

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

J.O., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Buffalo, NY, Employer**

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**Docket No. 10-785
Issued: September 21, 2011**

Appearances:
David W. Covino, Esq., 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 29, 2010 appellant, through his attorney, filed a timely appeal of an October 29, 2009 merit decision of the Office of Workers' Compensation Programs (OWCP) which affirmed a prior decision reducing his compensation benefits.¹ Pursuant to the Federal Employees' Compensation Act (FECA)² and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ By order dated November 23, 2010, the Board dismissed this appeal on the grounds that neither a person who was adversely affected by a final OWCP decision or his authorized representative had filed an application for review with the Board, pursuant to 20 C.F.R. § 501.3(a). *Order Dismissing Appeal*, Docket No. 10-785 (issued November 23, 2010). The Board vacated the Order Dismissing Appeal, via an order dated July 13, 2011, as counsel submitted a signed statement by appellant designating him to represent appellant on appeal before the Board, pursuant to 20 C.F.R. § 501.9(b). *Order Vacating Prior Board Order and Reinstating Appeal*, Docket No. 10-785 (issued July 13, 2011).

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly reduced appellant's compensation effective March 15, 2009 based on his capacity to perform the duties of an order clerk.

FACTUAL HISTORY

On November 8, 2001 appellant, then a 36-year-old letter carrier, filed a traumatic injury claim alleging that on that date, while lifting a parcel, he suffered lower back pain. By letter dated February 26, 2002, OWCP accepted his claim for lumbosacral sprain. Appellant had a preexisting herniated disc L4-5 from 1985. On June 10, 2005 OWCP accepted his claim for a recurrence on May 28, 2005. Appellant has not worked since May 15, 2006.

On July 19, 2005 OWCP referred appellant for the development of a vocational rehabilitation program. This referral did not result in employment. In a September 20, 2006 report, the certified rehabilitation counselor listed various suitable occupations for appellant. The rehabilitation counselors continued to contact him with regard to suitable positions.

In a December 18, 2007 report, Dr. Amrit Singh, appellant's treating physician who is Board-certified in pain medicine and physical medicine and rehabilitation, noted that his examination revealed persisting discomfort with change of position and ambulation and range of motion. He noted tenderness over the lumbar spine, lumbar paraspinals and over both sacroiliac joints right more than left. Dr. Singh stated that at this point appellant was at temporary total disability level until he is seen by his treating Board-certified orthopedic surgeon, Dr. Franco Vigna.

On December 20, 2007 appellant was referred to Dr. Elad Levy, a Board-certified neurosurgeon, for a second opinion evaluation. He was examined by Dr. Elad Levy on January 2, 2008, but OWCP had difficulty obtaining a report. As Dr. Elad Levy had requested additional diagnostic testing, the tests were authorized by OWCP and forwarded to Dr. Elad Levy for review. Although some interim reports were sent from Dr. Elad Levy to the Medical Consultants Network, the company that managed medical referrals for OWCP, the record reflects that OWCP first received Dr. Elad Levy's reports on July 21, 2008.³

On January 14, 2008 appellant was separated from the employing establishment. He remained on the periodic rolls.

³ In his January 2, 2008 report, Dr. Elad Levy recommended a new magnetic resonance imaging (MRI) scan and electromyogram (EMG). In his March 10, 2008 report, he noted that appellant's MRI scan of January 18, 2008 demonstrated disc desiccation at L5-S1 with herniations at L3-4 and L4-5, albeit mild to moderate. Dr. Elad Levy noted that EMG results done on January 29, 2008 demonstrated a combination of what could have been L4, L5 and S1 radiculopathies, specifically on the right superimposed or with diabetic neuropathy. He noted that he was unsure whether appellant wanted surgical intervention. Dr. Elad Levy addressed his March 10, 2008 report to Dr. Richard Junke, one of appellant's treating physicians and stated: "I had the pleasure of seeing [appellant] today. As you know, we have been evaluating him for lumbar pain. He had a recent MRI [scan] and EMG and is back here for a follow-up visit."

Not having timely received the second opinion reports of Dr. Elad Levy, on May 9, 2008 and then determining that Dr. Elad Levy had been serving as a treating physician, OWCP referred appellant to Dr. W. Jay Levy, a Board-certified neurosurgeon, for a new second opinion examination. In a report dated May 22, 2008, Dr. W. Jay Levy listed diagnoses of bilateral lumbar radiculopathy, lumbar degenerative disease, smoker and diabetic neuropathy. He stated that, based on the available information and the statement of accepted facts, appellant's lumbar radiculopathy and lumbar disc protrusion was directly causally related to the event of November 8, 2001 and appears to be an aggravation. Dr. W. Jay Levy stated that the lumbar degenerative disease is related by aggravation which is long term and therefore permanent. He noted that appellant's lumbar condition appeared to have disabled him from October 19, 2007 with progression of imaging abnormalities, antalgic gait with use of a cane, limitation of lumbar motion and sensory decrease right leg. Dr. W. Jay Levy concluded that appellant had a marked partial temporary disability with regard to the event of record. Appellant was not able to perform regular work activities, but should be able to perform light-duty work with a 10-pound lifting limit, avoiding frequent turning, bending and lifting and be able to change positions every 20 minutes. He was prohibited from squatting and kneeling. Appellant noted that this restriction was due to the event of November 8, 2001 as he was working prior to that. Dr. W. Jay Levy noted that, with regard to the Statement of Accepted Facts, some of these reports were not provided and therefore could not be considered. In an accompanying work capacity evaluation dated May 27, 2008,⁴ he indicated that appellant was limited to lifting 10 pounds, bending/stooping one hour a day, walking four hours a day and standing and reaching six hours a day

In a June 20, 2008 opinion, Dr. Singh indicated that appellant had a work injury of November 8, 2001 with low back pain, lumbar disc protrusion and radicular pain in the lower extremities and secondary myofascial pain. He noted that Dr. Elad Levy had recommended appellant see Dr. Vigna for surgery. Dr. Singh opined that appellant remained temporarily totally disabled until seen by Dr. Vigna. He stated that there was currently no active intervention that he could offer appellant for his symptoms.

On July 21, 2008 OWCP received the January 2, 2008 report from Dr. Elad Levy, who diagnosed lumbago and recommended more current diagnostic tests. Also, on July 21, 2008, it received the March 10, 2008 report of Dr. Elad Levy, who again diagnosed lumbago and noted that appellant was unsure about surgical intervention.

In a September 25, 2008 letter, the employing establishment indicated that it had no work available for appellant within his restrictions and asked OWCP to refer appellant to vocational rehabilitation services.

On October 23, 2008 OWCP referred appellant to Dr. Robert M. Bauer, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict between Dr. W. Jay Levy and Dr. Singh regarding diagnosis, the need for further treatment, the necessity for surgery due to the work-related condition, whether a causal relationship existed between

⁴ Although the work capacity evaluation was dated May 27, 2008, this date appears to be in error, as it accompanies a report dated May 22, 2008 and was received by OWCP on that date.

appellant's condition and the accepted work injury and whether there was any continuing disability to the work injury.

By letter dated November 2, 2008, appellant's attorney objected to the referral to Dr. Bauer. The attorney alleged that it was inappropriate when OWCP obtained two second opinions. He stated that appellant had been referred by OWCP to Dr. Elad Levy and, upon Dr. Elad Levy's recommendation, he was referred for additional diagnostic testing. After the testing, appellant had returned to Dr. Elad Levy to have the test results reviewed. He found the referral to Dr. W. Jay Levy improper. Appellant also objected to the selection of Dr. Bauer as an impartial medical examiner, contending that there had been no true conflict and that Dr. Bauer performed nothing but examinations for the insurance industry and was not impartial.

In the November 12, 2008 report, Dr. Bauer listed appellant's accepted diagnosis as lumbosacral sprain. He noted that appellant continued to have objective findings and demonstrated decreased range of motion of his lumbar spine with active testing. Dr. Bauer noted that appellant's lumbar strain had not resolved, that the disc herniation at L3-4 was also present and appellant remained symptomatic. He recommended a lumbar discectomy L3-4 and L4-5 levels with nerve root decompression. With regard to disability, Dr. Bauer opined that appellant's work injury was partly causing restrictions, although he did note that the disc herniation at L4-5 was not causally related to the employment injury. He apportioned disability, indicating that 50 percent was attributable to the preexisting L4-5 herniated disc and 50 percent was attributable to the employment-related lumbar strain. Dr. Bauer added that the accepted condition was a permanent aggravation. He stated that appellant could return to work eight hours a day with restrictions instructing him to refrain from any repetitive twisting, turning or bending with his torso. Dr. Bauer also indicated that appellant should have a 10-pound weight lifting restriction and be able to change his positions frequently. He stated that appellant was not able to perform full-time limited duties as a letter carrier. Dr. Bauer noted that, although he had not reviewed the actual written report of May 22, 2008 of Dr. W. Jay Levy, he was in agreement with the evaluation of May 27, 2008.⁵

By letter dated December 1, 2008, OWCP asked Melissa Nicosia, a vocational counselor, to update the labor market surveys for appellant. In a January 27, 2009 report, Ms. Nicosia indicated that he could obtain work as an order clerk. She copied the description of an order clerk from the Department of Labor's *Dictionary of Occupational Titles (DOT)*. Under specific vocational preparation, Ms. Nicosia noted that appellant had customer service and clerical-related experience and basic computer skills. Under availability, she noted that she verified the position was available with John Slenker, a New York Department of Labor, Labor Economist and reviewed help wanted ads in local publications. Ms. Nicosia stated that Mr. Slenker indicated that the weekly wage for this position was \$382.50. Specific positions were listed for a clerk/typist in Buffalo, New York and for a billing typist in Williamsville, New York. A description was also enclosed for a title clerk position at Adessa Auto Auction.

⁵ See *supra* note 4.

On February 5, 2009 OWCP proposed reducing appellant's compensation for wage loss due to his ability to earn wages as an order clerk at the rate of \$382.50 a week. It allotted him 30 days to submit evidence to the contrary. Appellant did not respond within the allotted time.

By decision dated March 9, 2009, the decision to reduce appellant's compensation benefits was made final.

On March 22, 2009 appellant, through his attorney, requested an oral hearing. A telephonic hearing was held on July 13, 2009 but appellant's attorney failed to call OWCP.

In an August 5, 2009 affidavit, appellant stated that he met with Ms. Nicosia of vocational rehabilitation only two times for a total of an hour, that he advised her that he wished to obtain further education or retrain for employment, that she advised him that retraining was out of the question and that she was unwilling to recommend to OWCP that it pay for training and would help him with job placement only, that she advised him of only one job opening as a title clerk at Adessa Auto Auction in Akron, New York, but that this job was over an hour commute each way in good weather and that his physician told him not to drive such distances. He also noted that, when he contacted Adessa Auto Auction, he was informed that the position was already filled before he even had a chance to apply for it. Appellant also indicated that the job description required him to be on his feet much of the day and Dr. Bauer limited him to sitting job. He also contended that the job required that he maintain knowledge of Department of Motor Vehicle laws and regulations concerning vehicles titles and that he had no such knowledge. Appellant also stated that Adessa Auto Auction informed him that the job required strong computer skills and that he had no computer skills.

By letter dated August 8, 2009, appellant's attorney apologized for missing the telephone hearing. He argued that OWCP's decision dated March 9, 2009, should be set aside and enclosed further documentation. He argued that OWCP illegally obtained a second second opinion from Dr. W. Jay Levy, over the attorney's objections. Appellant's attorney further contended that as no conflict existed between appellant's treating physician and the first second opinion examiner, Dr. Elad Levy, it was illegal to obtain an impartial medical opinion as no conflict existed between appellant's physician and the first second opinion examiner.

Appellant's attorney also contended that OWCP illegally relied on its hired rehabilitation counselor as Ms. Nicosia failed to offer any proof of her qualifications. He further argued there was no evidence that the position of order clerk actually existed or was reasonably available in appellant's commuting area, arguing that the only job she notified appellant about involved a commute of over one hour each way. Counsel further contended that the job offered did not meet appellant's work restrictions. Appellant found that the position was filled when he called and that he was unqualified for the job. He also contended that Dr. Bauer's report was not well rationalized. Appellant noted that Dr. Bauer never had the May 22, 2008 report of Dr. W. Jay Levy, one of the reports that created the conflict and that therefore his opinion was based on an incomplete record. Counsel concluded his argument by stating that OWCP's decision was in error.

In a February 20, 2009 letter, Phyllis A. Stevens from Human Resources at Adessa Auto Auction stated that appellant came into their offices to apply for the full-time position of title clerk but the position had been filled by an employee that was laid off recently and was rehired.

By decision dated October 29, 2009, an OWCP hearing representative affirmed the March 9, 2009 decision. The hearing representative stated that appellant failed to establish that he was unable to perform the duties of the constructed position or that he was totally disabled for all work and that the medical evidence of record supported appellant's ability to perform this job despite his disagreement with OWCP's decision.

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.⁶ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁷

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, the employee's age and vocational qualifications and the availability of suitable employment.⁸ Accordingly, 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. In determining an employee's wage-earning capacity, OWCP may not select a makeshift or odd lot position or one not reasonably available on the open labor market.⁹

When OWCP makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to OWCP's wage-earning capacity specialist for selection of a position, listed in the Department of Labor's *DOT* or otherwise available in the open market, that fit the employee's capabilities with regard to his physical limitations, education, age and prior experience. Once the 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. Finally, application of the principles set forth in *Albert C. Shadrick*¹⁰ and codified by regulations at 20 C.F.R. § 10.403¹¹ should be applied. Subsection (d) of the regulations provide that the employee's wage-earning capacity in terms of percentage is

⁶ *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

⁷ *P.B.*, Docket No. 10-2200 (issued June 21, 2011).

⁸ *Samuel J. Chavez*, 44 ECAB 431 (1993); *Hattie Drummond*, 39 ECAB 904 (1988); see 5 U.S.C. § 8115(a); A. Larson, *The Law of Workers' Compensation* § 57.22 (1989).

⁹ *Stephen M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

¹⁰ 5 ECAB 376 (1953).

¹¹ 20 C.F.R. § 10.403.

obtained by dividing the employee's actual earnings or the pay rate of the position selected by OWCP, by the current pay rate for the job held at the time of the injury.¹²

Section 8123(a) of FECA provides in part: 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 In situation where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.¹⁴

ANALYSIS

The Board finds that OWCP improperly reduced appellant's compensation benefits.

Initially, the Board rejects appellant's contention that OWCP improperly referred him to Dr. W. Jay Levy. The first second opinion physician, Dr. Elad Levy, did not cooperate with OWCP. OWCP asked for a clarification of Dr. Elad Levy's report, but as Dr. Elad Levy never gave a timely, well-rationalized report addressing the issues, appellant was properly referred to Dr. W. Jay Levy for a new second opinion.¹⁵ It then properly found a conflict in the medical evidence between Dr. W. Jay Levy (who found that appellant could return to work for eight hours a day with restrictions) and Dr. Singh (who found appellant totally disabled) and referred appellant to Dr. Bauer for an impartial medical examination. Although appellant alleged that Dr. Bauer was not impartial due to allegedly conducting examinations for the insurance industry, this allegation was not substantiated with any evidence of bias.

The Board finds, however, that the opinion of Dr. Bauer is insufficient. Dr. Bauer noted that he did not have the opinion of Dr. W. Jay Levy dated May 22, 2008, who was on one side of the conflict. The opinion of an impartial medical examiner must be based on a complete medical history and reflect an accurate understanding of the medical record.¹⁶ It is evident Dr. Bauer did not have a complete record. OWCP should have forwarded the May 22, 2008 report to Dr. Bauer and asked for a supplemental opinion.¹⁷ Moreover, Dr. Bauer apportioned appellant's

¹² *Id.* at § 10.403(d).

¹³ 5 U.S.C. § 8123(a).

¹⁴ *John E. Cannon*, 55 ECAB 585 (2004).

¹⁵ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence, Second Opinion Examinations*, Chapter 2.810.9(j). (OWCP has a duty to seek clarification for OWCP's elected physician and only if the second opinion physician does not respond or does not provide a sufficient response after being asked, should OWCP schedule a new examination). See also *Mae Z. Hackett*, 34 ECAB 1421 (1983) wherein the Board has held that, once OWCP begins to develop the medical evidence, it has the responsibility to obtain an evaluation which will resolve the issue involved in the case.

¹⁶ *Nancy Keenan*, 56 ECAB 687 (2005).

¹⁷ Where OWCP secures an opinion from an impartial medical specialist to resolve a conflict in the medical evidence, it has the obligation to secure a supplemental report from the specialist for the purpose of correcting the defect in the original report. See *April Ann Erickson*, 28 ECAB 336 (1977).

disability, stating that 50 percent was attributable to the employment injury and 50 percent was attributable to the preexisting condition. As the Board has held, no attempt should be made to apportion disability between a preexisting condition and an accepted one.¹⁸ Accordingly, the Board finds that this report is insufficient to meet OWCP's burden to reduce appellant's compensation benefits.

Furthermore, the Board notes that OWCP relied on the opinion of the rehabilitation counselor in determining that the job was vocationally suitable. OWCP procedures provide that the claims examiner may only rely on the opinion of a rehabilitation specialist who is an expert in the field of vocational rehabilitation as to whether a job is reasonably available.¹⁹ Further, the evidence is insufficient to establish that the position of clerk was within appellant's skill level or his specific physical restrictions or that it was within a reasonable commuting distance. It is OWCP's burden of proof to justify reduction of compensation by identifying a suitable position. It did not meet its burden of proof in this case to reduce appellant's compensation benefits.

CONCLUSION

The Board finds that OWCP improperly reduced appellant's compensation based on his capacity to perform the duties of an order clerk.

¹⁸ See *Henry Klaus*, 9 ECAB 333 (1957).

¹⁹ *M.V.*, Docket No. 10-1642 (issued June 15, 2011); *id.*, (October 2009).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 29, 2009 is reversed.

Issued: September 21, 2011
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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