United States Department of Labor
Employees' Compensation Appeals Board

B.F., Appellant	)	
and	)	**Docket No. 12-466**
	)	**Issued: July 13, 2012**
DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, Fort Dix, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 29, 2011 appellant, through his attorney, filed a timely appeal from an October 12, 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 determined that appellant's wage-earning capacity was represented by the selected position of computer support specialist.

FACTUAL HISTORY

On May 1, 2006 appellant, then a 27-year-old correctional officer, filed a traumatic injury claim (Form CA-1) alleging that on April 20, 2006 he sustained injuries when he slipped and fell on his left side while running in the performance of duty. OWCP accepted the claim for left

[1] 5 U.S.C. § 8101 *et seq.*

shoulder and hip sprains, lumbar sprain and lumbar radiculopathy. Appellant underwent L4-5 fusion surgery on February 6, 2007 and received compensation for wage loss.

OWCP referred appellant for a second opinion examination by Dr. Zohar Stark, an orthopedic surgeon. In a report dated July 26, 2007, Dr. Stark opined that appellant remained disabled for his date-of-injury position and further opined that appellant was "totally disabled from any work." He completed a work capacity evaluation (OWCP-5c) indicating no lifting, pushing or pulling.

In a report dated December 6, 2007, Dr. Stark stated that it appeared appellant was suffering from a failed back syndrome with disabling residuals from the April 20, 2006 work injury. He completed an OWCP-5c indicating appellant could work three hours a day sitting, walking or standing, with a 10-pound lifting restriction.

Appellant was referred for vocational rehabilitation services. In a report dated July 9, 2009, Dr. Jeffrey Pollack, an attending internist, stated that appellant remained disabled due to chronic lumbar pain, including a lumbar laminectomy and ongoing radicular symptoms following this procedure.

OWCP again referred appellant for a second opinion examination. In a report dated December 3, 2009, Dr. Robert Draper, Jr., a Board-certified orthopedic surgeon, provided a history and results on examination. He diagnosed herniated L4-5 disc, status post decompression laminectomy. Dr. Draper indicated that appellant had a permanent partial disability related to the work injury and he could work in a job with 50 pounds occasional lifting and 25 pounds frequent lifting.

By letter dated March 4, 2010, appellant's representative indicated that appellant had obtained a part-time, temporary job with a private corporation. In an undated statement, appellant indicated the position would end in May 2010.

On September 17, 2010 a vocational rehabilitation counselor prepared a job classification (Form CA-66) for the position of computer support specialist (Department of Labor, *Dictionary of Occupational Titles (DOT)*) No. 039.264-010. The job was described as a medium strength level position, available in appellant's commuting area, with wages of $855.57 per week. The counselor noted that appellant had received computer training. In a letter dated December 7, 2010, the employing establishment indicated that the current salary for the date-of-injury position was $55,405.00 annually.

By letter dated January 19, 2010, OWCP advised appellant that it proposed to reduce his compensation based on his capacity to earn wages as a computer support specialist. In a decision dated March 3, 2011, it determined that the selected position of computer support specialist represented his wage-earning capacity.

Appellant requested a hearing before an OWCP hearing representative, which was held on July 21, 2011. In a report dated February 11, 2011, Dr. Pollack stated that he had been treating appellant since 2006 and he had reviewed his treatment notes. He indicated that he had also reviewed Dr. Draper's report. Dr. Pollack stated, "[Appellant] certainly is disabled for his prior occupation completely. In a sedentary setting, he might do but he would require frequent

repositioning and would have a certain amount of chronic discomfort in the back which may not be beneficial for the patient's well being and also may make the back worse. Hence, I respectfully disagree with Dr. Draper's conclusion that [appellant] is able to be working full-time in a sedentary environment at this time." In a duty status report (Form CA-17) dated February 9, 2011, Dr. Pollack reported that appellant could work four to five hours per day with a 10-pound lifting restriction.

By decision dated October 12, 2011, the hearing representative affirmed the March 3, 2011 decision. The hearing representative found that Dr. Pollack "provided no actual examination findings or medical rationale to establish an objective worsening of the claimant's accepted conditions or a decrease in his physical abilities since he was released to full-time work in 2007." In addition, the hearing representative found Dr. Pollack's report was speculative and a fear of future injury is not compensable. According to the hearing representative, Dr. Draper represented the weight of the medical evidence. In addition, the hearing representative found part-time actual earnings were inappropriate for wage-earning capacity as medical evidence showed appellant could work full time.

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.[2] 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.[3]

When OWCP makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an OWCP 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.[4] 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.[5]

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

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

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

[5] 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.403.

ANALYSIS

With respect to whether appellant was physically able to perform the selected position of computer support specialist, OWCP found that Dr. Draper, the second opinion physician, represented the weight of the medical evidence. Dr. Draper indicated that the only work restrictions were 50 pounds lifting occasionally and 25 pounds frequently. The selected position is a "medium" strength level position, which has a limitation of 50 pounds occasionally and 25 pounds frequently.

The hearing representative found the February 11, 2011 report from attending physician Dr. Pollack was of diminished probative value. According to the hearing representative appellant was "released to full duty" in 2007 and Dr. Pollack did not establish an "objective worsening" of his employment-related condition. The record does not establish that appellant was released to full duty in 2007. Dr. Stark, a second opinion physician, did not indicate that appellant could work full time in 2007, and his work restrictions were clearly not within the selected position's physical requirements. Moreover, it is not appellant's burden to show an objective worsening of his condition. It is OWCP that has the burden to show that appellant can perform the physical requirements of the selected position.

Dr. Pollack indicated that he had treated appellant for several years, had reviewed his notes and Dr. Draper's report. There is no indication that his opinion was based on an insufficient background. Dr. Pollack offered an unequivocal opinion that appellant could not work a full-time position and the stated work restrictions, provided in a Form CA-17, were not within the requirements of the selected position. This is not a case of a restriction based solely on fear of future exposure to environmental factors at work.[6]

The Board accordingly finds that Dr. Pollack provided a probative medical opinion that was in disagreement with the second opinion physician Dr. Draper. Under FECA, 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.[7] OWCP should have resolved the conflict in the medical evidence. It is OWCP's burden of proof to reduce compensation, and OWCP failed to meet its burden in this case.

CONCLUSION

The Board finds that OWCP did not properly determine that appellant's wage-earning capacity was represented by the selected position of computer support specialist.

[6] *See Gaetan F. Valenza*, 39 ECAB 1349 (1988) (the claimant's temporary aggravation of asthma had resolved, and medical evidence indicating possible reaggravation on return to work did not establish a continuing employment-related disability).

[7] 5 U.S.C. § 8123.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 12, 2011 is reversed.

Issued: July 13, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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