

**United States Department of Labor
Employees' Compensation Appeals Board**

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J.R., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
San Francisco, CA, Employer)

) **Docket No. 13-1055**
) **Issued: May 27, 2014**
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Appearances:

Alan J. Shapiro, Esq., for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Alternate Judge

MICHAEL E. GROOM, Alternate Judge

JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 28, 2013 appellant, through counsel, filed a timely appeal from a February 26, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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 benefits based on his capacity to earn wages in the constructed position of surveillance system monitor.

FACTUAL HISTORY

On April 3, 2009 appellant, then a 53-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that on April 2, 2009 he sustained a right knee and hip injury when he

¹ 5 U.S.C. § 8101 *et seq.*

tripped over a tub of mail and lost his balance. By decision dated July 13, 2009, OWCP accepted the claim for right knee strain and right hip strain, claim No. xxxxxx909.

Appellant also has a July 5, 1999 claim for injuries to his left hand and wrist from employment-related repetitive motion activities. The claim was accepted for left carpal tunnel syndrome, left thumb carpometacarpal joint arthritis and left cubital tunnel syndrome, claim No. xxxxxx071. OWCP combined claim No. xxxxxx071 with this claim No. xxxxxx909 as the master file.

Appellant's duties as a mail carrier included lifting up to 70 pounds and eight hours per day of continuous simple grasping and fine manipulation. He worked in a full-time limited-duty capacity as a result of his accepted work injury through September 12, 2009. On September 12, 2009 appellant stopped work after his employing establishment could no longer accommodate his work restrictions and remained out of work to that date. He was placed on periodic rolls for wage-loss compensation.

On November 30, 2009 Dr. Paul Roache, a Board-certified orthopedic surgeon, performed a right knee arthroscopy, debridement of medial and lateral meniscus tears, chondroplasty of the medial and lateral compartments and a tricompartmental synovectomy. In a December 22, 2010 report, he advised that appellant was partially disabled as a result of his employment injury and was capable of working with restrictions of 45 minutes an hour of standing and walking, no lifting over 30 pounds and no pushing or pulling over 50 pounds.

On July 7, 2010 appellant was referred for vocational rehabilitation services with Kim Page, a vocational rehabilitation counselor. He completed vocational testing on October 27, 2010 which demonstrated that he had good reading skills and basic math skills. On December 20, 2010 appellant underwent a functional capacity evaluation. A vocational rehabilitation plan was formulated targeting the positions of surveillance system monitor and gate guard.

In a February 22, 2011 work capacity evaluation (Form OWCP-5c), Dr. Richard Fernandez, a treating physician Board-certified in physical medicine and rehabilitation, advised that appellant had reached maximum medical improvement (MMI) with regard to his left upper extremity. He found that appellant could work eight hours a day with permanent restrictions including up to three hours of reaching (right side) and three hours of repetitive movements of the wrists and hands (right side).

OWCP referred appellant, a statement of accepted facts and the case file to Dr. Ramon Jimenez, a Board-certified orthopedic surgeon, for a second opinion examination. In a February 28, 2011 report, Dr. Jimenez provided findings on physical examination and summarized appellant's prior medical records. He opined that appellant continued to have residuals of his work-related injuries including right knee tear of the medial meniscus, degenerative arthrosis, left carpal tunnel syndrome and lateral epicondylitis. Dr. Jimenez noted that appellant could not perform the full duties of a letter carrier but was capable of performing, at minimum, a full-time sedentary position with permanent restrictions.

In a May 24, 2011 Form OWCP-66, appellant's counselor identified the positions of gate guard and surveillance system monitor as within his physical limitations. She confirmed that the surveillance system monitor position was available within the San Francisco Bay area labor market with a salary of \$440.00 a week.

By letter dated May 26, 2011, OWCP informed appellant that the positions of surveillance system monitor and gate guard were suitable to his current work restrictions. It informed him that his compensation would be reduced based upon his wage-earning capacity.

On July 20, 2011 appellant advised OWCP that he had elected Office of Personnel Management (OPM) benefits effective October 1, 2011 in lieu of FECA benefits. On July 29, 2011 the surveillance system monitor position was still available but appellant declined participation in further placement services. Appellant underwent one day of security guard card training on May 31, 2011.

In an August 2, 2011 notice, OWCP informed appellant that it proposed to reduce his monetary compensation based on his capacity to earn wages as a surveillance system monitor within the restrictions identified by Dr. Fernandez. It noted that given the nature of his injury and physical impairment, the surveillance system monitor position best represented his wage-earning capacity. OWCP further noted that the labor market survey established that the position was reasonably available in the local labor market at a weekly wage of \$440.00.² Appellant was provided with 30 days to submit any additional evidence regarding his capacity to earn wages in the position described.

Appellant submitted an August 15, 2011 from Dr. Fernandez, who advised that he could not perform work at a computer monitor. Dr. Fernandez stated that appellant underwent diagnostic/therapeutic injection trials to alleviate his neck pain, noting that appellant continued to have difficulty with bilateral rotation. Aside from his neck, appellant had other limitations such as overhead activity with the left shoulder, lifting and manipulation with the left hand and prolonged ambulation due to the right knee, recommending modified duty with his current work restrictions.

By decision dated September 13, 2011, OWCP reduced appellant's monetary compensation effective September 25, 2011 based on his capacity to earn wages as a surveillance system monitor. This resulted in a 41 percent loss of wage-earning capacity. OWCP noted that Dr. Fernandez's February 22, 2011 work restrictions were more restrictive and inclusive than those provided by Dr. Roache and carried the weight of the medical evidence. It also noted that Dr. Fernandez's August 15, 2011 report did not establish that appellant's work restrictions had changed or that he sustained a material worsening of an accepted condition that would necessitate change.

² The duties of the surveillance systems monitor position were described as: Monitors premises of public transportation terminals to detect crimes or disturbances, using closed circuit television monitors, and notifies authorities by telephone of need for corrective action; observes television screens that transmit in sequence views of transportation facility sites; pushes hold button to maintain surveillance of location where incident is developing, and telephones police or other designated agency to notify authorities of location of disruptive activity; adjusts monitor controls when required to improve reception, and notifies repair service of equipment malfunctions. It has a sedentary strength level and does not require frequent reaching, handling or fingering.

On September 19, 2011 appellant, through counsel, requested an oral hearing before the Branch of Hearings and Review.

In a February 1, 2012 report, Dr. Fernandez noted that appellant had neck pain documented since January 4, 2000. The mechanism of his neck injury was mostly due to the October 31, 1995 work-related motor vehicle accident.³ Dr. Fernandez stated that the second mechanism of injury resulted from his left elbow injury, noting that, on November 26, 2007, Dr. Grotz diagnosed appellant as having cervical strain with radiculitis due to his July 5, 2009 injury.⁴ He also referenced a December 30, 2006 magnetic resonance imaging (MRI) scan of the cervical spine and a June 15, 2011 electromyography (EMG) study which revealed a neck injury. Dr. Fernandez reported that left cervical rotation was still problematic and neck rotation refers into the bilateral shoulders with pain referral. He diagnosed cervical disc injury and left cervical radiculopathy and opined that appellant would not be able to tolerate sitting in front of a monitor for prolonged periods of time due to his neck injury. Dr. Fernandez recommended a functional capacity evaluation.

By decision dated April 12, 2012, a hearing representative set aside the September 13, 2011 decision. She found that the evidence was insufficient to establish that appellant had a work-related cervical condition; but the case was remanded for further development and referral to a second opinion physician to address whether appellant's diagnosed cervical condition precluded him from performing the duties of the selected jobs.

Following the April 12, 2012 OWCP decision, appellant submitted a May 8, 2012 medical report from Dr. Peter B. Weber, a Board-certified neurological surgeon, who reported that appellant had long-standing neck, shoulder, arm and hand issues. Dr. Weber referenced an MRI scan from six years prior which showed normal aging changes and no significant or severe nerve root or spinal canal impingement. He opined that appellant's ongoing neck issues were not related to the cervical spine. Dr. Weber thought it would be reasonable for appellant to work in a sedentary job with respect to the cervical spine.

On May 3, 2012 OWCP referred appellant, a statement of accepted facts and the case file to Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon, for a second opinion examination on whether appellant could work as a surveillance system monitor or gate guard based on his preexisting cervical condition. In a June 17, 2012 report, Dr. Swartz examined appellant on May 29, 2012 and provided detailed findings on physical examination and a thorough history of medical treatment. He found that appellant's December 10, 2010 functional capacity evaluation revealed that he was capable of working in a sedentary position, calling into question appellant's complaints regarding reaching, grasping and holding objects with his hands. Dr. Swartz opined that appellant was capable of performing the job of a surveillance system monitor or gate guard; but stated that, "In order to confirm my opinion, I would request a job analysis of both of these

³ The record before the Board does not contain further information regarding appellant's October 31, 1995 work-related injury.

⁴ As a result of his July 5, 2009 injury, appellant's claim was accepted for left carpal tunnel syndrome, left thumb carpometacarpal joint arthritis and left cubital tunnel syndrome, claim No. xxxxxx071.

jobs.” A Form OWCP-5c was also submitted which found that appellant could work eight hours per workday with restrictions.

By decision dated August 10, 2012, OWCP reduced appellant’s wage-loss compensation effective that day based on his capacity to earn wages as a surveillance system monitor. This resulted in a 41 percent loss of wage-earning capacity. OWCP noted that the weight of the medical evidence rested with the June 17, 2012 report of Dr. Swartz.

By letter dated August 20, 2012, appellant, through counsel, requested an oral hearing before the Branch of Hearings and Review. Appellant submitted a July 25, 2012 medical report from Dr. Weber, who provided progress notes on treatment of his neck, arm and hand conditions.

At the December 17, 2012 hearing, appellant testified that he was unable to perform the position of surveillance system monitor because of his cervical condition. He explained that his neck condition prevented him from twisting his neck left to right or sitting for a prolonged period. Appellant further testified that he began experiencing neck pain and cervical symptoms following a 1995 car accident and again after he developed carpal tunnel syndrome. The record was held open for 30 days.

Following the hearing, appellant submitted a June 21, 2011 diagnostic report from Dr. Glenn Strome, a Board-certified diagnostic radiologist. An MRI scan of the cervical spine revealed C5-6 through C7-T1 degenerative disc disease, mild spinal stenosis at C6-7 and C7-T1 and mild bilateral foraminal stenosis at C6-7. In a March 9, 2012 medical report, Dr. Santi Rao, a treating physician, diagnosed chronic neck and left arm pain, C6-7 degenerative disc protrusion with some stenosis and left-sided radiculitis with probable radiculopathy at C6-7 on the left. He opined that appellant was currently disabled and noted that his disability status and work restrictions would be those offered by his treating physician. In progress reports dated December 12, 2012 and January 16, 2013, Dr. Roache reported that appellant sought continued treatment for right meniscus knee, medial and lateral. Appellant also provided a December 12, 2012 radiology consultation report of the bilateral knee and a February 13, 2013 schedule award report from an OWCP district medical adviser (DMA).

By decision dated February 26, 2013, a hearing representative affirmed the August 10, 2012 decision. She found that the evidence supported that the position of surveillance systems monitor fairly and reasonably represented appellant’s wage-earning capacity.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.⁵ An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.⁶

⁵ *James M. Frasher*, 53 ECAB 794 (2002).

⁶ 20 C.F.R. §§ 10.402, 10.403; *John D. Jackson*, 55 ECAB 465 (2004).

Section 8115 of FECA and the implementing federal regulations provide that 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 the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of his or her 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 his or her wage-earning capacity in his or her disabled condition.⁷

OWCP must initially determine a claimant's medical condition and work restrictions before selecting an appropriate position that reflects his or her wage-earning capacity. The medical evidence upon which OWCP relies must provide a detailed description of the condition.⁸ Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.⁹

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 for selection of a position listed in the Department of Labor, *Dictionary of Occupational Titles* or otherwise available in the open market, that fits that 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 open labor market should be made through contact with the state employment service or other applicable service.¹⁰ Finally, application of the principles set forth in *Albert C. Shadrick*,¹¹ as codified in section 10.403 of OWCP's regulations,¹² will result in the percentage of the employee's loss of wage-earning capacity.¹³

In determining an employee's wage-earning capacity based on a position deemed suitable, but not actually held, OWCP must consider the degree of physical impairment, including impairments resulting from both injury-related and preexisting conditions, but not impairments resulting from postinjury or subsequently acquired conditions. Any incapacity to perform the duties of the selected position resulting from subsequently acquired conditions is immaterial to the loss of wage-earning capacity that can be attributed to the accepted employment injury and for which appellant may receive compensation.¹⁴

⁷ 5 U.S.C. § 8115; 20 C.F.R. § 10.520; *John D. Jackson, id.*

⁸ *William H. Woods*, 51 ECAB 619 (2000).

⁹ *John D. Jackson, supra* note 6.

¹⁰ *James M. Frasher, supra* note 5.

¹¹ 5 ECAB 376 (1953).

¹² 20 C.F.R. § 10.403.

¹³ *James M. Frasher, supra* note 5.

¹⁴ *John D. Jackson, supra* note 6.

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was, in fact, erroneous.¹⁵ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.¹⁶

ANALYSIS

The Board finds that the February 26, 2013 OWCP wage-earning capacity decision was erroneous.

Appellant's physicians provided him with work restrictions which allowed him to work in a full-time limited-duty capacity until September 12, 2009 when appellant stopped work because his employing establishment could no longer accommodate his work restrictions. Reports from appellant's treating physicians, Dr. Roache and Dr. Fernandez, as well as Dr. Jimenez, a second opinion physician, established that appellant could work eight hours a day with permanent restrictions in a sedentary position. These reports were based on appellant's work restrictions involving his accepted injuries of right hip strain, right knee strain, left carpal tunnel syndrome, left thumb carpometacarpal joint arthritis and left cubital tunnel syndrome.

By decision dated September 13, 2011, OWCP reduced appellant's compensation based on his capacity to earn wages as a surveillance systems monitor within the restrictions listed by Dr. Fernandez's February 22, 2011 report. It found that his report carried the weight of the medical evidence because his work restrictions were more restrictive and inclusive than those provided by Dr. Roache.

Appellant appealed the September 13, 2011 decision and submitted a February 1, 2012 report from Dr. Fernandez, who diagnosed appellant with cervical disc injury and left cervical radiculopathy which he opined stemmed back from an October 31, 1995 work-related motor vehicle accident and the July 5, 1999 work injury. Dr. Fernandez noted prior medical reports and diagnostic studies which documented appellant's cervical condition and opined that appellant would not be able to tolerate sitting in front of a computer monitor for prolonged periods of time due to his neck injury.

Appellant was referred to Dr. Swartz, a Board-certified orthopedic surgeon, for a second opinion examination on May 29, 2012. Dr. Swartz was provided with a statement of accepted facts which included the physical requirements of appellant's prior full-duty position as a letter carrier. In a June 17, 2012 report, she provided detailed findings on physical examination and a thorough history of medical treatment. Dr. Swartz found that appellant's December 10, 2010 functional capacity evaluation, as well as his own physical examination, revealed that he was capable of working in a sedentary position, calling into question his complaints regarding reaching, grasping and holding objects with his hands. He opined that appellant was capable of performing the job of a surveillance system monitor or gate guard. Dr. Swartz concluded that his

¹⁵ *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Tamra McCauley*, 51 ECAB 375 (2000).

¹⁶ *Id.*

report by stating that, “In order to confirm my opinion, I would request a job analysis of both of these jobs.”

The Board finds that OWCP’s wage-earning capacity determination was erroneous because it was based on the June 17, 2012 report of Dr. Swartz who did not resolve whether the positions of surveillance system monitor or gate guard were within appellant’s capabilities.¹⁷ Dr. Swartz’s opinion is insufficient to resolve the question of whether appellant’s preexisting cervical condition would allow him to perform the duties of a surveillance systems monitor or gate guard. While he provided a detailed medical history and findings on physical examination, his conclusion that appellant was capable of meeting the requirements of a surveillance systems monitor or gate guard lacked was speculative and equivocal. Specifically, Dr. Swartz requested a job analysis of both positions, noting that he could not confirm his opinion until he reviewed the duties required by these positions. Without a description of the physical work requirements, he qualified his opinion as to whether the positions offered to appellant were medically suitable. As the June 17, 2012 report failed to evaluate the suitability of the work appellant was requested to perform as a security surveillance monitor or gate guard, OWCP improperly found that the weight of the medical evidence rested with Dr. Swartz.¹⁸ The Board has held that a medical opinion not fortified by rationale is of limited probative value.¹⁹

CONCLUSION

The Board finds that OWCP did not properly determine that the selected position of surveillance system monitor represented appellant’s wage-earning capacity.

¹⁷ *A.M.*, Docket No. 12-1301 (issued March 14, 2013).

¹⁸ *T.T.*, Docket No. 13-685 (issued June 7, 2013).

¹⁹ *A.D.*, 58 ECAB 149 (2006).

ORDER

IT IS HEREBY ORDERED THAT the February 26, 2013 decision of the Office of Workers' Compensation Programs is reversed.

Issued: May 27, 2014
Washington, DC

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

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

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