United States Department of Labor
Employees' Compensation Appeals Board

J.S., Appellant	)	
and	)	**Docket No. 12-1343**
	)	**Issued: April 22, 2013**
U.S. POSTAL SERVICE, POST OFFICE, Newark, 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:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 6, 2012 appellant, through his attorney, filed a timely appeal of a February 23, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) regarding his loss of wage-earning capacity determination. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c), the Board has jurisdiction to consider the merits of this case.[2]

ISSUE

The issue is whether OWCP met its burden of proof to reduce appellant's compensation benefits based on his capacity to earn wages in the constructed position of customer order clerk.

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the issuance of the February 23, 2012 OWCP decision, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c)(1).

On appeal, counsel contends that Dr. Paul Foddai, a Board-certified orthopedic surgeon, was not properly selected as the impartial medical examiner and, therefore, OWCP improperly relied on his reports in its decision.

FACTUAL HISTORY

On March 11, 2008 appellant, then a 59-year-old tractor trailer operator, filed a traumatic injury claim (Form CA-1) alleging that he sprained his right arm in the performance of duty that same day. OWCP accepted the claim for sprain of right shoulder and upper arm and aggravation of preexisting degeneration cervical intervertebral disc disease. It authorized cervical spine surgery and placed appellant on the periodic rolls.

On December 15, 2008 Dr. Frank M. Moore, a Board-certified neurosurgeon, indicated that appellant had cervical pain and right arm radiculopathy with motor weakness and sensory changes.

OWCP referred appellant to Dr. Jeffrey Lakin, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the status of his accepted condition and whether he was able to perform his regular duties as a motor vehicle operator. In a November 10, 2008 report, Dr. Lakin examined appellant and found that his accepted right upper arm and shoulder sprain had resolved. He advised that appellant was able to work with the following restrictions: no reaching above the shoulder and no pushing, pulling or lifting more than 10 pounds.

By letter dated July 31, 2009, OWCP referred appellant to Dr. Foddai to resolve the conflict in medical opinion between Drs. Moore and Lakin on the issues of necessity of surgery and continuing disability due to the accepted work injury. The record contains an ME023 Integrated Federal Employees Compensation System (iFECS) report dated July 30, 2009, which states that his impartial medical examination was scheduled with Dr. Foddai. The record also contains a screen shot of Dr. Ernesto Tolentino, a Board-certified orthopedic surgeon, who was bypassed under Code C of the Medical Management Application (MMA), which is used if the physician or his/her associate, has a previous connection with the claim or performed a fitness-for-duty examination for the employing establishment.

In an October 15, 2009 report, Dr. Foddai reviewed a statement of accepted facts, appellant's medical records and conducted a physical examination. He concurred with Dr. Lakin's conclusion that appellant's accepted medical condition of shoulder sprain and stain had completely resolved. Dr. Foddai opined that appellant had a permanent aggravation of his cervical condition and was not capable of resuming work, but would reexamine him in six to eight weeks to determine if he was capable of returning to at least sedentary duty.

In response, OWCP referred appellant for a second impartial medical examination with Dr. Foddai by letter dated June 16, 2010. The record contains an ME023 iIFECS report dated June 15, 2010, which states that appellant was scheduled to be reevaluated by Dr. Foddai.

On July 27, 2010 appellant underwent a functional capacity evaluation (FCE). Carl A. Gargiulo, a physical therapist, indicated that appellant did not have the physical capabilities

necessary to return to his position as tractor trailer operator. He opined that appellant was not able to lift more than seven pounds.

In his August 11, 2010 report, Dr. Foddai found that appellant was not able to return to his job as motor vehicle operator due to his subjective complaints, which were corroborated by objective clinical findings, including the findings of the FCE. He further found that appellant was not totally disabled and capable of performing light-duty sedentary work with the following permanent restrictions: no pushing, pulling, lifting or carrying greater than 10 pounds.

Subsequently, appellant submitted November 3, 2010 reports from Dr. Mazhar Elamir, a Board-certified internist, who opined that appellant was unable to resume regular work duties as a result of cervical spinal injuries.

By letter dated February 11, 2011, the employing establishment confirmed that on the date of injury March 11, 2008 appellant was a grade 7, step 0 and that the current salary would be $54,257.00 per year.

On June 27, 2011 a vocational rehabilitation counselor identified three potential positions for appellant, a customer order clerk, Department of Labor's Dictionary of *Occupational Titles* (DOT) No. 249.362-026, a data entry clerk, DOT No. 209.582-054 and a civil service clerk, DOT No. 205.362-010. The customer order clerk position was identified as sedentary and the duties included processing orders for material or merchandise and editing orders received for price and nomenclature. The vocational counselor confirmed that the positions were available in appellant's commuting area on a full- or part-time basis.

On June 28, 2011 OWCP issued a notice of proposed reduction of benefits finding that appellant was capable of earning wages as a customer order clerk at the rate of $527.88 per week. It afforded him 30 days in which to submit evidence or argument regarding his capacity to earn wages in the position described.

Subsequently, appellant's attorney submitted a July 19, 2011 statement contending that Dr. Foddai's reports did not support OWCP's proposed action.

By decision dated August 2, 2011, OWCP finalized the proposed reduction-of-compensation benefits finding that appellant had the capacity to earn wages as a customer order clerk. It determined that he had a 46 percent loss of wage-earning capacity and his compensation was reduced to a net compensation of $1,337.46 every four weeks.

By letter dated August 9, 2011, appellant's attorney requested an oral hearing, which was held before an OWCP hearing representative on December 6, 2011. Prior to the hearing, OWCP received an October 27, 2011 report from Dr. Elamir opining that appellant was completely and permanently disabled. Subsequent to the hearing, appellant submitted an August 22, 2011 report from Dr. Moore who opined that appellant was disabled.

By decision dated February 23, 2012, an OWCP hearing representative affirmed the August 2, 2011 wage-earning capacity decision.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[3]

Section 8115(a) of FECA,[4] provides in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his or her actual earnings if his or her actual earnings fairly and reasonably represent his or 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, his or her wage-earning capacity is determined with due regard to the nature of his or her injury, his or her degree of physical impairment, his or her usual employment, his or her age, his or her qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his or her wage-earning capacity in his or her disabled condition.[5] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[6] The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.[7] 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.[8]

When OWCP makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by OWCP for selection of a position, listed in the DOT or otherwise available in the open market, that fits that 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 basic rate of compensation paid under FECA is 66 2/3 percent of the injured employee's monthly pay.[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,

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[3] *See Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

[4] 5 U.S.C. § 8115.

[5] *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

[6] *See Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

[7] *Id.*

[8] *See Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

[9] 5 ECAB 376 (1953).

[10] *See Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

including impairments resulting from both injury-related and preexisting conditions, but not impairments resulting from postinjury or subsequently acquired conditions. Any incapacity to perform the duties of the selected position resulting from subsequently acquired conditions is immaterial to the loss of wage-earning capacity that can be attributed to the accepted employment injury and for which appellant may receive compensation.[11]

Under FECA, Congress has provided that, when there is disagreement between the physician on the part of the United States and that of the employee, the Secretary shall appoint a third physician who shall make an examination.[12] The Board has noted that the appointment of a referee physician under this section is mandatory in cases where there is such disagreement and that failure of OWCP to properly appoint a medical referee may constitute reversible error.[13]

In cases arising under section 8123(a), the Board has long recognized the discretion of the Director to appoint physicians to examine claimants under FECA in the adjudication of claims.[14] FECA does not specify how the appointment of a medical referee is to be accomplished. Moreover, it is silent as to the qualifications of the physicians to be considered.[15] The implementing federal regulations, citing to the Board's decision in *James P. Roberts*, provide that development of the claim is appropriate when a conflict arises between medical opinions of virtually equal weight.[16] The regulations state:

> "If a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or OWCP's medical adviser or consultant, OWCP shall appoint a third physician to make an examination (see § 10.502). This is called a referee examination. OWCP will

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

[12] 5 U.S.C. § 8123(a). In *Melvina Jackson*, 38 ECAB 443 (1987), the Board addressed the legislative history of section 8123 in terms of a challenge to whether an OWCP medical adviser's opinion could create a conflict in medical evidence. The Board noted that all provisions of section 8123(a) had been contained in FECA since its original enactment in 1916. *See* FECA of September 7, 1916, 39 Stat. 743. However, the last sentence of section 8123(a) pertaining to appointment of a third physician where disagreement exists between the employee's physician and the physician for the United States was found in a separate section of FECA, originally, section 22, later codified unchanged as 5 U.S.C. § 771. This section was incorporated into the current section 8123(a) as part of the general codification of Title 5 of the United States Codes in 1966. *See* FECA of September 6, 1966, 80 Stat. 378. The legislative intent in enacting the codification of Title 5 was to restate, without substantive change, the laws replaced by the codification. *See Melvina Jackson*, *id*. at 447.

[13] *See Tony F. Chilefone*, 3 ECAB 67 (1949).

[14] *See William C. Gregory*, 4 ECAB 6 (1950).

[15] The legislative history on the enactment of FECA in 1916 and on the subsequent amendments contains no discussion and thus no guidance on the meaning or intended operation of the medical referee provision. *See Melvina Jackson*, *supra* note 12.

[16] 20 C.F.R. § 10.321(a); *James P. Roberts*, 31 ECAB 1010 (1980).

select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case."[17]

Congress did not address the manner by which an impartial medical referee is to be selected.[18] Rather, this was left to the expertise of the Director in administering the compensation program created under FECA.[19] It is an established principle, however, that FECA is a remedial statute and should be broadly construed in favor of the employee to effectuate its purpose and not in derogation of an employee's rights.[20] The primary rule of statutory construction is to give effect to legislative intent and, in arriving at intent; it is well settled that the words in a statute should be construed according to their common usage.[21] The Board notes that the Director has been delegated authority under FECA in the selection of a medical referee physician through section 8123(a).

Under the Federal (FECA) Procedure Manual, the Director has exercised discretion to implement practices pertaining to the selection of the impartial medical referee. Unlike second opinion physicians, the selection of referee physicians is made from a strict rotational system.[22] OWCP will select a physician who is qualified in the appropriate medical specialty and who has no prior connection with the case.[23] Physicians who may not serve as impartial specialists include those employed by, under contract to or regularly associated with federal agencies;[24] physicians previously connected with the claim or claimant or physicians in partnership with those already so connected[25] and physicians who have acted as a medical consultant to OWCP.[26] The fact that a physician has conducted second opinion examinations in connection with FECA

[17] *Id.* at § 10.321(b). OWCP will pay for second opinion and referee medical examinations, reimbursing the employee all necessary and reasonable expenses incidental to such examination. 20 C.F.R. § 10.322.

[18] The Board has noted that the terms of section 8123(a) are not clear and unambiguous. *Melvina Jackson*, *supra* note 12. The Board found that the definition of the term examination under FECA was sufficiently broad in scope as to encompass the interpretation of an examination by OWCP's medical adviser. *Id.* at 448. To effectuate the purpose of the medical referee provision, the Board found that a medical adviser who did not physically examine the employee may, in appropriate circumstances, create a conflict in medical opinion. *Id.* at 449.

[19] *See, e.g.*, *Harry D. Butler*, 43 ECAB 859, 866 (1992) (the Director delegated discretion in determining the manner by which permanent impairment is evaluated for schedule award purposes).

[20] *See Stephen R. Lubin*, 43 ECAB 564, 569 (1992); *Samuel Berlin*, 4 ECAB 39 (1950).

[21] *See Erin J. Belue*, 13 ECAB 88 (1961). *See also* Sutherland Stat. Const. § 65.03, 239-40 (4th ed. 1986).

[22] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b) (July 2011).

[23] *Id.* at Chapter 3.500.4(b)(1).

[24] *Id.* at Chapter 3.500.4(b)(3)(a).

[25] *Id.* at Chapter 3.500.4(b)(3)(b).

[26] *Id.* at Chapter 3.500.4(b)(3)(c).

claims does not eliminate that individual from serving as an impartial referee in a case in which he or she has no prior involvement.[27]

In turn, the Director has delegated authority to each district OWCP for selection of the referee physician by use of the MMA within the iFECS.[28] This application contains the names of physicians who are Board-certified in over 30 medical specialties for use as referees within appropriate geographical areas.[29] The MMA in iFECS replaces the prior Physician Directory System (PDS) method of appointment.[30] It provides for a rotation among physicians from the American Board of Medical Specialties, including the medical boards of the American Medical Association and those physicians Board-certified with the American Osteopathic Association.[31]

Selection of the referee physician is made through use of the application by a medical scheduler. The claims examiner may not dictate the physician to serve as the referee examiner.[32] The medical scheduler imputes the claim number into the application, from which the claimant's home zip code is loaded.[33] The scheduler chooses the type of examination to be performed (second opinion or impartial referee) and the applicable medical specialty. The next physician in the roster appears on the screen and remains until an appointment is scheduled or the physician is bypassed.[34] If the physician agrees to the appointment, the date and time are entered into the application. Upon entry of the appointment information, the application prompts the medical scheduler to prepare a Form ME023, appointment notification report for imaging into the case file.[35] Once an appointment with a medical referee is scheduled the claimant and any authorized representative is to be notified.[36]

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[27] *Id.*

[28] *Id*. at Chapter 3.500.4(b)(6).

[29] *Id.* at Chapter 3.500.4(b)(6)(a).

[30] *Id.* at Chapter 3.500.5.

[31] *Id.* at Chapter 3.500.5(a).

[32] *Id.* at Chapter 3.500.5(b).

[33] *Id.* at Chapter 3.500.5(c).

[34] *Id.* The roster of physicians is not made visible to the medical scheduler under the application. The medical scheduler may update information pertaining to whether the selected physician can schedule an appointment in a timely manner and, if not, will enter an appropriate bypass code. *Id.* at Chapter 3.500.5(e-f). Upon entry of a bypass code, the MMA will present the next physician based on specialty and zip code.

[35] *Id*. at Chapter 3.500.5(g). The ME023 form serves as documentary evidence that the referee appointment was scheduled through the MMA rotational system. Should an issue arise concerning the selection of the referee specialist, a copy of the ME023 form may be reproduced and copied for the case record.

[36] *Id.* at Chapter 3.500.4(d). Notice should include the existence of a conflict in the medical evidence under section 8123; the name and address of the referee physician with date and time of appointment; a warning of suspension of benefits under section 8123(d) and information on how to claim travel expenses.

Under the Federal (FECA) Procedure Manual, a claimant may request to participate in the selection of the referee physician or may object to the physician selected under the MMA. In such instances, the claimant must provide valid reasons for any request or objection to the claims examiner.[37] The right of the claimant to participate in the selection of the medical referee is not unqualified. He or she must provide a valid reason, not limited to: (a) documented bias by the selected physician; (b) documented unprofessional conduct by the selected physician; (c) a female claimant who requests a female physician when gynecological examination is required; or (d) a claimant with a medically documented inability to travel to the arranged appointment when an appropriate specialist may be located closer.[38] When the reasons are considered acceptable, the claimant will be provided with a list of three specialists available through the MMA.[39] If the reason offered is determined to be invalid, a formal denial will issue if requested.[40]

ANALYSIS

OWCP accepted appellant's claim for sprain of right shoulder and upper arm and aggravation of preexisting degeneration cervical intervertebral disc disease and referred him to vocational rehabilitation. On August 2, 2011 it reduced his compensation benefits based on his capacity to earn wages as a customer order clerk. OWCP determined that this position was medically and vocationally suitable for appellant. It found that he was capable of earning $527.88 per week and had a 46 percent loss of wage-earning capacity. The question is whether appellant had some capacity to earn wages and the Board finds that the weight of the evidence of record establishes that he had the requisite physical ability, skill and experience to perform the constructed position of customer order clerk.

On July 31, 2009 OWCP found a conflict in medical opinion between Dr. Moore who indicated that appellant had cervical pain and right arm radiculopathy and Dr. Lakin who opined that appellant's accepted conditions had resolved and he was capable of light duty with restrictions. Appellant was referred to Dr. Foddai, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict in medical opinion on the issues of necessity of surgery and continuing disability due to the accepted injuries.

On appeal, counsel contends that Dr. Foddai was not properly selected as the impartial medical examiner and, therefore, OWCP improperly relied on his reports in its decision. OWCP has an obligation to verify that it selected Dr. Foddai in a fair and unbiased manner. It maintains records for this very purpose.[41] The record contains two ME023 iFECS reports dated July 30, 2009 and June 15, 2010 stating that an impartial medical examination was scheduled with Dr. Foddai. The record also contains a screen shot of Dr. Ernesto Tolentino, a Board-certified orthopedic surgeon, who was bypassed under Code C of the MMA system, which is used if the

[37] *Id.* at Chapter 3.500.4(f).

[38] *Id.* at Chapter 3.500.4(f)(1).

[39] *Id.* at Chapter 3.500.4(f)(1)(e)(2).

[40] *Id.* at Chapter 3.500.4(f)(1)(e)(3).

[41] *See M.A.*, Docket No. 07-1344 (issued February 19, 2008).

physician or his/her associate, has a previous connection with the claim or performed a fitness-for-duty examination for the employing establishment.[42] The Board finds that OWCP provided documentation and properly utilized its MMA system in selecting Dr. Foddai as the impartial medical examiner. The system bypassed Dr. Tolentino because he had a previous connection with the claim. The Board has placed great importance on the appearance as well as the fact of impartiality and only if the selection procedures which were designed to achieve this result are scrupulously followed may the selected physician carry the special weight accorded to an impartial specialist. As OWCP has met its affirmative obligation to establish that it properly followed its selection procedures, the Board finds that the attorney's argument is not substantiated.[43]

In his reports, Dr. Foddai found that appellant's conditions had resolved and opined that he was not totally disabled. He concluded that appellant was capable of performing light-duty sedentary work with the following permanent restrictions: no pushing, pulling, lifting or carrying greater than 10 pounds.

On June 27, 2011 the vocational rehabilitation counselor identified three potential positions that appellant would be capable of performing and which were available in the area. One of them was as a customer order clerk, DOT No. 249.362-026, with an average weekly salary of $527.88 per week. This position was identified as sedentary and was reasonably available in appellant's commuting area on a full or part-time basis.

In support of his claim, appellant provided reports from Dr. Elamir and Dr. Moore. However, neither physician noted that they had reviewed the duties required of a customer order clerk. These reports merely provided findings and did not offer any opinion as to whether appellant was capable of performing the duties required for the selected position of a customer order clerk. Additionally, the July 27, 2010 FCE from Mr. Gargiulo, a physical therapist, does not constitute medical evidence as it was not prepared by a physician.[44] As such, the Board finds that these reports fail to establish that appellant was unable to perform the duties of a customer order clerk.

The Board finds that the evidence establishes that appellant was capable of performing the duties required for the selected position of a customer order clerk. As noted, Dr. Foddai advised that appellant was capable of performing light-duty sedentary work with the following permanent restrictions: no pushing, pulling, lifting or carrying greater than 10 pounds. The vocational rehabilitation counselor determined that appellant was able to perform the position of

[42] Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500.6 (July 2011). *See also P.M.*, Docket No. 12-283 (issued September 4, 2012) (where the Board found that OWCP properly utilized its MMA system in selecting the impartial medical examiner and bypassed a physician under Code D because he did not accept Department of Labor patients).

[43] *Cf. H.W.*, Docket No. 10-404 (issued September 28, 2011) (where the ME023 iFECS report was the only documentation of the scheduled impartial medical specialist examination. There were no screen shots substantiating the selection of the impartial medical specialist. The Board remanded the case by an order for selection of another impartial medical specialist and the issuance of an appropriate decision following any further development).

[44] Physical therapists are not physicians under FECA. *See* 5 U.S.C. § 8101(2).

a customer order clerk. She provided a job description which was comprised of sedentary requirements related to processing and editing orders and determined that the position fell within his medical restrictions. The counselor noted that the position was available on a full- or part-time basis within appellant's commuting area and that the wage of the position was $527.88 per week.

The Board finds that OWCP considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment and age and employment qualifications, in determining that the position of customer order clerk represented his wage-earning capacity.[45] The evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the duties and that the position was reasonably available within the general labor market of his commuting area. The wage information as set forth by the vocational counselor indicated that the wages for the position of information clerk was $527.88 per week. Applying the *Shadrick*[46] principles, the current pay rate for the date-of-injury position is compared with the wage-earning capacity of $527.88 per week and a percentage of loss of wage-earning capacity is determined. OWCP determined that appellant had a 46 percent loss of wage-earning capacity and his compensation was reduced to a net compensation of $1,337.46 every four weeks. The Board finds that OWCP met its burden of proof to reduce appellant's compensation in this case.

Appellant may request modification of the loss of wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

CONCLUSION

The Board finds that OWCP met its burden of proof to reduce appellant's compensation benefits based on his capacity to earn wages in the constructed position of customer order clerk.

[45] *See James M. Frasher*, 53 ECAB 794 (2002).

[46] *See supra* note 9.

ORDER

IT IS HEREBY ORDERED THAT the February 23, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 22, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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