United States Department of Labor
Employees' Compensation Appeals Board

C.B., Appellant	)	
	)	
and	)	**Docket No. 10-2169**
	)	**Issued: September 22, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Oakford, IL, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 24, 2010 appellant filed a timely appeal from March 11 and July 8, 2010 decisions of the Office of Workers' Compensation Programs (OWCP) reducing appellant's compensation. Pursuant to the Federal Employees' Compensation Act (FECA)[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction only over the merits of the case.

ISSUE

The issue is whether OWCP met its burden of proof to reduce appellant's wage-loss compensation effective March 1, 2010 based on its determination that the constructed position of policyholder-information clerk represented her wage-earning capacity.

On appeal, appellant's attorney contends that the decision was contrary to fact and law.

[1] 5 U.S.C § 8101 *et seq.*

FACTUAL HISTORY

On October 25, 2006 appellant, then a 49-year-old postmaster, filed an occupational disease claim alleging that as a result of years of lifting heavy weight, extension of her arm and carrying mail, she sustained C5-6 degenerative disc disease, computerized tomography radiculopathy and rotator cuff tendinitis. On November 14, 2006 OWCP accepted her claim for aggravated preexisting degenerative disc disease with myelopathy, cervical region; and disorder of bursae and tendons in shoulder region, unspecified, right (right rotator cuff tendinitis). On November 9, 2006 appellant underwent a C5-6 anterior cervical discectomy with fusion with instrumentation and iliac crest bone graft. On June 14, 2007 her claim was expanded to include brachial neuritis or radiculitis. Appellant received appropriate compensation and medical benefits. On September 12, 2007 Dr. Joseph Williams, a Board-certified orthopedic surgeon, indicated that she was released to return to work with restrictions and she returned to part-time work with restrictions on or about September 20, 2007. However, appellant stopped work on or about November 6, 2007 and compensation benefits for total disability were resumed.

In a November 26, 2007 report, Dr. David Wright, appellant's Board-certified internist, indicated that appellant was totally disabled from her job. He noted that after her C5-6 fusion she developed bilateral C5 radiculopathies and now is unable to lift, extend her shoulders or grasp objects including pens and pencils. Dr. Wright also noted that appellant had bilateral rotator tendinitis with a right supraspinatus tear and was unable to put her arms above the level of her shoulders. He indicated that she was on long-term narcotic therapy with opioid dependence which will inhibit her from doing any type of concentration, operating any type of machinery or any activity involving cognitive function. Dr. Wright further noted that appellant had developed a rest tremor because of her chronic pain that inhibits any type of grasping or fine manipulation. He noted that she has parasomnias with somatic symptoms of trouble concentrating, dizziness with standing up and lightheadedness and therefore should not be engaged in any activity that involves standing for more than 5 to 10 minutes. Dr. Wright further noted that with appellant's bilateral sacroiliac strain, she is not to sit for more than 5 to 10 minutes. In a December 24, 2007 note, he indicated that she has two types of tremors, *i.e.*, a rest tremor caused by dopamine deficiency from chronic pain, most likely from her cervical radiculopathy and in addition, an essential-like tremor which is worse with movement, which also may be indirectly related to her cervical radiculopathy.

On December 19, 2007 OWCP referred appellant to Dr. Stephen J. Pineda, a Board-certified orthopedic surgeon, for a second opinion. In a January 22, 2008 report, Dr. Pineda reviewed appellant's work history, past medical history and physical examination and listed the following diagnoses: (1) status postanterior cervical discectomy and fusion; (2) cervical spine pain syndrome; and (3) rule out work relationships.[2] He noted that she did not have any objective findings of disability or dysfunction other than range of motion which is limited by pain, not by mechanical issues. Dr. Pineda further noted that at this point if appellant's x-rays demonstrate that her function is healed, his opinion is that the mechanical portion of her cervical

[2] The Board notes that Dr. Pineda did not sign this report. However, the report is dated January 22, 2008, the second opinion evaluation with Dr. Pineda was scheduled for that date; and Dr. Pineda discusses his January 22, 2008 report in his June 12, 2008 report. Accordingly, the Board accepts the January 22, 2008 report as the report of Dr. Pineda.

disc disease has terminated, but that the pain syndrome in her work continues. He noted that from a mechanical standpoint, if she has fused her spine, he would allow her to do any activities. Dr. Pineda noted that the only issue would be pain. He concluded that appellant was capable of some work and recommended a functional capacity evaluation. Dr. Pineda noted that he could not complete her work form at this point. He summarized that from a mechanical perspective no restrictions are required and that pain rather than true mechanical dysfunction would limit appellant's activity or capability.

On March 13, 2008 appellant underwent a functional capacity evaluation. The occupational therapist noted that it was difficult to comment as to her maximal functional capacity due to apparent sub-maximal and inconsistent efforts. He also noted that appellant stopped many of the assessment tests due to right elbow/forearm pain and reported forceful gripping aggravated this pain, seeming presenting as possible lateral epidconylitis. The occupational therapist noted that she demonstrated increased symptom provocation with material handling and many of the positional assessments. He believed that appellant is employable at a light physical demand level. The occupational therapist noted that due to increased symptoms during overhead lifting and elevated work, she may not tolerate repeated overhead work or overhead lifting greater than 10 pounds. He noted that appellant may require extended or more frequent breaks and/or alteration of her work methods such as unloading carts/bags in smaller portions to prevent symptom aggravation. The occupational therapist further opined that prognosis for work condition and/or further physical therapy is guarded due to limited success of previous courses of physical therapy/interventions, length of time appellant has spent in the patient role and apparent lack of occupational goals.

In a June 12, 2008 report, Dr. Pineda issued the following "addendum" to his report. He noted that at the time of his initial report on or around January 22, 2008, the major restriction he had placed on appellant was based on symptoms and presuming the fusion had healed. Dr. Pineda noted that, during appellant's functional capacity evaluation, she gave submaximal and inconsistent levels of efforts and that therefore the therapist was not able to determine her true capabilities. He stated that her effort skewed the examination and her true effort is essentially unknown based on this. Dr. Pineda opined that appellant can do any activity as she wishes and that pain would be her only restrictor. He indicated that he would not place any restrictions on her, assuming that her surgery had healed and that her primary surgeon does not have any additional restrictions for her.

On October 21, 2008 OWCP referred appellant to Dr. Stephen F. Weiss, a Board-certified orthopedic surgeon, for an impartial medical examination. In the memorandum of referral, it noted that the referral was to resolve the conflict between the opinion of appellant's treating physician and the second opinion physician with regards to appellant's ability to work.

In a December 8, 2008 report, Dr. Weiss diagnosed status/post C5-6 disc excision and fusion; impingement syndrome -- right shoulder. He opined that appellant could not return to her regular job as a postmaster without some modification. With regards to specific work restrictions, Dr. Weiss recommended that she not lift more than 30 pounds frequently or more than 50 pounds occasionally. He noted that these restrictions were necessary as a result of appellant's neck condition and should be considered permanent. With regards to her current right shoulder condition, Dr. Weiss recommended that she limit any overhead activity and not lift

more than 10 pounds occasionally. He opined that these restrictions were temporary as further treatment is indicated. Dr. Weiss concluded that although appellant needs no further treatment for her neck condition further treatment for her shoulder condition was appropriate. Specifically, he recommended that injections be considered along with an exercise program and that if her symptoms were still problematic, then he recommended an arthroscopy.

On June 3, 2009 OWCP referred appellant to a vocational rehabilitation counselor for the development of a suitable job with the employing establishment or a new employer.

By letter dated June 16, 2009, the employing establishment indicated that appellant would not be capable of returning to her present position. It proposed an alternate position and asked OWCP whether this position would be acceptable.

In a July 20, 2009 report, Dr. Wright reiterated that appellant has cervical, thoracic and lumbar radiculopathies, all documented by magnetic resonance imaging (MRI) scan examinations and nerve condition velocity/electromyogram studies. He noted that she has had two cervical fusion surgeries, initially one on C5-6 with subsequent removal of this fusion and another fusion done at C4-5 in the last year. Dr. Wright stated that appellant has residual headaches from her cervical radiculopathy as well as bilateral brachial, cubital, radial and carpal neuropathies and no physician will operate on her. He also indicated that she was opioid dependent because of the residual pain, which would preclude her from lifting more than 10 pounds, standing for more than three minutes or sitting for more than 30 minutes. Dr. Wright noted that the opioid analgesics that appellant was on cause cognitive dysfunction. He indicated that she has documented knee osteoarthritis that prevents her from climbing any stairs. Dr. Wright also noted that appellant has refractory restless leg syndrome and that this causes jerks, sudden episodes of sleepiness as well as parasomnias and even some hallucinations. He did not believe that she could perform her date-of-injury job and stated that, if she works, appellant will need to be accommodated for sleeping and naps. Dr. Wright concluded that she has multiple disabilities that preclude any type of work and that the treatment plan for her is multiple visits to various surgeons and himself for postoperative care and obtaining narcotics.

A new functional capacity evaluation was performed on July 22, 2009 at which time the counselor determined that appellant was demonstrating subjective tolerances at just above a light physical demand level, which is below the required demand level for performance of her job at the employing establishment. He noted that while she is employable at the levels demonstrated, her postures, medical history and pain behavior may be barriers to a successful return to work. The counselor believed that appellant had the capability to improve her functional levels if she were motivated to do so.

On August 9, 2009 the vocational rehabilitation counselor indicated that appellant was capable of returning to work as a policyholder-information clerk. He noted that this position was a sedentary position and involved lifting of up to 10 pounds and was performed in sufficient numbers so as to make it reasonably available to appellant within her commuting area. The vocational rehabilitation noted that a variety of skills associated with appellant's past position as a postmaster would transfer into a sedentary capacity where the clerk is responsible for ordering, supervising, compiling, scheduling, cash handling, clerking, customer service and handling

employee and personnel issues. He noted that she had the ability to handle multiple issues and deal with customers with a variety of temperments and complex issues.

On January 28, 2010 OWCP issued a notice of proposed reduction of appellant's wage-loss compensation, noting that she had the capacity to earn wages as a policyholder-information clerk at a rate of $541.15 a week. It gave her 30 days to respond to the proposed reduction and indicated that if no response was received within that time, OWCP would proceed to reduce her compensation. Appellant did not respond within the time allotted.

By decision dated March 11, 2010, OWCP made the reduction of compensation benefits final.

On March 16, 2010 appellant, through her attorney, requested a telephonic hearing which was held on June 1, 2010.

In a May 19, 2010 medical opinion, Dr. Edward Trudeau, a Board-certified physiatrist, stated that appellant was disabled from her work activities. He noted that her condition had worsened since he last saw her. Dr. Trudeau compared the prior diagnostic tests of December 8, 2008 with current ones, and noted, *inter alia*, that there has been persistence of an increase of electroneurophysiologic testing abnormality in both the right C5 and L5 distributions, persistence of irritability in the right T6 innervation distribution, a worsening of the right C5 and L5 radiculopathies, persistence of the irritation in the right T6 dorsal primary ramus distribution and persistence of sensory neuropathy, distal, diffuse, symmetrical and axonal. He also noted a new finding of bilateral ulnar neuropathies at the elbow, cubital tunnel syndrome.

In a May 24, 2010 report, Dr. Wright noted that appellant has long-term cervical stenosis (involving C4-6) for which she had undergone two cervical fusion surgeries, but unfortunately these surgeries had been ineffective. He noted that she continued to have problems with weakness, numbness and pain from her shoulder to the number 3, 4 and 5 digits bilaterals. In addition, Dr. Wright noted that appellant has had documented T6 spinal stenosis with associated radiculopathy as well as L3-4 and radiculopathy with an inability to walk for prolonged periods of time. He noted that compounding her problems, she had developed pseudotumor cerebri leading to a loss of peripheral vision which would inhibit any type of job that involves vision. Dr. Wright noted that appellant cannot lift, push, sit or stand for more than 15 minutes at a time. In addition, he noted that she suffered from headaches, diplopia and vertigo. Dr. Wright indicated that appellant was prohibited by these conditions from any job which involved concentration, writing or vision.

By decision dated July 8, 2010, OWCP's hearing representative affirmed OWCP's March 11, 2010 decision.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[3]

[3] *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

Section 8115(a) of FECA,[4] provides in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings if her actual earnings fairly and reasonably represent her wage-earning capacity. Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.[5] If the actual earnings do not fairly and reasonably represent wage-earning capacity or if the employee has no actual earnings, her wage-earning capacity is determined with due regards to the nature of his injury, her degree of physical impairment, her usual employment, her age, her qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect her wage-earning capacity in her disabled condition.[6] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[7] The job selected for determining wage-earning capacity must be one reasonably available in the general labor market in the commuting area in which the employee lives.[8] 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 a vocational rehabilitation counselor authorized by OWCP or to its 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 that employee's capabilities with regards to her physical limitation, 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.[10] 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.[11]

Section 8123(a) of FECA provides in pertinent part 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.[12] This is called a referee examination and OWCP will select a physician who is qualified in the appropriate

[4] 5 U.S.C. § 8115.

[5] *Hubert F. Myatt*, 32 ECAB 1994 (1981); *Lee R. Sires*, 23 ECAB 12 (1971).

[6] *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

[7] *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

[8] *Id.*

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

[10] *Karen L. Lonon-Jones*, 50 ECAB 293, 297 (1999).

[11] *Id. See Shadrick*, 5 ECAB 376 (1953).

[12] 5 U.S.C. § 8123(a).

specialty and who has no prior connection with the case.[13] In situations where there exist 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 upon a proper factual background, must be given special weight.[14]

ANALYSIS

OWCP accepted appellant's claim for aggravated preexisting degenerative disc disease with myelopathy, cervical region disorder of bursae and tendons in shoulder region, unspecified, right and brachial neuritis or radiculitis. Appellant underwent two fusion surgeries. OWCP reduced her compensation based on her wage-earning capacity in the constructed position of policyholder-information clerk effective March 1, 2010. The Board finds that it properly reduced appellant's compensation.

Appellant's treating physician, Dr. Wright, submitted numerous medical reports indicating that appellant either was completely unable to work or had serious issues with returning to work. In his November 26, 2007 report, Dr. Wright indicated that she was unable to, *inter alia*, lift, put her arms above her shoulder, extend her shoulders, grasp objects or sit more than 5 to 10 minutes. He also noted that appellant's long-term narcotic therapy with opioid dependence will inhibit her from doing any type of concentration, operate any type of machinery or conduct any activity involving cognitive function. OWCP referred appellant to Dr. Pineda for a second opinion. Dr. Pineda would not place any restrictions on appellant, noting that she could do any activity and that pain was her only restrictor.

Due to the conflict between Dr. Wright and Dr. Pineda regarding appellant's ability to work, OWCP properly referred her to Dr. Weiss for an impartial medical examination. Dr. Weiss diagnosed appellant with status post C5-6 disc excision and fusion; impingement syndrome -- right shoulder and found that she had work restrictions and that she could not lift more than 30 pounds frequently or more than 50 pounds occasionally due to her neck condition. With regards to appellant's right shoulder condition, he recommended that appellant not lift overhead 10 pounds on occasion. Dr. Weiss stated that further treatment for her right shoulder was necessitated but not for her neck condition. He concluded that appellant was unable to return to her date-of-injury position without modification. The Board finds that the special weight of the evidence lies with the report of Dr. Weiss who concluded that appellant was capable of working with restrictions due to the effects of the employment injury.

OWCP then referred the case to a vocational rehabilitation counselor who concluded that appellant was capable of returning to work as a policy-information clerk. The vocational rehabilitation counselor noted that this was a sedentary position that involved lifting up to 10 pounds and was within appellant's physical restrictions. He also properly evaluated whether appellant had the vocational capacity to compete for this position and determined that her skills as a postmaster would transfer to the duties of the position of policyholder-information clerk.

[13] *R.H.*, 59 ECAB 382 (2008); 20 C.F.R. § 10.321.

[14] *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

Finally, the vocational rehabilitation counselor determined that the position was available in sufficient numbers so as to make it reasonably available within appellant's commuting area. Based on these reports, OWCP proposed reducing appellant's compensation benefits. Subsequent to this notice of proposed reduction of benefits, appellant submitted reports by her physicians, Drs. Trudeau and Wright, contending that she was totally disabled. Dr. Wright reiterated his prior statement that appellant was disabled and Dr. Trudeau discussed her diagnostic tests and concluded that she was disabled. These reports were not sufficient to overcome the special weight given to the opinion of the impartial medical examiner. The Board has long held that the reports from a physician who was on one side of a medical conflict that an impartial specialist resolved are generally insufficient to overcome the weight accorded to the report of the impartial medical examiner or to create a new conflict.[15]

OWCP properly applied the *Shadrick* formula[16] and considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment, age and employment qualifications in determining that the position of policyholder-information clerk represented her wage-earning capacity.[17] The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of policyholder-information clerk and that such position was reasonably available within the general labor market of her commuting area.

Appellant may request modification of the wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

CONCLUSION

The Board finds that OWCP properly reduced appellant's wage-loss compensation effective March 1, 2010 based on its determination that the constructed position of policyholder-information clerk represented her wage-earning capacity.

[15] *I.J.*, 59 ECAB 408 (2008); *M.K.*, Docket No. 10-1572 (issued May 23, 2011).

[16] *Albert C. Shadrick*, *supra* note 11 as codified in 20 C.F.R. § 10.403.

[17] *See Clayton Varner*, 37 ECAB 248, 256 (1985); *P.B.*, Docket No. 10-2200 (issued June 21, 2011).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 8 and March 11, 2010 are affirmed.

Issued: September 22, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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