

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

D.C., Appellant)

and)

DEPARTMENT OF JUSTICE, BUREAU OF)
PRISONS, Beaver, WV, Employer)

**Docket No. 11-51
Issued: August 8, 2011**

Appearances:
Jill Carver, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 7, 2010 appellant filed a timely appeal from an August 19, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 this case.

ISSUE

The issue is whether OWCP properly reduced appellant's compensation on the grounds that the selected position of computer assistant/scheduler represented his wage-earning capacity.

FACTUAL HISTORY

On May 31, 2005 appellant, then a 45-year-old welder supervisor, filed a traumatic injury claim (Form CA-1) alleging that on May 11, 2005 he sustained a back injury while performing

¹ 5 U.S.C. § 8101 *et seq.*

the Heimlich maneuver on a coworker. OWCP accepted the claim for lumbar sprain/strain and postlaminectomy syndrome.² Appellant stopped work and received wage-loss compensation.

Appellant received treatment from attending orthopedic surgeon Dr. Robert Kropac. In a work capacity evaluation (OWCP5-c) dated April 16, 2008, Dr. Kropac provided work restrictions of two hours a day for sitting, standing and walking and 20 pounds lifting. OWCP referred appellant for a second opinion examination by Dr. Charles Lefebure, an orthopedic surgeon. In a report dated October 8, 2008, Dr. Lefebure provided a history and results on examination.³ He indicated that appellant had a “lumbar disc removed” in October 2003 following a work injury for an L5-S1 herniated disc. Dr. Lefebure further stated, “The diagnosis is chronic lumbar disc disease as evidenced by his previous history of herniated disc and surgical treatment of the same with aggravation by his work-related injury of May 2005 and chronic ongoing symptoms of back and right lower extremity pain consistent with that diagnosis.” He advised that appellant continued to have lifting restriction of 20 pounds. Dr. Lefebure stated that appellant could function in a sedentary, light-duty position with limited lifting, bending, twisting and no climbing or vigorous activity. He completed a work capacity evaluation (OWCP-5c) which included limitations of three hours sitting, two hours standing and reaching and one hour walking and reaching above shoulder.

In a report dated December 14, 2009, Dr. Kropac noted appellant’s chronic back condition was exacerbated by bending, stooping prolonged sitting and standing. He provided results on examination and stated that appellant’s return to work in a modified-duty capacity would include restrictions regarding a chronic left shoulder condition and bilateral epicondylitis.

Vocational rehabilitation services were provided to appellant while receiving compensation. On December 16, 2009 a rehabilitation specialist completed a job classification form (OWCP-65) for the position of Computer Assistant/Scheduler (Department of Labor’s *Dictionary of Occupational Titles* No. 221.362-030). The job description stated that the position involved scheduling work for computer processing and monitoring execution of schedules using a computer. The form stated that the position was sedentary (occasional lifting up to 10 pounds), with occasional reaching and handling and frequent fingering.⁴ The rehabilitation specialist found that appellant had the specific vocational preparation of one to two years for the position, noting that he had worked as a welding supervisor and performed many of the same tasks as a scheduler. The position was found to be reasonably available in appellant’s area, based on contact with the state employment service. Wages were reported as \$38,117.00 to \$41,553.00 a year.

By letter dated June 30, 2010, OWCP advised appellant of a proposed reduction in compensation on the grounds he had the capacity to earn wages of \$733.02 a week as a computer

² A November 30, 2005 Statement of Accepted Facts reported that appellant “had a prior job[-]related back injury claim under which he was working limited duty.”

³ Dr. Kropac stated the “allowed” condition was degenerative disc disease.

⁴ The form explains that occasional means up to one third of the time is spent on the activity.

assistant/scheduler. It stated that the weight of the medical evidence was represented by Dr. Lefebure.

On August 2, 2010 appellant submitted a report dated June 30, 2009, from Dr. Bruce Guberman, an internist, who reviewed a history of injury and results on examination. Dr. Guberman diagnosed acute and chronic lumbosacral strain, post-traumatic, generalized degenerative joint disease and history of nephrolithiasis. He opined that appellant had severe interference of his ability to perform work activities, including sitting, standing, walking, lifting, carrying, pushing and pulling. Dr. Guberman opined that appellant was totally disabled.

By decision dated August 3, 2010, OWCP reduced appellant's compensation based on a capacity to earn wages of \$733.02 a week. By letter dated August 18, 2010, it stated that it was vacating the August 3, 2010 decision and would review evidence submitted on August 2, 2010.

By decision dated August 19, 2010, OWCP reduced appellant's compensation on the grounds he had the capacity to earn wages of \$733.02 weekly as a computer assistant/scheduler. It listed the evidence received on August 2, 2010 and found that appellant was capable of performing the duties of the selected position.

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 in such benefits.⁵

Under section 8115(a) of FECA, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, his degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.⁶

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's *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. Once this selection is made, a determination of wage rate and availability in the labor market should be made through contact with the state employment service or other applicable service.⁷ Finally, application of the

⁵ *Carla Letcher*, 46 ECAB 452 (1995).

⁶ *See Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); *see also* 5 U.S.C. § 8115(a).

⁷ *See Dennis D. Owen*, 44 ECAB 475 (1993).

principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.⁸

OWCP's procedures state that unless the medical evidence is "clear and unequivocal" that the selected position is medically suitable, OWCP should send a job description to an appropriate physician for an opinion as to whether the claimant can perform the position.⁹

ANALYSIS

OWCP selected the position of computer assistant/scheduler and found this represented appellant's wage-earning capacity pursuant to 5 U.S.C. § 8115. As noted, the position selected must be both vocationally and medically suitable. With respect to vocational suitability, appellant has asserted on appeal that he was not vocationally qualified for the position. He stated that he does not have typing or computer skills or a proper vocational preparation. The Board notes the rehabilitation counselor who completed OWCP-65 form is a specialist in the vocational field and explained his findings. The job description of welder supervisor does require computer skills and supervisory duties such as monitoring and training and it was reasonable for the rehabilitation specialist to conclude that appellant's present job did involve similar tasks and would provide a vocational preparation for the selected position.

The selected position must, however, also be medically suitable based on the claimant's specific medical condition. OWCP relied on the October 8, 2008 report from Dr. Lefebure, which the Board notes was nearly two years old at the time of the August 19, 2010 decision.¹⁰ It is not clear that the selected position was within work restrictions provided by Dr. Lefebure. For example, the October 8, 2008 OWCP-5c limited appellant to two hours reaching and three hours sitting. The job classification forms state that the selected job had occasional reaching of up to one third of the time or approximately 2.66 hours a day. It is also not clear how many hours of sitting a day the selected position required or that it meets the limitations of Dr. Lefebure.

In addition, appellant submitted a more recent report from Dr. Guberman dated June 30, 2009, finding that he was totally disabled for work. OWCP did not discuss this report, other than to list it as being received. As the Board notes above, OWCP's procedures stated that unless the medical evidence is "clear and unequivocal," OWCP should send a detailed job description of the selected position to a physician for a proper review. The Board finds that the medical evidence is not clear and unequivocal in this case. Therefore, OWCP did not meet its burden in this case.

⁸ 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.303.

⁹ *J.V.*, Docket No. 10-886 (issued November 17, 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(d) (December 1995).

¹⁰ *See Keith Hanselman*, 42 ECAB 680 (1991) (the Board noted that a medical report was almost two years old when OWCP issued its decision and could not form a valid basis for a wage-earning capacity determination).

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to reduce appellant's compensation on the grounds he had the capacity to earn wages in the selected position of computer assistant/scheduler.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 19, 2010 is reversed.

Issued: August 8, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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