United States Department of Labor
Employees' Compensation Appeals Board

G.P., Appellant	)	
and	)	**Docket No. 13-1165**
	)	**Issued: August 16, 2013**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Boston, MA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 15, 2013 appellant, through his attorney, filed a timely appeal from a January 31, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (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 medical secretary represented his wage-earning capacity.

FACTUAL HISTORY

On October 8, 2001 appellant, then a 54-year-old nurse, sustained injuries when he slipped on a wet floor while in the performance of duty. He underwent right shoulder

[1] 5 U.S.C. § 8101 *et seq.*

arthroscopic surgery on March 7, 2002 to repair a torn rotator cuff. On March 1, 2004 appellant underwent additional rotator cuff surgery. On March 16, 2004 surgery was performed as a result of a right shoulder infection. According to a January 4, 2010 statement of accepted facts (SOAF), the accepted employment-related conditions are right shoulder rotator cuff tear, right shoulder sprain and joint pain; dermatitis; psychogenic pain; right shoulder postoperative infection and aggravation of a dysthymic disorder.[2] Appellant received compensation for total disability and was referred for vocational rehabilitation services on August 1, 2008.

OWCP referred appellant for a second opinion examination by Dr. Phillip Wirganowicz, a Board-certified orthopedic surgeon. In a report dated February 20, 2010, Dr. Wirganowicz reviewed a history of injury and results on examination. He found that appellant continued to have residuals of the right shoulder injury. Dr. Wirganowicz completed a work capacity evaluation (OWCP-5c), indicating that appellant was limited to four hours a day, with a 10-pound lifting restriction and no reaching above shoulder. Appellant was limited to four hours of standing or walking.

On September 10, 2010 the vocational rehabilitation specialist completed a job classification form (OWCP-66) for the position of medical secretary (Department of Labor *Dictionary of Occupational Titles* No. 201.362-014). The position was described as performing general secretarial duties in a medical setting, with a sedentary strength level (10 pounds lifting occasionally).

Appellant underwent a functional capacity evaluation (FCE) on January 13, 2011. The report found that he could work eight hours with restrictions. The attending physician, Dr. Adrian Bartoli, a Board-certified anesthesiologist and pain management specialist, completed an OWCP-5c dated October 18, 2011. He limited appellant to two hours bending and stooping, one hour sitting with no walking or standing. Dr. Bartoli also limited appellant to 20 pounds lifting.

OWCP found a conflict in the medical opinion with respect to appellant's work restrictions between Dr. Wirganowicz and Dr. Barton. Dr. Dave Atkin, a Board-certified orthopedic surgeon, was selected as a referee physician. In a report dated December 9, 2011, he listed a history of injury, reviewed the medical records and set forth results on examination. Dr. Atkin found that appellant could work eight hours a day, noting the medical record and the FCE. He limited appellant to four hours standing and walking per day. Dr. Atkin stated, "Based upon the job descriptions for medical secretary and administrative assistant, which I have reviewed, [appellant's] above[-]noted restrictions would not exclude him from performing all of the tasks involved in either position during an eight-hour workday."

The vocational rehabilitation specialist completed an OWCP-66 job classification form for a medical secretary on March 30, 2012. She stated that the position was reasonably available in appellant's commuting area based on state employment information with a weekly wage of $720.00.

[2] The acceptance of aggravation of dysthymic disorder was based on an April 1, 2009 report from second opinion examiner, Dr. Alberto Lopez, a Board-certified psychiatrist and neurologist, who found appellant was capable of working full duty from a psychiatric point of view.

By letter dated April 25, 2012, OWCP advised appellant that it proposed to reduce his monetary compensation on the grounds that the selected position of medical secretary represented his wage-earning capacity. Appellant was advised that, if he disagreed with the proposal, to submit evidence or argument within 30 days.

In a decision dated May 31, 2012, OWCP reduced appellant's compensation finding that he had the capacity to earn $720.00 per week in the selected position of medical secretary. It provided calculations that appellant's current pay rate for the date-of-injury job was $1,448.98, and the loss of wage-earning capacity (LWEC) was 50 percent.

Appellant requested a hearing before an OWCP hearing representative, which was held on November 14, 2012. In a November 23, 2012 report, Dr. Patrick McMahon provided results on examination. He indicated that appellant could work light duty with 15-pound lifting, no overhead use of arms and infrequent reaching.

By decision dated January 31, 2013, the hearing representative affirmed the May 31, 2012 decision. The hearing representative found that OWCP properly reduced appellant's compensation based on the selected position of medical secretary.

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.[3]

Under 5 U.S.C. § 8115, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his 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 wage-earning capacity is determined with due regard to the nature of his injury, his degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment, and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.[4]

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 with the state employment service or other applicable service.[5] Finally, application of the

[3] *Carla Letcher*, 46 ECAB 452 (1995).

[4] *See Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); *see also* 5 U.S.C. § 8115(a).

[5] *See Dennis D. Owen*, 44 ECAB 475 (1993); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity*, Chapter 2.814.8 (February 2013).

principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.[6]

It is well established that when a case is referred to a referee medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[7]

ANALYSIS

OWCP found a disagreement between second opinion physician Dr. Wirganowicz and attending physician Dr. Bartoli with respect to appellant's employment-related work restrictions. Dr. Wirganowicz stated that appellant could stand or walk four hours per day with a 10-pound lifting restriction. In an October 18, 2011 OWCP-5c form, Dr. Bartoli limited appellant to one hour of standing or walking, with a 20-pound lifting restriction. 5 U.S.C. § 8123(a) indicates that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.[8]

OWCP selected Dr. Atkin as a referee physician to resolve the conflict in the medical evidence and establish the specific work restrictions. In a December 9, 2011 report, Dr. Atkin provided a detailed history and review of the medical evidence. He offered an unequivocal opinion that appellant could work eight hours a day with restrictions. As to the medical secretary position, Dr. Atkin specifically indicated that he had reviewed the job description and opined that appellant could physically perform the duties of the position.

When a case is referred to a referee medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight. The Board finds that Dr. Atkin represents the weight of the medical evidence and establishes that the selected position of medical secretary was within appellant's work restrictions.

Once specific work restrictions are established, a rehabilitation specialist may select a position in the *Dictionary of Occupational Titles* that fits appellant's capabilities and is reasonably available in appellant's commuting area. In this case the rehabilitation specialist indicated that the position of medical secretary (No. 201.362-104) was suitable and was reasonably available based on state employment data. The weekly wage was reported as $720.00. There is no contrary evidence of record.

Having properly selected the position of medical secretary, appellant was provided notice and an opportunity to respond prior to reduction of compensation.[9] The reduction of

[6] 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.403.

[7] *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

[8] *Robert W. Blaine*, 42 ECAB 474 (1991); 5 U.S.C. § 8123(a).

[9] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity*, Chapter 2.814.8(e) (February 2013).

compensation is calculated based on the *Shadrick* principles as explained in 20 C.F.R. § 10.403. The employee's wage-earning capacity in terms of percentage is computed by dividing the earnings by the current pay rate for the date-of-injury position.[10] The record indicates that OWCP's calculations were in accord with established procedure. OWCP properly reduced appellant's compensation based on the selected position of medical secretary.

The Board notes that appellant submitted a November 23, 2012 report from Dr. McMahon providing work restrictions. Dr. McMahon did not provide a history, specifically discuss the selected position of medical secretary or appellant's condition as of May 31, 2012, the date of the wage-earning capacity determination. The report is of diminished probative value and the weight of the evidence remained with Dr. Atkin. To the extent that appellant was seeking modification of the May 31, 2012 wage-earning capacity determination based on new medical evidence, the evidence must show a material change in the nature and extent of the employment-related condition.[11] Dr. McMahon does not discuss a material change in the nature and extent of an employment-related condition as of November 23, 2012.

Based on a review of the evidence of record, the Board finds that OWCP followed its procedures and properly determined that the selected position of medical secretary was medically and vocationally suitable. OWCP properly reduced appellant's compensation based on a wage-earning capacity of $720.00 per week. 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 properly reduced appellant's compensation on the grounds that the selected position of medical secretary represented his wage-earning capacity.

[10] The wage-earning capacity in terms of dollars is computed by multiplying the pay rate for compensation purposes by the percentage of wage-earning capacity, and then subtracting the resulting dollar amount from the pay rate for compensation purposes. 20 C.F.R. § 10.403(e).

[11] *See Sue A. Sedgwick*, 45 ECAB 211 (1993).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 31, 2013 is affirmed.

Issued: August 16, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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