

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

G.A., Appellant)

and)

U.S. POSTAL SERVICE, BULK MAIL)
CENTER, Denver, CO, Employer)

**Docket No. 14-1516
Issued: July 14, 2015**

Appearances:

John S. Evangelisti, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On June 24, 2014 appellant, through counsel, filed a timely appeal from a January 24, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether OWCP has met its burden of proof to justify the reduction of appellant's wage-loss compensation as he currently has the capacity to earn full-time wages in the selected position of cashier II.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

Appellant, a 37-year-old mail handler, filed a traumatic injury claim alleging that he injured his right shoulder and neck area on December 5, 1993 while throwing parcels and lifting sacks.² OWCP denied his claim.

In April 1994 appellant accepted a part-time light-duty assignment fluffing empty sacks.

Appellant filed a traumatic injury claim alleging that he injured his left shoulder on July 24, 1994 while fluffing sacks; OWCP File No. xxxxxx565. OWCP denied this claim as well.

In May 1995, appellant filed an occupational disease claim alleging that his left shoulder rotator cuff overuse syndrome was a result of fluffing empty sacks at work. He first became aware of his left shoulder condition on July 24, 1994. Appellant referred OWCP to his traumatic injury claim of that date; OWCP File No. xxxxxx565.

Also in May 1995 appellant filed an occupational disease claim alleging that his right shoulder rotator cuff overuse syndrome was a result of pushing equipment as well as lifting and throwing mail weighing from 2 ounces to 70 pounds from ground level to the top of trailer vans.³ He first became aware of his right shoulder condition on December 5, 1993. Appellant referred OWCP to his traumatic injury claim of that date.

The record indicates that appellant took disability retirement in August 1996.

OWCP accepted appellant's occupational disease claim for permanent aggravation of bilateral rotator cuff tendinitis.⁴ In 2005 appellant underwent a right shoulder arthroscopic decompression and acromioclavicular joint resection. In 2009 he underwent a left shoulder arthroscopic decompression and distal clavicle resection.

Appellant received a schedule award for 11 percent permanent impairment of each upper extremity.

Dr. Robert P. Mack, a Board-certified orthopedic surgeon and OWCP referral physician, examined appellant in October 2012. He related appellant's history and reviewed the medical record. After describing his findings on physical examination, Dr. Mack found that appellant had demonstrated excellent results from the surgical procedures and had very minor residuals. Pain was minimal and range of motion was excellent with no impingement signs evident. Dr. Mack found that current limitations attributable to the accepted work injury and any preexisting conditions were lifting heavy weights, particularly above shoulder level or holding heavy weights out in front of him.

² OWCP File No. xxxxxx565.

³ OWCP File No. xxxxxx745.

⁴ OWCP File No. xxxxxx747.

Dr. Mack completed a work restriction evaluation indicating that appellant was unable to work eight hours a day with restrictions. As appellant had not worked for years, he recommended that appellant start at four hours a day and build to eight.

In an addendum, Dr. Mack clarified that “we are dealing with a man who has not worked since 1996, with psyche and other medical problems.” He found it difficult to put a timeframe on when appellant could start working six hours and then eight hours a day. “This project will require the cooperation and communication between [appellant’s] physician, his employing establishment and perhaps a [physical therapist]. Progression from four to six to eight hours a day will be based on his progress and motivation.” Asked what medical consequence he would anticipate if appellant worked eight hours a day, Dr. Mack identified shoulder muscle soreness until appellant developed the endurance to work longer hours. “[Appellant] will require [physical therapy] to assist in developing the strength he has lost after two surgical procedures.”

OWCP claims examiner advised the rehabilitation specialist that based on Dr. Mack’s comments, “I do not think that we can work [appellant] more than four hours a day at this time. I believe that we should go ahead with the four hours a day, and at a later date we can schedule another second [opinion] to see if we can increase his work hours.” The rehabilitation specialist then advised the rehabilitation counselor that the claims examiner’s comments were right on the mark and asked her to develop a plan targeting jobs that were available part time and also appeared to be available full time in anticipation of a future full-time work capability.

The rehabilitation counselor identified the position of cashier II as medically suitable for appellant, as the physical requirements were light and did not exceed his functional capabilities. Other considerations included the nature of appellant’s injury, his usual employment, age, degree of physical impairment and qualification for other employment. Entry-level wages averaged \$8.88 an hour. The rehabilitation counselor recommended an entry-level position, as appellant clearly possessed the education and quality work history, but did not have sufficient direct experience to earn higher pay.

After a meeting with the claims examiner, the rehabilitation specialist asked the rehabilitation counselor to recognize full-time work capacity. He quoted from Dr. Mack’s addendum and stated: “Earning capacity for compensation reduction should be based on full[-]time work capabilities.”

The rehabilitation counselor performed a labor market survey for the position of cashier II. She contacted a significant number of employers who hired individuals such as appellant for cashier and sales clerk jobs on a part-time and full-time basis. The employing establishment indicated that appellant’s restrictions could be accommodated. The rehabilitation counselor found the selected position to be medically suitable, matched the accepted work restrictions and existed in significant numbers on a part-time and full-time basis such that a person with appellant’s qualifications could successfully obtain such a job. “Some retail stores initially hire new employees part time from 20 hours a week and increases to full time once reliability and ability to perform essential duties are confirmed.” The rehabilitation counselor confirmed that entry-level wages were \$7.75 to \$10.00 an hour or \$310.00 to \$400.00 a week on a full-time basis.

In a decision dated April 23, 2013, OWCP reduced appellant's wage-loss compensation to reflect a capacity to earn full-time wages in the selected position of cashier II.

On January 24, 2014 an OWCP hearing representative affirmed. She addressed OWCP's decision to reduce compensation on the basis of full-time work:

“Further, after careful review of the second opinion report from Dr. Mack, as well as his addendum report, I find that he was not actually presenting a physical reason *per se* for the claimant's limitations. While he did note the possibility of muscle soreness, his report indicated that the claimant's motivation and cooperation were the primary issues with regard to his return to full[-]time work. Hence, I find that [OWCP] properly determined that the claimant was capable of earning wages at eight hours a day.”

On appeal, counsel argues, among other things, that Dr. Mack restricted appellant to work starting at four hours a day.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of his duty.⁵ “Disability” means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.⁶

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 wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity as appears reasonable under the circumstances is determined with due regard to the nature of his injury, the degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect his wage-earning capacity in his disabled condition.⁷

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.⁸ 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 physical limitations, education, age, and prior experience.

⁵ 5 U.S.C. § 8102(a).

⁶ 20 C.F.R. § 10.5(f).

⁷ 5 U.S.C. § 8115(a).

⁸ *Harold S. McGough*, 36 ECAB 332 (1984).

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 result in the percentage of the employee's loss of wage-earning capacity.⁹

ANALYSIS

Dr. Mack, the orthopedic surgeon and OWCP referral physician, found that appellant was unable to work eight hours a day with restrictions. After receiving his report and addendum, it was clear to OWCP that appellant could not currently work more than four hours a day and that his wage-earning capacity should be based on a part-time job until he could increase his hours. OWCP's rehabilitation specialist found that this was "right on the mark" and asked the rehabilitation counselor to develop a plan accordingly.

The rehabilitation counselor complied, but within days it appeared that OWCP changed its mind. The rehabilitation specialist indicated that he had a meeting with the claims examiner and was informed that appellant's wage-earning capacity should be based on full-time work. The record contains no other documentation of this meeting.

OWCP thereafter reduced appellant's wage-loss compensation as he currently had the capacity to earn full-time wages in the selected position of cashier II. It did not address the part-time/full-time issue in its April 23, 2013 decision. In her January 24, 2014 decision, however, the hearing representative explained that she had carefully reviewed Dr. Mack's report and addendum and she found that he was not "actually" presenting a physical reason "*per se*" for appellant's limitations. In her view, Dr. Mack's report indicated that it was appellant's motivation and cooperation that were the "primary" issues regarding his return to full-time work.

Dr. Mack found that appellant was unable to work eight hours a day with restrictions and he did not make it clear that appellant's motivation and cooperation were the primary issues. Indeed, although he mentioned that progression from four to six to eight hours a day would be based on appellant's progress and motivation, Dr. Mack focused on the strength that appellant had lost after two surgical procedures, the need for physical therapy to develop that strength, and the shoulder muscle soreness that would result if appellant were to start working eight hours a day without having developed the endurance to work such hours. In the Board's view, Dr. Mack presented a physical reason, causally related to the accepted employment injury, for limiting appellant to four hours a day until he gained the strength and endurance to work longer hours.

If OWCP questioned whether Dr. Mack was basing the four-hour work restriction on appellant's motivation, and not on a lack of strength and endurance resulting from the accepted work injury, it bore the burden to ask him to resolve the issue before it took official action to reduce appellant's compensation. OWCP 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

⁹ *Hattie Drummond*, 39 ECAB 904 (1988); see *Albert C. Shadrick*, 5 ECAB 376 (1953) codified at 20 C.F.R. § 10.403 (c)-(e).

medical conditions. If the medical evidence is not clear and unequivocal, it will seek medical advice from its medical adviser, treating physician or second opinion specialist as appropriate.¹⁰

As Dr. Mack's opinion does not clearly and unequivocally establish that appellant currently has the capacity to earn full-time wages in the selected position of cashier II, the Board finds that OWCP has not met its burden of proof to justify the reduction of his compensation. Accordingly, the Board will reverse OWCP's January 24, 2014 decision.

CONCLUSION

The Board finds that OWCP has not met its burden to justify the reduction of appellant's wage-loss compensation as he currently has the capacity to earn full-time wages in the selected position of cashier II.

ORDER

IT IS HEREBY ORDERED THAT the January 24, 2014 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 14, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

¹⁰ Federal (FEC) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(d) (October 2009).