

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

S.J., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Santa Clarita, CA, Employer)

Docket No. 14-1455
Issued: October 23, 2014

Appearances:

Alan J. Shapiro, Esq., for the appellant
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 June 9, 2014 appellant, through her attorney, filed a timely appeal from a March 18, 2014 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 effective July 17, 2013 based on her capacity to earn wages in the constructed position of receptionist.

FACTUAL HISTORY

On April 26, 2010 OWCP accepted that appellant, then a 40-year-old letter carrier, sustained temporary aggravation of bilateral plantar fibromatosis due to standing and walking for

¹ 5 U.S.C. §§ 8101-8193.

the majority of her workday and carrying a heavy mail satchel. She underwent an authorized plantar fasciotomy surgery on her left foot on July 26, 2010 and plantar fasciotomy surgery on her right foot on January 31, 2011. Appellant stopped work at the time of her July 26, 2010 surgery and received disability compensation on the daily and periodic rolls.

In a report dated June 22, 2011, Dr. Kathryn Mason, an attending Board-certified family practitioner, discussed the condition of appellant's feet following her surgeries. Appellant reported aching stiffness and some stabbing pain in her feet. Dr. Mason noted that physical examination revealed tenderness in the lateral aspect of appellant's left foot and at the surgery site of her right foot with mild swelling. She diagnosed bilateral plantar fasciitis² and advised that appellant could perform sedentary work with no prolonged walking or standing. On July 27, 2011 Dr. Mason noted that appellant reported that her left foot felt better but that her right foot was still a problem. She again determined that appellant could perform sedentary work with no prolonged walking or standing. In a December 12, 2011 report, Dr. Mason found that appellant had reached maximum medical improvement with respect to her feet. She reiterated that appellant could perform primarily sedentary work. Appellant could continuously walk for 10 to 15 minutes per hour and continuously stand for 10 to 15 minutes per hour.

In December 2011 appellant began participating in an OWCP-sponsored vocational rehabilitation program. She expressed an interest in the medical billing field. Appellant's vocational rehabilitation counselor recommended that she take training courses to obtain computer, typing and other clerical skills that would qualify her to work as an insurance clerk or receptionist. On October 12, 2012 appellant successfully completed a six-month training program with Zoom Graphics, which included courses relating to computer skills, typing and medical billing.³ She began the job placement phase of her vocational rehabilitation program, but she was unable to secure employment after 90 days of assistance.

In January 2013 the vocational rehabilitation counselor determined that appellant was vocationally capable of earning wages as a receptionist as described in the Department of Labor's *Dictionary of Occupational Titles*.⁴ The duties of the receptionist position included receiving visitors to establishments, determining the nature of their visits and directing them to their destinations. The receptionist also handled telephone calls to establishments and recording details such as name, time of call, nature of business and person called upon. The position might require operation of a private branch exchange telephone system, issuance of visitor passes and typing memoranda, correspondence, reports and other documents. The physical requirements of the receptionist position, classified as sedentary in nature, included exerting up to 10 pounds of

² Dr. Mason diagnosed tarsal tunnel syndrome in appellant's right foot per diagnostic testing but later indicated that this condition could not be confirmed by clinical findings.

³ A May 30, 2012 academic report from appellant's language of medicine course revealed that she received A+ grades in all her examinations during the prior month and a half.

⁴ On June 11, 2012 Dr. Mason reported findings upon physical examination and indicated that appellant's work restrictions had not changed in that she was still able to perform primarily sedentary work. In a December 20, 2012 report, she stated that appellant could work eight hours per day for five days per week. Dr. Mason could continuously walk for 10 to 15 minutes per hour and continuously stand for 10 to 15 minutes per hour throughout an eight-hour workday.

force on an occasional basis and a negligible amount of force on a frequent basis in order to lift, carry, push, pull or otherwise move objects. Sedentary work involved sitting most of the time, but might involve walking or standing for brief periods of time on an occasional basis.

On January 11, 2013 the labor market survey found that the position of receptionist was reasonably available in appellant's general commuting area with wages of \$360.00 per week.

In a February 28, 2013 letter, OWCP advised appellant that it proposed to reduce her monetary benefits based on her ability to earn wages as a receptionist.⁵ It noted that the opinion of Dr. Mason established that she was capable of performing the physical duties of the receptionist position. Appellant's vocational rehabilitation counselor determined that appellant was vocationally able to perform such duties. OWCP provided appellant 30 days to submit evidence or argument challenging the proposed action.

In a December 26, 2012 report, Dr. Sahana Huq, an attending Board-certified psychiatrist, stated that appellant had been seeing her since September 2010 for treatment of anxiety. Appellant reported having past episodes of anxiety triggered by traumatic experience which recurred several years ago and were significantly worse "with chronic pain, multiple surgeries, inability to function in many areas of life on a daily basis." Dr. Huq reported that her memory and concentration were poor as evidenced by an increasing dosage of the wrong medication. Dr. Huq diagnosed generalized anxiety disorder but did not provide any opinion on appellant's disability or ability to work.⁶

By decision dated July 17, 2013, OWCP reduced appellant's compensation effective that date based on her capacity to earn wages in the constructed position of receptionist. It noted that the December 26, 2012 report of Dr. Huq did not address appellant's ability to work and therefore did not establish that she lacked the capacity to work as a receptionist.

Appellant submitted an October 24, 2013 statement from her husband who indicated that the pain she experienced prevented her from working. She also resubmitted the December 26, 2012 report of Dr. Huq.

Appellant requested a telephone hearing with an OWCP hearing representative. During the December 30, 2013 hearing, counsel contended that the receptionist position description from the Department of Labor's *Dictionary of Occupational Titles* did not provide a realistic description of actual jobs in the workplace. He argued that OWCP should use the Occupational Information Network, a free internet resource.

In a March 18, 2014 decision, the hearing representative affirmed the July 17, 2013 decision. She found that the evidence established that appellant was vocationally and physically capable of earning wages as a receptionist.

⁵ OWCP stated that the reduction in compensation would be based on appellant's ability to earn wages as a "receptionist/insurance clerk," but the content and context of this letter and later communications show that the reduction in compensation would be based solely on appellant's ability to earn wages as a receptionist.

⁶ Appellant also submitted an election form in which she elected Office of Personnel Management (OPM) benefits effective February 20, 2013.

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.⁷ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁸

Under section 8115(a) of FECA, 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 or her 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 or her 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 The fact that an employee has been unsuccessful in obtaining work in the selected position does not establish that the work is not reasonably available in his or her commuting area.¹²

In determining wage-earning capacity based on a constructed position, consideration is given to the residuals of the employment injury and the effects of conditions which preexisted the employment injury.¹³ In determining wage-earning capacity based on a constructed position, consideration is not given to conditions which arise subsequent to the employment injury.¹⁴

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 Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open labor 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

⁷ *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

⁸ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁹ *See E.W.*, Docket No. 14-584 (issued July 29, 2014); 5 U.S.C. § 8115(a).

¹⁰ *Albert L. Poe*, 37 ECAB 684, 690 (1986).

¹¹ *Id.* The commuting area is to be determined by the employee's ability to get to and from the work site. *See Glen L. Sinclair*, 36 ECAB 664, 669 (1985).

¹² *See Leo A. Chartier*, 32 ECAB 652, 657 (1981).

¹³ *See Jess D. Todd*, 34 ECAB 798, 804 (1983).

¹⁴ *N.J.*, 59 ECAB 397 (2008).

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 the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.¹⁵

ANALYSIS

On April 26, 2010 OWCP accepted that appellant sustained temporary aggravation of bilateral plantar fibromatosis due to standing and walking for the majority of her workday and carrying a heavy mail satchel. Appellant underwent OWCP-authorized plantar fasciotomy surgery on her left foot on July 26, 2010 and plantar fasciotomy surgery on her right foot on January 31, 2011. She stopped work at the time of her July 26, 2010 surgery and received disability compensation on the daily and periodic rolls.

OWCP received information from Dr. Mason, an attending Board-certified family practitioner, who found that appellant was not totally disabled for work and had a partial capacity to perform work for eight hours per day subject to specified work restrictions. In a June 22, 2011 report, Dr. Mason noted that appellant reported some residual aching and pain in her feet, but determined that she could perform sedentary work with no prolonged walking or standing. On December 12, 2011 she advised that appellant had reached maximum medical improvement with respect to her feet and could perform primarily sedentary work. Appellant could continuously walk for 10 to 15 minutes per hour and continuously stand for 10 to 15 minutes per hour.

In March 2012 appellant began participating in an OWCP-sponsored vocational rehabilitation program. She successfully completed a six-month training program which included courses in computer skills, typing and other training skills. Appellant attempted to find employment with the help of her vocational rehabilitation counselor but she was unable to secure such employment after a 90-day period. During this period, Dr. Mason reiterated that appellant could work on a full-time basis in a primarily sedentary position.¹⁶

The evidence established that appellant was able to perform the position of receptionist and the position was available in sufficient numbers so as to make it reasonably available within her general commuting area.¹⁷

The Board notes that a vocational rehabilitation counselor is an expert in the field of vocational rehabilitation and OWCP may rely on her opinion that appellant was vocationally

¹⁵ See *Dennis D. Owen*, 44 ECAB 475, 479-80 (1993); *Albert C. Shadrick*, 5 ECAB 376 (1953). See also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.4 (June 2013).

¹⁶ In a December 20, 2012 report, Dr. Mason stated that appellant could work eight hours per day for five days per week. Appellant could continuously walk for 10 to 15 minutes per hour and continuously stand for 10 to 15 minutes per hour throughout an eight-hour workday.

¹⁷ In a December 20, 2012 report, Dr. Mason stated that appellant could work eight hours per day for five days per week. Appellant could continuously walk for 10 to 15 minutes per hour and continuously stand for 10 to 15 minutes per hour throughout an eight-hour workday.

capable of working as a receptionist and that the position was reasonably available in her general commuting area.¹⁸ Ms. Ferra's opinion is supported by the evidence of record which shows that appellant gained considerable clerical skills through an OWCP-sponsored six-month training program.¹⁹

A review of the medical evidence of record reveals that appellant was physically capable of performing the receptionist position. The work restrictions provided by Dr. Mason would allow appellant to work as a receptionist, a primarily sedentary position with few physical demands. Appellant submitted a December 26, 2012 report in which Dr. Huq, an attending Board-certified psychiatrist, stated that she had been seeing her since September 2010 for treatment of anxiety. Dr. Huq diagnosed generalized anxiety disorder but she did not provide any opinion on appellant's ability to work.²⁰

Appellant did not submit any evidence or argument showing that she could not vocationally or physically perform the receptionist position.²¹ 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.²² The weight of the evidence of record establishes that she 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 appellant's compensation effective July 17, 2013 based on her capacity to earn wages as a receptionist.²³

¹⁸ G.A., Docket No. 13-1351 (issued January 10, 1994).

¹⁹ During the December 30, 2013 hearing, counsel alleged that the receptionist position description from the Department of Labor's *Dictionary of Occupational Titles* did not provide a realistic description of actual jobs in the workplace. He argued that OWCP should use the Occupational Information Network, a free internet resource. The Board notes that counsel did not submit evidence to support the claimed unreliability of the Department of Labor's *Dictionary of Occupational Titles*. Moreover, the Occupational Information Network (found online at occupationalinfo.org) contains the same description of the receptionist position as the Department of Labor's *Dictionary of Occupational Titles*. See also *T.G.*, Docket No. 14-921 (issued September 17, 2014) (the Board noted that appellant did not submit evidence supporting that the position at issue was not reasonably available and that OWCP procedures clearly state that the vocational counselor shall include in their report the Department of Labor's *Dictionary of Occupational Titles* description of duties and physical requirements).

²⁰ In determining wage-earning capacity based on a constructed position, consideration is not given to the effects of conditions which arise subsequent to the employment injury. See *supra* notes 13 and 14. It is unclear from the record whether appellant's emotional condition preexisted or arose subsequent to her employment injury.

²¹ Appellant submitted an October 24, 2013 statement in which her husband indicated that the pain she experienced prevented her from working. However, a nonphysician's report would not have any probative value on this medical matter. See *Arnold A. Alley*, 44 ECAB 912, 920-21 (1993).

²² See *Clayton Varner*, 37 ECAB 248, 256 (1985).

²³ OWCP properly applied the principles set forth in the *Shadrick* decision to calculate the percentage of appellant's loss of wage-earning capacity. See *supra* note 15.

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 to reduce appellant's compensation effective July 17, 2013 based on her capacity to earn wages in the constructed position of receptionist.

ORDER

IT IS HEREBY ORDERED THAT the March 18, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 23, 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