United States Department of Labor
Employees' Compensation Appeals Board

G.A., Appellant	)	
and	)	**Docket No. 13-1351**
	)	**Issued: January 10, 2014**
DEPARTMENT OF HOMELAND SECURITY, EMERGENCY PREPAREDNESS & RESPONSE, Biloxi, MS, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 14, 2013 appellant, through her attorney, filed a timely appeal from a January 7, 2013 decision of the Office of Workers' Compensation Programs' (OWCP), which affirmed a June 28, 2012 wage-earning capacity determination. 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 met its burden of proof to reduce appellant's compensation effective July 1, 2012, based on its determination that the constructed position of personnel clerk represented her wage-earning capacity.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On June 10, 2006 appellant, then a 31-year-old site inspector, was injured in a motor vehicle accident while working. OWCP accepted her claim for a contusion of the left hip and a herniated lumbar disc at the L5-S1 level. It approved a September 27, 2007 L5-S1 microdiscectomy. Appellant returned to work after the surgery and worked intermittently in the position of program analyst. She stopped work in May 2010 and received total disability compensation on the periodic rolls.

A functional capacity evaluation (FCE) was performed on November 12, 2010. It revealed that appellant was capable of work at a medium level, eight hours a day. On February 8, 2011 Dr. Eric Wolfson, an attending Board-certified internist, advised that she was capable of work at a medium work level.

By letter dated March 29, 2011, OWCP requested that Dr. Wolfson clarify appellant's medical limitations. Dr. Wolfson was also asked whether she could perform the job of program analyst. In an April 8, 2011 response, he found that appellant was able to perform the duties of program analyst. Dr. Wolfson emphasized that she needed to move every 30 minutes.

On August 9, 2011 OWCP referred appellant for a second opinion, to Dr. Douglas N. Lurie, a Board-certified orthopedic surgeon.[2] In an August 25, 2011 report, Dr. Lurie noted appellant's history of injury and treatment. On examination, there was no indication of symptom magnification. Appellant had some mild tingling in the L5-S1 distribution of both legs on sensory examination but, she was neurologically and vascularly intact. She had no pain with range of motion of her hips and her lumbar spine range of motion included about 30 degrees of rotation in either direction and she was able to sit in 90 degrees of lumbar flexion. Dr. Lurie noted that lumbar spine x-rays revealed some narrowing at L5-S1. He noted that appellant's claim was accepted for a herniated disc at L5-S1. Appellant's current findings included a painful straight leg raise on both sides, very slight weakness of great toe extension on both sides, minimal tenderness to palpation of the lumbar spine and some slightly altered but not necessarily diminished sensations in the L5-S1 distribution on both legs. With regard to her ability to work, Dr. Lurie explained that he was unable to provide any opinion until he had reviewed the FCE. He recommended a sedentary or light-duty capacity pending review. Dr. Lurie also noted that appellant was an excellent candidate for vocational rehabilitation and would benefit from a lumbar epidural steroid injection.

On September 16, 2011 OWCP provided Dr. Lurie with a copy of the FCE. On September 28, 2011 Dr. Lurie advised that appellant demonstrated safe body mechanics and could perform in a medium physical demand category for eight hours per day, five days per week. He was concerned that pain medication affected her ability to operate a company vehicle. Dr. Lurie provided lifting restrictions of 30 to 50 pounds waist to crown and front carrying of 60 pounds and limited sitting.

On November 15, 2011 OWCP referred appellant to a vocational rehabilitation counselor. It noted that her former job was considered primarily sedentary in nature but also

[2] On April 25, 2011 OWCP proposed to terminate appellant's wage-loss compensation based on Dr. Wolfson's report. However, it was then determined that additional development was required.

required that she be able to train, maintain a state of readiness and be deployed into the possible high-risk environment of a disaster site. OWCP noted that travel might be required on short notice, including transportation in helicopters or other expedient means during poor conditions. It was therefore necessary for the counselor to explore light-duty jobs currently available within appellant's labor market commensurate with her transferable skills and former work experience.

In a December 6, 2011 report, the counselor noted meeting with appellant. Appellant's education included a Masters in Business administration degree as well as significant transferable skills working for the Army Corps of Engineers and Federal Emergency Management Agency. He recommended employment as a personnel clerk or administrative assistant. Appellant agreed to participate in the full-time job search plan on December 14, 2011.

The personnel clerk position, as listed in the Department of Labor, Dictionary of Occupational Titles (DOT), under No. 209.362-026 was classified as a sedentary light position. The duties included compiling and maintaining records; recording data; performing performance reviews or evaluations; processing employment applications; assisting in other employment activities; preparing reports using typewriter or computer; administer and score aptitude, personality and interest tests. The physical requirements were described as sedentary and included lifting up to 20 pounds occasionally and 10 pounds frequently, occasional stooping and crouching and frequent reaching, handling, fingering and talking. No climbing, balancing, kneeling or crawling was required. On December 5, 2011 the vocational rehabilitation counselor found that appellant's performance on vocational testing and her two years of training in preparation for entry into the private sector met the specific vocational preparation. He listed average weekly earnings of a personnel clerk as $840.00 a week based on December 2011 wage information from the Mississippi Employment Security Commission. The vocational rehabilitation counselor determined that the position was reasonably available in sufficient numbers on a full-time basis in appellant's commuting area based on a labor market survey.

In a December 27, 2011 letter, OWCP advised appellant that the selected position of a personnel clerk was suitable to her work restrictions and that she would receive 90 days of placement assistance to help her locate a position. Appellant was notified that her compensation would likely be reduced by the end of this period.

On February 23, 2012 appellant advised OWCP that she was operating a home based day care for two children and charged $60.00 dollars a week, per child, for 30 hours. This work began on January 16, 2012.

In a February 28, 2012 letter, the rehabilitation counselor advised OWCP that, given appellant's age, education, prior work experience and work restrictions, she was capable of performing work of a far more complex and economically productive nature that of a child care attendant. In a letter dated May 3, 2012, the employing establishment noted that her current date-of-injury salary was $47,448.00 per year.

On May 21, 2012 the vocational rehabilitation counselor concluded placement services on behalf of appellant. Appellant was provided with 120 days of placement assistance but did not obtain employment.[3]

On May 22, 2012 OWCP proposed to reduce appellant's wage-loss compensation because the medical and factual evidence of record established that she was no longer totally disabled. It found that she had the capacity to earn the wages of a personnel clerk. OWCP found that appellant's home-based babysitting work did not represent her true wage-earning capacity as her work experience and education demonstrated that she could earn more than $120.00 per week. Appellant was provided 30 days to submit additional evidence or argument in support of any objection to the proposed reduction. No response was received.

In a June 28, 2012 decision, OWCP reduced appellant's benefits effective July 1, 2012 based on her ability to earn wages in the constructed position of personnel clerk. Using the formula in *Albert C. Shadrick*,[4] it noted that her salary on the date her disability began on May 23, 2010 was $1,386.92 a week. The current adjusted pay rate for her job on the date of injury was $1,455.56 a week as of May 22, 2012. Appellant was found currently capable of earning $840.00 per week, the pay rate of a personnel clerk. OWCP determined that she had a 58 percent wage-earning capacity or 42 percent loss of wage-earning capacity, which resulted in an adjusted wage-earning capacity of $804.41 per week or a loss of wage-earning capacity of $582.51 per week, reduced by the basic, two thirds, compensation rate to total $436.88 and increased by cost-of-living adjustments to $450.75 per week. This yielded a new compensation rate of $1,803.00 every four weeks. After subtracting insurance and retirement premiums, OWCP found that the net compensation was $1,517.04 every four weeks.

Appellant's representative requested a hearing held on October 11, 2012. Appellant testified that she no longer had her day care business due to her back condition. She acknowledge that, based upon her work experience, she had the necessary skills to perform the selected job; but did not believe that she was physically capable of performing such work, because she could not sit long enough. Appellant stated that she used multiple accommodations at home such as a walker and cane. She noted that she would need surgery if she sat all day. Appellant's counsel questioned the pay rate of $20.00 per hour for a personnel clerk and argued that it was too high. It was contented that appellant did not receive proper notification from the vocational rehabilitation counselor about job leads as he did not have her correct e-mail address. She noted that the jobs ranged from $10.00 to $15.00 per hour. Appellant also noted that she took medications that interfered with her ability to drive or work.[5]

In a July 11, 2012 disability certificate, Dr. Fani Manney, a Board-certified neurologist, placed appellant off work due to low back pain. In a separate report, she noted that appellant complained of pain such that she could not perform her daily activities. Appellant had pain with back extension and rotation to the right. Dr. Manney diagnosed lumbar spondylarthritis, lumbar disc disease and postlaminectomy syndrome in the lumbar region. On August 9, 2012 she noted

[3] In a March 13, 2012 conference memorandum, OWCP determined that the rehabilitation counselor had e-mailed appellant job leads at an incorrect e-mail address. Due to this, it extended placement efforts another 30 days.

[4] 5 ECAB 376 (1953).

[5] On July 5, 2012 the Office of Personnel Management approved her disability retirement application.

that appellant had developed a chronic pain syndrome with residual low back pain along with radicular symptoms in her right hip and upper leg. Appellant often had an exacerbation of symptoms that was of natural progression and she could not stand, sit or walk for long. Dr. Manney advised that appellant was able to manage her symptoms with her medications. She stated that "it would seem reasonable to assume that [appellant's] current situation can be traced to the initial traumatic event. [Appellant] was asymptomatic before the event." Appellant had a chronic condition that required pain management and that other interventional therapies and a FCE obtained to ascertain specific limitations/restrictions.

On August 13, 2012 appellant provided additional medical evidence and argued that her condition had worsened and she had not been released to return to work. In an August 6, 2012 report, Dr. Vanessa Duncombe, a Board-certified family practitioner, diagnosed insomnia, anxiety and dermatitis. A September 19, 2012 magnetic resonance imaging (MRI) scan by Dr. Hoshall Barrett, a Board-certified diagnostic radiologist, revealed an L5-S1 disc herniation.

In an October 30, 2012 report, Dr. Jeremy Jernigan, a chiropractor, noted that full spine x-rays were obtained which revealed biomechanical alterations to the cervical, thoracic and lumbar spine and pelvis. In a November 5, 2012 report, Dr. Wolfson noted that appellant was undergoing chiropractic treatment for a recurrent disc herniation and was unable to work. OWCP received several physical therapy notes.

In a letter dated November 6, 2012, appellant's representative advised that he was submitting additional evidence. In a November 15, 2012 letter, appellant stated that she was facing foreclosure due to the reduction of her benefits. She argued that she was disabled. In a December 26, 2012 letter, appellant indicated that she and her family had tried to start a small business but she had to close it due to her health. It was open from August to November 2012. Appellant also noted that she needed additional time to submit medical reports.

By decision dated January 7, 2013, an OWCP hearing representative affirmed the June 28, 2012 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.[6]

Section 8115(a) of FECA,[7] 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. Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.[8] If the actual earnings do not fairly and reasonably represent wage-earning capacity or if the employee has no actual earnings, his or her

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

[7] 5 U.S.C. § 8115.

[8] *Hubert F. Myatt*, 32 ECAB 1994 (1981); *Lee R. Sires*, 23 ECAB 12 (1971).

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 disabled condition.[9] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[10] 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.[11] 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.[12]

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 or to an OWCP wage-earning capacity specialist for selection of a position, listed in the DOT or otherwise available in the open labor market, that fits that employee's capabilities with regard to his physical limitation, 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.[13] Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.[14]

ANALYSIS

OWCP accepted appellant's claim for a contusion of the left hip, a herniated disc at L5-S1 and it authorized the September 27, 2007 L5-S1 microdiscectomy. Appellant stopped work in May 2010 and began receiving total disability compensation on the periodic rolls.

An FCE was completed on November 12, 2010 which indicated that appellant could work at a medium level for eight hours per day. On February 8, 2011 appellant's physician, Dr. Wolfson, concurred that she could work at a medium level. On August 25 2011 Dr. Lurie, the second opinion physician, found that appellant was not totally disabled and could work at a full-time basis subject to work restrictions. He subsequently noted that she could work for eight hours per day at a medium demand level based upon the FCE with restrictions, as he was concerned with her pain medication affecting her ability to operate a company vehicle. Dr. Lurie provided a lifting restriction of 30 to 50 pounds waist to crown and front carrying of 60 pounds and limited sitting.

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

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

[11] *Id.*

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

[13] *Karen L. Lonon-Jones*, 50 ECAB 293, 297 (1999).

[14] *Id. See Shadrick*, 5 ECAB 376 (1953).

Appellant's vocational rehabilitation counselor determined that appellant had the capacity to perform the duties of a personnel clerk. Appellant had a strong education that included a master's in business administration. Contact with state employment services showed the position was available in sufficient numbers so as to make it reasonably available within appellant's commuting area. The position was sedentary and required occasional lifting of up to 10 pounds frequently and 20 pounds occasionally, occasional stooping and crouching and frequent reaching, handling, fingering and talking. It did not require climbing, balancing, kneeling or crawling. OWCP properly relied on the opinion of the rehabilitation counselor that appellant was vocationally capable of performing the personnel clerk position and a review of the evidence reveals that appellant is physically capable of performing the position.

The medical evidence from Drs. Wolfson and Lurie establishes that appellant was physically capable of performing the personnel clerk position. The physicians found that she could work full time in the medium physical demand category. The demand level is consistent with the physical requirements of a personnel clerk which, as noted, is classified as a sedentary light position.

After her benefits were reduced, appellant submitted reports from Dr. Manney, who placed her off work due to low back pain. On August 9 2012 Dr. Manney noted that appellant had chronic pain syndrome with residual low back pain along with radicular symptoms in her right hip and upper leg. She stated that appellant's symptoms were part of the natural progression of her condition and opined that "it would seem reasonable to assume that [appellant's] current situation can be traced to the initial traumatic event. Dr. Manney was asymptomatic before the event." The Board has held that an opinion that a condition is causally related to an employment injury because the employee was asymptomatic before the injury is insufficient, without supporting rationale, to establish causal relation.[15] Dr. Manney did not adequately address appellant's incapacity to perform the sedentary duties of a personnel clerk. She did not explain how appellant's accepted conditions, as well as any preexisting conditions,[16] precluded appellant from performing personnel clerk duties. Dr. Manney did not submit a sufficient medical opinion addressing how appellant's back condition prevented her from performing the duties of the personnel clerk position.[17] The other medical evidence provided by appellant did not specifically address her incapacity to perform the sedentary duties of a personnel clerk.[18]

[15] *Kimper Lee*, 45 ECAB 565 (1994).

[16] *See Jess D. Todd*, 34 ECAB 798, 804 (1983).

[17] *See Darletha Coleman*, 55 ECAB 143 (2003).

[18] The record contains physical therapy reports but physical therapists are not physicians under FECA. Thus, these records have no probative medical value. *See Jane A. White*, 34 ECAB 515, 518 (1983). The record also contains chiropractic reports from Dr. Jernigan. Under FECA, a physician includes a chiropractor only to the extent that his reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist. 5 U.S.C. § 8101(2); *Merton J. Sills*, 39 ECAB 572, 575 (1988). Because Dr. Jernigan did not treat or diagnose spinal subluxation based on x-ray, he is not a physician under FECA and his opinion lacks probative medical value. *Gloria J. McPherson*, 51 ECAB 441 (2000).

Appellant asserted at her hearing that she had physical limitations and that medication prevented her from working as a personnel clerk. The Board notes that she did not submit medical evidence to support that she was unable to perform the duties of a personnel clerk.

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 personnel clerk represented appellant's wage-earning capacity.[19] The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of personnel clerk and that such a position was reasonably available within the general labor market of her commuting area. Therefore, OWCP properly reduced her compensation effective July 1, 2012 based on her capacity to earn wages as a personnel clerk.

On appeal, appellant's attorney argues that there were errors in the medical and vocational foundations of OWCP's January 7, 2013 and June 28, 2012 decisions. He argued that an unresolved conflict remained in the medical evidence.[20] However, in this case, there is no conflict as both the treating physician, Dr. Wolfson, and the second opinion physician, Dr. Lurie, agreed that appellant was capable of working in a medium physical demand category for eight hours per day. Additionally, counsel argued that OWCP failed to adjudicate a surgery request and important consequential conditions. However, OWCP has not issued a final decision with regard to requests for surgery or consequential conditions and therefore the Board does not have jurisdiction over the matter.[21] Appellant also did not provide reasoned medical evidence explaining how her accepted or preexisting conditions precluded her from performing the selected position.[22]

Counsel also argued that OWCP used an antiquated system and artificially elevated appellant's wage-earning capacity in a depressed job market in a region where 95 percent of the jobs paid $30,000.00 per year or less. He argued that personnel clerks in Mississippi did not make $20.00 dollars an hour. The Board notes that the vocational rehabilitation counselor found that the selected position was available in sufficient numbers at a weekly wage of $840.00 based on December 2011 wage data from the Mississippi Employment Security Commission. The counselor is an expert in the field of vocational rehabilitation. OWCP may rely on his or her opinion as to whether the job is reasonably available and vocationally suitable.[23] The fact that

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

[20] *See* 5 U.S.C. § 8123(a) (if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination).

[21] *See* 20 C.F.R. § 501.2(c).

[22] *See Lee A. Dent*, 54 ECAB 704 (2003) (in a wage-earning capacity determination, physical ailments that preexisted the accepted condition must be taken into consideration while physical ailments acquired subsequent to and unrelated to the accepted injury are excluded from consideration).

[23] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8d (October 2009). *See also B.H.*, Docket No. 13-583 (issued September 10, 2013).

appellant was unable to secure a position does not mean that the position was not reasonably available to her in the open labor market.[24]

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP met its burden of proof in reducing appellant's compensation based on its determination that the constructed position of a personnel clerk represented her wage-earning capacity effective July 1, 2012.

ORDER

IT IS HEREBY ORDERED THAT the January 7, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 10, 2014
Washington, DC

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

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

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

[24] *Lawrence D. Price*, 54 ECAB 590 (2003).