United States Department of Labor
Employees' Compensation Appeals Board

E.R., Appellant	)	
and	)	**Docket No. 10-2140**
	)	**Issued: August 24, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Santa Clarita, CA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 23 2010 appellant filed a timely appeal from an Office of Workers' Compensation Programs (OWCP) decision dated July 8, 2010 which affirmed a March 11, 2010 wage-earning capacity decision. Pursuant to the Federal Employees' Compensation Act (FECA)[1] and 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 OWCP met its burden of proof to reduce appellant's compensation based on its determination that the constructed position of receptionist represented her wage-earning capacity.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On September 29, 2003 appellant, then a 45-year-old letter carrier, filed an occupational disease claim alleging that she developed pain in both elbows while casing mail. OWCP accepted her claim for bilateral medial epicondylitis, bilateral lateral epicondylitis and left ulnar neuropathy and authorized surgery. Appellant stopped work in 2005 and received wage-loss compensation beginning March 18, 2005.

Appellant came under the treatment of Dr. Robert Ruth, a Board-certified orthopedic surgeon, from November 29, 2004 to August 17, 2006, for bilateral medial elbow pain and numbness related to performing repetitive duties at work. Dr. Ruth diagnosed bilateral ulnar nerve subluxation at the elbow and bilateral medial epicondylitis. On March 18, 2005 he performed a right ulnar nerve decompression at the elbow and right medial epicondylectomy and diagnosed right ulnar nerve subluxation at the elbow and right medial epicondylitis. On June 3, 2005 Dr. Ruth performed a left ulnar decompression at the elbow, left medial epicondyloplasty with partial medial epicondylectomy and repair of the left flexor pronator tendon origin. He diagnosed subluxating left ulnar nerve at the elbow and left medial epicondylitis. Dr. Ruth noted worsening discomfort on the right medial elbow with pain and recommended an anterior subcutaneous transposition. On February 9, 2006 he performed a right ulnar nerve decompression at the elbow and right ulnar nerve anterior submuscular transposition and diagnosed right cubital tunnel syndrome. Dr. Ruth noted appellant's status and advised that she could not work.

On May 25, 2007 OWCP referred appellant to Dr. Steven W. Pearson, a Board-certified orthopedic surgeon, for a second opinion examination. In a June 14, 2007 report, Dr. Pearson noted appellant's history and listed his findings. He noted her work injuries and also advised that she complained of low back pain. Dr. Pearson noted that examination of the arms revealed normal range of motion of the shoulder, elbow and wrist, diffuse tenderness around the upper back, bilateral shoulders, bilateral elbows, wrists and hands, normal strength of the shoulder, wrist and hand with giveaway weakness bilaterally at the elbow and forearm. He diagnosed fibromyalgia with symptom magnification, status post bilateral ulnar nerve decompression with medial epicondylitis, status post right ulnar nerve transposition, diffuse thoracic strain and lumbar disc disease with spondylosis. Dr. Pearson advised that the majority of appellant's lumbar spine condition was not work related but degenerative in nature and would require further treatment. He noted that she had three failed bilateral upper arm surgeries. Dr. Pearson opined that appellant would have been totally disabled following each of the three surgeries for approximately six weeks postoperatively at which time she could have returned to work with restrictions. He advised that she was precluded from repetitive use of the arms, but could lift up to 30 pounds, frequently lift 10 pounds and occasionally lift 20 pounds, she was precluded from continuous pushing, pulling with the upper extremities and she could occasionally reach, handle and finger items. Dr. Pearson opined, that due to appellant's bilateral upper extremity conditions, she could not return to her usual job as she had significant lifting and carrying restrictions and was precluded from repetitive motions with the upper extremities.

Appellant submitted reports from Dr. Ruth dated June 7 to September 6, 2007. Dr. Ruth noted that she was permanent and stationary as of September 6, 2007. On September 6, 2007 he diagnosed status post bilateral ulnar nerve decompression and medial epicondylectomies for

subluxating ulnar nerves, revision of the right lunar nerve revision decompression and submuscular transportation, cervical spine degenerative changes with herniation at C5-6, bilateral upper extremity pain of unclear etiology and low back pain. Dr. Ruth noted that appellant could work subject to restrictions of lifting up to 30 pounds, frequently lifting and carrying 10 pounds and occasionally lifting and carrying 20 pounds, no repetitive pulling, pushing, gripping or grasping activities with the upper extremities. He opined that she was unable to perform her usual work duties and recommended vocational rehabilitation. Dr. Sharon L. Basham, a Board-certified physiatrist, treated appellant from June 12, 2007 to April 3, 2008, for spondylolisthesis with bilateral L5-S1 foraminal compromise, myofascial pain syndrome, bilateral ulnar nerve transpositions, right shoulder impingement syndrome and C5-6 degenerative disc disease.

On February 8, 2008 appellant was referred for vocational rehabilitation.[2] In a June 27, 2008 rehabilitation plan, the rehabilitation counselor recommended a 90-day job placement plan and noted that she could perform light sedentary work. It was noted that the employing establishment was unable to offer work. A rehabilitation plan was prepared and approved by the rehabilitation counselor and appellant with the objective of obtaining a job as a customer service representative or a reception clerk. The rehabilitation counselor noted that appellant had a high school diploma and experience as a procurement clerk and cashier and would receive computer skills during a summer session at a community college to meet entry level requirements for the job. The average annual salary for a customer service representative was $28,899.00 a year and a receptionist, $26,274.00 a year. The counselor stated that these jobs were within appellant's educational capabilities and were reasonably available in her commuting area. The rehabilitation counselor attached job classification for the positions. On June 25, 2008 the counselor requested Dr. Pearson, the second opinion physician, address whether appellant would be able to perform a receptionist position and attached a job description. On June 26, 2008 Dr. Pearson noted that appellant could work as a receptionist as described in the position description.

On July 9, 2008 OWCP advised appellant that the rehabilitation plan developed by her and her vocational rehabilitation counselor was within her work restrictions. The rehabilitation counselor's vocational evaluation and survey of the local labor market revealed a wage-earning capacity of $28,899.00 a year for the position of customer service representative and reception clerk. OWCP further advised appellant that at the end of the rehabilitation program, whether employed or not, it would reduce her compensation. In a November 20, 2008 conference call, it agreed to extend her training plan through May 23, 2009 so that she could complete two required computer courses. In a June 24, 2009 conference call, the rehabilitation counselor noted appellant had a failing grade in the excel computer course but believed that this grade would not affect her ability to seek employment. The rehabilitation counselor noted that she was provided with job leads and showed initiative in finding a position; however, the job market was poor.

Appellant submitted reports from Dr. Basham dated June 5, 2008 to June 25, 2009, who treated appellant for neck, right shoulder pain and radicular symptoms. Dr. Basham diagnosed

[2] In an April 11, 2008 telephone conference with appellant regarding the vocational rehabilitation plan development, appellant noted that a lumbar condition was causing a great deal of pain, that she might need surgery and that she had filed a claim for a recurrence of disability. OWCP's claims examiner noted that she had a closed claim involving a lumbar condition and that the recurrence matter would be addressed separately.

spondylolisthesis and myofascial pain syndrome and recommended trigger point injections and physical therapy. In the June 25, 2009 report, she noted that sensory changes in the ulnar aspect of appellant's arm did not correlate with her previous cervical diagnosis nor with ulnar nerve dermatomes.

In a September 9, 2009 conference call, OWCP's claims examiner advised that appellant was referred to rehabilitation after Dr. Pearson's evaluation when the employing establishment was unable to accommodate her restrictions. Appellant noted that she was having surgery for her lumbar condition the next day, September 10, 2009. In a September 29, 2009 rehabilitation closure report, the rehabilitation counselor noted that she completed her training and was provided with 90 days of placement services. Appellant was not offered a job with the employing establishment. The rehabilitation counselor indicated that an extension of placement services was granted until September 30, 2009 based on appellant's active participation and the current economic conditions. The rehabilitation counselor prepared an updated labor market survey for a receptionist and customer service representative revealed the market was favorable and that the positions were readily available in sufficient numbers both full and part time in appellant's commuting area. The rehabilitation counselor provided a job description for the two positions.

Appellant submitted reports from Dr. Basham dated September 23 to December 9, 2009, who treated appellant for pain management. Dr. Basham noted that appellant underwent a L5-S1 fusion and bilateral laminectomy and facetectomy for spondylolisthesis on September 10, 2009. She diagnosed status post L5-S1 fusion for grade 2 spondylolisthesis with radiculopathy, myofascial pain syndrome with C5-6 spondylosis, history of bilateral ulnar nerve transpositions and mood disturbance.

In a December 2, 2009 vocational rehabilitation closure memorandum the rehabilitation counselor noted that a training program was developed to enhance appellant's computer and clerical skills and qualify her for an entry level job in two positions, including receptionist DOT #237.367.010, with an entry level wage of $400.00 a week. The rehabilitation counselor noted that the job was considered sedentary and the physical requirements were consistent with the work restrictions posed by Dr. Pearson. The rehabilitation counselor noted that appellant received 11 months of computer training which was followed by 100 days of placement services. Appellant did not obtain employment because she had lumbar surgery for a nonindustrial back condition. The rehabilitation counselor noted that the updated labor market survey showed that the job of receptionist was reasonably available.

On February 3, 2010 OWCP issued a proposed reduction of compensation finding that the evidence established that appellant was partially disabled and had the capacity to earn wages as a receptionist, DOT #237.367.010, at the rate of $400.00 a week. It noted that this position was in compliance with Dr. Pearson's restrictions. OWCP referenced the rehabilitation counselor's report which determined that appellant would be employable as a receptionist which reasonably represents her wage-earning capacity.

Appellant submitted reports from Dr. Basham dated February 17 and 23, 2010, who noted appellant's complaints of cervical pain and recommended trigger point injections. Dr. Basham diagnosed status post L5-S1 fusion for grade 2 spondylolisthesis with radiculopathy,

myofascial pain syndrome with C5-6 spondylosis, recent onset of headaches, history of bilateral ulnar nerve transpositions and mood disturbance. On February 23, 2010 she performed trigger point injections in the paracervical and upper trapezius area.

In a March 11, 2010 decision, OWCP reduced appellant's compensation to reflect her wage-earning capacity as a receptionist effective March 14, 2010.

On March 18, 2010 appellant requested a telephone hearing which was held on June 1, 2010. At the hearing, she testified about her recent back surgery and stated that she filed claims for a back injury which she had since 1995.[3] Appellant also testified about her symptoms from the back condition and asserted that her back surgeon informed her that she was totally disabled for a year subsequent to the September 10, 2009 surgery.

Appellant submitted a July 1, 2008 report from Dr. Richard Scheinberg, a Board-certified orthopedic surgeon, who treated her for low back pain radiating into the thigh area. He diagnosed lumbar myofascial pain, rule out discogenic injury and status post multiple cubital tunnel decompressions and recommended a repeat magnetic resonance imaging scan. Also submitted were reports from Dr. Basham dated February 17 and 23, 2010, previously of record. In a March 18, 2010 report, Dr. Basham treated appellant for pain and muscle spasm and noted that appellant experienced ongoing hypoesthesia in the L5-S1 distribution to the foot. She diagnosed status post L5-S1 fusion for grade 2 spondylolisthesis with radiculopathy, myofascial pain syndrome with C5-6 spondylosis, recent onset of headaches, history of bilateral ulnar nerve transpositions and mood disturbance.

In a July 8, 2010 decision, OWCP's hearing representative affirmed the prior decision.

LEGAL PRECEDENT

Once OWCP 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.[4]

Under section 8115(a) of FECA,[5] titled "Determination of Wage-Earning Capacity" states in pertinent part: "In determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings if her actual earnings fairly and reasonably represent her wage-earning capacity." Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.[6] 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 regards to the nature of her injury, her degree of physical impairment, her usual employment,

---

[3] These claims are not before the Board on this appeal.

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

[5] 5 U.S.C. § 8115.

[6] *Hubert F. Myatt*, 32 ECAB 1994 (1981); *Lee R. Sires*, 23 ECAB 12 (1971).

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.[7] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[8] 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] In determining an employee's wage-earning capacity, OWCP may not select a makeshift or odd lot position or one not reasonably available on the open labor market.[10]

ANALYSIS

The Board finds that the medical evidence does not support a finding that the selected position as a receptionist is within appellant's physical limitations. The issue of whether an employee has the physical ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by the medical evidence.[11]

OWCP referred appellant to a vocational rehabilitation counselor who identified the constructed position of receptionist to be within appellant's physical restrictions. Dr. Pearson, OWCP's referral physician, opined that on a June 14, 2007 report appellant was precluded from repetitive use of the arms, but could lift up to 30 pounds, frequently lift 10 pounds and occasionally lift 20 pounds, she was precluded from continuous pushing and pulling. In a June 26, 2008 form report, he noted that appellant could perform the duties of a receptionist. OWCP relied on Dr. Pearson's reports that appellant could perform such duties in reducing her compensation.

The record indicates that appellant had a low back condition since around 1995 and that she had lumbar spine surgery on September 10, 2009 for a nonaccepted lumbar condition. Prior to reducing her compensation, appellant submitted reports from Dr. Basham dated September 23 to December 9, 2009, who treated appellant's September 10, 2009 L5-S1 fusion and bilateral laminectomy and facetectomy.[12] In reports dated February 17 and 23, 2010, Dr. Basham diagnosed status post L5-S1 fusion for grade 2 spondylolisthesis with radiculopathy and myofascial pain syndrome with C5-6 spondylosis. Appellant testified at her oral hearing on June 1, 2010 about her back surgery and that her surgeon informed her that she was totally disabled for a year after the September 10, 2009 surgery.

In determining wage-earning capacity based upon a constructed position, OWCP must consider certain factors including the degree of physical impairment, including impairments from

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

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

[9] *Id.*

[10] *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

[11] *Robert Dickinson*, 46 ECAB 1002 (1995).

[12] The actual surgical report is not of record.

both injury-related and preexisting conditions.[13] Appellant's September 2009 surgery, due to her preexisting lumbar condition, was not adequately considered by OWCP prior to the reduction of compensation. At the time OWCP reduced appellant's compensation, Dr. Pearson had not examined appellant in well over two years and OWCP did not attempt to obtain a more current opinion from a physician that included an assessment of how her back condition and her back surgery impacted her ability to perform the duties of a receptionist. While Dr. Pearson's June 14, 2007 report showed an awareness of appellant's low back condition, this report significantly predated appellant's low back surgery as did his June 26, 2008 response to a form question.[14] After her low back surgery, the record contains no current medical report addressing appellant's ability to work which takes into consideration both her employment-related and preexisting conditions. Therefore, OWCP erred in relying on the opinion of Dr. Pearson in reducing her compensation based on her capacity to perform the duties of a receptionist.[15] Accordingly, OWCP did not meet its burden of proof in this case to reduce appellant's compensation benefits pursuant to 5 U.S.C. § 8115.

CONCLUSION

The Board finds that OWCP did not meet its burden to reduce appellant's compensation benefits pursuant to 5 U.S.C. § 8115.

[13] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.814.8.a(2) (October 2009); *see also* Chapter 2.814.8(d), Medical Suitability, which states that in determining medical suitability under section 8115(a): "The [claims examiner (CE)] is responsible for determining whether the medical evidence establishes that the claimant is able to perform the job, taking into consideration medical conditions due to the accepted work-related injury or disease and any preexisting medical conditions." *See Betty J. Richardson*, Docket No. 03-386 (issued August 1, 2003) (in determining an employee's wage-earning capacity based on a position deemed suitable but not actually held, OWCP 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).

[14] *See Keith Hanselman*, 42 ECAB 680 (1991) (OWCP did not meet its burden of proof to reduce compensation where it did not obtain a detailed current description of appellant's disability and ability to perform work).

[15] *See Marvin Elder,* Docket No. 03-1421 (issued January 26, 2005) (where the Board found that OWCP should not decide that a claimant can perform a selected position without considering all of the claimant's medical conditions, employment related and nonemployment related, that existed prior to the selection of the position); *Terry L. Hewitt,* Docket No. 96-2563 (issued November 16, 1998) (the Board found that OWCP failed to consider appellant's preexisting conditions).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated July 8 and March 11, 2010 are reversed.

Issued: August 24, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

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