

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

G.G., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
San Francisco, CA, Employer**

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**Docket No. 11-1081
Issued: June 1, 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 March 21, 2011 appellant filed a timely appeal from the September 24, 2010 and March 17, 2011 merit decisions of the Office of Workers' Compensation Programs (OWCP) affirming that the constructed position of legal secretary represented his wage-earning capacity. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether OWCP met its burden of proof to reduce appellant's disability compensation effective August 31, 2008 on the grounds that he had the capacity to earn wages in the selected position of legal secretary; and (2) whether appellant met his burden of proof to establish modification of wage-earning capacity determination.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 22, 2001 appellant, then a 46-year-old letter carrier, filed an occupational disease claim due to lifting heavy loads, twisting and reaching. OWCP accepted his claim for aggravation of cervical degenerative disc disease and paid total disability compensation.² In a June 30, 2005 second opinion examination report, Dr. John R. Chu, a Board-certified orthopedic surgeon, stated that appellant's condition was permanent and imposed the following work restrictions: lifting objects weighing up to 25 pounds for four hours, pushing and pulling objects weighing up to 40 pounds for four hours and reaching above shoulder level on occasion. The employing establishment declined to offer him a job within these restrictions.

OWCP referred appellant to Sandra Schuster, a vocational rehabilitation counselor, on May 15, 2006. After conducting vocational testing and labor market surveys, Ms. Schuster assessed that he could obtain full-time employment as either a paralegal or legal secretary as both positions were reasonably available within his commuting area. She enumerated the job functions of a legal secretary as outlined in the Department of Labor, *Dictionary of Occupational Titles*:

“[DOT No. 201.362-010].... Prepares legal papers and correspondence of legal nature such as summonses, complaints, motions and subpoenas using typewriter, word processor or personal computer. May review law journals and other legal publications to identify court decisions pertinent to pending cases and submit articles to company officials.”

Ms. Schuster also cited the Department of Labor, *Dictionary of Occupational Titles*' description of a paralegal's duties. Regarding the physical demands, she noted that the paralegal and legal secretary positions were classified as “light” and “sedentary,” respectively. Because appellant lacked transferable job skills, Ms. Schuster advised that he undergo retraining.

An August 7, 2006 memorandum from Mickey Deveny, a rehabilitation specialist, recommended that OWCP approve Ms. Schuster's vocational rehabilitation plan. He specified that the sedentary legal secretary position was suitable in view of Dr. Chu's work restrictions as a sedentary job, under the Department of Labor, *Dictionary of Occupational Titles*, entailed exertion of 10 pounds of force “occasionally” and a negligible amount of force “frequently” to lift, carry, push, pull or otherwise move objects as well as brief periods of walking or standing.³ Physical requirements were also noted for a paralegal. OWCP approved the plan on August 8, 2006.

² Appellant worked intermittently from October 28, 2002 to November 19, 2004, first as a data conversion operator and then as a modified letter carrier. The employing establishment abolished the former effective August 21, 2004. Also, on April 21, 2006, OWCP determined that the job duties of a modified letter carrier were not suitable as it exceeded appellant's work limitations. Appellant also filed an October 5, 1998 occupational disease claim that OWCP accepted for a cervical strain. OWCP combined the two claims.

³ Department of Labor, *Dictionary of Occupational Titles* defines work activities that are conducted “occasionally” as those performed up to one-third of the time, “frequently” as those performed between one-third and two-thirds of the time and “constantly” as those performed two-thirds or more of the time.

In an August 31, 2006 duty status report, Dr. Jerel H. Glassman, appellant's attending osteopath and a Board-certified physiatrist, limited lifting to objects weighing up to 10 pounds and prohibited pulling, pushing and reaching above shoulder level. He advised in a November 29, 2006 report, that appellant was enthusiastic about vocational retraining.

Appellant enrolled in a paralegal studies certificate program at San Francisco State University starting August 29, 2006. He completed the course on December 21, 2007 and job placement services commenced on January 2, 2008. From January 3 to March 10, 2008, appellant was interviewed but did not receive any offer of employment.

In a February 19, 2008 report, Dr. Glassman related that appellant had periodic left arm pain. On examination, he observed C5-6 and C6-7 segmental motion restriction to side bending. A magnetic resonance imaging (MRI) scan showed severe foraminal stenosis and degenerative changes of the lower cervical spine. Dr. Glassman diagnosed cervical degenerative disc disease and radiculopathy associated with appellant's former employment as a letter carrier. He pointed out that appellant had recently completed vocational training and was looking for work that would accommodate his restrictions on repetitive cervical spine movements. Dr. Glassman marked the "yes" box in a February 19, 2008 work capacity evaluation form that appellant could work full time with permanent restrictions. He limited lifting to objects weighing 10 pounds or less and walking, standing, driving and repetitive wrist and elbow movements to one hour each. Dr. Glassman prohibited any reaching, pushing, pulling, squatting, kneeling, climbing, twisting and bending.

On March 6, 2008 OWCP asked Dr. Glassman to address appellant's ability to perform the physical demands of the jobs for which he was trained in light of his accepted aggravation of cervical degenerative disc disease. It specifically requested Dr. Glassman to review the position descriptions and opine whether such positions were appropriate.

Vocational rehabilitation and job development records from March 8 to May 23, 2008 indicated that appellant, who primarily searched for vacancies online, was unwilling to use the telephone to "cold call" potential employers. Ms. Schuster specified in a May 23, 2008 report:

“[Appellant] must be more assertive on his own behalf. I have again focused with him [on] the need to do more networking to reach into the community, to return [tele]phone calls and make [tele]phone calls. [Appellant] is very reluctant to pick up the [tele]phone. When we call him at home, he lets it ring, takes a message and then responds by e[-]mail. This has been an ongoing problem. [Appellant] is apparently very shy which will not serve him well in the job search.”

Kate Frazier, a job developer, added:

“The most difficult aspect of my work with [appellant] has been his reluctance to use the [tele]phone.... Though the [tele]phone issue has been a challenge from the start, it became a major problem during the past couple of weeks. Case in point: the employer who has shown the most interest in interviewing him was not able to reach him by [tele]phone, though several [tele]phone messages were left for him.”

Appellant was scheduled for an interview with a law firm on May 28, 2008. In May 29 and June 4, 2008 rehabilitation reports, Ms. Schuster detailed that he cancelled the interview on account of a back condition and failed to reschedule. This led the hiring coordinator to withdraw appellant's application from consideration due to his unreliability and lack of interest. Ms. Schuster concluded that continuing the job search "would be a waste of time, effort and money." Placement services expired on June 2, 2008.

On June 3, 2008 Ms. Schuster confirmed that appellant was vocationally qualified to work as a legal secretary and that positions were reasonably available in his commuting area. She advised that the weekly wage for a legal secretary was \$720.00 based on the job search effort from January 2 to June 2, 2008.

By letter dated July 16, 2008, OWCP notified appellant of its proposal to reduce his compensation benefits from total disability to partial disability because he had the capacity to earn wages as a legal secretary at a rate of \$720.00 per week.

Appellant asserted in a July 21, 2008 statement that the constructed position of legal secretary did not properly reflect his wage-earning capacity because he was retrained as a paralegal. Moreover, five months of job placement services were woefully insufficient to find an entry-level paralegal opening during an economic recession. Appellant attached a job search log listing 347 prospective employers to whom he submitted a resume from December 2, 2007 to May 20, 2008.

By decision dated August 21, 2008, OWCP finalized the reduction of compensation benefits effective August 31, 2008.⁴

Appellant requested an oral hearing, which was held on March 30, 2009. He testified that the labor market surveys conducted by Ms. Schuster in 2006 inaccurately portrayed the availability of entry-level paralegal and legal secretary positions. Furthermore, many vacancies listed heavy lifting as a job requirement. Appellant contended that his total disability compensation should be restored since he passed the paralegal studies certificate program, actively participated in his job search and was fully cooperative throughout the vocational rehabilitation process.

On September 15, 2009 OWCP's hearing representative affirmed the August 21, 2008 decision.

Appellant requested reconsideration on September 19, 2009 on the basis that the decision issued by OWCP's hearing representative was "filled with errors, misstatements and unsubstantiated claims." OWCP denied modification of the September 15, 2009 decision on December 22, 2009.

⁴ OWCP acknowledged that appellant was trained as a paralegal and stated that its use of the legal secretary position to represent his wage-earning capacity "was simply a construct, intended to represent a series of positions with similar duties and pay rates that are available in the selected field: one trained as a paralegal would certainly be capable of filling a number of positions in the legal field (legal assistant, legal aid, legal secretary, et al.)."

A January 5, 2010 MRI scan obtained by Dr. Murali Ranjithan, a Board-certified diagnostic radiologist, exhibited multilevel disc bulges, particularly at C5-6 and C6-7 and neural foraminal narrowing.

Appellant requested reconsideration on June 26, 2010. He argued that the job duties of a paralegal exceeded Dr. Glassman's recommended restrictions. Appellant provided a brochure of San Francisco State University's paralegal studies certificate program.

Dr. Glassman remarked in an April 26, 2010 report that appellant complained of neck stiffness and elbow symptoms related to his paralegal studies training. He observed bilateral elbow tenderness on examination. Dr. Glassman diagnosed cervical degenerative disc disease, cervical radiculopathy and chronic bilateral elbow tendinitis. In April 26, 2010 duty status and attending physician's reports, he explained that appellant's new condition arose in November 2007 "while training for legal assistant." Dr. Glassman restricted continuous and intermittent grasping and fine manipulation.⁵

On September 24, 2010 OWCP denied modification of the December 22, 2009 decision.

Appellant requested reconsideration on November 20, 2010. He submitted an October 6, 2010 letter from Pat Medina, the director of San Francisco State University's paralegal studies certificate program, which stated:

"The sole purpose of our certificate is to educate students to work as paralegals. We have never been a legal secretary training program and never will be since that is a different type of legal training. In fact, many of our students have work experience as legal secretaries and chose our certificate program to upgrade their skills and receive job promotions."

In a February 17, 2011 report, Dr. Glassman reiterated that appellant experienced left arm and suboccipital neck pain. Based on the January 5, 2010 MRI scan, he diagnosed multilevel cervical disc disease and stenosis.

On March 17, 2011 OWCP denied modification of the September 24, 2010 decision.

LEGAL PRECEDENT -- ISSUE 1

FECA provides compensation for the disability of an employee resulting from an injury sustained while in the performance of duty. Disability, which may be partial or total, refers to an employee's incapacity to earn the wages that he or she had been receiving at the time of injury.⁶

Compensation for partial disability is payable as a percentage of the difference between the employee's pay at the time of injury and the employee's wage-earning capacity.⁷ According

⁵ Appellant filed an occupational disease claim for bilateral arm strains. The claim for this condition is not presently before the Board.

⁶ *W.B.*, Docket No. 09-934 (issued January 11, 2010).

⁷ *See* 20 C.F.R. § 10.404(b)-(c).

to section 8115(a) of FECA, the wage-earning capacity of an employee is generally determined by actual earnings. However, if actual earnings do not fairly and reasonably represent wage-earning capacity or if the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his or her usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances that may affect wage-earning capacity in his or her disabled condition.⁸

When OWCP makes a medical determination of partial disability and specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by OWCP or to an OWCP wage-earning capacity specialist for selection of a position, listed in DOT or otherwise available in the open labor 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 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*⁹ will result in the percentage of the employee's loss of wage-earning capacity. The job selected for determining wage-earning capacity must be one that is reasonably available in the general labor market in the commuting area where the employee lives. OWCP may not select a makeshift or odd lot position or one not reasonably available on the open labor market.¹⁰

ANALYSIS -- ISSUE 1

OWCP accepted appellant's claim for aggravation of cervical degenerative disc disease and paid total disability compensation. In a June 30, 2005 second opinion examination report, Dr. Chu concluded that the condition was permanent and limited lifting to objects weighing up to 25 pounds for four hours, pushing and pulling to objects weighing up to 40 pounds for four hours and reaching above shoulder height. Dr. Glassman indicated on August 31, 2006 that appellant could lift objects weighing up to 10 pounds and prohibited pulling, pushing and reaching above shoulder level. In a February 19, 2008 work capacity evaluation form, he imposed stricter limitations that restricted walking, standing, driving and repetitive wrist and elbow movements to one hour each and proscribed reaching, pushing, pulling, squatting, kneeling, climbing, twisting and bending.

The employing establishment advised that it would not offer appellant a modified position. Thereafter, OWCP directed him to undergo vocational rehabilitation. Taking into account appellant's injury, physical limitations, prior experience and education, Ms. Schuster and Mr. Deveny selected two positions as suitable, including legal secretary, which is classified as a sedentary position requiring only occasional lifting up to 10 pounds. Following the completion of a paralegal studies certificate program at San Francisco State University, appellant participated in job placement services for the period January 2 to June 2, 2008, but was unable to

⁸ *N.J.*, 59 ECAB 171 (2007).

⁹ 5 ECAB 376 (1953).

¹⁰ *H.N.*, Docket No. 09-1628 (issued August 19, 2010).

obtain employment. As a result, OWCP reduced his compensation benefits to reflect partial disability.

The Board finds that the constructed position of legal secretary properly represents appellant's wage-earning capacity. According to Department of Labor, *Dictionary of Occupational Titles*, the legal secretary position is sedentary and entails lifting, carrying, pushing and pulling objects using 10 pounds of force up to one-third of the workday and a negligible amount of force between one-third and two-thirds of the workday as well as brief periods of walking or standing. These physical requirements do not exceed either Dr. Chu's 2005 or Dr. Glassman's 2006 restrictions. In addition, Department of Labor, *Dictionary of Occupational Titles* describes the duties of a legal secretary as primarily preparing legal documents and conducting legal research. While appellant did not initially possess the requisite job skills, he acquired them through his paralegal studies certificate program.¹¹ Finally, the labor market surveys conducted by Ms. Schuster established the weekly wage rate for a legal secretary and that full-time employment was reasonably available within his commuting area.¹² The fact that appellant did not successfully secure employment did not establish that the constructed position was not vocationally suitable.¹³

With respect to Dr. Glassman's February 19, 2008 work capacity evaluation, the Board has previously held that in determining a loss of wage-earning capacity where the residuals of an injury prevent an employee from performing his regular duties, the impairments which preceded the injury, in addition to the injury-related impairments, must be taken into consideration in the selection of a job within his work tolerance. Subsequently-acquired impairments unrelated to the injury, however, are excluded from consideration in the determination of work capabilities.¹⁴ Dr. Glassman's work capacity evaluation, which was provided after appellant completed the paralegal studies certificate program on December 21, 2007 and job placement services commenced on January 2, 2008, did not clearly address whether the stricter physical limitations he recommended resulted from the accepted aggravation of cervical degenerative disc disease, a preexisting injury or a subsequently-acquired impairment. Also, he did not indicate that appellant was unable to perform the duties of a legal secretary. On March 6, 2008 OWCP asked Dr. Glassman to clarify but the physician provided no response. Therefore, the evidence does not support that appellant was physically unable to perform the sedentary duties of a legal secretary at the time OWCP reduced his compensation. Consequently, OWCP met its burden of proof to reduce his disability compensation.

¹¹ The Board points out that Department of Labor, *Dictionary of Occupational Titles*' paralegal job description also identifies legal research and the preparation of legal documents as principal tasks.

¹² See *W.D.*, Docket No. 09-188 (issued August 21, 2009) (a vocational rehabilitation specialist is an expert in the field of vocational rehabilitation and OWCP may rely on his or her opinion as to whether the job is reasonably available and vocationally suitable).

¹³ *H.N.*, *supra* note 10. See also *W.D.*, *id.* (in determining that a selected position was reasonably available to a claimant within his or her commuting area, there is no guarantee there would be many openings for the position at any particular time, only that there were enough people performing that job that positions could be expected to open up from time to time, making it reasonably available in the open market).

¹⁴ *James Henderson, Jr.*, 51 ECAB 268 (2000); *William Ray Fowler*, 31 ECAB 1817 (1980).

LEGAL PRECEDENT -- ISSUE 2

It is well established that either a claimant or OWCP may seek to modify a formal loss of wage-earning capacity determination. Once the wage-earning capacity of an injured employee is established, a modification is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was, in fact, erroneous. The burden of proof is on the party attempting to show a modification. There is no time limit for appellant to submit a request for modification of a wage-earning capacity determination.¹⁵

ANALYSIS -- ISSUE 2

Appellant contends on appeal that the original loss of wage-earning capacity determination was, in fact, erroneous because OWCP trained him as a paralegal and that his physician's restrictions do not allow him to work as a paralegal. However, OWCP rated wage-earning capacity based on his ability to work as a legal secretary, not as a paralegal. The fact that appellant received paralegal training does not preclude OWCP from basing its wage-earning capacity determination on his ability to earn wages as a legal secretary so long as he is vocationally and medically qualified for such a position. As explained, the case record shows that he is qualified to work as a legal secretary. Furthermore, appellant did not assert that he was subsequently retrained or otherwise vocationally rehabilitated.

Appellant alternatively argues that the loss of wage-earning capacity determination should be modified because he experienced a material change in the nature and extent of his employment injury. In April 26, 2010 reports, Dr. Glassman imposed limitations that proscribed wrist motion and other hand-intensive activities and diagnosed bilateral elbow tendinitis. However, he attributed appellant's new condition to his paralegal studies training. Dr. Glassman's opinion regarding appellant's increased physical restrictions was of diminished probative value because they were not related to the accepted cervical condition or a preexisting condition.¹⁶ The remaining medical records submitted, namely Dr. Ranjithan's January 5, 2010 MRI scan and Dr. Glassman's February 17, 2011 report, did not offer an opinion on the matter.¹⁷ In the absence of evidence demonstrating a material change in the nature and extent of the accepted cervical condition, appellant did not meet his burden of proof.

The Board notes that appellant submitted new evidence after issuance of the March 17, 2011 decision. The Board lacks jurisdiction to review evidence for the first time on appeal.¹⁸ However, appellant may request modification of the wage-earning capacity determination, supported by any new evidence or argument, at any time before OWCP.

¹⁵ *F.B.*, Docket No. 10-99 (issued July 21, 2010); *W.W.*, Docket No. 09-1934 (issued February 24, 2010).

¹⁶ *See T.M.*, Docket No. 08-975 (issued February 6, 2009).

¹⁷ *J.F.*, Docket No. 09-1061 (issued November 17, 2009); *S.E.*, Docket No. 08-2214 (issued May 6, 2009).

¹⁸ 20 C.F.R. § 501.2(c).

CONCLUSION

The Board finds that OWCP met its burden to reduce appellant's disability compensation. The Board also finds that he did not meet his burden to establish modification of wage-earning capacity determination.

ORDER

IT IS HEREBY ORDERED THAT the March 17, 2011 and September 24, 2010 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 1, 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