

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

M.Y., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
New Orleans, LA, Employer**

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**Docket No. 12-125
Issued: June 18, 2012**

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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 2, 2011 appellant filed an appeal from a July 1, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 this case.

ISSUE

The issue is whether OWCP properly reduced appellant's compensation on the grounds that the selected position of billings clerk represented her wage-earning capacity.

FACTUAL HISTORY

On July 14, 1999 appellant, then a 40-year-old letter carrier, injured her neck when putting mail in a mailbox. She turned her neck and heard it pop. OWCP accepted appellant's claim for cervical sprain, degeneration of cervical intervertebral disc, and anxiety and paid

¹ 5 U.S.C. § 8101 *et seq.*

appropriate benefits. Appellant stopped work on September 29, 1999 and returned to limited-duty work on October 5, 1999. She was a term employee when hired and her term expired on December 30, 1999. Appellant did not return to work after her term expired on December 30, 1999. She was eventually placed on the periodic compensation rolls.

In an April 24, 2008 report, Dr. Donald Mauldin, a Board-certified orthopedic surgeon and second opinion physician, reviewed appellant's medical records together with an updated statement of accepted facts and presented findings on examination. He listed an impression of status post cervical strain with chronic subjective cervical radicular-type symptomatology. Dr. Mauldin found that appellant could work an eight-hour day doing lighter type of work activities within permanent restrictions.

Dr. Samuel J. Alianell, a Board-certified psychiatrist and appellant's attending physician, found that appellant's work-related conditions were active and she could not work. Glenn J. Bricken, Ph.D., appellant's clinical psychologist, advised that she had chronic pain and depression secondary to her pain and financial stress.

OWCP found a conflict in medical opinion between Dr. Alianell and Dr. Mauldin as to appellant's work capabilities and restrictions. Appellant was referred to Dr. John DeBender, a Board-certified orthopedic surgeon, for an impartial medical evaluation. In a November 12, 2008 report, Dr. DeBender provided examination findings and an impression of cervical strain superimposed on degenerative changes. He stated that there was no evidence on examination that appellant had any continuing objective changes that could be related to her July 14, 1999 work-related injury. Dr. DeBender indicated that appellant appeared to have had a cervical strain that may have aggravated underlying degenerative disc disease but found no indication of any nerve root irritation or radiculopathy present clinically and noted that the recent electromyogram by appellant's treating physician was normal in June of this year. He opined appellant could return to work eight hours a day with restrictions. In the attached work capacity evaluation, Dr. DeBender noted appellant was permanently restricted from: pushing, pulling and lifting greater than 20 pounds for one to two hours and no squatting, kneeling or climbing, reaching above the shoulder or bending/stooping. Appellant was also restricted to operating a motor vehicle no more than two hours at work.

In a December 10, 2008 letter, OWCP requested Dr. Bricken to provide an opinion on whether appellant's anxiety condition related to the cervical strain had resolved in light of Dr. DeBender's opinion. If appellant's anxiety condition related to the cervical sprain had not resolved, then Dr. Bricken was to render an opinion on whether appellant could return to work.

In a February 17, 2009 report, Dr. Bricken stated that appellant's anxiety state was directly related to the cervical sprain, but it was not totally disabling and she could return to restricted work duty. He opined that she was psychologically restricted from working in close proximity to small crowds and from working at night. In progress reports, Dr. Bricken advised that appellant suffered chronic pain and depression and anxiety secondary to pain but that she was able to return to work.

On July 6, 2009 appellant was referred to vocational rehabilitation services as the employing establishment was unable to provide employment. OWCP noted that the weight of

the evidence with regard to appellant's work restrictions rested with Dr. DeBender and Dr. Bracken.

On August 31, 2009 the vocational rehabilitation counselor performed a preliminary labor market survey report indicating that in conjunction with the August 18, 2009 transferable skills analysis report and other factors, appellant was vocationally and medically suited for the position of billing clerk with some type of refresher course in computers or billing.

On October 20, 2009 the vocational rehabilitation counselor identified the positions of receptionist Department of Labor's *Dictionary of Occupational Titles* (DOT) #237.367.038 and billing clerk (DOT #214.382.014) as being vocationally appropriate as they required four to six months specific vocational preparation and appellant had 10 years experience; both jobs fell within the light-duty category that appellant's work restrictions suggested and both jobs were performed in sufficient numbers so to make it reasonably available in appellant's commuting area. Target jobs required vocational training in the area of computer skills and/or medical billing. The job classification form (CA-66) for the identified position of billing clerk (DOT #214.382-014) describes the position as: complies date and types invoices and bills: Reads computer files or gathers records, such as purchase orders, sales tickets, and charge slips, to compile needed data. Enters information into computer or computes amounts due, using calculator. Types invoices, listing items sold, amounts due, credit terms, and dates of shipment, using typewriter or computer. It was described as a sedentary position which involved lifting no more than 10 pounds at a time. Weekly wage was listed as \$8.00 to \$20.00 per hour or \$320.00 to \$800.00 per week.

On December 11, 2009 OWCP approved an eight-week medical billing and coding certification training plan to enhance appellant's wage-earning capacity and employability. On December 15, 2009 it advised her that the prevocational training plan was approved and within her limitations.

On October 19, 2010 OWCP noted that appellant attended and successfully completed the medical billing training program.

In an October 19, 2010 letter to appellant, OWCP indicated that appellant would receive 90 days of job placement assistance. Appellant was also informed that, at the end of the 90-day period, FECA required that her compensation be reduced based on the wage-earning capacity of the selected position, even if she was not employed at that time. On November 15, 2010 appellant signed a job search plan indicating that she would pursue employment in the identified positions of billing clerk and hospital insurance clerk/coder.

On December 17, 2010 OWCP denied appellant's request for additional formal vocational training.

Appellant did not obtain any employment despite an extension of placement services. Vocational rehabilitation services were closed March 11, 2011.

By letter dated May 20, 2011, OWCP advised appellant of a proposed reduction in compensation on the grounds that she had the capacity to earn wages of \$320.00 per week as a billings clerk. It stated that the weight of the medical evidence was represented by Dr. Mauldin.

On May 26, 2011 the rehabilitation counselor submitted an updated Form CA-66 for the selected position of billing clerk. This reflected a weekly wage of \$424.80 and that the job was being performed in sufficient numbers in appellant's commuting area.

In a June 13, 2011 letter, appellant disagreed with the proposal to reduce her compensation due to the age of the medical evidence. She also noted that she had not worked in 10 years and potential employers were seeking people with at least one year experience in the medical billing and coding field. Appellant argued that certification in that area would make her more marketable and advised that a reduction in her compensation would cause additional mental stress.

In reports dated March 22 and May 10, 2011, Dr. Bricken opined that appellant had chronic pain, depression and anxiety secondary to pain, functional limitations and difficulty finding and applying for jobs. He also opined that there has been no change in appellant's condition and that she could return to work as soon as possible.

By decision dated July 1, 2011, OWCP reduced appellant's compensation effective July 3, 2011 on the grounds that she had the capacity to perform the duties of billing clerk. It found the evidence appellant provided was not sufficient to alter the recommendation to reduce her benefits.

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

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).

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

OWCP must initially determine appellant's medical condition and work restrictions before selecting an appropriate position that reflects her vocational wage-earning capacity. The Board has stated that the medical evidence upon which OWCP relies must provide a detailed description of her condition.⁶ Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.⁷

ANALYSIS

The July 1, 2011 wage-earning capacity determination was premised on appellant's ability to work full time as a billing clerk. The Board finds that OWCP failed to establish that the constructed billing clerk position reasonably represents her wage-earning capacity.

OWCP's July 1, 2011 determination that the constructed position of billing clerk was medically suitable was based on the April 12, 2008 report of Dr. Mauldin, a second opinion examiner. OWCP's reliance on Dr. Mauldin's report was in error. Dr. Mauldin was on one side of a conflict, regarding appellant's work capabilities and restrictions that Dr. DeBender was selected to resolve.⁸ OWCP did not explain why it did not rely on Dr. DeBender's opinion to resolve the conflict about appellant's work restrictions due to her orthopedic conditions.⁹ The Board has held that, to properly resolve a medical conflict, it is the impartial medical specialist who should provide a reasoned opinion that resolves the medical conflict.¹⁰ The Board will reverse the July 1, 2011 decision.

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

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

⁶ See *William H. Woods*, 51 ECAB 619 (2000); *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

⁷ See *M.A.*, 59 ECAB 624 (2008). See *Carl C. Green, Jr.*, 47 ECAB 737, 746 (1996) (six-month-old medical reports are reasonably current for purposes of wage-earning capacity determination); Cf. *Keith Hanselman*, 42 ECAB 680 (1991) (two-year-old medical report and year-old work restriction evaluation forms were not reasonably current for wage-earning capacity determination); *Anthony Pestana*, 39 ECAB 980 (1988) (three-year-old medical evaluation is not reasonably current for wage-earning capacity determination).

⁸ See 5 U.S.C. § 8123(a) (if there is 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 an examination).

⁹ OWCP also sought an opinion from Dr. Bricken, appellant's attending clinical psychologist, regarding appellant's ability to work based on her accepted anxiety condition. OWCP's May 20, 2011 proposed reduction and its July 1, 2011 wage-earning capacity decision do not indicate that it considered medical evidence regarding the anxiety condition in finding that appellant could perform the duties of the selected position.

¹⁰ See *Richard R. LeMay*, 56 ECAB 341 (2005).

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to reduce appellant's compensation on the grounds that she had the capacity to earn wages in the selected position of billing clerk because it relied on outdated medical evidence.

ORDER

IT IS HEREBY ORDERED THAT the July 1, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 18, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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