United States Department of Labor
Employees' Compensation Appeals Board

A.Z., Appellant	)	
and	)	**Docket No. 06-1480**
	)	**Issued: February 28, 2007**
DEPARTMENT OF THE AIR FORCE, AIR MOBILITY COMMAND, McCHORD AIR FORCE BASE, WA, Employer	)	

Appearances:
John Goodwin, Esq., for the appellant
Office of Solicitor, for the Director

Oral Argument February 13, 2007

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 12, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated May 22, 2006 which reduced her compensation benefits based on her capacity to earn wages in the constructed position of case aid. 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 compensation benefits based on her capacity to earn wages as a case aid.

FACTUAL HISTORY

This case has previously been before the Board. By decision dated January 15, 2002, the Board reversed a suitable work termination, finding that a conflict of medical opinion existed between appellant's attending physician, Dr. Anthony G. Johnson, a Board-certified family physician, and Dr. William T. Thieme, Board-certified in orthopedic surgery, regarding whether

appellant could perform the duties of the offered position.[1] Subsequent to the Board's January 15, 2002 decision, appellant was returned to the periodic rolls.

On March 26, 2003 the Office referred appellant to Dr. Harry H. Kretzler, a Board-certified orthopedic surgeon, to determine her current diagnoses, whether they were work-related and whether she had work restrictions.[2] In a report dated April 8, 2003, Dr. Kretzler noted his review of the record, the history of injury and appellant's current symptoms. Following physical examination, he diagnosed degenerative disc disease at C5-6 and C6-7 which predated the onset of neck pain caused by employment exposure. Dr. Kretzler also diagnosed bilateral carpal tunnel syndrome more severe on the left, preexisting degenerative joint disease of the acromioclavicular joint and employment-related right shoulder rotator cuff strain and impingement syndrome. He advised that he was "hard put" to find that her carpal tunnel syndrome was related to work activities, noting that she had fairly marked degenerative arthritis of the hands which became worse in the five years since she stopped work. Dr. Kretzler noted that appellant did not give her "all" in grip strength testing and opined that she could do sedentary work that would not require much overhead work or gripping. In a work capacity evaluation he advised that she could work eight hours a day with no reaching above the shoulders and one to two hours of repetitive movements of the wrists. Pushing, pulling and lifting were limited to 10 pounds.

On September 9, 2004 appellant was referred to Tim Condon, a rehabilitation counselor, for vocational rehabilitation. On March 8, 2005, the Office approved a training program at Tacoma Community College. Training was completed on December 16, 2005 and appellant was unable to secure employment. On March 31, 2006 the vocational counselor identified the positions of social services aid and case aid as within appellant's work restrictions and reasonably available in the local labor market. By letter dated April 18, 2006, the Office proposed to reduce appellant's compensation benefits based on her capacity to earn wages as a case aid. The Office advised appellant that, if she disagreed with the proposed reduction, she should submit additional evidence or argument within 30 days. In a response dated May 5, 2006, appellant disagreed with the proposed reduction, stating that she had "been off work a long time and there is often discomfort."

By decision dated May 22, 2006, the Office reduced appellant's compensation benefits, effective May 19, 2006, based on her capacity to earn wages as a case aid.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[3] 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

[1] Docket No. 01-883.

[2] The Office characterized Dr. Kretzler as a second opinion physician.

[3] *James M. Frasher*, 53 ECAB 794 (2002).

disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.[4]

Section 8115 of the Federal Employees' Compensation Act[5] and Office regulations provide that 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, her age, her qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect her wage-earning capacity in her disabled condition.[6]

The Office must initially determine a claimant's medical condition and work restrictions before selecting an appropriate position that reflects his or her wage-earning capacity. The medical evidence upon which the Office relies must provide a detailed description of the condition.[7] Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.[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 for selection of a position listed in the Department of Labor, *Dictionary of Occupational Titles* (DOT) or otherwise available in the open market, that fits that 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.[9] Finally, application of the principles set forth in *Albert C. Shadrick*[10] will result in the percentage of the employee's loss of wage-earning capacity.[11]

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 post injury or subsequently acquired conditions. Any incapacity to perform the duties of the selected position resulting from subsequently acquired conditions is

[4] 20 C.F.R. §§ 10.402, 10.403; *John D. Jackson*, 55 ECAB 465 (2004).

[5] 5 U.S.C. §§ 8101-8193.

[6] 5 U.S.C. § 8115; 20 C.F.R. § 10.520; *John D. Jackson, supra* note 4.

[7] *William H. Woods*, 51 ECAB 619 (2000).

[8] *John D. Jackson, supra* note 4.

[9] *James M. Frasher, supra* note 3.

[10] 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.403.

[11] *James M. Frasher, supra* note 3.

immaterial to the loss of wage-earning capacity that can be attributed to the accepted employment injury and for which appellant may receive compensation.[12]

ANALYSIS

The Board finds that the medical evidence does not establish that appellant was capable of performing the selected position of case aid. The April 8, 2003 report provided by Dr. Kretzler, an Office referral physician, established that appellant was no longer totally disabled. The Office referred her for vocational rehabilitation counseling in September 2004. She then underwent training as a case aid, which she completed in December 2005. Because appellant was unable to secure employment, the vocational rehabilitation counselor identified two positions, social services aid and case aid, that he felt fit her capabilities, and the Office determined that she had the capacity to earn wages as a case aid.

The position description found in the DOT provides that a case aid "performs community contact work on simpler aspects of programs or cases and assists in providing services to clients and family members, under close and regular supervision and tutorage of [a] caseworker."[13] The strength requirement is that of light work which is defined as "exerting up to 20 pounds of force occasionally, and/or up to 10 pounds of force frequently, and/or a negligible amount of force constantly."[14] The medical restrictions set forth by Dr. Kretzler do not comport with the strength requirements of the case aid position. In a work capacity evaluation dated April 8, 2003, the physician advised that pushing, pulling and lifting were limited to 10 pounds, and the position description requires exertion of up to 20 pounds. The Office therefore failed to meet is burden of proof to establish that appellant has the appropriate strength of perform the selected position of case aid. Accordingly, the Office failed to establish that this position represents her wage-earning capacity and failed to properly reduce her compensation benefits.[15]

CONCLUSION

The Board finds that the Office failed to meet its burden of proof in reducing appellant's wage-earning capacity based on her ability to earn wages in the selected position of case aid.

[12] *John D. Jackson, supra* note 4.

[13] DOT, section 195.367-010.

[14] *Id.*

[15] The Board notes that at oral argument counsel argued that the Office erred in relying on Dr. Kretzler's April 3, 2003 reports because his examination was too distant in time to the May 19, 2006 decision. The Board need not reach this issue, however, as it is reversing the May 19, 2006 decision on other grounds.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 22, 2006 be hereby reversed.

Issued: February 28, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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