United States Department of Labor
Employees' Compensation Appeals Board

R.B., Appellant	)	
and	)	**Docket No. 08-2379**
	)	**Issued: July 1, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Baltimore, MD, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 2, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' December 19, 2007 and August 22, 2008 merit decisions concerning her wage-earning capacity. 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 effective December 23, 2007 based on its determination that her wage-earning capacity was represented by the constructed position of administrative assistant.

FACTUAL HISTORY

In March 1998 the Office accepted that appellant, then a 38-year-old mail handler, sustained temporary aggravation of preexisting extrinsic asthma due to exposure to allergens at

work including dust and chemical fumes. The file number for this claim is xxxxxx315. Appellant stopped work and received compensation for periods of disability.[1]

In reports dated in late 2005, Dr. Deborah J. Joyner, an attending Board-certified allergist and immunologist, indicated that appellant was totally disabled due to employment-related asthma. On February 28, 2006 Dr. Michael R. Mardiney, a Board-certified allergist and immunologist who served as an Office referral physician, found that appellant could perform limited-duty work.

To resolve a conflict in medical opinion between Dr. Joyner and Dr. Mardiney, the Office referred appellant to Dr. Peter Oroszlan, a Board-certified specialist in internal, preventive, occupational and environmental medicine, for an impartial medical evaluation. Dr. Oroszlan provided reports dated August 23 and September 21, 2006 and April 30, 2007. He concluded that appellant was able to work on a full-time basis with restrictions such as pushing and pulling no more than 30 pounds and lifting no more than 30 pounds. Dr. Oroszlan indicated that he did not feel that appellant required any specific accommodations due to her history of asthma if she were to return to work. He noted that an allergy evaluation conducted in 2005 revealed that appellant was allergic only to house dust and cat dander and indicated that the only environmental allergen at work was the nuisance dust generated by the bags of mail. Dr. Oroszlan stated that a high efficiency particulate air (HEPA) filter, a simple and cost-effective accommodation, could be used on the dust particles generated by the mail to alleviate her propensity for an asthma attack while at work.

In October 2006 appellant began participating in a vocational rehabilitation program. She was not successfully placed in a job and her rehabilitation counselor determined that she was vocationally and physically capable of working as an administrative assistant. The position was clerical in nature and only required lifting up to 10 pounds. The constructed position was found to be reasonably available in appellant's commuting area with an average salary of $458.00 per week.

In an October 24, 2007 notice, the Office advised appellant that it proposed to reduce her compensation based on its determination that she could work as an administrative assistant. Appellant responded that she was unable to work for 40 hours a week as an administrative assistant because of her severe bronchial asthma and her reactions to the medications used to control her attacks. She contended that her condition was exacerbated by environment allergens, changes in climate, and physical activity and that she had to use HEPA machines as well as nebulizers several times a day. Appellant asserted that she was allergic to perfume, carpeting, and cigarette smoke and indicated that any potential workplace would not be sufficiently allergen free for her to work.

[1] Appellant filed claims in 1994 and 1995 for work-related exposures and their impact on her preexisting congenital childhood asthma. The Office accepted these occupational disease claims for aggravation of preexisting asthma under file numbers xxxxx933 and xxxxx129. Both claims were combined into the instant case. In a May 18, 2001 decision, the Office denied appellant's claim for employment-related bronchial asthma and lung disease under case file number xxxxx297. This file was combined into the instant case as it was determined that it appeared to be a duplication of appellant's prior accepted claims.

In a December 19, 2007 decision, the Office reduced appellant's compensation effective December 23, 2007 based on its determination that her wage-earning capacity was represented by the constructed position of administrative assistant.

Appellant requested a telephone hearing with an Office hearing representative. At the hearing, appellant's attorney argued that the decision should be set aside and a new referee examination scheduled because the opinion from Dr. Oroszlan was stale as his initial report was dated August 23, 2006. Counsel also argued that the employing establishment improperly contacted Dr. Oroszlan, citing a March 26, 2007 letter from the employing establishment's nurse care manager to Dr. Oroszlan and his response of April 30, 2007. He argued that this contact negated the impartiality of the impartial medical specialist. Appellant testified that she stopped working in 2000 and had been hospitalized six times for her condition. She indicated that she becomes anxious and suffers from panic attacks when she has to leave her house and when she is exposed to an allergen, such as perfume. Appellant previously received psychological treatments and therapy when she was a teenager, but had not received any psychiatric treatment after that time until January 2008 when her allergist changed the medication that she had been using for eight years, causing various emotional problems.[2]

In an August 22, 2008 decision, the Office hearing representative affirmed the December 19, 2007 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.[3] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[4]

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 her wage-earning capacity. 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

[2] Appellant submitted a February 5, 2008 medical report containing the diagnoses of bipolar disorder, depression (severe with psychotic features) and anxiety.

[3] *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

[4] *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

[5] *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

conditions.[6] 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.[7]

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's *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits that employee's capabilities with regard to his 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.[8]

Section 8123(a) of the Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[9] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.[10] In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[11]

ANALYSIS

In March 1998 the Office accepted that appellant sustained temporary aggravation of preexisting extrinsic asthma extrinsic due to exposure to allergens at work including dust and chemical fumes. Appellant stopped work and received Office compensation for periods of disability.

In late 2007, appellant's vocational rehabilitation counselor determined that appellant was able to perform the position of administrative assistant and that state employment services showed the position was available in sufficient numbers so as to make it reasonably available within appellant's commuting area. The Office properly relied on the opinion of the rehabilitation counselor that appellant was vocationally capable of performing the administrative

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

[7] *Id.*

[8] *See Dennis D. Owen*, 44 ECAB 475, 479-80 (1993); *Wilson L. Clow, Jr.*, 44 ECAB 157, 171-75 (1992); *Albert C. Shadrick*, 5 ECAB 376 (1953).

[9] 5 U.S.C. § 8123(a).

[10] *William C. Bush*, 40 ECAB 1064, 1975 (1989).

[11] *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

assistant position and a review of the evidence reveals that appellant is physically capable of performing the position. Appellant did not submit sufficient evidence or argument to show that she could not vocationally or physically perform the administrative assistant position.

The Office properly relied on the medical opinion of the impartial medical specialist, Dr. Oroszlan, a Board-certified specialist in internal, preventive, occupational and environmental medicine, in determining that appellant could physically perform the administrative assistant position. It properly determined that there was a conflict between Dr. Joyner, the attending physician, and Dr. Mardiney, the Office physician, and referred appellant to Dr. Oroszlan for an impartial medical evaluation.[12] The Office found that Dr. Oroszlan's well-rationalized opinions represented the weight of the medical evidence regarding appellant's ability to work. The reports showed that appellant could perform the limited clerical duties required by the position and that appellant's asthma would not prevent her from performing its duties. Dr. Oroszlan concluded that appellant was able to work on a full-time basis with restrictions such as pushing and pulling no more than 30 pounds and lifting no more than 30 pounds. The administrative assistant position only requires lifting up to 10 pounds and the work restrictions recommended by Dr. Oroszlan would not prevent appellant from performing its limited duties. Dr. Oroszlan further explained that an allergy evaluation conducted in 2005 revealed that appellant was allergic only to house dust and cat dander and indicated that the only environmental allergen at work was the nuisance dust generated by the bags of mail. He stated that a HEPA filter, a simple and cost-effective accommodation, could be used on the dust particles generated by the mail to alleviate the claimant's propensity for an asthma attack while at work

Counsel argued that Dr. Oroszlan's opinion was stale in that the first evaluation occurred in September 2006 but he did not provide adequate support for this position. He also argued that the employing establishment improperly contacted Dr. Oroszlan. According to a March 26, 2007 letter, the employing establishment's nurse care manager contacted Dr. Oroszlan to get clarification of the type of HEPA mask that would be appropriate for appellant. The Board finds that there was no attempt to influence Dr. Oroszlan's opinion and appellant's attorney has not adequately established bias or violation of procedures pertaining to impartial medical specialists. The February 5, 2008 medical report, which contained diagnoses of bipolar disorder, depression (severe with psychotic features) and anxiety, did not provide a rationalized opinion that appellant could not perform the administrative assistant position.

The Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment, age and employment qualifications, in determining that the position of administrative assistant represented appellant's wage-earning capacity.[13] The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of administrative assistant and that such a position was reasonably available within the general labor market of appellant's commuting area. Therefore, the Office properly reduced appellant's compensation effective December 23, 2007 based on her capacity to earn wages as an administrative assistant.

[12] Both Dr. Joyner and Dr. Mardiney are Board-certified in allergy and immunology medicine.

[13] *See Clayton Varner*, 37 ECAB 248, 256 (1985).

CONCLUSION

The Board finds that the Office met its burden of proof to reduce appellant's compensation effective December 23, 2007 based on its determination that her wage-earning capacity was represented by the constructed position of administrative assistant.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' August 22, 2008 and December 19, 2007 decisions are affirmed.

Issued: July 1, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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