

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

A.L., Appellant)	
)	
and)	Docket No. 13-857
)	Issued: August 14, 2013
U.S. POSTAL SERVICE, POST OFFICE,)	
Redwood City, CA, Employer)	
)	

<i>Appearances:</i>	<i>Case Submitted on the Record</i>
<i>Alan J. Shapiro, Esq., for the appellant</i>	
<i>Office of Solicitor, for the Director</i>	

DECISION AND ORDER

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

JURISDICTION

On February 26, 2013 appellant, through counsel, filed a timely appeal from a January 17, 2013 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 met its burden of proof to reduce appellant's compensation benefits based on her capacity to earn wages in the constructed position of security surveillance monitor.

On appeal appellant's attorney asserts that the January 17, 2013 decision is contrary to fact and law.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On January 7, 2006 appellant, then a 62-year-old distribution clerk, filed an occupational disease claim alleging that her work duties caused numbness in both hands, tingling in the fingers, weakness, clumsiness and pain. OWCP accepted trigger finger (acquired) on the left and bilateral tenosynovitis. Appellant worked modified duty eight hours a day with a lifting restriction of four pounds.

On September 3, 2009 appellant filed a recurrence of disability claim. The employing establishment noted that there was no work available within her restrictions after September 4, 2009. In a September 15, 2009 report, Dr. Alan Hsu, an attending physician, Board-certified in family and occupational medicine, advised that appellant could perform modified work with gripping and grasping limited to 15 minutes per hour for a total of 1 hour and a one-pound lifting restriction.

Appellant was paid wage-loss compensation effective September 4, 2009 and placed on the periodic rolls.

In October 2009, OWCP referred appellant to Dr. Ramon L. Jimenez, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a November 23, 2009 report, Dr. Jimenez reviewed the medical record and provided findings on physical examination. He diagnosed bilateral lateral epicondylitis, mild carpal tunnel syndrome and trigger finger. In an attached work capacity evaluation, Dr. Jimenez advised that appellant could work eight hours a day with restrictions on repetitive wrist and elbow motion, pushing and pulling limited to two pounds for two hours daily.

In April 2010, appellant was referred to Dr. Juon-Kin K. Fong, a Board-certified orthopedic surgeon, for another second opinion evaluation. In a July 7, 2010 report, Dr. Fong noted appellant's complaint of bilateral upper extremity pain. He provided physical examination findings and diagnosed bilateral repetitive strain injury/carpal tunnel disease syndrome of the upper extremities with forearm tendinitis, bilateral carpal tunnel syndrome and trigger digits. In an attached work capacity evaluation, Dr. Fong advised that appellant could work eight hours a day with permanent restrictions of two hours reaching and reaching above the shoulder, four hours of repetitive motion of the wrists, and one hour of pushing, pulling and lifting, with a 10-pound weight restriction. A November 10, 2010 functional capacity evaluation (FCE) demonstrated that she could perform light duty for eight hours a day with restrictions to her physical activity.²

On November 17, 2010 appellant was referred for vocational rehabilitation services with Kim Page, a vocational rehabilitation counselor. She completed vocational testing on December 3, 2010 that demonstrated that she had good reading skills and basic math skills. On

² Sitting and static standing were limited to 30 minutes continuously; walking to 30 to 60 minutes continuously, occasional climbing, power grasping, simple grasping and fingering; infrequent bending at the waist and squatting; occasional precision grasping with proper position; less than 4 minutes of continuous reaching overhead; 8 to 10 minutes of continuous midline reaching; 4 minutes of continuous reaching forward; isometric pushing limited to 23 pounds; isometric pulling limited to 25 pounds; and lifting limited to 20 pounds.

January 10, 2011 Dr. Fong agreed with the FCE results and reiterated that appellant could work full time at light duty.

On July 5, 2011 OWCP forwarded a copy of appellant's FCE, Dr. Fong's reports, and the Department of Labor *Dictionary of Occupational Titles* definitions to Dr. Hsu for comment regarding appellant's work restrictions. Dr. Hsu was asked to respond within 30 days.

In October 2011, Ms. Page identified the positions of identification clerk and security surveillance monitor as within appellant's physical limitations. She advised that the positions were reasonably available in the local labor market at entry level annual wages of \$10.00 to \$12.00 an hour. On November 10, 2011 appellant completed a one-day training class at The Loss Prevention Group on the power to arrest, weapons of mass destruction and terrorism awareness.

On November 28, 2011 Dr. Hsu advised that there had been no significant change in appellant's symptoms or clinical presentation since July 31, 2007. He submitted reports reiterating her work restrictions. Dr. Hsu did not comment on OWCP's July 5, 2011 letter.

On February 27, 2012 Ms. Page reported that appellant had participated in 90 days of placement services but was not offered a position.³

On April 28, 2012 OWCP obtained updated salary information from the employing establishment. By letter dated May 2, 2012, it proposed to reduce appellant's compensation based on her capacity to earn wages as a security surveillance monitor. OWCP noted that she could return to full-time work as a security surveillance monitor within the restrictions identified by Dr. Fong. It further noted that the labor market survey prepared by Ms. Shaw established that the position was reasonably available in the local labor market at a weekly wage of \$400.00.⁴

In correspondence dated May 14, 2012, appellant disagreed with the proposed reduction and restrictions provided by Dr. Fong. She asserted that she could not perform repetitive wrist movement up to four hours or reach above the shoulder for up to two hours, could not push or pull 25 pounds for one hour or lift 20 pounds for one hour due to her upper extremity condition. Appellant noted that she had a work-related back injury with permanent restrictions of no bending, twisting, pulling, pushing, lifting or carrying more than five pounds with sitting, standing and walking restricted to one-half hour. She asserted that repetitive movement and prolonged sitting would aggravate her conditions. In a May 10, 2012 report, Dr. Hsu advised that he disagreed with Dr. Fong's recommendations regarding appellant's work restrictions. He provided physical restrictions that limited bilateral gripping and grasping to 15 minutes per hour

³ On April 25, 2012 OWCP advised that it had been paying appellant compensation at an erroneous amount because she was entitled to augmented compensation. Appellant was paid the amount due.

⁴ The duties of the surveillance systems monitor position were described as: Monitors premises of public transportation terminals to detect crimes or disturbances, using closed circuit television monitors, and notifies authorities by telephone of need for corrective action; observes television screens that transmit in sequence views of transportation facility sites; pushes hold button to maintain surveillance of location where incident is developing, and telephones police or other designated agency to notify authorities of location of disruptive activity; adjusts monitor controls when required to improve reception, and notifies repair service of equipment malfunctions. It has a sedentary strength level and does not require frequent reaching, handling or fingering.

for a total of 1 hour and a one-pound lifting restriction. Appellant retired on disability effective May 31, 2012.

By decision dated July 26, 2012, OWCP reduced appellant's wage-loss compensation effective July 29, 2012 based on her capacity to earn wages as a security surveillance monitor. This resulted in a 61 percent loss of wage-earning capacity. OWCP noted that file number xxxxxx187 was the master case for appellant's lumbar sprain cases, with subsidiary cases xxxxxx110 (denied) and xxxxxx291 and xxxxxx225 (closed). An OWCP referral physician had advised that her lumbar condition had resolved and was at base-line for preexisting lumbar disc disease.

On July 31, 2012 appellant, through her attorney, requested a hearing held on November 6, 2012. She testified that she had worked as a nixie clerk at the employing establishment. Appellant completed two years of college and had several low back claims in addition to the present claim. Due to her upper extremity and back pain, she was incapable of performing the security surveillance monitor position. Appellant's attorney argued that a conflict in medical opinion had been created between Dr. Fong and Dr. Hsu regarding appellant's work restrictions.

On November 28, 2012 Dr. Hsu disagreed with Dr. Fong's opinion. He indicated that appellant had permanent restrictions established in July 2007.

In a January 17, 2013 decision, an OWCP hearing representative affirmed the July 26, 2012 decision.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.⁵ An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.⁶

Section 8115 of FECA and the implementing federal regulations provide that 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 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, the degree of physical impairment, his or her usual employment, age, qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect his or her wage-earning capacity in his or her disabled condition.⁷

⁵ *James M. Frasher*, 53 ECAB 794 (2002).

⁶ 20 C.F.R. §§ 10.402, 10.403; *John D. Jackson*, 55 ECAB 465 (2004).

⁷ 5 U.S.C. § 8115; 20 C.F.R. § 10.520; *John D. Jackson*, *id.*

OWCP must initially determine a claimant's medical condition and work restrictions before selecting an appropriate position that reflects his or her wage-earning capacity. The medical evidence upon which OWCP relies must provide a detailed description of the condition.⁸ Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.⁹

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 Department of Labor's *Dictionary of Occupational Titles* 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.¹⁰ Finally, application of the principles set forth in *Albert C. Shadrick*,¹¹ as codified in section 10.403 of OWCP's regulations,¹² will result in the percentage of the employee's loss of wage-earning capacity.¹³

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, 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.¹⁴

ANALYSIS

The Board finds that OWCP met its burden of proof to reduce appellant's compensation effective July 29, 2012 based on her capacity to earn wages in the constructed position of security surveillance monitor.

The weight of medical evidence is represented by the July 7, 2010 report from Dr. Fong, a Board-certified orthopedic surgeon, who provided a second opinion evaluation that established that appellant was no longer totally disabled. OWCP properly referred appellant for vocational rehabilitation counseling in November 2010.¹⁵ In October 2011, the vocational rehabilitation

⁸ *William H. Woods*, 51 ECAB 619 (2000).

⁹ *John D. Jackson*, *supra* note 6.

¹⁰ *James M. Frasher*, *supra* note 5.

¹¹ 5 ECAB 376 (1953).

¹² 20 C.F.R. § 10.403.

¹³ *James M. Frasher*, *supra* note 5.

¹⁴ *John D. Jackson*, *supra* note 6.

¹⁵ 5 U.S.C. § 8104(a); *see Ruth E. Leavy*, 55 ECAB 294 (2004).

counselor, Ms. Page, identified positions that conformed to appellant's capabilities. OWCP determined that appellant had the capacity to earn wages as a security surveillance monitor, based on the opinion of Dr. Fong.

Dr. Fong noted appellant's complaint of bilateral upper extremity aches and pains. He provided examination findings and diagnosed bilateral repetitive stress injury/carpal tunnel disease syndrome of the upper extremities with forearm tendinitis, bilateral carpal tunnel syndrome and trigger digits. In an attached work capacity evaluation, Dr. Fong advised that appellant could work eight hours a day with permanent restrictions of two hours reaching and reaching above the shoulder, four hours of repetitive motion of the wrists, and one hour of pushing, pulling and lifting, with a 10-pound weight restriction. A November 10, 2010 FCE demonstrated that appellant could perform light duty for eight hours per day with restrictions to her physical activity.¹⁶ On January 10, 2011 Dr. Fong agreed with the FCE results and opined that appellant could work light duty on a full-time basis.

The security systems monitor position was classified as within the sedentary strength category with negligible reaching, handling and fingering.¹⁷ Ms. Page, the vocational rehabilitation counselor, advised that the position was reasonable available in the local labor market with an entry-level hourly wage of \$10.00 to \$12.00.

Appellant disagreed with the proposed reduction and submitted a report from Dr. Hsu who disagreed with Dr. Fong's opinion regarding appellant's physical restrictions. Dr. Hsu indicated that appellant's work restrictions had been in place since July 2007. The restrictions provided by him indicate that bilateral gripping and grasping were limited to 15 minutes per hour for a total of 1 hour and a one-pound lifting restriction. The physical demands of the security surveillance monitor position listed above comport with the restrictions provided by Dr. Hsu and those of Dr. Fong.

The Board also notes that appellant asserted that she had restrictions based on a back condition. Preexisting conditions must be considered in a constructed wage-earning capacity determination.¹⁸ The record, however, contains no medical evidence that established that appellant had any physical restrictions as a result of her back condition. Other than stating that she experienced back pain, she did not submit medical evidence addressing why her back condition would prevent her from performing the duties of the security surveillance position.¹⁹

The Board finds that OWCP considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment, age and employment qualifications, in determining that the position of security surveillance monitor represented her wage-earning capacity.²⁰ The evidence of record establishes that she had the requisite physical

¹⁶ *Supra* note 2.

¹⁷ *Supra* note 4.

¹⁸ *Gary L. Moreland*, 54 ECAB 638 (2003).

¹⁹ *See Darletha Coleman*, 55 ECAB 143 (2003).

²⁰ *James M. Frasher*, *supra* note 5.

ability, skill and experience to perform the position and that such a position was reasonably available within the general labor market of her commuting area. OWCP therefore properly determined that the position of security surveillance monitor reflected appellant's wage-earning capacity, and using the *Shadrick* formula,²¹ properly reduced her compensation effective July 29, 2012.²²

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

CONCLUSION

The Board finds that OWCP met its burden to justify reduction of appellant's wage-loss compensation on the grounds that she had the capacity to earn wages in the constructed position of security surveillance monitor.

ORDER

IT IS HEREBY ORDERED THAT the January 17, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 14, 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

²¹ *Supra* note 11.

²² *James Smith*, 53 ECAB 188 (2001).