

**United States Department of Labor  
Employees' Compensation Appeals Board**

A.N., Appellant	)	
	)	
and	)	<b>Docket No. 06-1761</b>
	)	<b>Issued: May 18, 2007</b>
<b>DEPARTMENT OF THE ARMY, MARSHALL</b>	)	
<b>ARMY DENTAL CLINIC, Fort Dix, NJ,</b>	)	
<b>Employer</b>	)	
	)	

*Appearances:*  
Thomas R. Uliase, Esq., for the appellant  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

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

**JURISDICTION**

On July 26, 2006 appellant, through her attorney, filed a timely appeal of a July 12, 2006 merit decision of the Office of Workers' Compensation Programs, denying modification of her wage-earning capacity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant has established that the July 8, 2002 determination of her wage-earning capacity in the constructed position of reception clerk should be modified.

**FACTUAL HISTORY**

On May 3, 1978 appellant, then a 29-year-old dental assistant, filed an occupational disease claim. She alleged that her carpal tunnel syndrome was caused by her federal employment. Appellant stopped work on November 1, 1977. By letter dated October 2, 1978, the Office accepted appellant's claim for bilateral carpal tunnel syndrome. In a January 10, 1986

medical report, Dr. Stanley C. Leonberg, Jr., a Board-certified neurologist, opined that appellant was capable of performing limited-duty work. As a result of her participation in vocational rehabilitation, appellant returned to limited-duty work as an information receptionist on December 4, 1988. Appellant stopped work again on January 19, 1989.

In work capacity evaluation forms (OWCP-5) dated March 6, 1995, April 8, 1997 and June 14, 1999, Dr. Karen M. Scardigli, an attending Board-certified neurologist, released appellant to return to limited-duty work with the restrictions of no lifting more than 10 pounds, intermittent squatting for two hours, intermittent climbing, intermittent kneeling for one hour, intermittent twisting for four hours and no pushing or pulling. Appellant was permitted to frequently and continuously sit, walk and stand and bend intermittently for eight hours. Dr. Scardigli stated that appellant could reach above her shoulder and engage in fine manipulation. On July 1, 1999 the Office referred her to a vocational rehabilitation counselor.

On May 31, 2000 appellant underwent a functional capacity evaluation which found that she was limited to 4 minutes of standing while reaching, handling and fingering, 1 minute and 38 seconds of stooping, approximately 5 seconds of squatting, 22 seconds of kneeling, lifting and lowering no more than 6 pounds from the ground to overhead and pushing and pulling no more than 14 pounds, 50 feet. She was found to be fully functional with walking, performing seated desk work, hand manipulation with a bolt box and climbing up and down one flight of stairs.

On June 28 and 29, 2000 appellant underwent a psychological evaluation which found that she was best suited for a job as a reader, information clerk, call-out operator, space scheduler, travel clerk, information clerk at an auto club and a customer complaint clerk. The jobs were sedentary in nature and required only occasional reaching, handling, fingering and feeling. They also required no repetitive use of the wrists.

On October 19, 2000 appellant underwent a drive simulation evaluation due to her concern about her ability to commute and travel to work. The evaluation found that she was fully functional and able to drive for 30 minutes although there was some concern with her feeling of “dead hands” while driving.<sup>1</sup>

In a January 15, 2002 OWCP-5 form, Dr. Scardigli reiterated that appellant could work eight hours a day. She stated that appellant could sit and walk continuously and bend, squat, kneel, twist and stand eight hours a day. Appellant was restricted from lifting more than 10 pounds and pushing, pulling, fine manipulation and climbing. Dr. Scardigli stated that appellant could reach or work above her shoulder, use her feet to operate foot controls or for repetitive movement and that she could operate a car, truck, crane, tractor or other type of motor vehicle.

In a report dated January 17, 2002, a vocational rehabilitation counselor identified the position of reception clerk as being within appellant’s physical limitations, vocational skills and geographical area. The reception clerk position, as it appeared in the Department of Labor’s, *Dictionary of Occupational Titles* (DOT), was classified as a sedentary position. The position required appellant to receive callers at the employing establishment, determine the nature of

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<sup>1</sup> During the October 19, 2000 drive simulation evaluation, appellant actually drove 20 minutes.

business and direct callers to their destination. It further required obtaining the caller's name and arranging an appointment with the person called upon. It required the caller to be directed to the destination and recording of the name, time of call, nature of business and person called upon. Operation of a PBX telephone console to receive incoming messages may be required. Work in a medical practitioner's office or other health care facility may be required and be designated an outpatient receptionist or receptionist in a doctor's office. The position may also require the issuance of a visitor's pass when required, the performance of a variety of clerical duties and other duties pertinent to the type of establishment and collection and distribution of mail and messages. The physical requirements included lifting no more than 10 pounds, frequent reaching, handling, talking and hearing and occasional fingering. The vocational rehabilitation counselor stated that appellant's previous work experience in the dental field and the results of vocational testing prepared her for the constructed position.

On January 21, 2002 Dr. Scardigli approved of the constructed reception clerk position.

In a May 14, 2002 notice, the Office advised appellant that it proposed to reduce her wage-loss compensation because the medical and factual evidence of record established that she was no longer totally disabled. The Office found that she had the capacity to earn the wages of a reception clerk. The Office requested that appellant submit additional evidence or argument within 30 days if she disagreed with the proposed action.

By letter dated May 24, 2002, appellant's attorney objected to the proposed reduction. He contended that the reception clerk position was not within appellant's physical restrictions. Counsel contended that Dr. Scardigli's OWCP-5 forms established that appellant had limitations with regard to performing repetitive work and activities involving fine manipulation and confirmed that appellant could not lift more than 10 pounds and was limited with regard to pushing, pulling, climbing and fine manipulation. Counsel argued that the reception clerk position involved all of these activities.

In a letter dated June 11, 2002, Dr. Scardigli stated that appellant could drive for 20 minutes.

By decision dated July 8, 2002, the Office finalized the wage-earning capacity determination, effective July 14, 2002, based on appellant's capacity to earn wages as a reception clerk. It found that Dr. Scardigli's opinion constituted the weight of the medical opinion evidence. Based on the formula developed in *Albert C. Shadrick*,<sup>2</sup> the Office determined appellant's weekly pay rate in the former position to be \$188.40, her adjusted earning capacity in the reception clerk position was \$171.44 per week which resulted in loss in earning capacity of \$16.96 per week. Appellant's compensation rate every four weeks was found to be \$134.00 with a net compensation every four weeks of the same amount based on applicable cost-of-living adjustments of \$33.50.

In a letter dated July 11, 2002, appellant, through counsel, requested an oral hearing before an Office hearing representative. In a November 29, 2002 report, Dr. Scardigli stated that, based on her review of the reception clerk position, appellant could not perform the duties

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<sup>2</sup> 5 ECAB 376 (1953).

of this position as a result of her employment-related bilateral carpal tunnel syndrome. She stated that when she last examined appellant on May 10, 2002 she had the same continuing complaints of pain, numbness and electric shock in her hands. Dr. Scardigli's treatment notes dated May 10, 2002 and March 18, 2003, indicated that appellant still had symptoms of her accepted work-related condition.

Following an October 21, 2003 hearing, appellant submitted a summary of job leads that she pursued in vocational rehabilitation.

By decision dated January 16, 2004, a hearing representative affirmed the July 8, 2002 wage-earning capacity decision. The hearing representative found that the evidence submitted failed to establish that appellant was unable to perform the duties of the constructed position of reception clerk. She determined that, as the constructed position was suitable from a medical and vocational standpoint and was reasonably available in sufficient numbers in appellant's geographic area, the Office properly reduced her compensation.

In a letter dated July 23, 2004, appellant, through her attorney, requested reconsideration. Dr. Scardigli's April 13, 2004 treatment note found that appellant had bilateral carpal tunnel syndrome that was obviously permanent in nature. In a June 15, 2004 work capacity evaluation, Dr. Scardigli opined that appellant was totally disabled for work due to her complaints of pain, numbness and electric shock in her hands, right greater than left. She reported that appellant was limited with regard to reaching, operating a motor vehicle, repetitive movements of the wrists and elbow and pushing and pulling. Dr. Scardigli stated that appellant could not perform employment duties that were physically related to reaching and handling.

On October 27, 2004 the Office issued a decision, denying modification of the January 16, 2004 hearing representative's decision. The evidence submitted was insufficient to establish that appellant was not capable of performing the duties of the reception clerk position.

On March 2, 2005 appellant appealed to the Board. By order dated September 14, 2005, the Board remanded the case to the Office for reconstruction and proper assemblage of the case record, as the Office had failed to submit appellant's case record for review by the Board within the allotted time period.<sup>3</sup> The Board instructed the Office to issue an appropriate decision on remand to fully protect appellant's appeal rights.

Appellant submitted a May 26, 2005 medical report of Dr. Hillard C. Sharf, a Board-certified neurologist, who provided a history of her employment-related bilateral carpal tunnel syndrome. Dr. Sharf reported essentially normal findings on physical examination. On neurological examination, he reported decreased weakness and light touch, some atrophy of the thenar muscles bilaterally and positive Tinel's sign of both wrists. Dr. Sharf opined that appellant had chronic long-standing carpal tunnel syndrome. He advised that she was not suitable for employment at any job or position that required her to perform any repetitive tasks with her hands, carry objects and type. Dr. Sharf concluded that she was disabled. In a May 26, 2005 OWCP-5 form, he reiterated that appellant was totally disabled for work. Dr. Sharf stated that she could not reach above the shoulder, operate a motor vehicle at work or to and from

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<sup>3</sup> Docket No. 05-915 (issued September 14, 2005).

work, perform repetitive movements of the wrists and elbow and push, pull or lift for zero hours. He stated that appellant subsequently developed diabetes and breast cancer that should be considered in the identification of a position for her. Dr. Sharf's March 29, 2006 report indicated that appellant was experiencing headaches. He reported normal findings on physical examination. Dr. Sharf recommended a magnetic resonance imaging (MRI) scan of the brain and medication. His May 24, 2006 report provided a history of appellant's employment-related bilateral carpal tunnel syndrome. On neurological examination, Dr. Sharf reported some weakness of grip strength, positive Tinel's and Phalen's signs at both wrists and decreased vibratory appreciation in the feet. He further reported that appellant did not drive and that using her hands in daily activities caused significant discomfort. Appellant was only able to use her hands for a few minutes and then had to stop. She dropped objects and experienced electric shock-like sensations in her hands with movement. Appellant declined surgery to treat her bilateral carpal tunnel syndrome. Dr. Sharf reiterated his prior opinion that appellant was not suitable for employment at any job or position that required her to perform repetitive tasks with her hands or carry objects and type. He also opined that she could not perform a job that required her to answer the telephone. Dr. Sharf reiterated that appellant's disability was permanent.

On July 12, 2006 the Office issued a decision, finding that the evidence submitted by appellant did not warrant modification of the July 8, 2002 wage-earning capacity determination. It found that the medical evidence of record failed to establish a worsening of her work-related bilateral carpal tunnel syndrome which would preclude her from performing the duties of a reception clerk.

### **LEGAL PRECEDENT**

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.<sup>4</sup>

Once the loss of wage-earning capacity is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was, in fact, erroneous.<sup>5</sup> The burden of proof is on the party attempting to show modification of the award.<sup>6</sup>

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<sup>4</sup> See *Katherine T. Kreger*, 55 ECAB 633 (2004).

<sup>5</sup> *George W. Coleman*, 38 ECAB 782, 788 (1987); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

<sup>6</sup> *Jack E. Rohrbaugh*, 38 ECAB 186, 190 (1986); *James D. Champlain*, 44 ECAB 438 (1986).

## ANALYSIS

The Board finds that appellant did not meet her burden of proof to modify the July 8, 2002 wage-earning capacity as the evidence fails to establish that the original determination was made in error or that there was a material change in her accepted condition.

The March 6, 1995, April 8, 1997 and June 14, 1999 OWCP-5 forms of Dr. Scardigli, appellant's attending physician, found that appellant could perform light-duty work eight hours a day with the restrictions of no lifting more than 10 pounds, intermittent squatting for two hours, intermittent climbing, intermittent kneeling for one hour and intermittent twisting for four hours. Dr. Scardigli also found that appellant could sit, walk and stand frequently and continuously and bend intermittently for eight hours. She stated that appellant could reach above her shoulder and engage in fine manipulation. Based on these forms, the Office determined appellant's wage-earning capacity based on the constructed position of a reception clerk.

Appellant has not submitted any evidence establishing a material change in the nature and extent of her employment-related bilateral carpal tunnel syndrome. The relevant medical evidence includes Dr. Scardigli's November 29, 2002 letter which stated that, based on her review of the reception clerk position, appellant could not perform the duties of this position as a result of her employment-related bilateral carpal tunnel syndrome. Dr. Scardigli further stated that when she last examined appellant on May 10, 2002 she had the same continuing complaints of pain, numbness and electric shock in her hands. She, however, failed to provide any medical rationale explaining how or why appellant's accepted employment injury prevented her from performing the duties of a reception clerk, especially since she acknowledged that the complaints remained unchanged from prior examinations. Moreover, Dr. Scardigli did not provide an explanation for the change in her prior opinion that appellant could perform the duties of the constructed position.

Dr. Scardigli's treatment notes dated May 10, 2002 and March 18, 2003 indicated that appellant still had symptoms of her accepted work-related condition. In an April 13, 2004 treatment note, she found that appellant's continued and unchanged employment-related bilateral carpal tunnel syndrome was permanent in nature. Dr. Scardigli did not specifically address whether the position of reception clerk was unsuitable. Her treatment notes do not contain a rationalized medical opinion explaining how appellant's employment-related injury prevented her from performing the position of reception clerk either on a full or part-time basis and/or why her opinion changes from when the Office initially inquired as to appellant's capabilities.

In a June 15, 2004 work capacity evaluation, Dr. Scardigli stated that appellant was totally disabled for work due to her complaints of pain, numbness and electric shock in her hands, right greater than left. She indicated that appellant was limited with regard to reaching, operating a motor vehicle, repetitive movements of the wrists and elbow and pushing and pulling. Dr. Scardigli stated that appellant could not perform employment duties that were physically related to reaching and handling. She did not provide any medical rationale explaining how the employment-related bilateral carpal tunnel syndrome had changed to such an extent to disable appellant from the position of reception clerk, which she previously approved.

Similarly, Dr. Sharf's May 26, 2005 and May 24, 2006 medical reports failed to provide any medical rationale explaining how the employment-related bilateral carpal tunnel syndrome had changed to such an extent to disable appellant from the position of reception clerk. He provided his findings on physical and neurological examination regarding appellant's chronic bilateral carpal tunnel syndrome. Dr. Sharf opined that appellant was not suitable for employment at any job or position that required her to perform any repetitive tasks with her hands, carry objects, type and answer the telephone. He concluded that she was disabled. However, Dr. Sharf did not indicate whether he reviewed a description of the constructed reception clerk position. Further, he did not explain why the accepted employment-related condition prevented appellant from performing the duties of the constructed position.

Dr. Sharf's May 26, 2005 OWCP-5 form stated that appellant's diabetes and breast cancer were acquired subsequent to the accepted work-related condition and that they should be considered in the identification of a position for her. The Board notes that 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 and for which appellant may receive compensation.<sup>7</sup>

In a March 29, 2006 report, Dr. Sharf stated that appellant was experiencing more headaches. He reported normal findings on physical examination. Dr. Sharf recommended a MRI scan of the brain and medication. The Board notes that Dr. Sharf did not attribute appellant's headaches to her accepted employment-related injury nor did he address her specific ability to perform the constructed position of reception clerk. Moreover, as the Office never accepted that appellant sustained headaches as a result of her work-related injury, the burden of proof is on appellant to establish such a causal nexus. The Board finds that there is no medical evidence to support such a conclusion.

The Board finds that there is no medical evidence which establishes a change in appellant's employment-related bilateral carpal tunnel syndrome such that a modification of the Office's loss of wage-earning capacity determination would be warranted. The evidence from Dr. Scardigli and Dr. Sharf does not indicate that the position of reception clerk was unacceptable. Appellant also did not otherwise establish a basis for modification by submitting evidence establishing that she had been retrained or otherwise vocationally rehabilitated or that the original determination was, in fact, erroneous. Consequently, she has failed to carry her burden of proof to establish modification of the wage-earning capacity determination.

### **CONCLUSION**

The Board finds that appellant has failed to establish a basis for modification of the July 8, 2002 wage-earning capacity rating as a reception clerk.

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<sup>7</sup> See *John D. Jackson*, 55 ECAB 465 (2004).

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 12, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 18, 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