United States Department of Labor
Employees' Compensation Appeals Board

E.C., Appellant	)	
and	)	**Docket No. 11-1329**
	)	**Issued: January 5, 2012**
DEPARTMENT OF THE NAVY,	)	
Port Hueneme, CA, Employer	)	

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 May 10, 2011 appellant filed a timely appeal from a March 3, 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 properly reduced appellant's compensation under 5 U.S.C. § 8115 on the grounds that his wage-earning capacity was represented by the selected positions of customer complaint clerk or information clerk.

FACTUAL HISTORY

OWCP accepted that appellant sustained the following injuries on February 5, 1998 after lifting and pulling boxes: chronic cervical sprain, lumbar sprain, lumbar spinal stenosis, cervical disc degeneration, lumbar disc degeneration and herniated cervical disc without myelopathy.

[1] 5 U.S.C. § 8101 *et seq.*

The record lists that he had six prior accepted claims for injuries through October 1995. Appellant stopped working in November 1998 and received compensation for wage loss.

OWCP referred appellant for a second opinion evaluation by Dr. Aubrey Swartz, an orthopedic surgeon.[2] In a report dated May 29, 2008, Dr. Swartz stated that appellant's low back problems began in 1987 and he sustained a temporary aggravation on February 5, 1998. He indicated that appellant was disabled due to his nonindustrial conditions.

By letter dated November 18, 2008, OWCP advised appellant that he was being referred for a referee examination.[3] In a report dated December 16, 2008, Dr. Mark Rosen, a Board-certified orthopedic surgeon, provided a history and results on examination. He noted that the past medical history included coronary artery disease with coronary artery bypass surgeries, hypertension, borderline diabetes, bilateral knee surgeries and three back surgeries. Dr. Rosen stated that total disability referable to the February 1998 injuries ceased one month after cervical spine surgery.[4] He completed an OWCP-5 form report providing work restrictions that included a 10-pound lifting restriction. Dr. Rosen stated that appellant had nonindustrial conditions that would likely keep him from performing any work.

In a letter dated January 28, 2009, OWCP requested an additional report from Dr. Rosen. It requested that he clarify his opinion on employment-related residuals. In a report dated February 2, 2009, Dr. Rosen indicated that appellant continued to have residuals of an August 13, 1987 employment injury to his back. He submitted an OWCP-5c form with the same restrictions as noted in the December 16, 2008 OWCP-5c form.

Appellant was referred for vocational rehabilitation services. On November 6, 2009 a rehabilitation counselor prepared job classification CA-66 forms for the positions of information clerk (Department of Labor, *Dictionary of Occupational Titles (DOT)* No. 237.367-022) and customer complaint clerk (*DOT* No. 241.367-014). Both positions were reported as sedentary with occasional lifting of 10 pounds. The weekly wage was found to be $425.00.

Pursuant to vocational rehabilitation, appellant underwent a training course. On October 1, 2010 the rehabilitation counselor again completed CA-66 forms for the above clerk positions.

In a report dated October 12, 2010, Dr. Rosen stated that he had reviewed medical records and job descriptions provided. He stated that, based on the records and his previous examination, appellant "should not be capable of performing either the duties described as information or customer complaint clerk." Dr. Rosen submitted an OWCP-5c report repeating his prior work restrictions. He stated on the form report "can perform as clerk."

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[2] FECA provides that an employee shall submit to an examination by a physician designated or approved by the Secretary of Labor as frequently and at the times and places as may reasonably be required. 5 U.S.C. § 8123(a).

[3] A medical conflict statement dated September 9, 2008 reported that an attending physician, Dr. Bienvenido Reyes, had opined that appellant was totally disabled. The last report in the record from Dr. Reyes is a February 2, 2005 Form OWCP-5c (work capacity evaluation) checking a box "no" regarding appellant's capacity to work eight hours per day.

[4] Appellant underwent a cervical discectomy and fusion on March 23, 1999.

By letter dated December 10, 2010, OWCP requested clarification from Dr. Rosen. In a report dated January 21, 2011, Dr. Rosen stated that appellant "should be capable of performing either the duties described as information or customer complaint clerk."

In a letter dated February 1, 2011, OWCP advised appellant that it proposed to reduce his compensation. It stated that he had the capacity to earn wages as customer complaint clerk and/or as an information clerk. With respect to medical evidence, OWCP stated that Dr. Rosen had examined appellant on September 8, 2009 and the selected positions were within his work restrictions. Appellant was provided 30 days to respond if he disagreed with the proposal.

By decision dated March 3, 2011, OWCP reduced appellant's compensation based on his capacity to earn wages as either a customer complaint clerk or information clerk at $400.00 per week.

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 in such benefits.[5]

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 his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, his degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment, and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.[6]

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, *Dictionary of Occupational Titles* or otherwise available in the open market, that fits the 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 labor market should be made through contact with the state employment service or other applicable service.[7] 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.[8]

The Board notes that it is well established that a wage-earning capacity determination must be based on a reasonably current medical evaluation.[9] OWCP cannot properly determine

[5] *Carla Letcher*, 46 ECAB 452 (1995).

[6] *See Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); *see also* 5 U.S.C. § 8115(a).

[7] *See Dennis D. Owen*, 44 ECAB 475 (1993).

[8] 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.303.

[9] *Carl C. Green, Jr.*, 47 ECAB 737, 746 (1996).

appellant's wage-earning capacity without a detailed current description of her condition and ability to perform work.[10]

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 post injury or subsequently acquired conditions.[11]

ANALYSIS

In this case, OWCP made a determination that the selected clerk positions[12] were medically suitable based on reports from Dr. Rosen. The medical evidence from Dr. Rosen, however, is of diminished probative value on this issue.

The Board notes that, while OWCP selected Dr. Rosen as a referee physician to resolve a conflict under 5 U.S.C. § 8123(a),[13] there was no existing conflict. The second opinion physician, Dr. Swartz, had submitted a report dated May 29, 2008 regarding appellant's condition. At that point the last report from an attending physician was a form report dated February 2, 2005 indicating that appellant was then totally disabled. There was no current disagreement and Dr. Rosen is therefore a second opinion physician.[14]

The examination by Dr. Rosen was on December 16, 2008.[15] In a brief October 12, 2010 report, Dr. Rosen stated that he had reviewed medical records and reiterated the work restrictions previously reported on the date of examination. This is not a case where an attending physician continued to provide follow-up examinations but kept the same work restrictions.[16] Dr. Rosen examined appellant on December 16, 2008 and there were no further examinations.

The October 12, 2010 report is a brief report that states appellant could not perform the selected positions. The January 21, 2011 report is similar but states that appellant should be able to perform the positions, without further explanation. This inconsistency was not resolved. Dr. Rosen stated that he reviewed medical records, but he did not discuss any specific medical

[10] *See Anthony Pestana*, 39 ECAB 980 (1988); *Samuel J. Russo*, 28 ECAB 43 (1976) (medical reports submitted two years prior to the wage-earning capacity determination were not sufficient to establish appellant's current work capacity).

[11] *John D. Jackson*, 55 ECAB 465 (2004).

[12] It is unclear why OWCP chose two positions. The well-established procedure for a wage-earning capacity under 5 U.S.C. § 8115 based on a position selected from the Department of Labor, *Dictionary of Occupational Titles* is to choose one position.

[13] FECA provides that, if there is a 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 the examination. 5 U.S.C. § 8123(a).

[14] *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

[15] OWCP incorrectly stated in its February 1, 2011 proposed reduction of compensation that the examination was September 8, 2009.

[16] *See M.A.*, 59 ECAB 624 (2008).

evidence of record. A medical opinion as to disability must include consideration of preexisting conditions, as noted above. Dr. Rosen had noted numerous "nonindustrial" conditions in his evaluation and indicated that appellant would be totally disabled from these conditions. To the extent that these conditions were preexisting, they must be considered in any determination of disability. It is not clear that Dr. Rosen's opinion as to disability took into consideration preexisting conditions.

The Board finds that OWCP did not properly establish that the selected positions were medically suitable. The January 21, 2011 report is of diminished probative value with respect to appellant's ability to perform the duties of the selected positions. It is OWCP's burden of proof on this issue, and the Board finds OWCP did not meet its burden of proof in this case.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to reduce appellant's compensation under 5 U.S.C. § 8115.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 3, 2011 is reversed.

Issued: January 5, 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