and that she had to use a walker to walk. Appellant contended that she was unable to push or pull 10 pounds and she could not do any squatting, kneeling, or reaching above the shoulders and she could not sit for long periods of time without getting stiff. She expressed her belief that the arthritis was brought about by the carpal tunnel. Appellant further advised that she had relocated back to Louisiana as that was where she was born.

In a report dated June 10, 2004, the Office rehabilitation counselor provided updated information on the customer service representative position (DOT No. 237.367-022) finding it to be reasonably available in Los Angeles, California. The position was listed as sedentary with lifting and carrying up to 10 pounds. The position involved some reaching, handling, feeling and fingering; the ability to see; and the ability to hear and talk. The position required a three- to six-month preparation and had a weekly wage of $560.00.

In a September 28, 2004 decision, the Office reduced appellant's compensation effective October 3, 2004, finding that she was capable of performing the constructed position of customer service representative (DOT No. 237.367-022). The Office found that appellant's rheumatoid arthritis and eye conditions were considered to be subsequently acquired conditions and there was no medical evidence that those conditions disabled appellant from performing the selected position. The Office further found that the newly selected customer service representative position was reasonably available in the Los Angeles, California, area where appellant had resided, been employed and received vocational rehabilitation services. The Office stated "the fact that an employee chooses to move to another area does not invalidate the proposal to rate that person based on the availability of employment in the area where she worked and was injured."

Appellant requested an oral hearing which was held February 22, 2005 in Shreveport, Louisiana. Medical evidence from Dr. Larry K. Broadwell, a Board-certified internist specializing in arthritis and osteoporosis, was submitted along with copies of various tests. In a July 23, 2002 report, Dr. Broadwell advised that appellant had rheumatoid arthritis and was at high risk due to her active disease state and damage on x-ray, which included loss of joint space and erosions. He recommended that appellant avoid heavy lifting and bending and avoid prolonged sitting and standing due to a degenerative disc in the lumbar spine.

Medical reports from Dr. James E. Lusk, a Board-certified ophthalmologist, were provided regarding appellant's eyes. This included a December 4, 2003 report which noted that appellant had a failing corneal transplant left eye and a January 16, 2004 operative report of her right eye.

In an October 11, 2004 report, Dr. Richard I. Ballard, a Board-certified orthopedic surgeon, noted that appellant had, in addition to her compensable injury, significant rheumatic complications over her entire body. He stated that "[f]or this reason, I must try to sort out the amount of her disability and her limitations secondary to her compensable tenosynovitis and carpal tunnel syndrome of the hand and wrist from her other problems, which limit her activities." Dr. Ballard noted his agreement with Dr. Zoppi that appellant could perform some type of light-duty work. He stated that appellant would need to have frequent rest periods as far as using her hands. With respect to appellant's hands, Dr. Ballard restricted any type of repeated motion and any pushing or pulling.

By decision dated May 9, 2005, an Office hearing representative affirmed the September 28, 2004 decision. The Office hearing representative found that, based on Dr. Ballard's October 11, 2004 report, the updated customer service representative position was within appellant's medical restrictions. Regarding availability and potential salary of the job offered, the hearing representative relied on the Office's recent confirmation that the position was still reasonably available in the Los Angeles area. The hearing representative stated that "availability and salary are determined on the area where the claimant was originally employed. Voluntary movement to another location is not considered in this determination."

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[2] An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.[3]

Under section 8115(a) of the Federal Employees' Compensation Act, 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 the employee's wage-earning capacity or if the employee has no actual wages, the wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the employee's usual employment, age, 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.[4]

[2] *James B. Christenson*, 47 ECAB 775, 778 (1996); *Patricia A. Keller*, 45 ECAB 278 (1993); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

[3] 20 C.F.R. §§ 10.402, 10.403 (2002).

[4] 5 U.S.C. § 8115(a); *see Dorothy Lams*, 47 ECAB 584 (1996).

The Office must initially determine appellant's medical condition and work restrictions before selecting an appropriate position that reflects his vocational wage-earning capacity. The Board has stated that the medical evidence upon which the Office relies must provide a detailed description of appellant's condition.[5] Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.[6]

When the Office makes a medical determination of partial disability and of specific 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 in the open labor 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 service or other applicable service. 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.[7]

In determining an employee's wage-earning capacity based on a position deemed suitable, but not actually held, the Office must consider the degree of physical impairment, including impairments resulting from both injury-related and preexisting conditions, but not impairments resulting from postinjury or subsequently acquired conditions.[8] Any incapacity to perform the duties of the selected position resulting from subsequently acquired conditions is immaterial to the loss of wage-earning capacity that can be attributed to the accepted employment injury and for which appellant may receive compensation. Additionally, the job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.[9]

[5] *See William H. Woods*, 51 ECAB 619 (2000); *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

[6] *Carl C. Green, Jr.*, 47 ECAB 737, 746 (1996).

[7] *David L. Scott*, 55 ECAB ___ (Docket No. 03-1822, issued February 20, 2004); *John D. Jackson*, 55 ECAB ___ (Docket No. 03-2281, issued April 8, 2004); *John E. Cannon*, 55 ECAB ___ (Docket No. 03-347, issued June 24, 2004).

[8] *See John D. Jackson, supra* note 7***;*** *James Henderson, Jr.*, 51 ECAB 268 (2000).

[9] *See David L. Scott, supra* note 7; *Richard Alexander*, 48 ECAB 432 (1997).

ANALYSIS -- ISSUE 1

The medical evidence established that appellant was no longer totally disabled and the Office referred her for vocational rehabilitation counseling beginning in 2000. After an unsuccessful attempt at rehabilitation, the Office selected a position for determining her wage-earning capacity. Although the Office originally proposed to reduce appellant's wage-loss compensation based on the medical evidence from Dr. Zoppi and her ability to perform the duties of the selected position of information clerk/customer service representative (DOT No. 237.367-022), approximately two years lapsed before the Office issued a final decision regarding appellant's wage-loss capacity on September 28, 2004.

As previously noted, the selected position must be reasonably available in appellant's commuting area.[10] Appellant relocated to Bernice, Louisiana, in July 2002, approximately two years prior to the September 28, 2004 decision, when the Office advised that the constructed position was reasonably available based on her former residence in California. Both the Office and the Office hearing representative indicated that appellant's voluntary move to another location had no bearing on the availability of employment in the area where appellant was originally employed and injured. The Office procedures state:

> "The availability of the employment is usually evaluated with respect to the area where the injured employee resides at the time the determination is made, rather than the area of residence at the time of injury. However, when the employee voluntarily moves to an isolated locality with few job opportunities, the question of availability should be applied to the area of residence at the time of the injury."[11]

Although the record reflects that appellant voluntarily moved to Bernice, Louisiana, there is no indication that the Office considered whether appellant moved into an isolated area or whether Bernice was sufficiently close to a major city so as to base the wage-earning capacity on her new residential area. The Office apparently based its reasonable availability finding on appellant's prior residence in California without any consideration or regard of appellant's move to Bernice, Louisiana. Accordingly, this is inconsistent with the Office's procedures. The selected position is not reasonably available as the Office relied on data based on appellant's former location in California in issuing its September 24, 2004 decision.

[10] *Id.; see Philip S. Deering*, 47 ECAB 692, 699 (1996).

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.814.8(c)(1) (December 1993).

The Board notes that the record establishes that appellant's arthritis and eye conditions were acquired subsequent to the accepted condition. As previously noted, any incapacity to perform the duties of the selected position resulting from subsequently acquired positions is immaterial to the loss of wage-earning capacity which can be attributed to the accepted employment injury.[12]

CONCLUSION

The Office has not established that the selected position was reasonably available in appellant's commuting area. It did not meet its burden of proof to reduce her wage-loss compensation.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs decision dated May 9, 2005 is hereby reversed.

Issued: December 7, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

[12] *See John D. Jackson, supra* note 7.