United States Department of Labor
Employees' Compensation Appeals Board

M.C., Appellant	)	
and	)	**Docket No. 13-1985**
	)	**Issued: March 27, 2014**
U.S. POSTAL SERVICE, POST OFFICE, Philadelphia, PA, Employer	)	

Appearances:
Thomas Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 28, 2013 appellant, through his attorney, filed a timely appeal from an April 3, 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 effective November 18, 2012 to the selected position of sorter, as representative of his wage-earning capacity.

FACTUAL HISTORY

On June 7, 2006 appellant, then a 49-yer-old carrier, filed a traumatic injury claim (Form CA-1) alleging that he sustained shoulder, neck and left arm injuries in the performance of duty

[1] 5 U.S.C. § 8101 *et seq.*

on April 17, 2006. He stated that on April 17, 2006 he was trying to open a door of an "outbound" box and felt a pop in his left shoulder, arm and neck area. On March 5, 2007 OWCP accepted the claim for a C5-6 herniated disc. Appellant stopped working and began receiving wage-loss compensation.

OWCP referred appellant for a second opinion examination by Dr. Robert Draper, a Board-certified orthopedic surgeon. In a report dated March 25, 2011, Dr. Draper provided a history and results on examination. He diagnosed degenerative cervical disc disease from C3-7, with disc osteophyte complex and bulging cervical discs at all levels. Dr. Draper stated:

> "The above-stated medical condition is a preexisting condition associated with the aging process and degenerative cervical disc disease. These changes on the [magnetic resonance imaging scan] are not the result of trauma. However, [appellant] had an aggravation of some of the preexisting degenerative disc disease with a confirmed disc herniation at C5-6 that has been accepted and he will need permanent restrictions. [He] is capable of performing modified[-]duty work, [he] can perform a job that does not require him to lift more than 50 [pounds] occasionally and 25 [pounds] frequently. [Appellant] can work an [eight-]hour day. These are permanent restrictions."

Appellant was referred for vocational rehabilitation services. In a job classification form (OWCP-66), a rehabilitation counselor (RC) identified the position of sorter Department of Labor's *Dictionary of Occupational Titles* (No. 521.687-086). The job description indicated that the position was sedentary with occasional lifting of 10 pounds. According to the RC, the position was reasonably available in appellant's area with wages of $8.25 per hour.

In a form report dated July 10, 2012, Dr. Richard Strulson, an osteopath, indicated that appellant was disabled for work. He diagnosed a C5-6 disc condition.

In a letter dated September 23, 2012, OWCP advised appellant that it proposed to reduce his compensation pursuant to 5 U.S.C. § 8115. It found that the selected position of sorter, with wages of $330.00 per week, represented his wage-earning capacity based on the evidence of record.

By decision dated November 16, 2012, OWCP finalized the decision effective November 18, 2012. It found that the weight of the medical evidence was represented by Dr. Draper with respect to work restrictions.

Appellant requested a hearing before an OWCP hearing representative, which was held on February 5, 2013. He submitted reports from Dr. Steven Valentino, an osteopath. In a report dated December 4, 2012, Dr. Valentino provided a history and results on examination. He diagnosed facet pain, lumbar and cervical degenerative joint disease, cervical radiculitis and cervical spinal stenosis. By report dated January 30, 2013, Dr. Valentino provided results on examination. He stated that appellant's "main interest is determining that he continues to be disabled from gainful employment given his constellation of symptoms as well as is reasonable."

By report dated February 21, 2013, Dr. Valentino stated that he first examined appellant on December 4, 2012 with neck pain and radiation of numbness and weakness in both arms. He

stated that he agreed with Dr. Draper that appellant had an aggravation of preexisting degenerative disc disease. Dr. Valentino further stated that he disagreed with Dr. Draper as "I find [appellant] to continue to meet requirements for disability. I would certainly disagree that [appellant] could return to work in a medium capacity that Dr. Draper has opined."

By decision dated April 3, 2013, the hearing representative affirmed the November 16, 2012 decision, finding that the evidence at that time was sufficient to support OWCP's determination. The hearing representative further found that evidence from Dr. Valentino was sufficient to create a conflict in the medical evidence as to appellant's work capacity and the case was remanded for resolution of the conflict.

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.[2]

Under 5 U.S.C. § 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 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.[3]

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 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.[4] 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.[5]

ANALYSIS

In the present case, the Board notes that, although the hearing representative found a conflict in the medical evidence, the April 3, 2013 decision is an adverse decision in that it affirms the November 16, 2012 wage-earning capacity decision. In this regard, the issue is

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

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

[4] *See Dennis D. Owen*, 44 ECAB 475 (1993).

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

whether the evidence in the record as of April 3, 2013 supports the reduction of compensation as of November 18, 2012 based on the selected position of sorter.

An initial question presented is whether the medical evidence is sufficient to establish that appellant was capable of performing the selected position as of sorter as of November 16, 2012. The Board finds that Dr. Draper represents the weight of the medical evidence on this issue. Dr. Draper provided a March 25, 2011 report providing an opinion that appellant could work full time with lifting restrictions of 50 pounds occasionally and 25 pounds frequently.[6] His report was based on a complete examination and an accurate factual and medical background. The selected position of sorter is within Dr. Draper's work restrictions, as it is a sedentary, light position with lifting of up to 10 pounds occasionally.

The attending physicians of record provided little evidence as to appellant's work restrictions as of November 16, 2012. Dr. Strulson submitted a July 10, 2012 form report that reported that appellant could not work but provided no history, results on examination or other relevant information.

Dr. Valentino did not begin treating appellant until December 4, 2012. He does not discuss the sorter position or provide specific work restrictions as of November 16, 2012. Dr. Valentino stated that he disagreed with Dr. Draper as to the ability to perform a "medium capacity" position, but that is of little probative value to the issue presented. The issue is whether appellant was capable of performing the sorter position at the time of the wage-earning capacity determination and the sorter position was, as noted above, a sedentary position with lifting of 10 pounds occasionally. There were no medical reports with a rationalized medical opinion that he could not perform the selected position as of November 16, 2012.[7]

Based on the medical evidence of record, the Board finds that OWCP properly found that the selected position was within appellant's physical restrictions. The next issue is whether the record supports the finding that the selected position was vocationally suitable, available in appellant's area and with wages of $330.00 per week. The RC made finding that the position was appropriate and available in appellant's commuting area based on state employment information. In addition, the RC determined the wages of the position were $8.25 per hour. There was no contrary evidence of record.

The Board finds that OWCP properly determined that the selected position of sorter represented appellant's wage-earning capacity as of November 16, 2012. The position was medically and vocationally suitable based on the probative evidence of record. OWCP reduced

[6] The Board notes that appellant's representative argued at the February 5, 2013 hearing that Dr. Draper's report was not a current medical report. It is well established that a physician's report must be reasonably current to support a wage-earning capacity determination. *See John D. Jackson*, 55 ECAB 465 (2004). But in this case it is not established that the March 25, 2012 report was beyond a reasonable time period prior to the November 16, 2012 decision. *See, e.g., R.F.* Docket No. 13-1345 (issued September 19, 2013) (the second opinion examination was January 19, 2011, the wage-earning capacity determination was June 3, 2012).

[7] Rationalized medical opinion evidence is medical evidence that is based on a complete factual and medical background of reasonable medical certainty and supported by medical rationale explaining the opinion. *Jennifer Atkerson*, 55 ECAB 317, 319 (2004).

appellant's compensation in accord with the *Shadrick* decision and OWCP's regulations. The wage-earning capacity in terms of percentage is computed by dividing the earnings ($330.00) by the current earnings for the date-of-injury position ($1,067.87) and then the percentage is applied to the date-of-injury pay rate ($946.52).[8] The Board finds that OWCP properly reduced appellant's compensation based on the probative evidence of record.

On appeal, appellant identified the April 3, 2013 as the decision on appeal and then provided arguments regarding development of the case after April 3, 2013. The only final decision on appeal is the April 3, 2013 hearing representative decision. The Board notes that OWCP issued a July 22, 2013 letter that refers to the findings of a referee physician. This letter is not accompanied by appeal rights, does not make adequate findings or otherwise constitute a final adverse decision.[9] On this appeal the Board can review only the evidence of record as of April 3, 2013. The remand by the hearing representative for further development concerned the issue of whether the wage-earning capacity determination should be modified and appellant is entitled to a decision on that issue. On return of the case record OWCP should properly issue a final decision with respect to the issues in the case.

CONCLUSION

The Board finds that OWCP properly reduced appellant's compensation as of November 18, 2012 on the grounds that the selected position of sorter represented appellant's wage-earning capacity.

[8] 20 C.F.R. § 10.403.

[9] *See id.* at § 10.126 for the requirements of an OWCP decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 3, 2013 is affirmed.

Issued: March 27, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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