

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

C.A., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Benicia, CA, Employer**

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**Docket No. 14-1016
Issued: October 6, 2014**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 31, 2014 appellant, through her attorney, filed a timely appeal from a February 24, 2014 decision of the Office of Workers' Compensation Programs (OWCP) regarding a loss of wage-earning capacity determination. 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 properly reduced appellant's compensation benefits effective July 28, 2013 based on her capacity to earn wages in the constructed position of receptionist.

FACTUAL HISTORY

OWCP accepted that appellant, then a 51-year-old letter carrier, sustained bilateral collateral ligament strains and aggravation of bilateral lower leg osteoarthritis while in the

¹ 5 U.S.C. § 8101 *et seq.*

performance of duty. It authorized left total knee arthroplasty surgery performed on July 26, 2005. Appellant returned to full-time modified duty on November 29, 2005. In a November 25, 2008 decision, OWCP granted her a schedule award for 50 percent impairment of the left lower extremity.

On January 27, 2010 the employing establishment sent appellant home because it could no longer accommodate her physical restrictions. Appellant received compensation for total disability. On January 13, 2011 she was referred for vocational rehabilitation services.

By letter dated June 3, 2011, OWCP referred appellant, together with a statement of facts and the case record, to Dr. J. Hearst Welborn, Jr., a Board-certified orthopedic surgeon, for a second opinion to assess her work capacity for vocational rehabilitation purposes. In a June 27, 2011 medical report, Dr. Welborn reviewed the history of injury and appellant's medical treatment. He noted her complaints of bilateral knee and back pain. Dr. Welborn provided findings on physical examination and the history of left knee replacement, right knee arthritis and lateral collateral ligament sprain and strain. He advised that appellant continued to suffer residuals of the accepted bilateral knee arthritis. Appellant had continued left knee pain after her left knee replacement. She also had continued lateral collateral ligament laxity and tenderness at the medial joint in the left knee. Dr. Welborn advised that appellant was able to participate in vocational rehabilitation and could perform light work as outlined by the Department of Labor's *Dictionary of Occupational Titles* (DOT). He stated that her work-related physical imitations were no lifting more than 20 pounds or standing more than one hour at a time. In a June 28, 2011 work capacity evaluation (Form OWCP-5c), Dr. Welborn stated that appellant could not perform her usual job. Appellant could work eight hours a day with restrictions which included walking and standing four hours a day, pushing, pulling and lifting 20 pounds, two hours a day, squatting, kneeling and climbing with 20 pounds, one hour a day, and no bending or stooping. Dr. Welborn concluded that she had reached maximum medical improvement.

On January 6, 2012 OWCP referred appellant for vocational rehabilitation services. Appellant met with Kim Page, a vocational rehabilitation counselor on January 25, 2012. Ms. Page noted that appellant had a General Education Diploma (GED). Appellant took classes over the years at Diablo Valley College; however, they were strictly personal interest classes and she did not receive any certificates or degrees. Ms. Page noted appellant's employment history included working as a letter carrier at the employing establishment. Appellant also worked for a school district in a library aid position which involved returning books to shelves and stamping in new materials. Ms. Page stated that appellant's transferrable skills included, mail handling and sorting, customer service and basic keyboarding. She scheduled a one-day evaluation of appellant at the Center for Career Evaluations (CCE). In reports dated February 15 and 25, 2012, Ms. Page advised that the results of the CCE test performed on February 14, 2012 revealed average nonverbal reasoning skills, 4.9 math skills, 12.4 reading skills and ability to type eight words a minute. Appellant stated that she could type more words a minute. She underwent a transferrable skills analysis which revealed that she could perform customer service work. Appellant wanted to work as a receptionist or customer clerk. Ms. Page stated that she was motivated to return to work as she was not financially or mentally ready to retire. Appellant needed a short training program to learn basic computer skills. Ms. Page noted that a training center was located near her home. She believed that appellant would be very successful in this endeavor.

On February 21, 2012 Ms. Page determined that appellant could be reemployed as a receptionist. The duties of the receptionist position listed in the Department of Labor's DOT required receiving callers at the establishment; determining the nature of business and directing callers to destination; obtaining callers' name and arranging for appointment with person called upon; directing callers to destination and recording name, time of call, nature of business and person called upon. The duties of the position may require operating private branch exchange telephone console to receive incoming messages; typing memos, correspondence, reports and other documents; working in office of medical practitioner or in other health care facility and be designated outpatient receptionist (medical services) or receptionist, doctor's office (medical services); issuing visitor's pass when required; making future appointments and answering inquiries [information clerk (clerical) 237.367-022]; performing variety of clerical duties [administrative clerk (clerical) 219.362-010] and other duties pertinent to type of establishment; and collecting and distributing mail and messages. The job required a GED. The position was classified as sedentary with no climbing, balancing, stooping, kneeling, crouching, crawling, feeling, tasting, smelling, far acuity, depth perception, color vision or field of vision. The position required frequent reaching, handling, talking and hearing and occasional fingering. The strength level was listed as sedentary, which involved occasional lifting of 10 pounds. Ms. Page determined that appellant would meet the specific vocational preparation in three to six months by acquiring the needed computer skills from the proposed training. Appellant already possessed customer service skills. Ms. Page stated that labor market research showed full-time receptionist positions available in appellant's commuting area and that the weekly wage was \$480.00. She stated that "E.D.D." reported that entry level wages were \$11.56 per hour.

On July 27, 2012 appellant completed an introduction to computers course.

An August 16, 2012 memorandum of conference with appellant, Ms. Page and an OWCP claims examiner noted that she was unable to find a receptionist position. In reports dated September 25 and October 25, 2012, Ms. Page noted appellant's inability to obtain a receptionist position.

A January 10, 2013 report signed by Joan Hart, a nurse practitioner from the office of Dr. John Knight, a Board-certified orthopedic surgeon, stated that appellant could perform part-time sedentary work up to six hours a day with no lifting over 20 pounds, no prolonged bending, stooping or squatting and a frequent change of position every hour.

On March 11, 2013 OWCP determined that there was a conflict in medical opinion between Dr. Welborn and Dr. Knight regarding appellant's work capacity. By letter dated April 5, 2013, it referred her, together with a statement of accepted facts and the case record, to Dr. Roger D. Dainer, a Board-certified orthopedic surgeon, for an impartial medical evaluation.

In an April 29, 2013 report, Dr. Dainer reviewed a history of the accepted employment injury and appellant's family, social and employment background, the medical records and vocational rehabilitation reports. He provided a detailed review of the medical record. Dr. Dainer noted appellant's current complaints of pain in both knees at the medial aspect that increased with prolonged standing and walking for greater than one hour. Appellant had significant difficulty with kneeling, squatting and climbing activities. She also had occasional swelling. On physical examination, Dr. Dainer reported that appellant was not in any acute

distress. She ambulated with a cane for balance. On examination of the lower extremities, Dr. Dainer found that the right calf was 47 centimeters and the left was 50 centimeters. Range of motion measurements for the right knee included 0 degrees of extension and 105 degrees of flexion. There was generalized tenderness medially. There is no gross swelling. A ligamentous examination appeared to be stable. Range of motion measurements for the left knee included 0 degrees of extension and 100 degrees of flexion. There was tenderness over the medial aspect. There is no joint swelling. The knee was ligamentously stable. There was a well-healed surgical scar. The distal neurovascular examination appeared to be normal.

Dr. Dainer diagnosed degenerative arthritis of the bilateral knees. He opined that appellant was unable to perform her usual and customary occupation as a letter carrier due to her inability to walk and stand for prolonged periods, kneel, squat, climb or lift greater than 20 pounds based on her left total knee arthroplasty and current restricted range of motion in both knees associated with degenerative arthritis still present on the right side and generalized pain involving both knees. Dr. Dainer reviewed the description of the duties for the order clerk and receptionist positions and opined that she was capable of performing the duties based on his evaluation of her knees and review of the record. He listed appellant's work-related physical limitations which precluded her from any kneeling, squatting, prolonged walking or standing greater than one hour, repetitive stair climbing or lifting greater than 20 pounds. Dr. Dainer concluded that she could work eight hours a day.

By letter dated May 29, 2013, OWCP proposed to reduce appellant's monetary compensation benefits based on Dr. Dainer's opinion which established her capacity to earn wages as a receptionist.

In an undated report, Dr. Knight diagnosed degenerative disc pain in the lumbar spine. He advised that appellant's status had worsened and she was temporarily totally disabled.

In a July 15, 2013 decision, OWCP reduced appellant's wage-loss benefits effective July 28, 2013, based on her capacity to earn wages as a receptionist. It applied the principles in *Albert C. Shadrick*,² to find a wage-earning capacity of 40 percent and accordingly reduced her compensation.

By letter dated July 22, 2013, appellant, through her attorney, requested a telephone hearing with an OWCP hearing representative.

In reports dated July 8 and 25, 2013, Dr. Knight evaluated appellant's chronic back pain and diagnosed lumbar degenerative disc disease. In a January 6, 2014 report, he advised that her status was unchanged. Dr. Knight noted that appellant had retired.

In a May 31, 2013 magnetic resonance imaging (MRI) lumbar scan report, Dr. R. Craig Platenberg, a Board-certified radiologist, found transitional vertebral body anatomy with partial sacralization of L5 on S1, right greater than left. He also found 10 percent bilateral foraminal narrowing at L4-5 with no nerve root contact or compromise.

² 5 ECAB 376 (1953); 20 C.F.R. § 10.403(d).

In a February 24, 2014 decision, an OWCP hearing representative affirmed the July 15, 2013 decision. She found that appellant failed to submit any factual or medical evidence to establish that the constructed receptionist position was medically, vocationally or educationally unsuitable.

LEGAL PRECEDENT

Section 8115 of FECA³ provides 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, his or her age, his or her 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.

OWCP must initially determine the employee's medical condition and work restrictions before selecting an appropriate position that reflects his or her vocational wage-earning capacity.⁴ The medical evidence OWCP relies upon must provide a detailed description of the employee's condition and the evaluation must be reasonably current.⁵ Where suitability is to be determined based on a position not actually held, the selected position must accommodate the employee's impairment from both injury-related and preexisting conditions, but not impairment attributable to post-injury or subsequently acquired conditions.⁶

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's DOT or otherwise available in the open market, that fits that employee's capabilities with regard to 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. Finally, application of the principles set forth in *Shadrick*⁷ will result in the percentage of the employee's loss of wage-earning capacity. The basic rate of compensation paid under FECA is 66 2/3 percent of the injured employee's monthly pay.⁸

³ 5 U.S.C. §§ 8101-8193, 8115.

⁴ *M.A.*, 59 ECAB 624, 631 (2008).

⁵ *Id.*

⁶ *N.J.*, 59 ECAB 171, 176 (2007); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8d (October 2009).

⁷ *Supra* note 3; 20 C.F.R. § 10.403.

⁸ *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

ANALYSIS

The Board finds that OWCP met its burden of proof to reduce appellant's monetary compensation benefits based on her capacity to earn wages in the selected position of receptionist.

OWCP accepted that appellant sustained bilateral collateral ligament strains and aggravation of bilateral lower leg osteoarthritis while in the performance of duty. It determined that the selected position of receptionist represented her wage-earning capacity. To be an appropriate position for a loss of wage-earning capacity determination under 5 U.S.C. § 8115(a) the position must be medically and vocationally suitable. The evidence must also properly document the position's availability and the wages and OWCP must follow established procedures before reducing appellant's wage-loss compensation.

With respect to the issue of medical suitability of the selected position, OWCP relied on the report of the impartial medical specialist, Dr. Dainer. The Board finds, however, that there was no conflict of medical evidence between, Dr. Knight, an attending physician, and Dr. Welborn, an OWCP referral physician, at the time of OWCP's referral to Dr. Dainer for an impartial medical opinion. The January 10, 2013 report finding that appellant could only work six hours a day with restrictions was signed by Ms. Hart, a nurse practitioner from Dr. Knight's office, and not by Dr. Knight. As a nurse practitioner is not a physician as defined under FECA,⁹ Ms. Hart's report has no probative value to establish the medical suitability of the constructed receptionist position.

Therefore, there was no conflict of medical evidence at the time of referral to Dr. Dainer. The Board finds that, although Dr. Dainer's April 29, 2013 report is not entitled to the special weight afforded to the opinion of an impartial medical specialist, his report can still be considered as a second opinion.¹⁰

Dr. Dainer restricted appellant from any kneeling, squatting, prolonged walking or standing greater than one hour, repetitive stair climbing and lifting more than 20 pounds. He stated that she could work eight hours a day with these restrictions. Dr. Dainer reviewed a description of the constructed receptionist position and advised that appellant could perform the duties of the position.

The selected position of receptionist is a sedentary position requiring occasional lifting of 10 pounds. The physical requirements are within the restrictions provided by Dainer. The Board finds that Dr. Dainer's April 29, 2013 report is entitled to the weight of the medical evidence and establishes that appellant could physically perform the duties of the selected position. Dr. Dainer provided a detailed, clear history of injury and medical treatment, detailed findings on examination and explained the basis for his opinion.

⁹ 5 U.S.C. § 8101(2); *see also*, *M.B.*, Docket No. 12-1695 (issued January 29, 2013).

¹⁰ *R.C.*, Docket No. 09-2217 (issued September 8, 2010).

The Board also finds that the selected position of receptionist was vocationally suitable. The specific vocational preparation required for the position was three to six months. Ms. Page, the vocational rehabilitation counselor, found that appellant met this requirement as she had a GED and experience as a letter carrier and library aid. She also found that the results of a transferrable skills analysis test showed that appellant could perform customer service work. Appellant completed an introductory computer course. Ms. Page conducted a labor market survey which revealed that the receptionist job was being performed in sufficient numbers as to make it reasonably available to appellant within her commuting area and the weekly wage was \$480.00 and \$11.56 per hour for an entry level position. 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.¹¹ The fact that appellant was unable to secure a position does not mean that the position was not reasonably available to her in the open labor market.¹²

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 receptionist represented appellant's wage-earning capacity.¹³ The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of receptionist 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 28, 2013 based on her capacity to earn wages as a receptionist.

Appellant may request modification of the wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

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 receptionist represented her wage-earning capacity effective July 28, 2013.

¹¹ Federal (FECA) Procedure Manual, *supra* note 7. See also *B.H.*, Docket No. 13-583 (issued September 10, 2013).

¹² *Lawrence D. Price*, 54 ECAB 590 (2003).

¹³ *James M. Frasher*, 53 ECAB 794 (2002).

ORDER

IT IS HEREBY ORDERED THAT the February 24, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 6, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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