

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

R.P., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Redwood City, CA, Employer**

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**Docket No. 13-236
Issued: April 11, 2013**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 15, 2012 appellant filed a timely appeal from a September 4, 2012 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 September 4, 2012, based on her capacity to perform the duties of a receptionist.

FACTUAL HISTORY

On October 8, 2005 appellant, then a 49-year-old letter carrier, filed a traumatic injury claim alleging that on October 8, 2005 she injured her waist and back when she was hit on the

¹ 5 U.S.C. § 8101 *et seq.*

right side by a gurney that was pushed by another employee. She stopped work.² OWCP accepted appellant's claim for lumbar strain. Appellant returned to modified duty on November 14, 2005. On September 2, 2009 she stopped work after the employing establishment withdrew her modified position under the National Reassessment Process (NRP). Appellant filed a recurrence claim due to the withdrawal of modified-duty work. OWCP accepted the claim and paid compensation for temporary total disability. Appellant was placed on the periodic rolls.

In an August 10, 2009 report, Dr. Arnold Bunyaviroch, Board-certified in occupational medicine, noted that he last examined appellant in March 2009 for an October 8, 2005 employment injury. Examination of the lumbar spine revealed mild tenderness to palpation over the L3-5 paraspinal levels. Manual muscle testing was 5/5 and sensation was normal to light touch. Dr. Bunyaviroch diagnosed right lumbar back strain and herniation of intervertebral disc. In a work status report, he noted that appellant could return to modified duty with restrictions limited to occasional bending, limited twisting, no lifting over 15 pounds, no sitting for more than 1 hour, no standing for more than 1 hour and no walking more than 30 to 45 minutes.

OWCP referred appellant for a second-opinion examination. In an October 14, 2009 report, Dr. Michael G. Klassen, a Board-certified orthopedic surgeon, reviewed appellant's history, including the statement of accepted facts and provided an accurate history of injury. Upon examination of the lumbar spine, he observed normal gait and no tenderness to palpation. Flexion and extension were also normal. Straight leg raise and Lasegue's tests were negative. Dr. Klassen diagnosed lumbago and cervicgia. He opined that appellant's condition was an aggravation to her lumbar spine. Dr. Klassen explained that her neck and shoulder problems were not at issue and her bilateral foot plantar fasciitis had resolved. He stated that the lumbar aggravation was permanent and manageable with work restrictions. Dr. Klassen found that appellant was able to work with restrictions of walking 30 to 45 minutes, standing for 1 hour at a time, lifting less than 50 pounds, pushing and pulling less than 15 pounds, and occasional bending and stooping.

In May 26 and October 15, 2010 reports, Dr. Bunyaviroch agreed with Dr. Klassen's findings except for appellant's work restrictions. He limited appellant to occasional bending, limited twisting, no lifting over 15 pounds, no sitting more than 1 hour at a time, no standing more than 1 hour at a time and no walking more than 30 to 45 minutes at a time.

On July 13, 2010 OWCP referred appellant for vocational rehabilitation services, based on Dr. Bunyaviroch's reports.

In reports dated October 5, November 15 and December 23, 2010, a vocational rehabilitation counselor discussed appellant's education and work history and noted that she had received a clerical certificate for completion of a Regional Occupational Program (ROP). The rehabilitation counselor summarized efforts to find vocational training or suitable alternate employment for appellant within her physical restrictions.

² The record reveals that appellant has a previously accepted February 10, 1995 traumatic injury claim for plantar fasciitis and evans calcaneal osteotomies (File No. xxxxxx760).

On December 21, 2010 the rehabilitation counselor recommended that OWCP approve training for appellant at a ROP and an adult school studying computer training classes in order to improve her computer application skills. She identified two positions for appellant listed in the Department of Labor's *Dictionary of Occupational Titles* (DOT) for receptionist, DOT #237.367-038, or medical voucher clerk, DOT #214.482-018. The rehabilitation counselor identified the occupation requirements for a receptionist and medical voucher clerk and provided job descriptions. The positions were noted to be sedentary and found to be within appellant's restrictions, her vocational and work history, education, skills and training so as to reflect her capacity to earn wages. The vocational counselor contacted the Bureau of Labor Statistics for that region and determined that the jobs for receptionist and medical voucher clerk were being performed in sufficient numbers so as to make them reasonably available to the claimant within her commuting area and there was a positive labor market for the receptionist job. The weekly wages were \$440.00 for a receptionist and \$400.00 for a medical voucher clerk. OWCP approved a 12-week training program.

Appellant completed Medical Insurance Billing and Coding and Medical Assisting coursework at a ROP and a computer application coursework at an adult school. On October 18, 2011 OWCP authorized 150 days of job placement assistance.

On March 8, 2012 appellant accepted a job offer as a receptionist at a local removal service. She earned \$10.00 an hour for a 40-hour workweek or \$400.00 per week. Appellant's daily duties included answering telephones, scheduling appointments, responding to e-mails, transferring calls, filing and confirming appointments.

On March 30, 2012 OWCP adjusted appellant's disability compensation to reflect her actual wages.

In a March 23, 2012 report, Dr. Bunyaviroch stated that on March 19, 2012 appellant started a new job as a call service representative, which was essentially a desk or sedentary job. He related that on March 21, 2012 she noticed tingling over the back of her left leg to her entire left foot and tingling in the inside of the right leg to the foot. The tingling lasted approximately four to five hours and that getting up and walking around did not make a difference. Appellant stated that her work duties did not follow her work restrictions because she was sitting for more than one hour at a time. Upon examination, Dr. Bunyaviroch observed mild and moderate tenderness to palpation over the L4-5 level. Appellant had normal sensation to light touch except over the bilateral lower legs. Straight leg raise testing was negative. Dr. Bunyaviroch diagnosed right lumbar back strain and small right-sided disc herniation. He authorized appellant to return to modified duty with restrictions of occasional bending, limited twisting, no lifting more than 15 pounds, no sitting more than 1 hour, no standing more than 1 hour and no walking more than 30 to 45 minutes.

On April 3, 2012 appellant resigned from her job as a receptionist because she felt she was too disabled to work.

In an April 13, 2012 report, the rehabilitation counselor submitted updated job descriptions and labor market surveys for the receptionist position. She noted that the position was primarily sedentary. The rehabilitation counselor contacted the Bureau of Labor Statistics

for that region and found the position to be in sufficient numbers so as to make it reasonably available to appellant within her commuting area. The weekly wages were \$400.00 to \$520.00.

On May 15, 2012 OWCP informed the rehabilitation counselor that the labor market surveys were insufficient because she failed to document whether the positions required more than 1 hour of sitting or standing and more than 45 minutes of walking.

In a May 17, 2012 report, the rehabilitation counselor conducted another labor market survey for the receptionist and medical voucher positions and found that appellant was vocationally qualified for such work. She reviewed Dr. Bunyaviroch's medical restrictions and noted that each contact, with a few exceptions, in the labor market survey indicated that they were able to accommodate appellant's restrictions of no sitting or standing for more than 1 hour and no walking for more than 45 minutes at a time. The report related that 10 potential employers were contacted. Of these 10, two did not respond to a request for clarification of the physical requirements of the position. Of the remaining eight, seven responded that the receptionist could sit or stand at will, or did not have to sit for more than an hour at a time, or walk for more than 45 minutes at a time.

In a June 4, 2012 report, the rehabilitation counselor stated that both targeted positions remained vocationally and medically appropriate because appellant was qualified to perform both positions, and both positions were sedentary and within her work limitations. The salary ranged from \$10.00 to \$15.00 an hour. Based on the labor market surveys, the rehabilitation counselor reported that both targeted positions existed in sufficient numbers within the reasonable commuting area.

OWCP referred appellant for a second-opinion examination. In a June 7, 2012 report, Dr. Bruce R. Huffer, a Board-certified orthopedic surgeon, related appellant's complaints of low back pain and symptoms, intermittent neck and shoulder pain and a bilateral foot condition. He reviewed appellant's medical records, including the statement of accepted facts, and provided an accurate history of appellant's injury and vocational rehabilitation efforts. Upon examination, Dr. Huffer observed full range of motion of appellant's cervical spine without pain and full range of motion to both shoulders without pain. He noted mild tenderness in the midline of the cervical spine at the mid aspect down to the thoracolumbar junction, slight tenderness in the bilateral paravertebral muscles and pain down the right side. Extension was normal. Straight leg raise testing was negative. Dr. Huffer found that appellant continued to have residuals of her back injury and noted that it was not likely that there would be any change in her back symptoms. He opined that appellant was capable of returning to work as a receptionist or medical voucher clerk as the positions were sedentary-type work that did not require any lifting. Dr. Huffer stated that appellant should be allowed to periodically take breaks to get up and move around if her job duties were 100 percent sitting. He limited appellant to sitting for 2 hours with a 5-minute break, walking for 30 minutes with a 5-minute break, and standing for 1 hour with a 5-minute break, 4 hours a day.

By notice of proposed reduction dated July 3, 2012, OWCP advised appellant of its proposal to reduce her wage-loss compensation as the factual and medical evidence established that she was no longer totally disabled. Appellant had the capacity to earn wages as a receptionist, DOT #237.367-038 at the rate of \$400.00 per week, in accordance with the factors

outlined in 5 U.S.C. § 8115.³ It calculated that appellant's compensation rate should be adjusted to \$2,048.00 each four weeks. The vocational rehabilitation counselor found that the receptionist position to be suitable for appellant, given her work restrictions and was available in her commuting area. OWCP allowed appellant 30 days in which to submit any contrary evidence.

In a July 26, 2012 statement, appellant requested that her compensation be reinstated. She stated that her rehabilitation counselor informed her not to tell prospective employers about her medical issues and explained that her removal services employer did not know of her restrictions until after she started work. Although the rehabilitation counselor was willing to accommodate her medical limitations, he was concerned about how his other employees might react to her being given special treatment. The private employer also told appellant's rehabilitation counselor that her job entailed sitting all day because the telephones needed to be manned constantly. Appellant stated that she had too much pain at the end of the day to continue working at Junk King.

In a September 4, 2012 decision, OWCP reduced appellant's compensation to reflect wage-earning capacity as receptionist effective September 4, 2012.

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 proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.⁴ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵

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 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, her wage-earning capacity is determined with due regards to the nature of the 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.⁶

OWCP procedure instructs that, in cases where a claimant has undergone vocational rehabilitation, the vocational rehabilitation counselor will submit a final report to the vocational rehabilitation specialist summarizing why vocational rehabilitation was unsuccessful and listing two or three jobs which are medically and vocationally suitable for the claimant. Where no vocational rehabilitation services were provided, the vocational rehabilitation specialist will have

³ 5 U.S.C. § 8115.

⁴ *Bettye F. Wade*, 37 ECAB 556 (1986); *Ella M. Gardner*, 36 ECAB 238 (1984).

⁵ *See Del K. Rykert*, 40 ECAB 284 (1988).

⁶ 5 U.S.C. § 8115(a); *see Pope D. Cox*, 39 ECAB 143 (1988).

provided this report. Included will be the corresponding job numbers from DOT (or OWCP specified equivalent) and pay ranges in the relevant geographical area.⁷ 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 the *Shadrick*⁸ decision will result in the percentage of the employee's loss of wage-earning capacity.

In determining an employee's wage-earning capacity based on a position defined suitable but not actually held, OWCP must consider the degree of physical impairment, 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.⁹ Additionally, 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.¹⁰

ANALYSIS

The Board finds that OWCP properly reduced appellant's disability compensation benefits based upon the selected position of receptionist.

Dr. Bunyaviroch provided an accurate history of injury and conducted a thorough examination. He authorized appellant to return to limited duty with restrictions of occasional bending, limited twisting, no lifting over 15 pounds, no sitting or standing more than 1 hour and no walking more than 30 to 45 minutes at a time. Based on Dr. Bunyaviroch's finding that appellant could work limited duty with restrictions, OWCP referred her for vocational rehabilitation. The Board finds that OWCP properly relied upon the medical evidence in referring her for vocational rehabilitation as she was no longer totally disabled due to residuals of her employment injury. The rehabilitation counselor determined that appellant could perform the duties of a receptionist.

The Board finds that the evidence establishes that the physical demands of the position of receptionist were within appellant's medical restrictions. In a March 23, 2012 report, Dr. Bunyaviroch determined that appellant was restricted from sitting or standing more than 1 hour at a time or walking more than 45 minutes at a time. In a June 7, 2012 report, Dr. Huffer, a second-opinion examiner, opined that appellant was capable of returning to work as a receptionist or medical voucher clerk as long as she was allowed to periodically take breaks to get up and move around if her job duties were 100 percent sitting. He limited appellant to sitting

⁷ Federal (FECA) Procedure manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8 (October 2009).

⁸ *Albert C. Shadrick*, 5 ECAB 376 (1953).

⁹ *James Henderson, Jr.*, 51 ECAB 268 (2000).

¹⁰ *Albert L. Poe*, 37 ECAB 684 (1986); *David Smith*, 34 ECAB 409 (1982).

for 2 hours with a 5-minute break, walking for 30 minutes with a 5-minute break and standing for 1 hour with a 5-minute break, 4 hours a day.

The Department of Labor's *Dictionary of Occupational Titles* description of the duties of the selected position of receptionist does not address whether the position required sitting more than one or two hours. Pursuant to DOT, sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time.

On April 23, 2012 OWCP informed the rehabilitation counselor that the labor market surveys for the positions of receptionist and medical voucher clerk were insufficient because they failed to demonstrate whether the job duties were within appellant's restrictions of no sitting or standing more than 1 hour and no walking more than 45 minutes. In a May 17, 2012 report, the rehabilitation counselor stated that she had contacted 10 potential employers and that with few exceptions, the employers who responded to the specific question related that they were able to accommodate appellant's restrictions of no sitting or standing for more than 1 hour and no walking for more than 45 minutes at a time. In fact, seven out of the eight employers who responded to questions regarding physical requirements of the position, related requirements of sitting and standing which were within appellant's restrictions.

The Board finds that OWCP considered the proper factors, such as vocational training and availability of the receptionist position, to determine that the position represented appellant's wage-earning capacity. The record reflects that appellant had completed a Medical Insurance Billing and Coding and Medical Assisting coursework at a ROP and a computer application coursework at an adult school. Appellant has not alleged that she was vocationally unable to perform the requirements of a receptionist. The rehabilitation counselor indicated that she contacted the Bureau of Labor Statistics for that region and found the position to be in sufficient numbers so as to make it reasonably available to appellant within her commuting area. Also, OWCP followed the established procedures under the *Shadrick* decision in calculating appellant's employment-related loss of wage-earning capacity. Appellant does not contend that OWCP erred in its mathematical calculations of her wage-earning capacity. The Board finds that OWCP properly determined that appellant was medically and vocationally capable of working eight hours a day as a receptionist.

CONCLUSION

The Board finds that OWCP met its burden of proof in reducing appellant's compensation.

ORDER

IT IS HEREBY ORDERED THAT the September 4, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 11, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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