

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

A.M., Appellant

and

**SMITHSONIAN INSTITUTION, NATIONAL
ZOO, Washington, DC, Employer**

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**Docket No. 11-1874
Issued: April 17, 2012**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 7, 2011¹ appellant filed a timely appeal from a February 8, 2011 decision of the Office of Workers' Compensation Programs (OWCP) adjusting her compensation based on a wage-earning capacity determination. Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ Under the Board's *Rules of Procedure*, the 180-day time period for determining jurisdiction is computed beginning on the day following the date of OWCP's decision. See 20 C.F.R. § 501.3(f)(2). As OWCP's decision was issued on February 8, 2011, the 180-day computation begins February 9, 2011. One hundred eighty days from February 9, 2011 was August 8, 2011. Since using August 12, 2011, the date the appeal was received by the Clerk of the Board, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is August 7, 2011, which renders the appeal timely filed. See 20 C.F.R. § 501.3(f)(1).

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly reduced appellant's compensation effective July 3, 2011 based on her capacity to earn wages in the constructed position of file clerk.

On appeal, appellant contends that OWCP erred in issuing a loss of wage-earning capacity decision as she had elected to receive retirement benefits instead of FECA benefits.

FACTUAL HISTORY

On October 18, 2007 appellant, then a 55-year-old animal keeper, filed a traumatic injury claim alleging that on that day she sustained a deep bite wound in her right wrist and forearm when she was bit by a howler monkey. OWCP accepted the claim for right wrist laceration with tendon involvement, which was expanded to include right wrist and hand tenosynovitis and right median nerve lesions. Appellant returned to light-duty full-time work on March 17, 2008. On May 28, 2009 OWCP placed her on the periodic rolls for temporary total disability as the employing establishment could no longer accommodate her light-duty restrictions.

In a September 22, 2008 report, Dr. Sunjay Berdia, a second opinion Board-certified orthopedic surgeon with a subspecialty certification in hand surgery, concluded that appellant was disabled from performing her date-of-injury position, but was capable of working with restrictions. In a September 24, 2008 work capacity evaluation form, he provided restrictions on repetitive movement and recommended that a functional capacity evaluation (FCE) be performed to determine lifting restrictions.

An October 27, 2008 FCE indicated that appellant was capable of performing work requiring light physical demands. Lifting restrictions were up to 45 pounds from the ground to the waist and 55 pounds from the knees to the waist. In a November 13, 2008 addendum, Dr. Berdia agreed with the October 27, 2008 FCE and concluded that appellant was capable of performing light-duty jobs. Restrictions noted by him on a September 24, 2008 work capacity evaluation include: reaching; reaching above the shoulder; operating a motor vehicle at work; operating a motor vehicle to and from work; repetitive wrist movements; pushing up to 15 pounds; pulling up to 25 pounds; lifting up to 10 pounds and climbing. On September 18, 2009 OWCP referred appellant for vocational rehabilitation.

On January 9, 2010 the vocational rehabilitation counselor completed a Form CA-66 and identified the positions of file clerk, Department of Labor, *Dictionary of Occupational Titles (DOT)* (206.387-034) with a weekly salary of \$330.00 and mail clerk, DOT No. 209.687-026 with a weekly salary of \$340.00. The physical demands of both positions included frequent reaching, fingering and handling. The file clerk duties included filing, reading material and keeping records of materials. The physical demands for the mail clerk position included frequent reaching, fingering and handling. Duties of the position included sorting mail, examining outgoing mail, readdressing undeliverable mail and stamping mail by hand or with a machine. The vocational rehabilitation counselor noted that these positions were within appellant's physical restrictions as the jobs were classified as light and required no prolonged pushing, pulling, standing, walking, bending, crawling, climbing or stooping and no lifting more than 20 pounds.

On January 19, 2010 the vocational rehabilitation specialist reviewed the January 9, 2010 report from the vocational rehabilitation counselor and found that the positions of file clerk or mail clerk with a full-time annual salary of between \$17,160.00 and \$17,680.00 was within appellant's work restrictions and reasonably available in sufficient numbers in her commuting area.

On April 20, 2010 appellant was approved by the Office of Personnel Management (OPM) for disability retirement. On April 25, 2010 a Notification of Personnel Action (SF50) noted transfer from FECA benefits to OPM.

On July 9, 2010 the vocational rehabilitation specialist closed appellant's rehabilitation file as she elected to accept retirement benefits from OPM.

On August 6, 2010 OWCP proposed to reduce appellant's compensation for wage loss, noting that the medical and factual evidence established that she was no longer totally disabled but had the capacity to earn wages as a file clerk with a weekly salary of \$330.00. It allotted her 30 days within which to submit additional evidence.

In a letter dated August 16, 2010, appellant disagreed with the proposal to reduce her wage-loss compensation as the position of file clerk was not appropriate based on educational background and work experience. Moreover, she elected to receive benefits from OPM instead of FECA. Appellant also argued that the vocational rehabilitation counselor erred in rejecting her request for rehabilitation training services to work as an interpreter.

On September 13, 2010 appellant completed an election form in which she requested to receive benefits from OPM instead of receiving FECA benefits effective April 24, 2010.

By decision dated September 21, 2010, OWCP adjusted appellant's compensation benefits effective September 26, 2010 based upon its determination that the position of file clerk represented her wage-earning capacity. It noted that her weekly pay rate when injured was \$1,027.21 and that the current pay rate for the job and step when injured was \$1,124.57. OWCP found that appellant was capable of earning \$330.00 a week, that the adjusted wage-earning capacity per week was \$297.89, that the percentage of the new wage-earning capacity was 29 percent, that the loss in wage-earning capacity amount a per week was \$729.32, leaving her with a compensation rate of \$546.99. It calculated that this resulted in a new compensation rate every four weeks of \$2,262.00 beginning on September 26, 2010.

On October 21, 2010 appellant requested a review of the written record by an OWCP hearing representative.

By decision dated February 8, 2011, an OWCP hearing representative affirmed the September 21, 2010 decision reducing appellant's wage-loss compensation.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.³ An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.⁴

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 her wage-earning capacity. If the actual earnings do not fairly and reasonably represent the employee's wage-earning capacity or if the employee has no actual wages, the wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the employee's usual employment, age, 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.⁵

OWCP must initially determine appellant's medical condition and work restrictions before selecting an appropriate position that reflects her vocational wage-earning capacity. The Board has stated that the medical evidence upon which OWCP relies must provide a detailed description of appellant's condition.⁶ Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.⁷

ANALYSIS

OWCP accepted appellant's claim for right wrist laceration with tendon involvement, which was expanded to include right wrist and hand tenosynovitis and right median nerve lesions and placed her on the periodic rolls for temporary total disability. It reduced her compensation effective September 26, 2010 based on its finding that she had the capacity to earn wages in the selected position of file clerk.

The Board finds that OWCP failed to establish that appellant was capable of performing the duties of the selected full-time position. On September 22, 2008 Dr. Berdia, a second opinion Board-certified orthopedic surgeon with a subspecialty certification in hand surgery, concluded that appellant was capable of working an eight-hour day with restrictions on repetitive wrist work, reaching and reaching above the shoulder. The vocational rehabilitation expert found that the position of file clerk was suitable to appellant's medical restrictions as it classified

³ *H.N.*, Docket No. 09-1628 (issued August 19, 2010); *T.F.*, 58 ECAB 128 (2006); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

⁴ 20 C.F.R. §§ 10.402 and 10.403.

⁵ 5 U.S.C. § 8115(a); *see N.J.*, 59 ECAB 171 (2007); *T.O.*, 58 ECAB 377 (2007); *Dorothy Lams*, 47 ECAB 584 (1996).

⁶ *See William H. Woods*, 51 ECAB 619 (2000).

⁷ *Carl C. Green, Jr.*, 47 ECAB 737 (1996).

as light and required no prolonged pushing, pulling, standing, walking bending, crawling, climbing or stooping and no lifting more than 20 pounds. According to the Department of Labor, *Dictionary of Occupational Titles* the physical requirements for the position of file clerk, includes frequent reaching, handling and fingering. The Department of Labor, DOT provides that an activity is frequent if it is performed from one-third to two-thirds of the time. Dr. Berdia's restrictions on the September 24, 2008 work capacity evaluation form included restrictions on repetitive wrist movement and no lifting more than 10 pounds. The restrictions set by the physician do not conform to the physical requirements of the selected position. The record does not adequately define whether the activities of frequent handling, reaching and fingering complies with the work restriction of no repetitive wrist motion. OWCP's procedures state that, unless the medical evidence is clear and unequivocal that the selected position is medically suitable, it should send a job description to an appropriate physician for an opinion regarding whether the claimant can perform the position.⁸ The medical evidence of record does not clearly and unequivocally establish that appellant can perform the duties of the selected position. The Board finds that OWCP did not meet its burden of proof to reduce her compensation.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof in reducing appellant's wage-loss compensation benefits effective July 3, 2011.

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(d) (October 2009); see also *John D. Jackson*, 55 ECAB 465 (2004); *William H. Woods*, 51 ECAB 619 (2000).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 8, 2011 is reversed.

Issued: April 17, 2012
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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