

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

C.K., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Ferndale, WA, Employer)

Docket No. 11-974
Issued: February 8, 2012

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 9, 2011 appellant filed a timely appeal from an Office of Workers' Compensation Programs' (OWCP) decision dated November 3, 2010. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 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 OWCP properly reduced appellant's compensation effective November 3, 2010, based on her capacity to perform the duties of a customer service representative.

FACTUAL HISTORY

Appellant, a 54-year-old rural mail carrier, injured her left knee while entering her truck on December 29, 2004. She filed a claim for benefits, which OWCP accepted for permanent

¹ 5 U.S.C. § 8101 *et seq.*

aggravation of osteoarthritis of the left knee, lumbar strain and temporary aggravation of major depression. OWCP commenced payment for temporary total disability compensation.

On April 18, 2006 appellant underwent a total left knee arthroplasty. The procedure was performed by Dr. Ronald Y. Woo, Board-certified in orthopedic surgery.

In order to determine appellant's current condition, OWCP referred her to Dr. Paul H. Reiss, Board-certified in orthopedic surgery, for a second opinion examination. In a February 27, 2007 report, Dr. Reiss stated that she had no objective findings stemming from her accepted conditions. He advised that appellant had sustained a strain/sprain of left knee, which caused an aggravation of her degenerative, preexisting condition; Dr. Reiss opined that this condition had resolved. In response to OWCP's question, "Did the December 29, 2004 work injury aggravate or accelerate a preexisting condition?" Dr. Reiss responded, "In my opinion, no." He also stated that "the magnetic resonance imaging [MRI] scan findings predated the injury and were not aggravated either temporarily or permanently by the injury."

On March 16, 2007 OWCP referred appellant for vocational rehabilitation.

In a report dated August 24, 2007, Dr. Lora C. Sherman, Board-certified in family practice, stated that appellant was currently experiencing several medical problems which interfered with her ability to obtain gainful employment. She advised that appellant had significant lower extremity lymphedema and was undergoing tests to determine whether this was cardiac related. Dr. Sherman stated that appellant needed to keep her legs elevated and was unable to walk and sit with her legs down for long periods of time; this hindered her ability to perform the physical tasks necessary to engage in a full-time job search. She advised that appellant could continue to engage in job search efforts on the computer or activities at home with her legs elevated.

Dr. Sherman further indicated that appellant had severe chronic depression, which had significantly worsened over the last several months, in addition to left-sided buttock and sacroiliac pain. She advised that appellant was also being evaluated for obesity surgery. Dr. Sherman asserted that, following this surgery, as appellant continues to lose weight, her ability to function after her total knee replacement would improve, as would her low back and left buttocks pain. Appellant would eventually be able to return to a physical job search, depending on the date of her obesity surgery and her subsequent recovery period.

In a September 4, 2007 report, Dr. Sherman stated that appellant's emotional and physical conditions had severely impaired her ability to hold any job. She advised that appellant walked with a cane, with difficulty and was unable to climb two flights of stairs. Dr. Sherman noted that appellant had severe osteoarthritis in both of her knees. She stated that appellant's left knee had been replaced but that her right knee was also severely affected. Appellant also had severe degenerative joint disease of her lumbar spine and sacroiliac joints in addition to significant lower extremity edema which limited her ambulation. Dr. Sherman opined that appellant was not able to engage in gainful employment at that time.

In a report dated October 4, 2007, Dr. Susan Hakeman, a Board-certified psychiatrist, stated that appellant had been experiencing severe depression since her December 2004

employment injury. Appellant related that she had limited energy and low interest in activities; she experienced sleeplessness, anxiety and feelings of anger and frustration. Dr. Hakeman diagnosed major depression, recurrent and dysthymia and anxiety.

In an April 12, 2008 report, Dr. Gwenyth K. McConnell, Board-certified in psychiatry and a second opinion referral physician opined that appellant had a major depression condition which was aggravated by employment factors. She advised that appellant was not totally disabled and could perform the duties of a foreign clerk for four hours per day; in approximately six months, she should be able to work for eight hours per day.

OWCP found that there was a conflict in the medical evidence regarding whether appellant was totally disabled due to her major depression condition. In order to resolve this conflict, it referred her to Dr. Robert I. Fink, Board-certified in psychiatry. In reports dated July 17 and October 13, 2008, Dr. Fink agreed with Dr. McConnell that appellant could work for four hours a day for six months and then for eight hours per day.

In a report dated May 3, 2010, Dr. Shelby R. Hein, a Board-certified family practitioner, stated that appellant was experiencing multiple medical issues which impeded her ability to work. He noted that she underwent total left knee replacement surgery but also experienced right knee pain, due primarily to overcompensating while awaiting surgery. Appellant also had significant osteoarthritis and pain with weight bearing, with recurrent lower extremity edema pain and pain in her low back, hips and ankles. Dr. Hein advised that she was unable to ambulate without using a cane. Appellant stated that she needed to keep her legs elevated when she was not walking, which interfered with her ability to sit for long periods of time. In addition, she had morbid obesity which was worsening due to severe pain and inability to exercise. Although appellant underwent lap-band surgery to assist with her obesity, her pain was preventing her from exercising to keep her weight stable. Dr. Hein noted that she also was experiencing severe, chronic depression. Appellant opined that she was unable to perform work duties or engage in a job search. In her work capacity evaluation, which accompanied Dr. Hein's report, he indicated that she was not able to walk or sit without pain for extended periods due to lower extremity pain; he opined that she was not able to work an eight-hour day due to significant pain in her back and in both knees, in addition to her severe depression condition.

In a vocational rehabilitation report dated May 14, 2010, a vocational rehabilitation counselor recommended two positions for appellant listed in the Department of Labor's *Dictionary of Occupational Titles* (DOT), foreign sales, DOT No. 214.467-010 and customer service representative DOT No. 239.362-014 which were within her indicated restrictions and reasonably reflected her ability to earn wages.

OWCP found that there was a conflict in the medical evidence between Dr. Hein, her treating physician, and Dr. Reiss, the second opinion physician, regarding appellant's ability to engage in gainful employment. It referred her to Dr. James A. Champoux, Board-certified in orthopedic surgery, for a referee medical examination to resolve the conflict in the medical evidence. In a July 28, 2010 report, Dr. Champoux noted appellant's medical history including a right knee arthroscopic surgery with lateral release in 2002. He stated that the presence of a total left knee arthroplasty would have a permanent impact on her employment capabilities, specifically with reference to prolonged standing or walking. Dr. Champoux advised that the

presence of the multilevel lumbar degenerative disc disease of the spine would also negatively impact appellant's ability to stand or walk for prolonged periods of time. He stated that both conditions would affect her ability to lift or carry heavier loads. Dr. Champoux opined that appellant was not totally disabled and could perform sedentary work, with restrictions on lifting more than 25 to 30 pounds.

In an August 30, 2010 form report, Dr. Champoux checked a box indicating that appellant was capable of performing the foreign clerk and customer service representative positions. In a supplemental report dated August 30, 2010, he explained that he had now been provided the position descriptions for foreign clerk and customer service representative. Dr. Champoux concluded that appellant could perform those positions, taking in account her work injury of December 29, 2004.

By notice of proposed reduction dated September 24, 2010, OWCP advised appellant of its proposal to reduce her compensation because the factual and medical evidence established that she was no longer totally disabled and that she had the capacity to earn wages as a customer service representative at the weekly rate of \$472.00 in accordance with the factors outlined in 5 U.S.C. § 8115.² It calculated that her compensation rate should be adjusted to \$1,508.00 using the *Shadrick*³ formula. OWCP found that appellant's current adjusted compensation rate, every four-week period, was \$418.30. It stated that the case had been referred to a vocational rehabilitation counselor, who had located positions as a customer service representative which he found to be suitable for appellant given her work restrictions and was available in her commuting area. OWCP allowed appellant 30 days in which to submit any contrary evidence.

In a report received by OWCP on October 22, 2010, Dr. Hein reiterated his previously stated opinion that appellant was unable to engage in gainful employment. He also reiterated that the left knee replacement surgery caused overcompensation on her right knee and weight gain due to her inability to exercise. Dr. Hein asserted that appellant's lack of mobility due to her left knee injury was most likely related to the continuum of medical issues and depression. Appellant stated that she underwent an MRI scan on September 13, 2010 which showed multi-level degenerative disease of the lumbar spine, with significant progression at the L4-5, L5-S1 levels which demonstrated moderate-to-severe canal stenosis. In addition, results of x-ray testing on her right knee she underwent on September 30, 2010 showed severe degenerative joint disease of the patellofemoral and medial compartments of the right knee. Dr. Hein stated that appellant was scheduled for total right knee replacement on November 9, 2010.

By decision dated November 3, 2010, OWCP advised appellant that it was reducing her compensation because the weight of the medical evidence showed that she was no longer totally disabled for work due to effects of her December 29, 2004 employment injury and that the evidence of record showed that the position of customer service representative represented her wage-earning capacity.

² *Id.* at § 8115.

³ *Albert C. Shadrick*, 5 ECAB 376 (1953); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2, 814.2 (April 1995).

LEGAL PRECEDENT

Once OWCP has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of benefits.⁴

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injuries and the degree of physical impairment, his or her usual employment. If 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 the injury, the degree of physical impairment, his or her usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect wage-earning capacity in her disabled condition.⁵ Also, the evidence must establish that jobs in the position selected for determining wage-earning capacity are reasonably available in the general labor market in the commuting area in which the employee lives.⁶

ANALYSIS

The Board finds that OWCP did not meet its burden to reduce appellant's disability compensation. In this case, OWCP determined that a conflict existed in the medical evidence between Dr. Hein, appellant's treating physician, and Dr. Reiss, OWCP's second opinion physician, as to whether appellant was still totally disabled due to her December 29, 2004 work injury. It thereafter based its decision to reduce her compensation on the July 28 and August 30, 2010 reports of Dr. Champoux, the independent medical examiner. The Board, however, finds that OWCP erred in finding that there was a conflict in the medical evidence at the time it referred appellant to Dr. Champoux. OWCP erred by finding that Dr. Reiss represented one side of the medical evidence. Dr. Reiss advised in his February 27, 2007 report that appellant's December 29, 2004 work injury did not aggravate or accelerate a preexisting condition. He also stated that MRI scan findings predated the injury and were not aggravated either temporarily or permanently by the injury. OWCP, however, had accepted a permanent aggravation of underlying arthritis of the left knee as employment related. As Dr. Reiss did not give due regard to the statement of accepted facts, his opinion was not based on a proper factual background. He disregarded a critical element of the statement of accepted facts and his report is of diminished probative value. The Board notes that OWCP's June 8, 2010 statement of accepted facts listed that the claim had been accepted for a permanent aggravation of preexisting osteoarthritis of the left knee, causally related to the December 29, 2004 work injury. Thus, OWCP erred by asking Dr. Reiss whether the December 29, 2004 work injury aggravated or accelerated a preexisting condition. Consequently, the Board finds that there is an unresolved conflict in the medical evidence regarding whether appellant continues to have disability or residuals attributable to her accepted condition, aggravation of underlying arthritis of the left knee.

⁴ *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

⁵ *See N.J.*, 59 ECAB 171 (2007).

⁶ *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

Further, Dr. Hein presented probative medical opinion that appellant had additional medical conditions which rendered her unable to engage in gainful employment. He stated that September 30, 2010 x-rays of her right knee demonstrated severe degenerative joint disease of the patellofemoral and medial compartments; he opined that her 2006 left knee replacement surgery caused overcompensation on her right knee and weight gain due to her inability to exercise. Dr. Hein stated that, as a result, appellant was scheduled for total right knee replacement on November 9, 2010 with Dr. Woo, the surgeon who performed the 2006 left knee replacement procedure. Dr. Woo concluded that her lack of mobility due to her left knee injury was most likely related to the continuum of medical issues and depression. Dr. Hein opined that the emergence of appellant's right knee osteoarthritic condition had caused a recurrence of her major depression condition. In addition, a September 13, 2010 MRI scan showed multi-level degenerative disease of the lumbar spine, with significant progression at the L4-5, L5-S1 levels, which demonstrated moderate-to-severe canal stenosis.

The additional medical evidence therefore at least suggests that appellant had greater physical and mental restrictions, causally related to the accepted injury, than those upon which the customer service position was based and which were not evaluated by Dr. Champoux.⁷ While Dr. Champoux based his opinion that she could perform the selected positions, given her accepted conditions from the December 29, 2004 injury, he did not consider her preexisting conditions in assessing her ability to perform this work.⁸

OWCP did not meet its burden of proof in this case to reduce appellant's compensation benefits. The Board will reverse the November 3, 2010 decision.

CONCLUSION

The Board finds that OWCP has failed to meet its burden of proof in reducing appellant's compensation.

⁷ See 20 C.F.R. § 10.124(c).

⁸ In determining an employees' 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. See *N.J.*, *supra* note 5.

ORDER

IT IS HEREBY ORDERED THAT the November 3, 2010 decision of the Office of Workers' Compensation Programs is reversed.

Issued: February 8, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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