

FACTUAL HISTORY

On August 26, 2011 appellant, then a 44-year-old tractor trailer operator, filed a traumatic injury claim alleging that on that date he injured his left knee and low back when he slipped inside a trailer while pushing a container. He stopped work on August 26, 2011. OWCP accepted the claim for lumbar sprain and a left knee contusion. It paid appellant compensation beginning October 29, 2011.

On October 4, 2011 OWCP referred appellant to Dr. John L. Howard, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated October 24, 2011, Dr. Howard diagnosed status post lumbosacral strain and left knee strain. He found that appellant could resume work without restrictions.

On December 9, 2011 OWCP notified appellant of its proposed termination of his compensation and authorization for medical benefits as he had no residuals of his accepted work injury.

In a report dated November 11, 2011, received by OWCP on January 4, 2012, Dr. Serge Obukhoff, a Board-certified neurosurgeon, obtained a history of appellant sustaining an injury on August 26, 2011 when he slipped while pushing a container onto a truck. On examination he found a loss of sensation at L4, L5, and S1 on the left and a positive straight leg raise. Dr. Obukhoff reviewed findings from a magnetic resonance imaging (MRI) scan study and requested that OWCP revise the accepted diagnoses to include a disc injury at L4-5 and L5-S1, disc herniation, canal stenosis, and radiculopathy.²

In a report dated November 21, 2011, Dr. I. Grant Orlin, an attending general practitioner, diagnosed a left knee contusion after an August 26, 2011 injury, left knee chondromalacia, and L4-5 and L5-S1 disc herniations with extrusion at L4-5 with an annular tear and left radiculopathy as found by Dr. Obukhoff. He found that appellant could work with restrictions including lifting no more than five pounds.

On December 9, 2011 Dr. Obukhoff reviewed Dr. Howard's report and challenged his findings. He requested that OWCP expand acceptance of appellant's claim to include disc herniations at L5-S1 and L4-5 resulting in radiculopathy and pain syndrome of the back. Dr. Obukoff opined that appellant was not able to perform his usual employment. He stated:

“[Appellant] was injured on August 26, 2011 as described in my initial report. The mechanism of injury produced significant stress to his lumbar spine muscles, [which] most likely were not able to sustain the pressure on his lumbar spine and ligaments failed around the disc and [he] developed [an] annular tear around the disc and disc material herniated and migrated all through the disc space. This has explained [the] acute severe pain syndrome with radiculopathy due to compression.”

² An MRI scan study performed on November 9, 2011, received by OWCP on January 9, 2012, showed disc protrusions at L4-5 and L5-S1 without spinal stenosis or foraminal narrowing.

In a report dated December 19, 2011, Dr. Orlin noted that appellant experienced a sharp pain at work on December 17, 2011 which caused him to fall on his back. He diagnosed a left knee contusion occurring on August 26, 2011, disc herniations at L4-5 and L5-S1 with an annular tear, left radiculopathy, and decreased sensation and motor strength, left knee chondromalacia, and increased lumbar pain and radiculopathy after a fall on December 17, 2011.

On January 11, 2012 OWCP requested that Dr. Howard review the December 9, 2011 report of Dr. Obukoff, the December 19, 2011 report of Dr. Orlin, and the November 9, 2011 MRI scan study and address whether the additional evidence altered his opinion. In a supplemental report dated January 23, 2012, Dr. Howard advised that his opinion was unchanged and that the MRI scan findings were diagnostic in nature rather than functional.

OWCP determined that a conflict existed between appellant's physicians, Dr. Orlin and Dr. Obukoff, and its referral physician, Dr. Howard, regarding whether appellant had further disability due to his August 26, 2011 work injury. It referred him to Dr. Ray Craemer, a Board-certified orthopedic surgeon, for an impartial medical examination. In an accompanying statement of accepted facts, OWCP indicated that it had accepted appellant's claim for lumbar and left knee strain. It also noted that it had accepted a lumbar strain due to a January 2011 traumatic injury under another file number.

In a report dated April 3, 2012, Dr. Craemer reviewed appellant's history of injury and the medical reports of record. On examination, he found mild tenderness over the left patella and mild crepitation of the patellofemoral joint of the left knee. Regarding the low back, Dr. Craemer stated, "Although [appellant] does have subjective complaints somewhat in excess of his objective findings, he does have reproducible objective findings such as positive straight leg raising, decreased range of motion of the lumbar spine, and mild atrophy of the left calf with sensory changes." He found that appellant needed further medical treatment for his back, but opined that he had no further disability or need for medical treatment due to his knee injury. Dr. Craemer diagnosed a hyperextensive ligamentous low back sprain with left radiculopathy and an improved left patella contusion with residuals of prepatellar bursitis due to the August 26, 2011 work injury. He noted that appellant had experienced prior low back sprains without radiculopathy on January 22 and October 2010. Dr. Craemer further reviewed appellant's history of a fall in December 2011, but opined that the fall did not alter his condition. He determined that appellant could work in a light-duty capacity lifting, pushing, and pulling up to 10 pounds and sitting no more than 30 minutes without breaks. Dr. Craemer recommended epidural injections rather than surgery and electrodiagnostic testing.

On May 10, 2012 OWCP requested that Dr. Orlin review and comment on Dr. Craemer's report and treatment recommendations.

In a report dated May 10, 2012, Dr. Orlin diagnosed a left knee contusion, disc herniations at L4-5 and L5-S1 with an annular tear and left radiculopathy, left knee chondromalacia, and increased lumbar and radicular symptoms due to a fall on December 17, 2011. He referred appellant to Dr. Gary Baker, a Board-certified anesthesiologist,

for pain management, including lumbar epidurals.³ Dr. Orlin found that appellant was disabled from work until June 17, 2012.

In a work restriction evaluation dated May 26, 2012, Dr. Craemer determined that appellant could sit, reach, and reach above the shoulder for eight hours a day, stand, walk, twist, and bend for four hours a day, operate a motor vehicle at work and going to and from work for six hours a day, and push, pull, and lift up to 10 pounds for eight hours a day. He further advised that appellant required a 15-minute break every 2 hours.

On June 28, 2012 OWCP referred appellant for vocational rehabilitation.⁴

Electrodiagnostic testing performed July 2, 2012 yielded normal results.

Appellant underwent a vocational assessment on August 28, 2012. On October 5, 2012 the rehabilitation counselor recommended that OWCP approve a training plan in computer skills with the goal of finding him employment as an information clerk.

On October 5, 2012 the rehabilitation counselor completed a job classification form for the position of information clerk. The position was sedentary and required a specific vocational preparation of four to six months. The rehabilitation counselor indicated that appellant would meet the requirements for the position by attending a four-month training program in “computer based office skills....” He found that the position existed in sufficient numbers within his geographical area as confirmed by “telephone contact with 10 employers” in the area at a median hourly wage of \$13.02.

On October 17, 2012 OWCP approved vocational training from October 29, 2012 to March 29, 2013.

In reports dated March 4, 2013, Dr. Orlin found that appellant was totally disabled from March 4 to April 11, 2013.

In March 2013, appellant received a certificate of completion in computer software applications from the vocational training facility.

In an April 5, 2013 memorandum of conference, the rehabilitation counselor indicated that appellant had completed his training on March 20, 2013 but he still believed that he was totally disabled. OWCP advised appellant that it had not received any rational medical evidence supporting disability and informed him that the report of the impartial medical examiner constituted the weight of the evidence.

In a report dated April 23, 2013, the vocational rehabilitation counselor noted that appellant related that he could not look for employment due to his low back pain. He noted that he was “noncompliant in [appellant’s] job placement efforts.”

³ The record contains reports from Dr. Baker dated July 2012 through April 2013 describing his treatment of appellant for pain.

⁴ Dr. Orlin continued to submit progress reports throughout 2012 and 2013.

In a closure memorandum dated April 23, 2013, an OWCP rehabilitation specialist identified the position of information clerk as a sedentary position suitable for appellant and reasonably available within his geographical area at a salary of \$400.00 to \$600.00 a week. He noted that appellant had not participated in job placement because he believed that his physical condition prevented him for seeking employment.

In a report dated June 21, 2013, Dr. Obukoff diagnosed disc herniations at L4-5 and L5-S1 with broad tears and lumbar radiculopathy and attributed appellant's condition to his August 26, 2011 work injury based on the mechanism of injury.⁵ He noted that appellant had not improved and stated:

“In the meanwhile, [appellant] is looking forward to trying to tolerate work and I do not mind him doing that. However, if his pain increases, the only solution for his injured back would be to offer him surgical treatment, which could include fusion. I do not think that simple microdiscectomy is going to be effective considering that most of [appellant's] problem is rather severe lower pain syndrome.”

In a report dated July 17, 2013, Dr. Orlin reviewed the findings of Dr. Obukoff and opined that appellant could perform modified employment lifting no more than five pounds, sitting up to two or three hours at one-half hour intervals, standing, bending, stooping, and walking a half hour for a total of three hours, no climbing, pushing, twisting or pulling, and driving a truck three hours a day.

On October 22, 2013 OWCP notified appellant of its proposed reduction of his compensation based as he had the capacity to work as an information clerk earning \$400.00 a week.⁶

On October 30, 2013 Dr. Orlin found that appellant could perform modified work duties sitting, standing, and walking up to four hours a day, lifting up to 5 pounds for four hours a day, and pulling and pushing up to 20 pounds for four hours a day.

In a decision dated January 14, 2014, OWCP reduced appellant's compensation benefits effective January 14, 2014 after finding that he had the ability to earn wages of \$400.00 a week as an information clerk. It indicated that it had accepted his claim for lumbar sprain, a left knee contusion, and displacement of a lumbar intervertebral disc without myelopathy.

⁵ A lumbar MRI scan study dated April 25, 2013 revealed left disc protrusions at L4-5 and L5-S1. In progress reports dated May 17 and June 20, 2013, Dr. Orlin found that appellant had not improved after three lumbar steroid injections. He recommended that Dr. Obukoff review the MRI scan study and advise whether he required surgery. Dr. Orlin found that appellant was disabled from employment.

⁶ On August 8, 2013 OWCP requested that Dr. Orlin clarify appellant's work restrictions. In a duty status report dated August 26, 2013, Dr. Orlin found that he could work four hours a day. On August 29, 2013 he provided the same work restrictions as in his July 17, 2013 report. In a progress report dated September 30, 2013, Dr. Orlin advised that appellant did not want to undergo surgery.

On January 21, 2014 appellant, through counsel, requested a telephone hearing before an OWCP hearing representative.⁷

On March 21, 2014 Dr. Obukhoff stated, “[Appellant] has a severe problem. He has two-level disc herniations at L4-5 and L5-S1 with severe degeneration with back pain, and radiculopathy, [and] failed epidural steroid injections. I have been requesting surgery for [appellant]. I do not think that [he] is able to go back to work and do any physical activity.”⁸

On April 2, 2013 Dr. Orlin noted that appellant experienced increased pain after performing housework a week earlier. In a report and disability certificate dated April 18 and June 9, 2014, he advised that appellant was totally disabled based on Dr. Obukhoff’s findings.

On July 14, 2014 counsel argued that the loss of wage-earning capacity determination was based on an outdated publication.

At the telephone hearing, held on July 14, 2014, counsel argued that OWCP should use O*Net rather than the Department of Labor, *Dictionary of Occupational Titles*. The hearing representative requested that he submit a medical report explaining why he could not perform the duties of an information clerk. Appellant related that in February 2014 he experienced increased back pain when mopping the kitchen floor. The hearing representative indicated that his physician should address whether any worsening of his condition was due to his accepted work injury rather than an intervening injury.

By decision dated September 3, 2014, the hearing representative affirmed the January 14, 2014 decision. She noted that under file number xxxxxx775 OWCP accepted that appellant sustained lumbosacral strain when bending down on January 22, 2010 and a left knee contusion and lumbar sprain due to his August 26, 2011 employment injury.

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.⁹ Under section 8115(a), wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings 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 is determined with due regard to the nature of the injury, the degree of physical

⁷ In a progress report dated February 3, 2014, Dr. Orlin related that appellant had experienced “a flare-up of severe back pain.” He recommended another surgical evaluation and found that he was totally disabled for two weeks. On February 17, 2013 Dr. Orlin found that he could resume modified employment with the previous work restrictions.

⁸ In a report dated February 21, 2014, Dr. Obukhoff diagnosed lumbar strain, disc herniations and tears at L4-5 and L5-S1, and lumbar radiculopathy. He requested authorization for an anterior lumbar discectomy and fusion at L4-5 and L5-S1.

⁹ *T.O.*, 58 ECAB 377 (2007).

impairment, his or her usual employment, age, qualifications for other employment, the availability of suitable employment, and other factors or circumstances which may affect wage-earning capacity in his or her disabled condition.¹⁰

When OWCP makes a medical determination of partial disability and of 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, *Dictionary of Occupational Titles* or otherwise available in the open market, that fits the employee's capabilities with regard to his or her physical limitations, education, age, and prior experience.¹¹ 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*¹² will result in the percentage of the employee's loss of wage-earning capacity.

Section 8123(a) provides that, 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.¹³ The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹⁴

When an OWCP medical adviser, a second opinion specialist, or a referee physician renders a medical opinion based on an incomplete or inaccurate statement of accepted facts or that does not use the statement of accepted facts as the framework in forming the opinion, the probative value of the opinion is diminished or negated altogether.¹⁵ OWCP procedures specify that the statement of accepted facts must include a specific description of injury or exposure factors particularly in cases involving occupational disease.¹⁶

ANALYSIS

OWCP accepted that appellant sustained lumbar strain and a left knee contusion as a result of an August 26, 2011 work injury. In its January 14, 2014 decision, it also indicated that

¹⁰ *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

¹¹ *Mary E. Marshall*, 56 ECAB 420 (2005); *James A. Birt*, 51 ECAB 291 (2000).

¹² 5 ECAB 376 (1953); codified by regulation at 20 C.F.R. § 10.403.

¹³ 5 U.S.C. § 8123(a).

¹⁴ 20 C.F.R. § 10.321.

¹⁵ See *A.R.*, Docket No. 11-692 (issued November 18, 2011); *Willa M. Frazier*, 55 ECAB 379 (2004); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990).

¹⁶ Federal (FECA) Procedure Manual, *id.* at Chapter 3.600.3(a)(4) (October 1990).

it had accepted displacement of an intervertebral disc without myelopathy. The record, however, does not contain an acceptance letter advising appellant that OWCP had expanded his claim to include an intervertebral disc without myelopathy. The hearing representative, in her September 3, 2014 decision, did not include displacement of an intervertebral disc without myelopathy as an accepted condition.

OWCP found that a conflict existed between Dr. Orlin and Dr. Obukhoff, appellant's physicians, and Dr. Howard, who performed a second opinion examination, regarding whether he had any further disability or residuals of his accepted work injury. It referred appellant to Dr. Craemer, a Board-certified orthopedic surgeon, for an impartial medical examination. OWCP determined that the opinion of Dr. Craemer constituted the weight of the evidence and established that appellant had the physical capacity to work as an information clerk. Dr. Craemer, however, relied upon a statement of accepted facts that included only the conditions of left knee and lumbar strain. If OWCP has also accepted the displacement of an intervertebral disc, his opinion would be based on an inaccurate statement of accepted facts and would thus be of diminished probative value.¹⁷ As noted, to assure that the report of a medical specialist is based upon an accurate factual background, OWCP provides information to the physician through the preparation of a statement of accepted facts.¹⁸ Its procedures indicate that the accepted conditions must be included in a statement of accepted facts and that when a referee physician renders a medical opinion based on a statement of accepted facts which is incomplete or inaccurate or does not use the statement of accepted facts as the framework in forming his or her opinion, the probative value of the opinion is diminished.¹⁹ Dr. Craemer's opinion is insufficient to resolve the conflict in medical opinion as it is unclear whether he relied upon an accurate statement of accepted facts.

Consequently, the Board finds that the case should be remanded to OWCP for clarification of the accepted conditions and any further development needed to resolve the issue of whether appellant had the capacity to work as an information clerk. Following this and any necessary further development, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision.

¹⁷ See *supra* note 15.

¹⁸ See *A.T.*, Docket No. 14-153 (issued July 2, 2014).

¹⁹ See *supra* note 15; see also *S.P.*, Docket No. 14-1053 (issued October 2, 2014).

ORDER

IT IS HEREBY ORDERED THAT the September 3, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: August 5, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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