

FACTUAL HISTORY

Appellant, then a 50-year-old distribution clerk, filed a Form CA-2 claim for benefits on November 24, 2005, alleging that she developed a bilateral hand/wrist condition causally related to employment factors. OWCP accepted the claim for right carpal tunnel syndrome, bilateral, lateral epicondylitis and bilateral trigger finger.

On December 9, 2008 Dr. Jeffrey D. Stone, a Board-certified hand surgeon, performed appellant's surgery for right ulnar nerve submuscular transposition with V-Y flexor pronator lengthening and right ring trigger finger.

Appellant returned to full duty on February 3, 2009.

Dr. Stone performed a second surgical procedure on September 8, 2009 for left ulnar nerve submuscular transposition, with flexor pronator lengthening.

Appellant returned to work to a light-duty position tailored to restrictions outlined by Dr. Stone on December 5, 2009.

On February 4, 2010 appellant was placed off work again due to the National Reassessment Program (NRP), which resulted in the loss of available work for appellant at the employing establishment. She began receiving compensation for temporary total disability.

In a work capacity evaluation form dated February 22, 2010, Dr. Stone indicated that appellant could work eight hours with the following restrictions: reaching and reaching above the shoulder for four hours per day; frequent lifting not exceeding 25 pounds; frequent pushing not exceeding 40 pounds; intermittent pushing not exceeding 80 pounds; and overhead lifting not exceeding 10 pounds.

On March 18, 2010 OWCP referred appellant for vocational rehabilitation.

In a February 5, 2010 report, received by OWCP on April 10, 2010, Dr. Walter E. Afield, a Board-certified psychiatrist, related that appellant was placed off work on February 4, 2010 due to NRP and had a work-related right hand condition which limited her activities. He advised that this condition had resulted in permanent pain and opined that emotionally she was not able to cope with her problems; she had developed severe depression, anxiety and an emotional condition as a result of all her issues.

In three reports dated June 7, 2010, Dr. Stone expanded appellant's work limitations to include the restriction of five minutes off for every five minutes of typing.

In a vocational rehabilitation report dated September 1, 2010, a vocational rehabilitation counselor recommended a position for appellant listed in the Department of Labor's *Dictionary*

of *Occupational Titles*, cashier 2, DOT #211.462-010, which was within her indicated restrictions and reasonably reflected her ability to earn wages.³

By letter dated September 2, 2010, OWCP asked Dr. Stone to review the job descriptions of six selected jobs, including the cashier position. The descriptions set forth the duties and physical requirements of each position. Dr. Stone was asked to state his opinion as to whether appellant could perform these jobs.

On September 10, 2010 Dr. Stone responded to OWCP's letter by signing his assent to all six positions, including that of cashier 2, DOT #211.462-010.

In a September 23, 2010 report, received by OWCP on October 26, 2010, Dr. Afield essentially reiterated his previous findings and conclusions. He stated that appellant experienced stress dealing with her vocational counselor, which exacerbated her emotional condition. Dr. Afield advised that she was uncomfortable with the perceived "dishonesty" displayed by the vocational counselor, who was attempting to place her in suitable alternate employment. He opined that, given appellant's emotional condition, he did not believe that she was capable of any form of employment, as this would be detrimental to her mental health.

By letter to OWCP dated September 21, 2010, the vocational counselor indicated that he had closed appellant's case. He stated that she was capable of earning an entry level wage of at least \$8.25 per hour based on his review of a May 2010 employment survey of her commuting area and that cashier jobs were reasonably available to her in her commuting area based on estimated occupational employment statistics. The entry pay level for this position was \$330.00 per week.

³ The job description for the cashier position entails the following duties:

"Alternate Titles: Cash Clerk; Cashier, General; Cashier, Office; Ticket Clerk Receives cash from customers or employees in payment for goods or services and records amounts received; Recomputes or computes bill, itemized lists and tickets showing amount due, using adding machine or cash register. Makes change, cashes checks and issues receipts or tickets to customers. Records amounts received and prepares reports of transactions. Reads and records totals shown on cash register tape and verifies against cash on hand. May be required to know value and features of items for which money is received. May give cash refunds or issue credit memorandums to customers for returned merchandise. May operate ticket-dispensing machine. May operate cash register with peripheral electronic data processing equipment by passing individual price coded items across electronic scanner to record price, compile printed list and display cost of customer purchase, tax and rebates on monitor screen. May sell candy, cigarettes, gum and gift certificates and issue trading stamps. May be designated according to nature of establishment as Cafeteria Cashier (hotel and restaurant); Cashier, Parking Lot (automotive ser[vice]); Dining-Room Cashier (hotel and restaurant); Service-Bar Cashier (hotel and restaurant); Store Cashier (clerical); or according to type of account as Cashier, Credit (clerical); Cashier, Payments Received (clerical). May press numeric keys of computer corresponding to gasoline pump to reset meter on pump and to record amount of sale and be designated Cashier, Self-Service Gasoline (automotive service). May receive money, make change and cash checks for sales personnel on same floor and be designated Floor Cashier (clerical). May make change for patrons at places of amusement other than gambling establishments and be designated Change-Booth Cashier (amuse. & rec.)."

By notice of proposed reduction dated September 28, 2010, OWCP advised appellant of its proposal to reduce her compensation because the factual and medical evidence established that she was no longer totally disabled and that she had the capacity to earn wages as a cashier at the weekly rate of \$330.00 in accordance with the factors outlined in 5 U.S.C. § 8115.⁴ It calculated that her compensation rate should be adjusted to \$367.64 using the *Shadrick*⁵ formula. OWCP found that appellant's current adjusted compensation rate, every four-week period, was \$1,470.54. It stated that the case had been referred to a vocational rehabilitation counselor, who had located a position as a cashier, which he found to be suitable for her, given her work restrictions and was available in her commuting area. OWCP allowed appellant 30 days in which to submit any contrary evidence.

By decision dated November 10, 2010, OWCP advised appellant that it was reducing her compensation because the weight of the medical evidence showed that she was no longer totally disabled for work due to the effects of her accepted right hand conditions and that the evidence of record showed that the position of cashier represented her wage-earning capacity. Regarding Dr. Afield's report pertaining to her emotional condition, OWCP found that as a psychiatrist he could not offer an opinion regarding her physical restrictions.

By letter dated December 1, 2010, appellant requested a hearing, which was held on April 18, 2011. At the hearing she stated that she began to experience severe anxiety in 2007, which was caused by her chronic pain. Appellant's attorney indicated that reports from Dr. Afield would establish that appellant had a consequential emotional condition; he advised that the aggravation of her anxiety and depression caused by chronic pain from her accepted injuries, would establish that she was not capable of performing the selected position of cashier.

In a report dated June 13, 2011, Dr. Afield stated that he had been treating appellant since September 2009. He advised that she had been experiencing difficulty coping with some of her chronic pain problems. Dr. Afield further stated that appellant's emotional condition was progressing and that her depression and anxiety were becoming more severe. He opined that she was not emotionally capable of doing much from an occupational standpoint. Dr. Afield diagnosed severe depression, anxiety, a chronic pain problem, some post-traumatic symptomatology with regard to two of appellant's surgeries and some of the situations she encountered while working for the employing establishment. He related that she underwent psychological testing in October 2009, which showed that she was extremely emotionally labile, with symptoms of many severe depression, fatigability, irritability, anxiety, tension, significant suicidal ideation and somatic concerns. Dr. Afield advised that appellant's results were indicative of post-traumatic stress disorder with symptomatology including anxious arousal, depression, anger, irritability and intrusive experiences.

Dr. Afield reiterated that, from an emotional standpoint, appellant lacked the coping skills and adaptive skills to be able to do any type of suitable alternate employment. He noted that the selected positions approved by Dr. Stone required her to perform repetitive motions,

⁴ 5 U.S.C. § 8115.

⁵ *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).

which would only exacerbate her pain and aggravate her emotional condition; thus he opined that she was not capable of doing these jobs. Finally, Dr. Afield noted that appellant had some preexisting anxiety before he started treating her; however, because her anxiety and depression became so severe, she was referred her to a psychiatrist who was better able to handle her emotional problems and prescribe appropriate medication and treatment.

By decision dated July 21, 2011, an OWCP hearing representative affirmed the November 10, 2010 decision. The decision did not specifically express that OWCP had reviewed the evidence received from Dr. Afield, but the hearing representative did note that an emotional condition had not been accepted as work related.

By letter dated August 19, 2012, appellant's attorney asked OWCP to apprise him of the status of his request to expand the accepted conditions to include the emotional injury diagnosed by Dr. Afield.

By letter dated October 3, 2012, received by OWCP on October 9, 2012, appellant's attorney requested reconsideration of the July 21, 2011 decision. Accompanying his request was a copy of a letter requesting reconsideration dated July 30, 2011, which counsel asserted, appellant's attorney had sent to OWCP at the time the letter was dated. Appellant's attorney asked OWCP to consider Dr. Afield's June 13, 2011 report in support of his request for reconsideration and reiterated his request to expand the accepted conditions to include a consequential emotional condition.

By decision dated October 22, 2012, OWCP denied appellant's request for reconsideration without a merit review, finding that the request was untimely and that she had not established clear evidence of error. Regarding Dr. Afield's report, it stated that it had previously reviewed reports pertaining to his examination of her. OWCP stated that appellant was required to present evidence which showed that it made an error and that there was no evidence submitted that showed that its final merit decision was in error.

LEGAL PRECEDENT

Section 8128(a) of FECA⁶ does not entitle an employee to a review of an OWCP decision as a matter of right.⁷ This section, vesting OWCP with discretionary authority to determine whether it will review an award for or against compensation, provides:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may-- (1) end or increase the compensation awarded; or (2) award compensation previously refused or discontinued.”

⁶ 5 U.S.C. § 8128(a).

⁷ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

OWCP, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁸ As one such limitation, it has stated that it will not review a decision denying or terminating a benefit unless the application for review is filed within 180 days of the date of that decision.⁹ The Board has found that the imposition of this 180-day time limitation does not constitute an abuse of the discretionary authority granted by OWCP under 5 U.S.C. § 8128(a).

ANALYSIS

On appeal, appellant's attorney argues that OWCP erred in finding that his request for reconsideration was untimely. He asserts that he submitted a letter dated July 30, 2011, which timely requested reconsideration. The Board does not accept this argument. While counsel submitted a copy of a letter dated July 30, 2011 in which he requested reconsideration of the July 21, 2011 decision, there is no indication in the record that OWCP received a copy of this letter until October 9, 2012. The Board therefore affirms OWCP's finding that appellant's request for reconsideration was untimely.

Appellant's attorney further contends that OWCP's hearing representative erred by failing to address June 13, 2011 report, which was received by OWCP prior to the July 21, 2011 hearing representative's decision. Counsel contends that the October 22, 2012 nonmerit decision should be reversed and that OWCP should be directed on remand to consider Dr. Afield's report with regard to whether it should accept a consequential emotional condition.

The Board has duly reviewed the case record and finds that the failure of OWCP, in the November 10, 2010 and July 21, 2011 merit decisions, as well as the October 22, 2012 nonmerit decision, to consider Dr. Afield's reports, which indicated that appellant's emotional condition would preclude her from performing the selected position as cashier, constitutes clear evidence of error. The issue of whether an employee has the ability to perform a modified position offered by the employing establishment is primarily a medical question that must be resolved by the medical evidence.¹⁰ OWCP referred appellant to a vocational rehabilitation counselor who identified the selected position of cashier based on the physical restrictions outlined by Dr. Stone. Appellant signed his assent to the cashier position on September 10, 2010; OWCP therefore found in its November 10, 2010 reduction of compensation decision that the position of cashier was within appellant's physical restrictions.

However, OWCP has received Dr. Afield's thorough, well-rationalized reports in which he opined that appellant had an emotional condition, possibly preexisting, which precluded her from performing the cashier position. This report indicated that she had greater restrictions than

⁸ Thus, although it is a matter of discretion on the part of OWCP whether to review an award for or against payment of compensation, OWCP has stated that a claimant may obtain review of the merits of a claim by (1) showing that OWCP erroneously applied or interpreted a point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constituting relevant and pertinent new evidence not previously considered by OWCP. *See* 20 C.F.R. § 10.606(b).

⁹ *Id.* at § 10.607(b).

¹⁰ *Robert Dickinson*, 46 ECAB 1002 (1995).

those upon which the cashier job had been based. Appellant's counsel has continuously argued that her emotional condition should be accepted as a consequential injury, but OWCP has refused to address this issue. In determining wage-earning capacity, impairments which preexisted the injury and all injury-related impairments must be taken into consideration in the selection of the position.¹¹ Once Dr. Afield indicated that appellant had additional restrictions stemming from an emotional condition and that this condition was consequential to the accepted injury, this raised the issue of whether the duties of the cashier position exceeded the restrictions imposed by Dr. Stone which only addressed the right hand conditions. Therefore, OWCP erred in failing to address medical evidence that appellant submitted prior to its July 21, 2011 decision; *i.e.*, Dr. Afield's reports, in considering whether the November 10, 2010 decision reducing her compensation was proper.¹²

CONCLUSION

The Board finds that the hearing representative committed reversible error in her July 21, 2011 decision by finding that the November 10, 2010 decision properly reduced her compensation based on her ability to perform the selected position of cashier.

¹¹ See *supra* note 4 at Chapter 2.814.8.a(2), (5), (6) (December 1993); see also Chapter 2.814.8(d), Medical Suitability, which states: "The [claims examiner] is responsible for determining whether the medical evidence establishes that the claimant is able to perform the job, taking into consideration medical conditions due to the accepted work-related injury or disease and any preexisting medical conditions."

¹² *Thu M. McGill*, Docket No. 98-1867 (issued July 14, 2000); see also *O'Lester Williams*, Docket No. 01-1637 (issued May 15, 1992); *Ruth Hickman*, Docket No. 91-831 (issued July 31, 1991).

ORDER

IT IS HEREBY ORDERED THAT the October 22, 2012 decision of the Office of Workers' Compensation Programs is reversed.

Issued: February 4, 2014
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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