United States Department of Labor
Employees' Compensation Appeals Board

B.S., Appellant	)	
and	)	
DEPARTMENT OF HOMELAND SECURITY, FEDERAL EMERGENCY MANAGEMENT AGENCY, EMERGENCY PREPAREDNESS & RESPONSE, Alexandria, VA, Employer	)	**Docket No. 11-890** **Issued: January 20, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 22, 2011 appellant filed a timely appeal from a February 7, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 in the constructed position of general clerk.

On appeal, appellant asserts that, because of his predisposition to infection, he could not perform the duties of clerk without a reasonable accommodation.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On July 2, 2008 appellant, then a 60-year-old, intermittent disaster assistance employee who was deployed in West Virginia, filed a traumatic injury claim. He alleged that on June 22, 2008 a splinter entered his left index finger causing flexor fasciitis and infection.[2] Appellant stopped work on June 30, 2008. He was admitted to a hospital in Pennsylvania on July 4, 2008 for infection of the left index finger.[3] On admission, Dr. Andrew Haussmann, Board-certified in family medicine, noted a history of methicillin-resistant Staphylococcus aureus (MRSA) skin infections. On July 6, 2008 appellant underwent incision and drainage. He was discharged on July 8, 2008 on antibiotic medication. OWCP accepted cellulitis of the left hand, infectious tenosynovitis of the left index finger, superficial foreign body (splinter) of the left index finger and other disorder of the synovium, tendon and bursa.

On October 14, 2008 Dr. Ronald E. DiSimone, a Board-certified orthopedic surgeon, advised that appellant could return to work with physical restrictions. In an October 16, 2008 report, Dr. Robin W. Hampton, Board-certified in internal medicine and infectious disease, advised that appellant should not be involved in any duties that, could result in increased risks for incidental abrasion of his skin and should an abrasion occur, he should institute meticulous wound care because he was at increased risk for MRSA soft tissue infections, based on his clinical history.

On December 10, 2008 the employing establishment offered appellant a limited-duty position that he accepted on January 5, 2009. Appellant did not return to work and on January 12, 2009 resigned, based on recommendations of his physicians and the fact that he was prone to further infections. He was placed on the periodic compensation rolls. In a March 6, 2009 report, Dr. DiSimone advised that appellant could do light duty, office work, with a permanent restriction of no work on ladders and lifting limited to 10 pounds.

On April 6, 2009 OWCP referred appellant to Dr. Evan Bell, Board-certified in internal medicine and infectious disease, for a second-opinion evaluation. In a May 5, 2009 report, Dr. Bell noted the history of injury and reviewed the medical record. He advised that appellant reported no evidence of recurrent infection off antibiotics and provided findings on physical examination. Screening cultures for MRSA of the nose, axilla and groin were negative. Dr. Bell diagnosed cellulitis of the left hand and infectious tenosynovitis of the left index finger, associated with MRSA, with complete resolution of the evidence of the infection. In answer to specific OWCP questions, he advised that appellant could return to his full-duty position from an infectious disease standpoint and no further medical treatment was needed. Dr. Bell stated that appellant's only physical limitation was a minimal decrease in flexion of his left index finger that did not interfere with grasping, lifting or pulling and that he essentially had full use of the hand. He concluded that this minimal limitation should not impact appellant's ability to work. In an attached work capacity evaluation, Dr. Bell advised that maximum medical improvement had been reached and that appellant could return to his usual job with no restrictions.

[2] Appellant worked about 60 days a year for the employing establishment as a specialist in logistics supply, responding to disasters.

[3] Appellant was apparently initially treated in West Virginia. These medical records are not in the claim file.

On June 15, 2009 OWCP referred appellant to Dr. Russell N. Worobec, a Board-certified orthopedist, for a second-opinion evaluation. In a June 15, 2009 report, Dr. Worobec noted the history of injury, his review of the medical record and appellant's complaints that he would tire after operating a keyboard on a rapid basis for a prolonged period, could not make a full fist and could not carry objects for prolonged periods because his left hand would give out and that he had difficulty in fine movements with his left hand. He advised that appellant was right-hand dominant and that he demonstrated decreased grip strength on the left, diminished sensation over the volar aspect of the proximal and middle phalanx and decreased range of motion of the left index finger. Dr. Worobec opined that, because appellant had very thin skin secondary to altered vascularity, the palmar surfaces of his index finger were subject to blistering after prolonged periods of heavy use and therefore he was restricted from climbing ladders on repeated occasions or grasping small objects firmly for prolonged periods of time. In answer to specific OWCP questions, he advised that appellant could not return to his previous position of responding to emergency situations because he could incur additional trauma to his finger due to the epithelial changes. Dr. Worobec diagnosed: infection, foreign body, left index finger; hand cellulitis; and infectious tenosynovitis of the left index finger, all connected to the employment injury. In an attached work capacity evaluation, he advised that appellant had reached maximum medical improvement and could not return to his previous employment but could work eight hours a day with restrictions of no pushing or pulling continuously for more than two hours, no ladder work and a weight restriction of 50 pounds. Dr. Worobec stated that appellant should be very careful not to cause blisters or skin damage to the left index finger.

In September 2009, OWCP referred appellant to Arlene Gibble, a vocational rehabilitation counselor. In an October 26, 2009 report, Ms. Gibble noted that he had a bachelor degree in economics and had retired as a county purchasing agent. Appellant then began intermittent employment with the employing establishment. He began receiving social security retirement benefits in November 2009. By letter dated November 18, 2009, appellant informed OWCP that he would not accept any job that compromised the standards and opinions set forth by his physicians, *i.e.*, maintaining the highest degree of skin integrity in order to prevent another MRSA infection. He further noted that he had been diagnosed with degenerative disc disease with severe back pain and numbness in his left leg.

On November 19, 2009 Ms. Gibble identified the positions of outside deliverer and general clerk as within the light strength category, with occasional lifting of 20 pounds. She advised that, based on May 2008 data from Lycoming County, Pennsylvania, the positions were reasonably available in the local labor market at entry level annual wages of $19,230.00 and $18,160.00 respectively. Appellant began a job search in December 2009, continuing through May 2010.

In a July 12, 2010 report, Dr. Worobec reiterated the findings and conclusions of his June 15, 2009 report.

By letter dated September 8, 2010, OWCP proposed to reduce appellant's compensation benefits based on his capacity to earn wages as a general clerk. It noted that both Dr. Bell and Dr. Worobec found that appellant could return to full-time work and that the general clerk position was within the permanent restrictions identified by Dr. Worobec. OWCP further noted

that the labor market survey prepared by Ms. Gibble indicated that the position was reasonably available in the local labor market at a weekly wage of $349.23.[4]

In correspondence dated September 13, 2010, appellant disagreed with the proposed reduction, stating that Dr. Hampton advised that working with paper, staples, clips, handling money, being bruised by office furniture, left him vulnerable to skin cuts and potential infection. He notified potential employers of the responsibility they would be taking if he contracted MRSA while on the job and none would accommodate him.

By decision dated February 7, 2011, OWCP reduced appellant's compensation benefits based on his capacity to earn wages as a general clerk, which yielded a 30 percent loss of wage-earning capacity.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[5] 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.[6]

Section 8115 of FECA and OWCP regulations provide 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.[7]

OWCP must initially determine a claimant's medical condition and work restrictions before selecting an appropriate position that reflects his or her wage-earning capacity. The medical evidence upon which OWCP relies must provide a detailed description of the condition.[8]

[4] The general clerk position duties were described as: writes, types or enters information into computer to prepare correspondence, bills, statements, receipts, etc.; sorts and files records; answers telephone; opens and distributes mail. It has a light strength level with frequent physical demands of reaching, handling and fingering. Ms. Gibble stated that, based on May 2008 wage data, the occupation was to experience growth of 6.5 percent from 2006 to 2016.

[5] *James M. Frasher*, 53 ECAB 794 (2002).

[6] 20 C.F.R. §§ 10.402, 10.403; *John D. Jackson*, 55 ECAB 465 (2004).

[7] 5 U.S.C. § 8115; 20 C.F.R. § 10.520; *John D. Jackson, id.*

[8] *William H. Woods*, 51 ECAB 619 (2000).

Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.[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 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 that 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 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*,[11] as codified in section 10.403 of OWCP's regulations,[12] will result in the percentage of the employee's loss of wage-earning capacity.[13]

In determining an employee's wage-earning capacity based on a position deemed suitable, but not actually held, OWCP must consider the degree of physical impairment, including impairments resulting from both injury-related and preexisting conditions, but not impairments resulting from postinjury or subsequently acquired conditions. Any incapacity to perform the duties of the selected position resulting from subsequently acquired conditions is immaterial to the loss of wage-earning capacity that can be attributed to the accepted employment injury and for which appellant may receive compensation.[14]

ANALYSIS

The Board finds that OWCP met its burden of proof in reducing appellant's compensation on February 7, 2011 based on his capacity to earn wages in the constructed position of general clerk.

The medical evidence from Dr. Bell and Dr. Worobec, establishes that appellant was no longer totally disabled. OWCP properly referred him for vocational rehabilitation counseling in September 2009.[15] On November 19, 2009 the vocational rehabilitation counselor identified two positions that conformed to appellant's work restrictions. OWCP determined that he had the capacity to earn wages as a general clerk, based on the opinions of Dr. Bell and Dr. Worobec.

[9] *John D. Jackson, supra* note 6.

[10] *James M. Frasher, supra* note 5.

[11] 5 ECAB 376 (1953).

[12] 20 C.F.R. § 10.403.

[13] *James M. Frasher, supra* note 5.

[14] *John D. Jackson, supra* note 6.

[15] 5 U.S.C. § 8104(a); *see Ruth E. Leavy*, 55 ECAB 294 (2004).

Dr. Bell, an infectious disease specialist, advised that appellant could return to his full-duty position from an infectious disease standpoint and that further medical treatment was not needed. He stated that appellant's only physical limitation was a minimal decrease in flexion of his left index finger that did not interfere with grasping, lifting or pulling and that he essentially had full use of the hand. Dr. Bell concluded that this minimal limitation should not impact appellant's ability to work. In an attached work capacity evaluation, he advised that maximum medical improvement had been reached and that appellant could return to his usual job with no restrictions.

Dr. Worobec, an orthopedic surgeon, also advised that appellant had reached maximum medical improvement. While appellant could not return to his previous employment, he could work eight hours a day with restrictions of no pushing or pulling continuously for more than two hours and no ladder work, with a weight restriction of 50 pounds. Dr. Worobec indicated that the palmar surfaces of appellant's index finger were subject to blistering after prolonged heavy use and therefore he should avoid blisters or skin damage to the left index finger.

The general clerk position was classified as within the light strength category, with occasional lifting of 20 pounds. It did not require prolonged heavy work. Ms. Gibble, the vocational rehabilitation counselor, found that the position was reasonably available in the local labor market with an entry level annual wage of $18,160.00.

Appellant disagreed with the proposed reduction, asserting that Dr. Hampton advised that working with paper, staples, clips, handling money, being bruised by office furniture, left him vulnerable to skin cuts and potential infection. On October 16, 2008 Dr. Hampton merely advised that appellant should not be involved in any duties that could result in increased risks for incidental abrasion of his skin. She did not state that he was disabled for work or prohibit work with paper, staples, clips and money. Dr. Hampton merely provided prophylactic precautions as appellant was at risk for MRSA infections. As both Dr. Bell and Dr. Worobec provided comprehensive, well-rationalized opinions, their opinions constitute the weight of the medical evidence that appellant could return to work within the restrictions of the general clerk position.

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 general clerk represented his wage-earning capacity.[16] The evidence of record establishes that he 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 general clerk reflected appellant's wage-earning capacity and using the *Shadrick* formula,[17] properly reduced his compensation on February 7, 2011.[18]

[16] *James M. Frasher, supra* note 5.

[17] *Supra* note 11.

[18] *James Smith*, 53 ECAB 188 (2001).

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 met its burden to justify reduction of appellant's wage-loss compensation on the grounds that he had the capacity to earn wages in the constructed position of general clerk.

ORDER

IT IS HEREBY ORDERED THAT the February 7, 2011 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: January 20, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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