United States Department of Labor
Employees' Compensation Appeals Board

K.S., Appellant	)	
and	)	**Docket No. 14-752**
	)	**Issued: July 24, 2014**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION FACILITY, Denver, CO, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 20, 2014 appellant filed a timely appeal from an October 30, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) reducing her compensation benefits. 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.[2]

ISSUE

The issue is whether OWCP properly reduced appellant's compensation benefits effective February 13, 2011 based on its finding that she had the capacity to earn wages in the selected position of Cashier II.

[1] 5 U.S.C. § 8101 *et seq.*

[2] On appeal appellant submitted new evidence. The Board has no jurisdiction to review new evidence on appeal; *see* 20 C.F.R. § 501.2(c)(1).

FACTUAL HISTORY

This case has previously been before the Board. On June 23, 2008 appellant, then a 51-year-old mail handler, filed a traumatic injury claim alleging that she injured her left knee in the performance of duty. OWCP accepted the claim for a left medial meniscus tear, a left hip and thigh sprain and a left knee and leg sprain. It paid appellant compensation for total disability beginning August 7, 2008. Appellant returned to modified employment with the employing establishment on January 27, 2009.

In a work restriction evaluation dated May 5, 2009, Dr. Craig S. Anderson, Board-certified in family practice, found that appellant could work eight hours per day walking and standing for 15 minutes intermittently for no more than two hours per day, pushing, pulling and lifting no more than 5 pounds, and performing no squatting, kneeling or climbing. He advised that the restrictions were permanent.

The employing establishment could not accommodate the restrictions set forth by Dr. Anderson. OWCP paid appellant compensation for total disability beginning February 27, 2010.

On July 20, 2010 OWCP referred appellant for vocational rehabilitation. On August 6, 2010 the rehabilitation counselor stated that she met with appellant who refused to sign a return to work timeline. By letter dated August 6, 2010, OWCP advised that she had 30 days to cooperate with vocational rehabilitation or have her compensation reduced by what would have been her wage-earning capacity had she cooperated.

In a report dated August 12, 2010, the rehabilitation counselor discussed appellant's work history of 20 years as a mail handler/sorter. On September 14, 2010 the counselor advised that she was obstructing the return to work effort.

By letter dated September 20, 2010, appellant related that she had applied for both disability retirement and social security disability, and was not interested in signing a rehabilitation plan.[3]

In an October 17, 2010 report, the rehabilitation counselor noted that it was difficult to identify suitable positions as appellant's limitations were "below sedentary exertion" according to the Department of Labor's *Dictionary of Occupational Titles*. She further noted that appellant was uninterested in obtaining private employment.

In a November 2, 2010 earnings capacity report, the rehabilitation counselor related that the only job title reasonably available within appellant's commuting area was Cashier II, which was classified by the *Dictionary of Occupational Titles* as requiring light strength. She noted

[3] In a February 9, 2009 psychological consultation, Dr. Rebecca Hawkins, a clinical psychologist, diagnosed recurrent, moderate major depressive disorder possibly aggravating her physical pain.

that some jobs within this classification required sedentary work with only occasional walking and lifting of less than five pounds. The rehabilitation counselor stated:

> "This counselor contacted a significant number of employers who hire individuals such as [appellant] for cashier jobs that require only occasional lifting of five pounds. Employers indicated if additional weight was required to be moved, there are a significant number of alternative employees that can perform the duties. Hence, special accommodations could be provided for this injured worker."

Appellant listed six employers that she contacted directly to verify this information, in addition to a state employment service representative.

In a job classification report dated November 2, 2010, the rehabilitation counselor identified the position of Cashier II from the *Dictionary of Occupational Titles* as suitable for appellant. The position was classified as requiring light physical demands with occasional lifting of 20 pounds and frequently lifting of 10 pounds. The rehabilitation counselor noted that appellant's lifting restriction of up to five pounds was inconsistent with the position of Cashier II but reiterated that she confirmed by telephone contact with a state employment service representative that "there are a sufficient number of Cashier II jobs that match the five-pound restriction to ensure suitability and availability of the job title for this injured worker." The rehabilitation counselor also found that appellant met the vocational requirements of the position, which required a short demonstration of up to 30 days.

On December 15, 2010 an OWCP rehabilitation specialist concurred with the opinion of the rehabilitation specialist that a subset of Cashier II jobs were within appellant's work restrictions and performed in sufficient numbers within her geographical area.

On January 6, 2011 OWCP advised appellant of its proposed reduction of her compensation based on its finding that she had the capacity to perform the constructed position of Cashier II. It found that the position was vocationally suitable and within the work restrictions of Dr. Anderson's May 5, 2009 work restriction evaluation.

On February 4, 2011 appellant's attorney challenged the proposed reduction, arguing that the position was outside her work restrictions. He also noted that she had two other accepted claims that should be considered in determining her wage-earning capacity.

By decision dated February 15, 2011, OWCP reduced appellant's compensation effective February 13, 2011 after determining that she could earn wages as a Cashier II. It discussed the evidence in two other file numbers and noted that each had been closed without restrictions.

On March 4, 2011 appellant, through her attorney, requested a telephone hearing before an OWCP hearing representative. A hearing was held on June 7, 2011. On June 28, 2011 appellant's attorney argued that the rehabilitation specialist did not document specific cashier jobs that were within her restrictions or address whether the positions were within her standing and walking limitations.

In a report dated June 10, 2010, received by OWCP on July 1, 2011, a Dr. Claudia Eisner found that appellant could work mostly sitting with some bending, occasional overhead reaching and walking up to 10 minutes for an hour or two each day.[4]

In a decision dated August 4, 2011, an OWCP hearing representative affirmed the February 11, 2011 decision. He discussed appellant's March 7, 2007 traumatic injury claim, accepted for a concussion under file number xxxxxx783, and her September 17, 2007 claim for a left hip injury, which was not accepted or denied but instead administratively closed under file number xxxxxx382. The hearing representative determined that it was reasonable to find that a subset of Cashier II positions required less strength and would be within her restrictions as set forth by Dr. Anderson's May 5, 2009 work restriction evaluation, which he found continued to constitute the weight of the evidence.

By decision dated September 12, 2011, OWCP denied appellant's request for reconsideration finding that she did not submit evidence or raise an argument sufficient to warrant reopening her case for further merit review under 5 U.S.C. § 8128.

Appellant appealed to the Board. In an order dated September 12, 2012, the Board set aside the August 4 and September 12, 2011 decisions.[5] The Board noted that OWCP had considered medical evidence from file numbers xxxxxx783 and xxxxxx382 in reaching its loss of wage-earning capacity determination but such evidence was not associated with the record on appeal. The Board remanded the case for OWCP to combine the case records.

By decision dated October 17, 2012, OWCP reissued its February 11, 2011 loss of wage-earning capacity decision. It noted that it had doubled all prior claims into the current file number.

On November 12, 2012 appellant, through her attorney, requested an oral hearing. A telephone hearing was held on March 19, 2013.

By decision dated June 5, 2013, an OWCP hearing representative affirmed the October 17, 2012 decision. She noted that OWCP had accepted appellant's December 29, 2011 claim for right shoulder impingement, tendinitis and arthropathy under file number xxxxxx273 and that the medical evidence in that file number precluded appellant from overhead reaching. The hearing representative found, however, that there was no reasoning provided for this finding.

On August 16, 2013 appellant, through her attorney, requested reconsideration based on an August 13, 2013 report from Dr. Jack L. Rook, a Board-certified physiatrist, who diagnosed right shoulder tendinitis, impingement syndrome, acromioclavicular joint arthropathy and myofascial pain syndrome. Dr. Rook advised that she should avoid reaching over the shoulder level and not lift over five pounds.

[4] In a report dated June 9, 2010, Dr. Aimee Henley, a clinical psychologist, diagnosed major depressive disorder, to rule out pain disorder and to rule out a cognitive disorder.

[5] Docket No. 12-470 (issued September 12, 2012).

In a decision dated October 30, 2013, OWCP denied modification of the June 5, 2013 decision. It noted that Dr. Rook's finding that appellant could lift only five pounds was within the previous work restrictions. OWCP further determined that she could perform overhead reaching with her left arm.

On appeal appellant discussed her job duties and noted that on November 2013 she underwent right shoulder surgery. She submitted additional medical evidence.

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 of benefits.[6] Under section 8115(a), 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 his or her wage-earning capacity, or if the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the 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 wage-earning capacity in his or her disabled condition.[7]

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.[8] 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 *Albert C. Shadrick*[9] will result in the percentage of the employee's loss of wage-earning capacity.

ANALYSIS

OWCP accepted that appellant sustained a left medial meniscal tear, a left hip and thigh sprain and a left leg and knee sprain due to a June 17, 2008 employment injury. It further accepted that she sustained a concussion under file number xxxxxx783.[10]

[6] *T.O.*, 58 ECAB 377 (2007).

[7] *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

[8] *Mary E. Marshall*, 56 ECAB 420 (2005); *James A. Birt*, 51 ECAB 291 (2000).

[9] 5 ECAB 376 (1953); codified by regulations at 20 C.F.R. § 10.403.

[10] OWCP further accepted that appellant sustained right shoulder tendinitis, impingement syndrome, acromioclavicular joint arthropathy and myofascial pain syndrome under file number xxxxxx273.

In a work restriction evaluation dated May 5, 2009, Dr. Anderson found that appellant could work full time with permanent restrictions of walking and standing intermittently for 15 minutes at a time for no more than 2 hours per day. He further opined that she could push, pull and lift up to five pounds but could not squat, knee or climb. Based on Dr. Anderson's finding that appellant could work with restrictions, OWCP properly referred her for vocational rehabilitation.

The Board finds, however, that OWCP did not meet its burden of proof to reduce her compensation as the medical evidence is insufficient to establish that the selected position of Cashier II was within her physical limitations. The issue of whether an employee has the physical ability to perform a selected position is a medical question that must be resolved by probative medical evidence.[11] As noted, Dr. Anderson found that appellant could walk and stand intermittently for 15 minutes at a time for a maximum of 2 hours per day, and could lift, push and pull no more than five pounds. The *Dictionary of Occupational Titles* describes the duties of a Cashier II as requiring light strength with lifting up to 20 pounds occasionally and 10 pounds frequently. It further provides that the physical demands are in excess of those of a sedentary position, which requires walking and standing for only brief periods.

The rehabilitation counselor found that there was a subset of Cashier II positions that required lifting of five pounds or less. She based this determination on conversations with six employers and a state employment service representative. The rehabilitation counselor further related that those with whom she spoke indicated that there were other employees to assist in lifting any excess weight and that, consequently, "special accommodations could be provided for this injured worker." The purpose, however, of a wage-earning capacity is to find a position within appellant's actual physical and vocational capabilities. The rehabilitation counselor's determination that a subset of Cashier II positions could, if modified, be suitable for appellant is insufficient to show that the position was within her physical limitations. As the medical evidence does not clearly and unequivocally establish that appellant could perform the duties of the selected position, OWCP did not meet its burden of proof to reduce her compensation.[12]

CONCLUSION

The Board finds that OWCP improperly reduced appellant's compensation benefits effective February 13, 2011 based on its finding that she had the capacity to earn wages in the selected position of Cashier II.

[11] *See Maurissa Mack*, 50 ECAB 498 (1999); *Robert Dickinson*, 46 ECAB 1002 (1995).

[12] *See William H. Woods*, 51 ECAB 619 (2000).

ORDER

IT IS HEREBY ORDERED THAT the October 30, 2013 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 24, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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