United States Department of Labor
Employees' Compensation Appeals Board

S.L., Appellant	)	
and	)	**Docket No. 14-485**
	)	**Issued: February 19, 2015**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Battle Creek, MI, Employer	)	

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
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 24, 2013 appellant, through his attorney, filed a timely appeal from a November 21, 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 benefits effective April 22, 2013 based on his capacity to perform the duties of a laundry worker.

FACTUAL HISTORY

OWCP accepted that on December 18, 1998 appellant, then a 49-year-old housekeeping aid, sustained a low back strain and herniated disc at L5-S1 as a result of pushing a floor

[1] 5 U.S.C. § 8101 *et seq.*

scrubber up a back ramp. He stopped work on December 21, 1998 and has not returned to work. OWCP authorized a L5-S1 discectomy performed on January 1, 1999, a single fusion at L5-S1 on January 3, 2001, a posterior spinal fusion at L5-S1 with left iliac crest bone grafting on October 10, 2002 and an extension of the fusion to L4 on December 21, 2006. Appellant was placed on the periodic rolls.

In a September 26, 2008 work capacity evaluation, Dr. Gregory P. Graziano, an attending Board-certified orthopedic surgeon and appellant's treating physician, advised that appellant was disabled for work.

By letter dated August 5, 2010, OWCP requested that Dr. Graziano provide a report addressing whether appellant had any continuing residuals or disability related to his accepted employment injuries.[2]

In an August 13, 2010 report, Dr. Graziano stated that he was unable to comment on appellant's current conditions since he had not seen him since December 14, 2007.

By letter dated September 8, 2011, OWCP referred appellant, together with a statement of accepted facts and the medical record, to Dr. Emmanuel Obianwu, a Board-certified orthopedic surgeon, for a second opinion. In an October 3, 2011 report, Dr. Obianwu diagnosed chronic lumbar disc disease and a herniated lumbar disc at L5-S1. He advised that, while appellant no longer had any residuals of his employment-related lower back strain he had residuals of his employment-related herniated disc condition. Dr. Obianwu opined that appellant could not perform his housekeeping aid job, but he could work with restrictions that included no reaching above the shoulder, climbing, repetitive bending, twisting, and lifting more than 20 pounds.

On December 16, 2011 OWCP referred appellant for vocational rehabilitation services. Appellant met with a vocational rehabilitation counselor on January 5, 2012. The vocational rehabilitation counselor determined that appellant's transferable skills included light assembly from a bench, sorting, and folding. He indicated that the employing establishment was prepared to offer appellant a job sorting laundry which was within his functional restrictions and transferable skills. The vocational rehabilitation counselor stated that his determination was based on appellant's past experience as a bridge builder, brake assembler, and maintenance and casual laborer.

On January 21, 2012 the employing establishment offered appellant a full-time laundry worker position with retained grade and pay. The primary duties of the position included sorting, folding, and stacking clean linens. Additional duties included sorting personal clothing for residents by ward, color, and name, and sorting undergarments and socks, by name, ward,

[2] Investigative surveillance performed from March 16, 2002 to March 17, 2004 revealed that appellant was observed walking, driving in a normal unrestricted fashion, assisting three individuals with holding, lifting, and moving large plastic tubing, carrying a carry-on size bag over his right shoulder, attempting to extend a slide on a compartment on his camper with the help of another male, bending, kneeling, pushing, and pulling a metal bar with both hands to jack up the camper, laying and rolling under the camper, reaching under the camper while propped up on one elbow, turning a hand crank with his left and right hands while standing, and bending and turning a crank to raise the stabilizers in the rear of the camper.

and size. The employee may be assigned to mark patient clothing, scrubs, uniforms, and laboratory coats as needed. The administrative duties of the position included answering the telephone, making copies, shredding paperwork marked for destruction, and assembling and stapling paperwork. The physical requirements included good use and dexterity of hands for tasks such as, sorting and stacking clothing items, and performing repetitive work. This work could be accomplished either sitting or standing. There were intermittent periods of walking, standing, and sitting while performing administrative tasks. The physical requirements also included lifting items weighing less than one to two pounds.

On January 30, 2012 appellant refused the job offer, stating that his doctors found that he could not work.

By letter dated January 31, 2012, OWCP informed appellant that it had been advised that he had impeded the efforts of the vocational rehabilitation counselor. It informed him that Dr. Obianwu's October 3, 2011 report constituted the weight of the evidence unless appellant were to submit evidence refuting Dr. Obianwu's opinion within 30 days. Appellant was notified of the penalty provisions of section 8113(b) of FECA[3] and section 10.519 of OWCP regulations.[4] He did not respond.

On March 5, 2012 OWCP requested that Dr. Obianwu submit an addendum report clarifying his climbing and lifting restrictions. It further requested that he review the position description for a laundry worker and indicate whether appellant could perform the duties of that position.

In an April 6, 2012 report, Dr. Obianwu advised that appellant had the following permanent restrictions: he should not engage in work that required reaching above the shoulder; twisting; bending; or stooping more than four hours. Appellant could not lift above 20 pounds. He could work as many hours as he wished. Appellant should not be expected to climb up scaffolding, etc. Dr. Obianwu reviewed the laundry work position description and advised that he was capable of performing the laundry worker position.

By letter dated April 13, 2012, OWCP advised appellant that Dr. Obianwu found that he could perform the laundry worker position offered by the employing establishment. Dr. Obianwu was afforded 30 days to provide an explanation justifying his refusal to participate in the vocational rehabilitation effort.

On May 3, 2012 appellant advised OWCP that his doctors had submitted everything and that he could not work.

By letter dated May 18, 2012, OWCP informed appellant that the offered position of laundry worker dated July 26, 2013 was suitable work as it complied with the medical limitations set forth by Dr. Obianwu. It further informed him that the position remained available to him. OWCP allowed appellant 30 days to accept or provide a written explanation of his reasons for

[3] 5 U.S.C. § 8113(b).

[4] 20 C.F.R. § 10.519.

refusal and advised that an employee who refuses an offer of suitable work without reasonable cause is not entitled to compensation under 5 U.S.C. § 8106(c).

Appellant retired from the employing establishment on disability and elected to receive retirement benefits from the Office of Personnel Management effective May 9, 2012. On May 29, 2012 OWCP was advised that he wished to change his retirement election back to FECA compensation benefits. Appellant submitted a December 23, 2011 report from Dr. Ireneo Y. Diaz, Jr., an infectious disease specialist. Dr. Diaz listed a history of the December 18, 1998 employment injuries and appellant's medical treatment. He provided findings on physical examination and diagnostic test results. Dr. Diaz advised that appellant was unable to perform any jobs due to low back pain.

On June 20, 2012 OWCP determined that there was a conflict in medical opinion between Drs. Obianwu and Diaz on the issue of whether appellant was totally disabled for work. By letter dated June 22, 2012, it referred appellant, together with a statement of accepted facts and the medical record, to Dr. Michael E. Holda, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a July 30, 2012 report, Dr. Holda reviewed the medical record and statement of accepted facts. He discussed a history of the December 18, 1998 employment injuries as well as appellant's medical treatment and family, social, and work background. Dr. Holda noted appellant's current complaints of low back pain that radiated to his left leg and foot. He listed findings on physical examination and diagnosed chronic low back pain, a history of disc herniation at L5-S1, and degenerative disease of the lumbar spine. Dr. Holda also diagnosed post L5-S1 discectomy, post anterior laparoscopic fusion at L5-S1, post L5-S1 posterior spinal fusion with liberty instrumentation, and post L4-5 transforaminal interbody fusion with Capstone cage. Based on his orthopedic examination and review of medical records, he opined that appellant's ongoing pain was related to his accepted work-related disc herniation at L5-S1 which resulted in his four lumbar spine surgeries. Dr. Holda further opined that appellant was unable to return to his previous employment, but could work eight hours a day with restrictions. He recommended permanent restrictions of no repetitive bending and twisting at the waist, and no lifting over 15 pounds.

On August 14, 2012 OWCP requested that Dr. Holda submit an addendum report. Dr. Holda was asked to differentiate between the work and nonwork-related diagnoses. He was also asked to review the laundry worker position description and indicate whether appellant could perform the duties of the position.

In a February 28, 2013 report, Dr. Holda advised that his diagnosis of degenerative disease of the lumbar spine was due to the aging process and not related to appellant's work injury. The diagnoses of chronic low back pain and history of disc herniation at L5-S1 and subsequent surgery were related to his work injury. Dr. Holda reviewed the job description for a laundry worker and opined that appellant was physically capable of performing the duties delineated in the job description. He concluded that the job fell within his recommended restrictions.

In a March 19, 2013 notice, OWCP informed appellant that it proposed to reduce his compensation benefits as the medical and factual evidence of record established that he was no longer totally disabled and had the capacity to earn the wages of a laundry worker. Appellant was afforded 30 days to submit any additional evidence regarding his capacity to earn wages in the position described.

Also, on March 19, 2013 the employing establishment advised OWCP that the offered position was still available.

In an April 22, 2013 decision, OWCP finalized the March 19, 2013 proposed decision based on appellant's capacity to earn wages as a laundry worker. It determined that the position was medically and vocationally suitable and readily available in his geographical location. OWCP applied the principles identified in *Albert C. Shadrick*,[5] finding that he had zero loss of wage-earning capacity.

By letter dated April 25, 2013, appellant, through his attorney, requested a telephone hearing with an OWCP hearing representative.

During the telephone hearing on September 4, 2013 appellant's attorney argued that the offered laundry worker position was not within appellant's physical restrictions.

In a November 21, 2013 decision, the hearing representative affirmed the April 22, 2013 decision. She accorded special weight to Dr. Holda's opinion as an impartial medical specialist in finding that appellant was capable of performing the offered laundry worker position.

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.[6]

Section 8115 of FECA[7] 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.

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 *Dictionary of*

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

[6] *P.M.*, Docket No. 12-1451 (issued February 19, 2013).

[7] 5 U.S.C. §§ 8101-8193, 8115.

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. Finally, application of the principles set forth in *Shadrick*[8] 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.[9]

ANALYSIS

The Board finds that OWCP did not properly determine appellant's wage-earning capacity.

As stated above, there are two methods for determining wage-earning capacity: (1) determining that actual earnings fairly and reasonably represent wage-earning capacity; and then calculating loss of wage-earning capacity by applying the *Shadrick* formula to the actual earnings; and (2) if actual earnings do not fairly and reasonably represent wage-earning capacity, then a constructed position may be used, based on the factors enumerated under section 8115 and in accordance with established procedures, followed by application of the *Shadrick* formula.[10]

In the present case, OWCP found that the laundry worker position offered to appellant by the employing establishment represented his wage-earning capacity as it was medically and vocationally suitable. The Board notes that appellant never accepted the position. As appellant had no actual earnings, the analysis must follow the principles utilized for determining wage-earning capacity based on a constructed position.[11] The Board finds that OWCP failed to follow established procedures in this regard. At the time of OWCP's November 21, 2013 decision, procedures pertaining to the determination of wage-earning capacity based on a constructed position required a labor market survey conducted by a rehabilitation counselor. While the rehabilitation counselor determined that appellant had the transferable skills to perform the offered job based on his previous experience as a bridge builder, brake assembler, and maintenance and casual laborer, appellant did not conduct a labor market survey to determine whether the offered position was actually performed in sufficient numbers within appellant's commuting area so as to be considered reasonably available.[12] In addition, the vocational rehabilitation counselor did not contact the state employment service or other applicable service to determine whether the wages of the offered position fell within the pay range for such

[8] *Supra* note 5; 20 C.F.R. § 10.403.

[9] *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

[10] The Board notes that since OWCP had made a suitability determination on May 18, 2012 regarding the offered laundry worker position, it alternatively could have reviewed appellant's refusal of the job offer pursuant to 5 U.S.C. § 8106(c). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, 2.816.3.f (June 2013).

[11] 5 U.S.C. § 8115.

[12] *Id.* at 2.816.6.b (June 2013).

positions in the relevant geographical area.[13] For the stated reasons, the Board finds that OWCP failed to properly determine appellant's wage-earning capacity. It is OWCP's burden of proof to justify a subsequent reduction of compensation benefits and it did not meet its burden.[14]

CONCLUSION

The Board finds that OWCP improperly reduced appellant's compensation benefits effective April 22, 2013 based on his capacity to earn wages in the constructed position of laundry worker.

ORDER

IT IS HEREBY ORDERED THAT the November 21, 2013 decision of the Office of Workers' Compensation Programs is reversed.

Issued: February 19, 2015
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

[13] *See Richard Alexander*, 48 ECAB 432 (1997); *see Hattie Drummond*, 39 ECAB 904 (1988).

[14] *P.M.*, Docket No. 12-1451 (issued February 19, 2013).