

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

E.F., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
New York, NY, Employer**

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**Docket No. 11-1268
Issued: March 13, 2012**

Appearances:
Paul Kalker, Esq., for the appellant
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 April 28, 2011 appellant, through his attorney, filed a timely appeal from a March 16, 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 effective October 13, 2010, based on his capacity to perform the duties of a maintenance supervisor.

FACTUAL HISTORY

Appellant, a 53-year-old electronic technician/mechanic, filed a Form CA-2 on December 23, 2007, alleging that he developed a back condition causally related to factors of employment. His regular duties included heavy machinery, pushing, pulling and lifting. Appellant

¹ 5 U.S.C. § 8101 *et seq.*

stated that his condition became fully disabling as of October 30, 2007. OWCP accepted the claim for cervical strain, cervical radiculopathy and lumbar strain. Appellant stopped work on October 30, 2007 and OWCP placed him on the periodic rolls.

In a May 21, 2008 report, Dr. Tafiq M. Azamy, a specialist in neurology and appellant's treating physician, stated that he examined appellant on January 18, 2008, at which time he had complaints of worsening neck pain radiating to the left arm and left hand, with numbness and tingling in his left arm. Appellant also was experiencing low back pain. Dr. Azamy advised that he planned to evaluate appellant to determine the feasibility of spinal surgery. He opined that appellant was moderately, partially disabled.

In order to determine appellant's current condition and his capacity for performing gainful employment, OWCP referred him to Dr. Frank Hudak, Board-certified in orthopedic surgery, for a second opinion examination. In a report dated June 25, 2008, Dr. Hudak stated that appellant had not reached status quo in regard to the accepted conditions of cervical radiculopathy and cervical sprain; appellant did reach status quo ante in regard to his accepted lumbar sprain. He asserted that appellant was not able to return to full duty without restrictions. Dr. Hudak noted that he underwent nerve testing, as well as a magnetic resonance imaging (MRI) scan, which showed spondylosis of the cervical spine and a left C6-7 herniated disc with left cervical radiculopathy.

Dr. Hudak found that appellant was not experiencing any residuals from any medical condition as a result of his work-related conditions. He stated, however, that appellant's work-related cervical condition had not resolved, as he had experienced an injury to his cervical spine superimposed on preexisting spondylosis. Dr. Hudak recommended that appellant be seen by a physician specializing in pain management and consider epidural injections to ameliorate his condition. Appellant was capable of performing light duty for eight hours a day with restrictions. Dr. Hudak reiterated that appellant had not reached maximum medical improvement; this would occur in the event that he declined epidural injections and surgery to the cervical spine.

On August 11, 2008 appellant underwent a functional capacity study administered by a physical therapist. The study demonstrated the capacity to tolerate sedentary work with the following restrictions: sitting, standing and walking not to exceed 60 minutes at one time; no forward bending; infrequent squatting; no lifting to shoulder or overhead levels and infrequent climbing.

In a supplemental report, Dr. Hudak reviewed the August 11, 2008 functional capacities study. Based on his examination and review of appellant's medical records, he agreed with the restrictions as outlined.

In progress reports dated August 13 and September 10, 2008, Dr. Azamy reiterated his previously stated findings and conclusions. He continued to opine that appellant was disabled in these and subsequent reports.

OWCP found a conflict in the medical opinion between Dr. Hudak and Dr. Azamy regarding appellant's capacity to perform a sedentary job. It referred him to Dr. Sounder R. Eswar, a Board-certified orthopedic surgeon, to resolve the conflict. In an October 27, 2008 report, Dr. Eswar stated that appellant showed no evidence of cervical torticollis, no tenderness

in the cervical spine or any muscle atrophy in the upper extremities. He advised that sensory examinations of the shoulder and cervical regions were essentially normal. Dr. Eswar stated:

“Patient has cervical spine arthritis associated with cervical radiculopathy affecting his left upper extremity. The patient’s cervical radiculopathy and arthritis is not a direct causation related to his employment. The cervical spine arthritis and radiculopathy could have been aggravated by his repeated occupation.”

On examination, appellant had no localized tenderness of the lumbar spine, with full range of motion and normal reflexes. Dr. Eswar opined that, while appellant was unable to perform his regular occupation, he was able to perform sedentary work for eight hours a day, five days a week with restrictions on strenuous activity, heavy lifting and overhead activities. He recommended that appellant avoid undergoing cervical spine surgery.

OWCP received two work capacity evaluation forms dated November 11, 2008 from Dr. Eswar, who outlined the following restrictions: walking and standing for no more than seven hours; reaching for no more than three hours; no reaching above the shoulder; bending or stooping for no more than six hours; no repetitive movements involving the wrists for more than four hours; no repetitive movements involving the elbows for more than six hours; no pushing, pulling or lifting more than 20 pounds; and no pushing, pulling, lifting, squatting, kneeling or climbing for more than two hours. The second work capacity evaluation form from Dr. Eswar listed the same restrictions, except that appellant was not able to perform any reaching above the shoulder.

Appellant was referred for vocational rehabilitation services. On April 15, 2009 a vocational specialist recommended a position for appellant listed in the Department of Labor, *Dictionary of Occupational Titles*, maintenance supervisor, DOT No. 891.137.010, which was within appellant’s indicated restrictions and reasonably reflected his ability to earn wages.² This recommendation was reiterated on May 9, 2010. The DOT job description noted that reaching, handling and fingering was performed by a maintenance supervisor on a frequent basis at least 1/3 to 2/3 of the time.

In a June 9, 2010 report, Dr. James A. Wolter, Board-certified in neurology, stated that appellant was scheduled to undergo cervical spine surgery on July 27, 2010. He advised that appellant’s condition had progressed to the point where surgery was necessary.

² The job description stated: “Building-maintenance supervisor, mechanical, building supervisor supervises and coordinates activities of workers engaged in maintaining and repairing physical structures and utility systems of buildings and maintaining grounds. Directs workers engaged in painting and performing structural repairs to masonry, woodwork, and furnishings and buildings and maintaining and repairing building utility systems, such as electrical wiring and controls, heating and ventilating systems, and water distributing and plumbing systems. Directs workers engaged in ground maintenance activities, such as mowing lawns, trimming hedges, removing weeds, and raking and disposing of leaves and refuse requisitions tools, equipment, and supplies inspects completed work for conformance to blueprints, specifications and standards. Performs other duties as described under supervisor. May supervise workers engaged in installing, servicing and repairing mechanical equipment.

In a July 26, 2010 report, Dr. Wolter reiterated that appellant was scheduled to undergo complex spine surgery on July 27, 2010, which he needed to prevent his condition from getting worse. The surgery, however, would not restore the function he had lost. Dr. Wolter opined that appellant would remain completely disabled.

In a September 2, 2010 notice of proposed reduction, OWCP advised appellant of its proposal to reduce his compensation because the evidence established he was no longer totally disabled but had the capacity to earn wages as a maintenance supervisor at the weekly rate of \$1,019.36 in accordance with 5 U.S.C. § 8115.³ Appellant's compensation rate would be adjusted to \$1,038.67 using the *Shadrick*⁴ formula. OWCP found that his current adjusted compensation rate, four-week period, was \$922.38. The case had been referred to a vocational rehabilitation counselor, who had located a position as a maintenance supervisor which he found to be suitable for appellant given his work restrictions. This notice also stated that the selected position required frequent to constant fingering, handling and reaching. It also noted that the position was available in appellant's commuting area. OWCP allowed appellant 30 days in which to submit any contrary evidence.

In an October 13, 2010 decision, OWCP reduced appellant's compensation to zero and terminated his compensation benefits effective October 13, 2010. It found that he had the capacity to earn wages as a maintenance supervisor and found that Dr. Eswar's impartial opinion represented the weight of the medical evidence.

Appellant submitted an October 24, 2010 report from Dr. Wolter, who performed an anterior cervical discectomy and fusion to repair a herniated disc at C6-7 on July 29, 2010. He stated that the proximate cause for the herniated disc was the trauma caused by appellant's use of a conveyer belt on October 30, 2007. This resulted in neck and left arm pain and weakness which failed to resolve with nonoperative treatment. Dr. Wolter disagreed with the opinion of Dr. Eswar, who had advised against cervical surgery. He asserted that appellant's condition had continued to deteriorate because with noticeable atrophy of the left arm during his evaluation of March 24, 2010. Dr. Wolter opined that appellant would reach maximum medical improvement as of July 2011 and found he was totally disabled.

In a November 11, 2010 report, Dr. Nathan Strandmark, an osteopath, stated that appellant had experienced severe pain and neurological symptoms since October 2007 that had progressed and worsened over time. Appellant underwent an MRI scan which showed disc disease at C6-7, for which Dr. Wolter performed surgery in July 2010. Dr. Strandmark disagreed with Dr. Eswar's findings. He stated that appellant had diminished strength in his upper extremities and did not believe he was capable of working at a sedentary job as a maintenance supervisor for eight hours a day, five days a week. This type of work would increase the amount of pain in his cervical spine and make a bad situation intolerable. Based on his examination and on several medical reports of record, Dr. Strandmark found appellant continued to be permanently disabled due to the 2007 injury.

³ 5 U.S.C. § 8115.

⁴ *Albert C. Shadrick*, 5 ECAB 376 (1953); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.814.2 (April 1995).

By decision dated March 16, 2011, OWCP denied modification of the October 13, 2010 decision.

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 of benefits.⁵

Section 8115(a) of FECA⁶ provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity.⁷ Generally, wages actually earned are the best measure of a wage-earning capacity, and in the absence of showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such a measure.⁸

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.⁹

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injuries and the degree of physical impairment, his or her usual employment, the employee's age and vocational qualifications and the availability of suitable employment.¹⁰ Accordingly, the evidence must establish that jobs in the position selected for determining wage-earning capacity are reasonably available in the general labor market in the commuting area in which the employee lives. In determining an employee's wage-earning capacity, OWCP may not select a makeshift or odd-lot position or one not reasonably available on the open labor market.¹¹

⁵ *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

⁶ 5 U.S.C. § 8115(a).

⁷ *Id.* at § 8115(a); *Loni J. Cleveland*, 52 ECAB 171, 177 (2000).

⁸ *Lottie M. Williams*, 56 ECAB 302 (2005); *see Edward Joseph Hanlon*, 8 ECAB 599 (1956).

⁹ 5 U.S.C. § 8115; 20 C.F.R. § 10.520; *N.J.*, 59 ECAB 171 (2007); *John D. Jackson*, 55 ECAB 465, 471 (2004).

¹⁰ *Samuel J. Chavez*, 44 ECAB 431 (1993); *Hattie Drummond*, 39 ECAB 904 (1988); *see* 5 U.S.C. § 8115(a); A. Larson, *The Law of Workers' Compensation* § 57.22 (1989).

¹¹ *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

Section 8123(a) provides that, 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.¹²

ANALYSIS

The Board finds that OWCP did not meet its burden to reduce appellant's disability compensation. There is insufficient medical evidence to support a finding that the selected position of maintenance supervisor was within appellant's physical limitations. As the Board explained in *Mary A. Henson*,¹³ OWCP must clarify whether the sedentary position selected is consistent with the employee's work tolerance restrictions. It found a conflict in the medical opinion evidence between the opinions of appellant's treating physician, Dr. Azamy, who believed that appellant was disabled and could not return to work, and the second opinion physician, Dr. Hudak, who opined that appellant could return to work with restrictions, and referred him to Dr. Eswar for an impartial medical evaluation. Dr. Eswar advised that appellant had cervical spine arthritis associated with cervical radiculopathy; that "could have" been aggravated by his occupation. Regarding appellant's work restrictions, he stated that appellant was able to perform sedentary work for eight hours per day, five days per week with restriction of repetitive movements of the wrists and elbows for more than four hours a day, and restriction on reaching for more than three hours a day, and reaching above the shoulder for more than zero to six hours a day. The Board finds that OWCP erred in relying on this opinion to terminate appellant's compensation benefits.

The DOT job description for maintenance supervisor indicated that reaching, handling and fingering would be required to be performed on at least a frequent basis, defined as up to 2/3 of the time. OWCP stated in its September 2, 2010 notice of proposed termination of benefits, that these activities would be required on a frequent to constant basis; however, Dr. Eswar limited appellant's reaching to three hours a day, reaching above the shoulder from zero to six hours a day, and repetitive use of the wrists and elbows to four hours a day. Dr. Eswar's impartial report does not support a finding that the position of maintenance supervisor was within appellant's work capacity. The limitations set by Dr. Eswar are more restrictive than the described sedentary duties of the selected position.

OWCP did not meet its burden of proof in this case to reduce appellant's compensation benefits. The March 16, 2011 decision will be reversed.

CONCLUSION

The Board finds that OWCP has failed to meet its burden of proof to reduce appellant's compensation.

¹² *Regina T. Pellecchia*, 53 ECAB 155 (2001).

¹³ 36 ECAB 565 (1985).

ORDER

IT IS HEREBY ORDERED THAT the March 16, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: March 13, 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