

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

E.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Coppell, TX, Employer**

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**Docket No. 13-645
Issued: July 23, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On January 28, 2013 appellant filed a timely appeal from the January 2, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP), which determined his loss of wage-earning capacity. 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 determined that appellant had the capacity to earn wages in the selected position of telephone solicitor.

FACTUAL HISTORY

Appellant, born April 10, 1949, was employed as a city letter carrier. He had three work injuries that have been combined and managed under one active claim number. On May 1, 1989 appellant sustained a traumatic injury in the performance of duty when he slipped in mud while

¹ 5 U.S.C. § 8101 *et seq.*

delivering mail. OWCP accepted his claim for left knee sprain, lumbosacral strain and depression. It authorized psychotherapy. On July 20, 1990 appellant received a schedule award for an 18 percent impairment of his left lower extremity. On March 14, 1996 OWCP found that he was entitled to an additional schedule award of 7 percent, for a total impairment of 25 percent. On August 19, 1998 the Board affirmed.²

Appellant filed an occupational disease claim for an injury on or before November 9, 1992. OWCP accepted this claim for depressive disorder. On April 7, 1994 appellant, now a modified carrier, sustained a traumatic injury in the performance of duty when he fell over backward in his chair. It accepted his claim for right shoulder contusion, lumbar strain and right rotator cuff tear.³ OWCP authorized arthroscopic right shoulder surgery.

On May 9, 1995 OWCP found that appellant's employment four hours a day as a limited-duty letter carrier with wages of \$324.20 per week effective August 21, 1994 fairly and reasonably represented his wage-earning capacity.

On April 16, 1998 appellant was placed on administrative leave for four hours a day while receiving compensation for four hours a day. He claimed compensation for total disability. OWCP denied his claim on May 17, 1999 because he failed to establish a recurrence of total disability.

On June 29, 1999 OWCP denied appellant's request for reconsideration because the evidence submitted was considered repetitious and insufficient to warrant a merit review of the prior decision.

On May 3, 2001 the Board found conflicts in the various medical opinions and remanded the case for further development.⁴ OWCP referred appellant to Dr. Arthur L. Sarris, a Board-certified orthopedic surgeon, and Dr. Cherye Callegan, a Board-certified psychologist, to resolve the conflicts. Dr. Sarris determined that appellant had not sustained a recurrence of total disability in 1998. He found that appellant could work eight hours a day and could return to his modified job. Dr. Callegan found that appellant had not sustained a recurrence of disability in 1998. She found that his condition was no worse in 1998 than it was in 1992.

On October 4, 2001 OWCP denied appellant's claim that he sustained a recurrence of total disability in 1998.

On April 28, 2003 OWCP found that appellant's employment as a modified city carrier with wages of \$423.48 per week effective January 6, 2003 fairly and reasonably represented his wage-earning capacity. An OWCP hearing representative reversed, however, finding that OWCP improperly modified its previous loss of wage-earning capacity decision of May 9, 1995. There was no evidence that appellant had been retrained or otherwise vocationally rehabilitated following his original injury. There was no indication that the May 9, 1995 determination was

² Docket No. 96-1388 (issued August 19, 1998).

³ It appears OWCP later expanded its acceptance to include headache.

⁴ Docket No. 99-2241 (issued May 3, 2001).

erroneous. OWCP had not demonstrated a change in the nature and extent of appellant's injury-related condition. The hearing representative explained that the fact that the employing establishment made a new job offer and brought him back to work after removing him from his position in April 1998 was not sufficient, by itself, to modify the previous determination.

On June 2, 2010 the employing establishment notified appellant that there was no work available for him within the operational needs of the service. The employing establishment placed him on administrative leave effective immediately.

Appellant filed claims for wage-loss compensation beginning September 14, 2010. Having received written confirmation that no work was available, OWCP paid him compensation for temporary total disability on the periodic rolls.⁵

On October 18, 2010 Dr. James D. Cable, the attending specialist in occupational medicine, completed a duty status report outlining appellant's work restrictions. He advised that it would be necessary for appellant to take time off work due to stress, weather and pain and intermittently as needed to take medications. Dr. Cable added that it would be necessary for appellant to change positions frequently. He stated: "[Appellant] cannot maintain sitting, walking or standing for the full four hours and will need to change from sitting, to walking, to standing frequently according to pain, in order of [10] to [30] minutes." Further, Dr. Cable restricted appellant to working from 6:00 a.m. to 10:00 a.m. only, with a 15-minute break every hour, which should not be changed. He explained that appellant had been doing the same job for several years and attempts to change or modify this position had resulted in stress and physical harm. "I strongly recommend that he be left in his current position!"

In January 2011, OWCP referred appellant to a rehabilitation counselor for development of a vocational rehabilitation program to assist him in returning to work. On March 7, 2011 the rehabilitation counselor recommended that appellant be given "medically not feasible status." He noted that appellant had been working modified duty four hours a day for several years. Dr. Cable had limited all activities to a four-hour workday, including zero hours for "simple grasping," which significantly eroded the occupational base. Based on Dr. Cable's work restrictions, the rehabilitation counselor found that appellant's physical functioning "would fall below the sedentary level, which most if not all employers would not be able to accommodate and which would not be feasible for vocational rehabilitation services."

On April 18, 2011 Dr. Cable clarified that appellant could do simple grasping occasionally or intermittently. He explained that, when he indicated zero hours simple grasping, he did not mean that appellant could not even pick up a pen. Dr. Cable just did not want appellant to do constant grasping.

The rehabilitation counselor identified occupations that were within appellant's revised physical capabilities, including the position of telephone solicitor. The position of telephone solicitor was sedentary and required only occasional reaching and handling and frequent fingering. He found that there were a sufficient number of job openings for this occupation in

⁵ On September 15, 2010 OWCP changed appellant's compensation rate from three-fourths to two-thirds effective August 6, 2006. On February 15, 2011 an OWCP hearing representative affirmed.

the Dallas-Fort Worth area so as to make it reasonably available to appellant within his commuting area. The rehabilitation counselor also found that the position paid \$378.00 per week, according to the Texas Workforce Commission and a labor market survey. Based upon the medically determinable residuals of appellant's injuries and taking into consideration all significant preexisting impairments and pertinent nonmedical factors, the rehabilitation counselor concluded that appellant was able to perform the selected job of telephone solicitor.

On May 23, 2011 Dr. Cable reviewed the position description and physical requirements for the selected position of telephone solicitor and confirmed that appellant was capable of performing the required duties.⁶

Effective June 14, 2011, appellant's rehabilitation status changed to "placement with new employers." The rehabilitation specialist instructed the rehabilitation counselor to provide 90 days of job placement assistance. OWCP notified appellant that, at the end of this 90-day period, FECA required that his compensation be reduced based on a wage-earning capacity of \$378.00, even if he were unemployed at the time.

On June 21, 2011 Dr. Cable addressed the job description he had approved:

"What was not clear from that, what [was] not apparent to them is that [appellant] has been working [four] hours a day since 1994. His restrictions were for a total workday of [four] hours a day and he has been doing that for a longtime. Nowhere on the [Form] CA-17 does it [explicitly] say that nor did this job description say that [explicitly]. This is to clarify my previous letter and the CA-17 [form] that he is limited to [four] hours a day and has been doing that for a longtime."

In the meantime, Dr. Cable noted, appellant had been having increased neck and left arm pain. He stated that appellant had at least two- or three-level disease in his neck.

The rehabilitation counselor searched the availability of part-time work for the selected position of telephone solicitor and found that, although the number of jobs was naturally reduced, there were a sufficient number of openings. Part-time wages for the position of telephone solicitor/telemarketer averaged \$220.00 per week.

At the end of the 90-day period for placement, appellant was not able to secure a job. His rehabilitation file was closed. The rehabilitation counselor updated the average weekly wage for a part-time telephone solicitor to \$185.00.

On July 11, 2011 Dr. Cable advised that a magnetic resonance imaging scan of appellant's cervical spine showed multiple level disease: a three-millimeter (mm) protrusion at C3-4, more on the left; spurring at C4-5, more severely on the left; a three- to four-mm left paracentral protrusion at C5-6 causing severe left neural foraminal stenosis; and a two-mm bulge

⁶ OWCP informed Dr. Cable to please notify if he determined that additional work hardening programs, physical therapy or psychological/psychiatric testing was needed.

on the right at C6-7. “The 5-6 is probably the biggest problem in view of his current symptomatology.”

Appellant retired effective October 31, 2011.

On June 19, 2012 OWCP proposed to reduce appellant’s compensation for wage loss because the medical and factual evidence established that he was not totally disabled for work but was partially disabled. It found that he had the capacity to earn wages as a telephone solicitor at the rate of \$185.00 per week working 4 hours a day.

On March 25, 2012 Dr. Tom G. Mayer, a Board-certified orthopedic surgeon, performed a periodic medical review. He diagnosed chronic right shoulder pain, chronic left knee pain and chronic low back pain. Dr. Mayer indicated that effects of appellant’s 1994 injury had not ceased; appellant continued to have chronic low back pain and chronic depression related to his injury. “These are keeping [appellant] from working at this point.” Dr. Mayer stated that the work injury had been limiting his activity and limiting his ability to return to work. He stated that appellant was currently not working related to his injury.

On August 8, 2012 OWCP reduced appellant’s compensation for wage loss under 5 U.S.C. §§ 8106 and 8115 effective July 29, 2012. It found that he was capable of performing the duties of a telephone solicitor and therefore had a wage-earning capacity of 18 percent.

In September and December 2012, Dr. Howard M. Cohen, the attending Board-certified psychiatrist with a subspecialty in pain management, related that appellant’s mood was euthymic and that he was stable on medication.

Appellant’s main concern was that OWCP did not consider his restrictions in making its decision to reduce his compensation. He also wanted to know why his neck condition was not being included as an accepted injury. Appellant requested a telephonic hearing, which was held on October 23, 2012.

In a January 2, 2013 decision, an OWCP hearing representative affirmed the reduction of appellant’s wage-loss compensation. The hearing representative found no medical evidence to support appellant’s contention that his neck condition prevented him from performing the selected position. Going further, he found that the Dr. Cable’s review of the early medical evidence was insufficient to establish that the April 7, 1994 work injury caused appellant’s current neck condition.

Appellant argues that his neck condition is causally related to the April 7, 1994 work injury. He argues that OWCP did not base the reduction of his compensation on his restrictions. Further, appellant argues that OWCP did not take into account his mental health.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of his duty.⁷ “Disability” means the incapacity,

⁷ 5 U.S.C. § 8102(a).

because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.⁸

Section 8115(a) of FECA provides that in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his or her actual earnings, if his or her actual earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings of the employee do not fairly and reasonably represent his or her wage-earning capacity or if the employee has no actual earnings, his or her wage-earning capacity as appears reasonable under the circumstances is determined with due regard to the nature of his or her injury, the degree of physical impairment, his or her usual employment, his or her age, his or her qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect his or her wage-earning capacity in his or her disabled condition.⁹

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.¹⁰ When it makes a medical determination of partial disability and of the specific work restrictions, it may refer the employee's case to an OWCP 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 the employee's capabilities in light of 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. Finally, application of the principles set forth in *Albert C. Shadrick* will provide the percentage of the employee's loss of wage-earning capacity.¹¹

ANALYSIS

Following his employment injuries, appellant worked part time for many years. He thereby demonstrated that he was not totally disabled for work. Indeed, it appears that the only reason appellant stopped work, first in 1998 and again in 2010, was that the employing establishment placed him on administrative leave. He did not stop work because he was no longer physically or mentally capable of working. These were administrative decisions. The presumption remained that appellant could have and would have continued to work part time in his modified position if the employing establishment would have allowed him.

OWCP began paying appellant compensation for total disability in 2010 because the employing establishment determined that there was no productive work available for him. This did not mean that appellant was no longer capable of working part time. Indeed, Dr. Cable, the

⁸ 20 C.F.R. § 10.5(f).

⁹ 5 U.S.C. § 8115(a)

¹⁰ *Harold S. McGough*, 36 ECAB 332 (1984).

¹¹ *Hattie Drummond*, 39 ECAB 904 (1988); see *Albert C. Shadrick*, 5 ECAB 376 (1953) (*Shadrick* formula codified at 20 C.F.R. § 10.403).

attending specialist in occupational medicine, completed a duty status report in 2010 outlining appellant's work restrictions and recommending that he be left in his current position.

The work restrictions outlined by Dr. Cable stand as the best representation of appellant's work capabilities. Having received medical confirmation that appellant was not, in fact, totally disabled for work but was capable of working with certain restrictions, OWCP properly referred him to a wage-earning capacity specialist for placement with a new employer or failing that, the selection of a position available in the open labor market that fit his capabilities.

The rehabilitation counselor identified occupations that were within appellant's revised physical capabilities, including the position of telephone solicitor. This was a sedentary position that required very little physical activity. This was also a position that was reasonably available to appellant because it was performed in sufficient numbers within his commuting area.

OWCP provided Dr. Cable with the position description and physical requirements for the selected position of telephone solicitor and on May 23, 2011 he confirmed that appellant was capable of performing the required duties. It invited him to please notify if he thought additional work hardening, physical therapy or psychological/psychiatric testing was needed, but he declined. Dr. Cable did emphasize that appellant was restricted to working only four hours a day, something that was not clear from the position description OWCP had given him.

With this in mind, the rehabilitation counselor researched the availability of part-time work for the selected position of telephone solicitor and found that there were still a sufficient number of openings to make part-time work reasonably available to appellant. Through contact with the Texas Workforce Commission and a labor market survey, the rehabilitation counselor ultimately determined that the average weekly wage for a part-time telephone solicitor was \$185.00.

The Board finds that OWCP followed standard procedures for determining appellant's wage-earning capacity and properly reduced his wage-loss compensation to reflect his capacity to earn wages part time in the selected position of telephone solicitor. Dr. Cable had followed appellant for many years and was as knowledgeable as any physician on appellant's capacity to work. He made clear that appellant was capable of performing the duties of the selected position part time.

There is no probative medical evidence to the contrary. Dr. Cohen, the attending Board-certified psychiatrist, was reporting that appellant's mood was euthymic and that he was stable on medication. He did not suggest that the accepted depression, which had not prevented appellant from working part time for many years, now prevented him from working part time in the selected position. Dr. Mayer, a Board-certified orthopedic surgeon, advised that appellant's chronic low back pain and chronic depression were keeping him from working, but he did not explain,¹² did not directly address the selected position of telephone solicitor and did not reply to the clearance given by Dr. Cable, who directly addressed the selected position. Also, it was not

¹² Medical conclusions unsupported by rationale are of little probative value. *Ceferino L. Gonzales*, 32 ECAB 1591 (1981); *George Randolph Taylor*, 6 ECAB 968 (1954).

clear whether Dr. Mayer was expressing his professional opinion on appellant's work capacity or simply relating what appellant had advised.

The Board finds that the weight of the medical opinion evidence rests with Dr. Cable and establishes that appellant is capable of working part time as a telephone solicitor. Accordingly, the Board will affirm OWCP's January 2, 2013 decision on the issue of appellant's loss of wage-earning capacity.

Appellant may request modification of OWCP's August 8, 2012 loss of wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

The issue properly before the Board on this appeal is whether appellant has the capacity to earn some wages as a telephone solicitor, such that he should receive compensation for partial disability instead of total disability. That was the issue OWCP decided in its August 8, 2012 decision to reduce his compensation for wage loss under 5 U.S.C. §§ 8106 and 8115. That was the issue properly before an OWCP hearing representative when appellant requested a hearing. When appellant pursued his hearing, he raised a separate issue. Appellant asked why OWCP had not included his neck condition among the accepted injuries in his case. OWCP did not rule on this issue in its August 8, 2012 loss of wage-earning capacity determination.

If appellant claims that, the April 7, 1994 work injury caused a neck injury, he should pursue the issue with OWCP, which can then issue a final decision with full appeal rights. Ruling on such an issue for the first time at the hearing level denies appellant an initial decision by OWCP and deprives him of the right to a hearing should he disagree with that ruling.¹³

Although appellant argues that OWCP did not base the reduction of his compensation on his restrictions, the record shows that the rehabilitation counselor identified the selected position from the restrictions imposed by Dr. Cable. To remove any doubt, OWCP provided Dr. Cable with the position description and physical requirements of the selected position so he could examine the same and advise whether appellant was capable of performing that job. Dr. Cable answered in the affirmative, so long as appellant worked no more than four hours a day. OWCP thus based its reduction of compensation on appellant's restrictions. Appellant may argue that Dr. Cable previously restricted him to working in the early morning, but it was Dr. Cable who later cleared appellant to perform the selected position and he did so without restricting appellant to early morning hours.

Appellant argues that OWCP did not take into account his mental health, but that is not quite right. While it is true that OWCP did not provide Dr. Cohen with the position description of the selected position, the attending psychiatrist gave every indication that appellant's accepted depression was well controlled with medication and that his mood was normal and reasonably positive. Appellant was not reporting any work restriction due to the accepted depression. Further, although the matter was strictly outside his expertise, Dr. Cable expressed no concern that appellant's mental health might possibly present an issue with the selected position.

¹³ Note that the appeal rights attached to the hearing representative's January 2, 2013 decision do not provide appellant the right to request a hearing.

CONCLUSION

The Board finds that OWCP properly determined that appellant had the capacity to earn wages in the selected position of telephone solicitor.

ORDER

IT IS HEREBY ORDERED THAT the January 2, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 23, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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