United States Department of Labor
Employees' Compensation Appeals Board

J.H., Appellant	)	
and	)	**Docket No. 11-1386**
	)	**Issued: February 16, 2012**
U.S. POSTAL SERVICE, POST OFFICE, San Diego, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 25, 2011 appellant filed an appeal of the May 2, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) affirming the reduction of his compensation benefits. Pursuant to the Federal Employees' Compensation Act[1] (FECA) 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 met its burden of proof to reduce appellant's compensation benefits based on his capacity to earn wages as an information clerk effective October 24, 2010.

FACTUAL HISTORY

Appellant has three claims involving work-related injuries to the upper extremities. On March 7, 2001 he, then a 54-year-old letter carrier, filed an occupational disease claim that OWCP accepted for right carpal tunnel syndrome. OWCP authorized a right carpal tunnel

[1] 5 U.S.C. §§ 8101-8193.

release that was performed on June 10, 2002 under claim number xxxxxx122. Appellant returned to full-time light duty in September 2002. On January 9, 2002 he had filed an occupational disease claim alleging that repetitive casing, holding and carrying mail caused several upper extremity conditions. OWCP accepted left lateral epicondylitis, bilateral carpal tunnel syndrome, bilateral ulnar nerve lesion and left-sided cervical radiculopathy under claim number xxxxxx062. Appellant underwent bilateral carpal tunnel release and returned to work with restrictions in August 2002. He was later assigned new duties as a lobby director. On January 13, 2006 appellant claimed that his bilateral ulnar nerve condition was related to repetitive gripping and hand manipulation in his modified lobby director duties. OWCP accepted permanent aggravation of bilateral lesions of ulnar nerve and permanent aggravation of bilateral medial epicondylitis under claim number xxxxxx110. Appellant underwent left-sided subcutaneous ulnar nerve transposition in November 2006 and was released to light-duty part-time work as lobby director in April 2007.

On October 17, 2007 Dr. Andrew P. Hartman, a Board-certified hand surgeon and a treating physician, opined that appellant had reached maximum medical improvement and that he could perform the position of lobby monitor for eight hours a day. OWCP subsequently paid some of appellant's claims for intermittent wage loss beginning on December 24, 2007 as there was no work available within his physical limitations. It also accepted a May 5, 2009 recurrence claim noting that the employer withdrew its offer of modified employment and paid compensation for wage loss, placing appellant on the periodic rolls.

OWCP referred appellant for a second opinion with Dr. Thomas J. Sabourin, a Board-certified orthopedic surgeon.[2] In a June 11, 2009 report, Dr. Sabourin reviewed the medical record, a statement of accepted facts and summarized his examination findings. He diagnosed mild bilateral cubital tunnel syndrome, status post right cubital tunnel surgery with ulnar nerve transposition and bilateral carpal tunnel syndrome status post release with minimal residuals. Dr. Sabourin noted that, while electromyogram (EMG) findings supported evidence of mild median and ulnar nerve changes, appellant's pain symptoms were severely disproportionate from the determinable condition. He indicated that appellant had other problems such as a cervical spine condition, which the magnetic resonance imaging (MRI) scan did not demonstrate was a severe problem and treatment was of little benefit. Dr. Sabourin opined that appellant had a pain syndrome which was severely disproportionate to his medical problems from an orthopedic standpoint. He opined that the EMG findings over the years were the most representational of appellant's condition and supported only mild changes. Dr. Sabourin concluded that appellant had residuals that required medical limitations. He further opined that appellant's work restrictions were permanent and completed a work capacity form indicating that appellant could work with limitations on reaching above the shoulder for more than one hour, no repetitive movement of the wrist or elbow and only one hour of pushing/pulling/lifting up to 20 pounds.

In a June 29, 2009 report, Dr. Hartman reviewed Dr. Sabourin's June 11, 2009 report and agreed with his assessment of appellant. He stated that appellant was not a candidate for vocational rehabilitation. Dr. Hartman noted that appellant had poor results with both nonsurgical and surgical interventions and that his symptoms were "somewhat magnified" and

[2] Dr. Sabourin had also previously evaluated appellant for OWCP.

inconsistent with the physical examination findings. He opined that appellant should not perform work which required overhead use, pushing or pulling greater than 20 pounds and no repetitive use of the upper extremities. Dr. Hartman indicated that appellant could stand, sit and walk without restrictions.

On July 23, 2009 OWCP referred appellant for vocational rehabilitation and a vocational rehabilitation counselor met with appellant on July 29, 2009. The counselor sent Dr. Hartman copies of position descriptions for various positions being targeted for reemployment. An August 20, 2009 report of an August 19, 2009 functional capacity evaluation (FCE) indicated that appellant was capable of performing within the light physical demand category, lifting up to 15 pounds from floor to waist level. It noted that he perceived himself as totally disabled but his performance was not consistent with total disability and was self-limiting due to complaints of pain.

In an October 23, 2009 report, Dr. Hartman noted appellant's status and also advised that he had reviewed six different jobs descriptions with regard to appellant's ability to return to modified work. He opined that appellant was capable of performing the duties of an information clerk, parking lot attendant and a customer service representative but not that of a security guard, gate guard or cashier. Dr. Hartman stated that it was possible for appellant to use his hands and opined that he could intermittently use a keyboard for no more than 10 minutes an hour. In a November 16, 2009 report, he completed a form indicating that he had reviewed the FCE and opined that appellant was medically capable of performing intermittent keyboarding for an 8-hour shift, 10 minutes at a time, up to 30 minutes an hour.

On November 24, 2009 the vocational rehabilitation counselor identified two positions within appellant's medical and work limitations, customer service representative and information clerk. The counselor noted that these positions were performed in sufficient numbers to be reasonably available in appellant's commuting area. As the identified jobs required computer knowledge, the counselor recommended training to improve appellant's qualifications and to enhance his competitiveness in the San Diego labor market. OWCP approved a 16-week computer skills training program from December 14, 2009 to April 9, 2010. The rehabilitation counselor developed individual placement plans for the positions of customer service representative and information clerk, in the Department of Labor, *Dictionary of Occupational Titles* (DOT) No. 237.367.022. The rehabilitation specialist reviewed the plan and by letter dated November 25, 2009, OWCP advised appellant that he would have 90 days of placement services following the approved program to assist him in finding employment and that his compensation would be reduced based upon his capacity to earn a salary.

In a December 25, 2009 report, the rehabilitation counselor noted that appellant began computer skills training on December 15, 2009. She noted that he started training one day late due to a conflicting appointment, but he made up the lost time and completed all training hours during the first week of school. The counselor also noted that Dr. Hartman's office reported that appellant could perform handwriting up to 20 minutes per hour. As this information was received subsequent to the completion of the labor market surveys, she recontacted a number of employers and confirmed that the vocational goals primarily involved verbal communication, telephonic or in person and intermittent computer use. Handwriting was generally reported to be minimal and within the restrictions noted.

The rehabilitation counselor's January 26, 2010 report noted that, during a January 13, 2010 meeting at the training facility with appellant and his instructor, appellant stated that he typed with two fingers and that it was too painful to use more than two fingers to keyboard. The instructor reported that appellant was progressing slowly but appeared to be learning the material. Appellant also had perfect attendance.

In a January 29, 2010 telephone call to OWCP, Dr. Hartman indicated that, based on appellant's complaints of pain, he was limited to keyboarding 10 minutes per hour. In a February 3, 2010 letter, OWCP requested that Dr. Hartman clarify appellant's limitations. It noted that appellant may type at will and at his own pace. In a February 27, 2010 report, the rehabilitation counselor noted that on January 29, 2010 Dr. Hartman indicated that he was changing work restrictions to 10 minutes per hour keyboarding and no forceful use of bilateral hands. The counselor noted that on February 1, 2010 appellant continued with training, took breaks as needed and appeared to be staying within his medical restrictions of 30 minutes per hour. Appellant typed with two fingers, was progressing slowly, but had perfect attendance.

In a February 26, 2010 report, Dr. Hartman indicated that he reviewed the August 20, 2009 FCE. He noted that appellant felt the amount of typing required in his training program was beyond his capacity. Dr. Hartman stated that appellant's physical examination findings were identical to all previous examinations. He advised that his decision to alter appellant's restrictions to 10 minutes of typing per hour was based more on appellant's complaints than on physical examination findings. Dr. Hartman stated that physical examination findings were difficult to objectively define work capacity. He noted that the August 20, 2009 FCE found that appellant could type for two minutes with his right hand and three minutes with his left hand and then stopped because of pain. Dr. Hartman concluded that a more reasonable restriction would be allowing 5 minutes of typing with a 5- to 10-minute break, allowing 20 minutes of typing each hour.

In a March 24, 2010 vocational report, the vocational counselor noted that on March 2, 2010 the instructor at the vocational training stated that appellant had finished Microsoft Works and was working on PowerPoint and Excel. Appellant was taking breaks and self-monitoring his keyboarding to be within work restrictions. The report indicated that he made negative comments about vocational rehabilitation and his ability to work and that the counselor had explained that it was appellant's responsibility to fully participate in vocational rehabilitation and the placement process.

On March 24, 2010 appellant was assigned a new vocational rehabilitation counselor. The counselor's reports documented difficulty meeting with appellant, missed appointments and lack of follow through on meetings for placement services. An April 23, 2010 OWCP rehabilitation status report indicated that, as appellant successfully completed his training on April 6, 2010, there was no need to develop a new plan and that placement services would begin April 12, 2010.

In an April 30, 2010 report, the rehabilitation counselor noted that appellant confirmed during an April 12, 2010 meeting that he had completed the training program on April 9, 2010. The training program was noted to be a five-month computerized office program. The counselor indicated that appellant was informed of the 90 days of placement, new employer services

effective April 12, 2010, but showed no desire or motivation to participate in placement or meet with him. The counselor identified several job openings within appellant's restrictions and mailed them to him. The May 31, 2010 rehabilitation report noted that appellant had not met with the counselor, but had faxed information about his education, prior job duties and experience. The counselor stated that he prepared a resume for appellant and continued to provide job opportunities for various openings in the local area in the targeted positions. All the job openings were within appellant's physical restrictions to include the restriction of using a keyboard no more than 20 minutes per hour. The counselor noted that appellant had not contacted him about the results of the job search.

In a July 23, 2010 report, the counselor noted that appellant met with him once during the 90-day job placement period and did not contact him again for over three months regarding additional placement. On July 21, 2010 appellant informed him that he did not contact any employers and had not obtained a job. The counselor noted that he had confirmed with appellant on April 13, 2010 that he completed the training program on April 9, 2010. He indicated that he contacted the training program on July 21, 2010 and received a copy of appellant's Certificate of Completion in Computer Applications Training for Office Work along with the courses appellant completed. This included basic computing, keyboarding, word processing, Power Point, Excel, the Internet and Customer Service. The counselor stated that appellant's prior job experience with the postal service, Army Navy Academy and U.S. Marine Corps provided experience that would allow him to obtain employment. He indicated that the labor market surveys confirmed that the jobs of customer complaint clerk and information clerk were performed in sufficient numbers to be considered reasonably available and that there were a sufficient number of job openings within a reasonable commuting distance from appellant's home. Information about the weekly salary of each position was also provided.

In September 14, 2010 letter, OWCP proposed to reduce appellant's compensation benefits based on his capacity to earn wages as an informational clerk, DOT No. 237.367.022, at the rate of $520.00 per week or $13.00 per hour. It allowed him 30 days to respond.

On September 28, 2010 appellant disagreed with OWCP's proposed action. He indicated that Dr. Sabourin thought he was not a good candidate for rehabilitation and discussed Dr. Hartman's restrictions of no lifting over two pounds and no keyboarding more than 10 minutes per hour. Appellant stated that, during the training, he only typed 10 minutes each hour for a total of 40 minutes per day and had only completed the first two sessions of the six total sessions available. He argued that the rehabilitation service was inefficient and did not keep appointments, send him letters and call him. Copies of evidence already of record were resubmitted.

By decision dated October 21, 2010, OWCP reduced appellant's compensation effective October 24, 2010 based on the finding that he was capable of performing the selected position of information clerk.

On October 28, 2010 appellant, through his attorney, requested an oral hearing. In a November 5, 2010 report, Dr. Hartman indicated that appellant's condition had not changed since his permanent and stationary report of October 17, 2007.

Appellant's attorney submitted a brief arguing that appellant was not a fit candidate for vocational rehabilitation and was not medically capable of performing the selected position. Appellant provided May 3, 2010 and February 5, 2011 statements, which discussed his vocational training. He stated that he only completed two classes, Excel and Word, out of the six classes. Appellant indicated that he typed using only one finger and that he was unable to type more than 10 minutes an hour. Copies of the vocational rehabilitation as well as other documents related to the vocational rehabilitation were also submitted. Several reports were received from Dr. Jacob E. Tauber, a Board-certified orthopedic surgeon, in which he opined that appellant's cervical conditions were work related and provided an impairment rating. A copy of the November 28, 2010 cervical MRI scan was also submitted.

A video hearing was held on February 25, 2011. Appellant's attorney argued that appellant was not a feasible rehabilitation candidate and appellant testified about the vocational training he underwent, noting that he only completed two courses and the ineffectiveness of his second vocational rehabilitation counselor. Appellant also testified about his limited use of his hands and arms on a daily basis, noting that he did not use a computer and only intermittently drove his car because of difficulty with his upper extremities. Following the hearing, a March 8, 2011 EMG was submitted which indicated no evidence of cervical radiculopathy although sensory radiculopathy could not be ruled out. Also found was mild median abnormalities suggestive of residual abnormalities after carpal tunnel release as well as evidence of asymptomatic ulnar neuropathy at the elbow. Also submitted were minor changes to the transcript and numerous correspondence from appellant to his attorney and from appellant's attorney to the rehabilitation counselor and OWCP. This included a March 6, 2011 statement from appellant.

In a March 30, 2011 letter, the employer noted that an investigation showed that appellant was observed riding his motorcycle on several occasions on less than straight roadways in the last 20 days. Appellant was using his hands to manipulate the throttle and hand breaks on his motorcycle. The employing establishment stated that, while he testified that he seldom drove because of the pain in his hand, he was observed driving both with his wife in the vehicle and alone on three occasions in the last 20 days. A copy of the investigation report covering the period March 16 to April 6, 2011 was submitted as well as a compact disc.

On March 31, 2011 the employer provided Dr. Hartman a copy of the investigative report as well as a digital video disc (DVD) of surveillance footage of appellant's activities and requested a medical opinion on his ability to work as an information clerk. On April 6, 2011 Dr. Hartman indicated that driving a motorcycle for 70 miles represented prolonged repetitive use of appellant's hands and was outside of his restrictions. He stated that use activities were detrimental to his recovery and noted that appellant had not specifically reported that he could not perform such activities. Dr. Hartman stated that, based on his knowledge of appellant's injury, objective medical findings and his review of appellant's activities as depicted on the DVD, appellant could perform the activities and duties of an information clerk.

On April 8, 2011 OWCP received responses from both appellant and his attorney discussing the employing establishment's information. In an April 7, 2011 letter, appellant's attorney indicated that appellant had no restrictions on operating either a car or motorcycle and that he mostly rode his motorcycle for pleasure and only on "good days." Appellant stated that

he had testified that he seldom drove a vehicle and indicated that he only drove on days his condition was not severely limiting. He stated that riding his motorcycle was easier for him and he only rode for pleasure. Appellant indicated that he stopped periodically to rest his hands and opined that it was good exercise for his upper extremities and neck and that the rides were easy because of the location he chose.

In a May 3, 2011 decision, the hearing representative found that the selected position properly represented appellant's wage-earning capacity and affirmed the prior decision.

LEGAL PRECEDENT

Section 8115 of FECA[3] provides that 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 the employee has no actual earnings, his wage-earning capacity 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.[4]

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 for selection of a position, listed in the DOT or otherwise available in the open market, that fits that employee's capabilities with regard to his physical limitations, 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. Finally, application of the principles set forth in *Albert C. Shadrick*[5] will result in the percentage of the employee's loss of wage-earning capacity.[6]

ANALYSIS

OWCP accepted appellant's claim for permanent aggravation of bilateral ulnar nerve lesion and permanent aggravation of bilateral medial epicondylitis. Appellant's prior claims included accepted conditions of bilateral carpal tunnel syndrome, left lateral epicondylitis, bilateral ulnar nerve lesion and left-sided cervical radiculopathy. In June 2009, both appellant's treating physician, Dr. Hartman and OWCP's second opinion physician, Dr. Sabourin, opined that appellant could work with restrictions. In July 2009, OWCP referred appellant for vocational rehabilitation and the vocational rehabilitation counselor identified two jobs that appellant could perform and that were reasonably available. One of these positions was information clerk. The Board finds that the selected position of information clerk was medically and vocationally suitable.

[3] 5 U.S.C. § 8115.

[4] *N.J.*, 59 ECAB 171 (2007).

[5] 5 ECAB 376 (1953).

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

On October 23, 2009 Dr. Hartman reviewed the requirements of this position along with a recent FCE and stated that appellant was capable of performing intermittent keyboarding for an 8-hour shift, 10 minutes at a time, up to 30 minutes per hour. On November 24, 2009 the vocational rehabilitation counselor found that the position of information clerk was vocationally appropriate based on appellant's experience and that the position was being performed in sufficient numbers so as to make it reasonably available in appellant's commuting area. The counselor noted that the position of information clerk required computer knowledge and appellant underwent a 16-week computer skills training program from December 15, 2009 to April 9, 2010. While appellant continued in the training program, Dr. Hartman indicated on January 29, 2010 that appellant was limited to keyboarding for 10 minutes per hour. In a February 26, 2010 report, Dr. Hartman indicated that his decision to change appellant's restrictions to keyboarding only 10 minutes per hour was based on appellant's complaints and not on objective findings.[7] But he subsequently stated on November 16, 2009 that appellant could use a keyboard 10 minutes at a time on up to 30 minutes an hour and, on February 26, 2010, he stated that appellant could type for 5 minutes, take a break and then type again for a total of 20 minutes per hour. Accordingly, the medical evidence supports that appellant can type for 20 minutes each hour with intermittent breaks. The evidence further reflects that his other restrictions on his upper extremities did not affect his ability to perform the duties of the selected position of information clerk.[8] Thus, there is no medical evidence supporting that the selected position is not medically suitable.[9]

Although appellant was not able to find employment as an information clerk, the Board has frequently held that the fact that a claimant is not able to secure a job does not establish that the work is not available or suitable.[10] When placement services did not yield employment for him, OWCP, after providing him notice, reduced his compensation effective October 24, 2010 based on his capacity to earn wages as an information clerk.

The Board finds that OWCP 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 information clerk represented his wage-earning capacity. As noted, the evidence of file supports that the selected position was within the medical limitations provided by Dr. Hartman. Appellant and his attorney have alleged that appellant did not complete the training program and, therefore, was not qualified to perform the position. However, the rehabilitation counselor's reports support that appellant had completed the computerized office program. The rehabilitation counselor's April 30, 2010 report noted that appellant began his training on December 15, 2009 and completed the program on April 9, 2010, with perfect attendance. Furthermore, the rehabilitation counselor noted in his July 23, 2010

[7] *See William A. Archer*, 55 ECAB 674 (2004) (a physician's statements regarding an employee's ability to work without objective signs of disability are not a basis for payment of compensation).

[8] The Board notes that the listed physical demands for an information clerk do not indicate that any particular amount of keyboarding is required in the job.

[9] Following the reduction of appellant's compensation, Dr. Hartman, on April 6, 2011, confirmed that appellant could perform the activities and duties of an information clerk.

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

report that he had received a copy of appellant's Certificate of Completion in Computer Applications Training for Office Work along with the courses appellant had completed. Neither appellant nor his attorney raised this argument until after appellant was advised that his compensation would be reduced. Additionally, the vocational rehabilitation specialist, by report dated August 20, 2010, approved the selected position based on appellant's past work experience and this training. As the rehabilitation specialist is an expert in the field of vocational rehabilitation, OWCP may rely on his or her opinion in determining whether the job is vocationally suitable and reasonably available.[11] The Board finds that appellant's training and past work experience constitutes adequate vocational preparation for the constructed position of information clerk.

The evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position and that such a position was reasonably available within the general labor market of his commuting area. OWCP, therefore, properly determined that the position of information clerk reflected appellant's wage-earning capacity and used the *Shadrick* formula to properly reduce his compensation.

On appeal, appellant argues, *inter alia,* that he was not medically fit to undergo vocational rehabilitation as both the second opinion physician and his physician indicated that he was not a candidate for vocational rehabilitation. However, neither physician offered a medical reason why he was not a vocational rehabilitation candidate. Moreover, as noted above, both physicians found that appellant was capable of working within limitations. Since the employing establishment could no longer accommodate those medical limitations, it was appropriate for OWCP to refer him to vocational rehabilitation.

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 determined that appellant was capable of earning wages in the constructed position of information clerk.

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(b) (2) (December 1993).

ORDER

IT IS HEREBY ORDERED THAT the May 2, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 16, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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