United States Department of Labor
Employees' Compensation Appeals Board

B.N., Appellant	)	
and	)	**Docket No. 14-2003**
	)	**Issued: February 13, 2015**
U.S. POSTAL SERVICE, POST OFFICE, Tampa, FL, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge

JURISDICTION

On September 17, 2014 appellant filed a timely appeal from the August 18, 2014 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.[2]

ISSUE

The issue is whether OWCP properly reduced appellant's compensation effective August 24, 2014 based on her capacity to earn wages in the constructed position of receptionist.

[1] 5 U.S.C. §§ 8101-8193.

[2] The record contains a July 29, 2014 decision in which OWCP found that appellant received a $968.56 overpayment of compensation. Appellant has not appealed this decision and its subject matter is not presently before the Board.

FACTUAL HISTORY

On May 7, 2012 appellant, then a 50-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that she sustained osteoarthritis of both knees due to performing her work duties for 26 years, including engaging in extensive walking and standing.[3] After developing the medical evidence, in February 2013, OWCP accepted that appellant sustained work-related bilateral osteoarthritis of both knees. Appellant had previously stopped work on January 9, 2012 and began receiving compensation on the daily rolls effective April 21, 2012. She thereafter received compensation on the periodic rolls.

In a February 6, 2012 report, Dr. Mark C. Gillespy, an attending Board-certified orthopedic surgeon, noted a history that appellant had developed right knee pain in December 2008 and later had right knee surgery which improved her right knee condition.[4] Appellant reported to him that she was now developing pain in both knees and that her position as a letter carrier tended to aggravate her symptoms. X-rays were taken and Dr. Gillespy diagnosed osteoarthritis of the medial compartment of the right knee, status post medial meniscectomy, and internal derangement of the left knee. A February 23, 2012 magnetic resonance imaging (MRI) scan of appellant's left knee showed moderate chondromalacia and trace joint effusion/Bakers' cyst. Dr. Gillespy indicated that appellant's arthritic knee condition prevented her from performing the job duty of getting up and down from her mail delivery truck.

In a September 5, 2012 report, Dr. Kenneth B. Hawthorne, Jr., an attending Board-certified orthopedic surgeon, reported upon physical examination that appellant had pain on range of motion of both knees, the right worse than the left. He noted that she had full extension and 120 degrees of flexion in both knees, 5/5 muscle strength of all the major muscle groups in both legs, and intact sensation in both legs. Dr. Hawthorne indicated that recent radiographs revealed moderate to severe medial compartment arthritis in appellant's right knee and moderate arthritis medial compartment in her left knee. He diagnosed MRI scan consistent with patellofemoral osteoarthritis of her left knee joint, mild to moderate medial compartment osteoarthritis of her left knee joint, and moderate to severe medial compartment osteoarthritis of her right knee joint. Dr. Hawthorne recommended that appellant continue with physical therapy sessions. He continued to produce examination reports through mid-2013 that provided a similar assessment of appellant's bilateral knee condition. Dr. Hawthorne periodically completed work restriction forms through early-September 2013 in which he indicated that appellant was disabled from all work.

In a September 18, 2013 report, Dr. David B. Lotman, a Board-certified orthopedic surgeon and an OWCP referral physician, discussed appellant's medical history, including findings on diagnostic testing, and reported the findings of his physical examination on that date. He indicated that his examination of her left knee demonstrated normal longitudinal alignment. There was no knee effusion, but there was tenderness at the medial femoral condyle with less tenderness at the medial tibial plateau. Appellant had normal patellofemoral excursion without

[3] Appellant indicated that she first became aware of her condition and realized that it was work related on January 9, 2012.

[4] The evidence of record reveals that appellant underwent right partial medical meniscectomy on April 9, 2009.

crepitation. However, she complained of pain on manual displacement of the patella mediolaterally and superoinferiorly. Dr. Lotman stated that passive flexion range of motion of appellant's left knee was 0 to 130 degrees with no tibiofemoral crepitation. The McMurray test was negative in both compartments both for crepitation and pain and her left knee was stable to varus, valgus, and anteroposterior stress. Dr. Lotman noted that examination of appellant's right knee was identical to her left knee with the exception that on the right there was slight crepitation in the lateral compartment on passive range of motion. Appellant also lacked about five degrees of full flexion and lacked about 10 degrees of full extension on the right. Dr. Lotman diagnosed status post arthroscopic partial medial meniscectomy of the right knee, degenerative arthritis of the right knee, and mild degenerative arthritis of the left knee.

Within his September 18, 2013 report, Dr. Lotman answered six questions that had been posed by OWCP regarding appellant's present knee condition and ability to perform the duties of her employment. He stated that appellant continued to have osteoarthritis of both knees and continued to have residuals of her accepted work injury. Dr. Lotman noted that, based on his evaluation including a record review, appellant was not capable of returning to the full duties of her date-of-injury position as a letter carrier. He believed that appellant could return to work in modified light-duty employment per an attached work capacity evaluation form also dated September 18, 2013. The attached form indicated that appellant could work for eight hours per day but that she had restrictions of walking no more than one hour per workday, standing no more than one hour, and no engaging in squatting, kneeling, or climbing. Dr. Lotman indicated that appellant had reached maximum medical improvement vis-a-vis her accepted work condition and he felt that she could perform some rehabilitative exercises on her own.[5] He stated that she would be a candidate for vocational rehabilitation.

In an October 2, 2013 letter to OWCP, Dr. Hawthorne indicated that he had reviewed Dr. Lotman's narrative report and his work capacity evaluation form dated September 18, 2013. He stated, "After reviewing these reports I agree with Dr. Lotman's opinion in the independent medical examination regarding Dr. Lotman's clinical impression and his conclusions on the six specific questions you required in the examination."

On October 21, 2013 appellant was referred for participation in an OWCP-sponsored vocational rehabilitation program. Appellant's vocational rehabilitation counselor indicated that the September 18, 2013 opinion of Dr. Lotman, as assented to by Dr. Hawthorne in his October 2, 2013 letter, represented the best assessment of appellant's physical ability to work. She found appellant's education and work history provided her with transferrable skills including customer service, interpersonal, organizational, and basic computer skills.

Linda Ebersold determined that appellant was able to perform the position of receptionist[6] and that a state employment labor market survey, conducted on December 9, 2013, showed the position was available in sufficient numbers so as to make it reasonably available

[5] Dr. Lotman also recommended that appellant consider herbal foods and/or medications to achieve some relief.

[6] The position is listed in the Department of Labor's *Dictionary of Occupational Titles* under number 237.367.038.

within her commuting area. The survey also revealed that the average wage for a receptionist in appellant's area was $400.00 per week.

The position of receptionist involves receiving callers at establishments, directing callers to destinations, preparing correspondence, answering telephones, and collecting and delivering mail and messages. Under the Department of Labor's *Dictionary of Occupational Titles*, the position of receptionist is classified under the category of "sedentary" which means that it does not require lifting more than 10 pounds and that the work involves sitting most of the time, but may involve walking or standing for brief periods of time. The job does not require climbing, stooping, kneeling, or crouching.[7]

Beginning in late December 2013, appellant was provided with vocational job placement services with the goal of returning her to work as a receptionist, customer service representative, or appointment clerk. The vocational job placement services did not result in appellant finding employment.

In a January 21, 2014 form report, Dr. Hawthorne indicated that appellant could not perform her regular work as a letter carrier. In a January 8, 2014 narrative report, he stated that appellant had pain on range of motion of both knees, but that no instability or malalignment was present. Dr. Hawthorne indicated that he advised appellant "that she may advance activity as tolerated."

On April 3, 2014 OWCP received a written request from appellant to change her address of record from an address in Daytona Beach, FL, to an address in Ormond Beach, FL.

In a May 23, 2014 form report, Dr. Hawthorne indicated that appellant could not perform her regular work as a letter carrier. His narrative report of the same date contained examination findings that were similar to those contained in his January 8, 2014 narrative report.

In a June 6, 2014 letter, OWCP advised appellant that it proposed to reduce her compensation based on her capacity to earn wages in the constructed position of receptionist. It explained that the medical evidence, as represented by the September 18, 2013 opinion of Dr. Lotman and the October 2, 2013 opinion of Dr. Hawthorne, showed that she was physically capable of working as a receptionist. Her vocational rehabilitation counselor had determined that she could vocationally perform the job and that it was reasonably available in her commuting area. OWCP provided appellant 30 days to submit evidence and argument challenging the proposed action. The June 6, 2014 letter was sent to appellant's address in Ormond Beach but it was returned on June 26, 2014 as undeliverable to this address, with no forwarding address provided.

On July 10, 2014 OWCP's June 6, 2014 letter, now dated July 10, 2014, was remailed to appellant's prior address in Daytona Beach and she was provided 30 days from July 10, 2014 to submit evidence and argument challenging the proposed reduction of her compensation. This letter was not returned to OWCP and on July 22, 2014 appellant called OWCP and indicated that

[7] Ms. Ebersold also indicated that appellant could work as a customer service representative or appointment clerk.

she had received the letter. Appellant did not submit any additional evidence or argument within the allotted time.

In an August 18, 2014 decision, OWCP reduced appellant's compensation effective August 24, 2014 based on her capacity to earn wages in the constructed position of receptionist. It found that the evidence showed that she was vocationally and physically capable of working as a receptionist.

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.[8] Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[9]

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, her wage-earning capacity is determined with due regard to the nature of her injury, her degree of physical impairment, her usual employment, her age, her qualifications for other employment, the availability of suitable employment, and other factors and circumstances which may affect her wage-earning capacity in her disabled condition.[10] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[11] 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.[12] 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.[13]

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.[14] In determining wage-earning capacity based on a constructed position, consideration is not given to conditions which arise subsequent to the employment injury.[15]

---

[8] *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

[9] *Del K. Rykert*, 40 ECAB 284 (1988).

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

[11] *Albert L. Poe*, 37 ECAB 684 (1986).

[12] *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 (1985).

[13] *Leo A. Chartier*, 32 ECAB 652 (1981).

[14] *Jess D. Todd*, 34 ECAB 798 (1983).

[15] *N.J.*, 59 ECAB 397 (2008).

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 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.[16]

ANALYSIS

OWCP accepted in February 2013 that appellant sustained work-related bilateral osteoarthritis of both knees due to the performance of her work duties over significant time. She stopped work on January 9, 2012 and started receiving compensation on the daily rolls effective April 21, 2012. Appellant later received compensation on the periodic rolls.

In a September 18, 2013 report, Dr. Lotman, a Board-certified orthopedic surgeon, discussed appellant's medical history, including findings on diagnostic testing, and reported the findings of his physical examination on that date. He diagnosed status post arthroscopic partial medial meniscectomy of the right knee, degenerative arthritis of the right knee, and mild degenerative arthritis of the left knee. In a portion of his September 18, 2013 report, Dr. Lotman answered six questions that had been posed by OWCP regarding appellant's present knee condition and ability to work. He stated that appellant continued to have osteoarthritis of both knees and continued to have residuals of her accepted work injury. Dr. Lotman noted that appellant was not capable of returning to the full duties of her date-of-injury position as a letter carrier, but that she could return to work in modified light-duty employment per an attached work capacity evaluation form also dated September 18, 2013. The attached form indicated that appellant could work for eight hours per day with restrictions of walking no more than one hour per workday, standing no more than one hour, and no engaging in squatting, kneeling, or climbing.

In an October 2, 2013 letter to OWCP, Dr. Hawthorne, an attending Board-certified orthopedic surgeon, indicated that he had reviewed Dr. Lotman's narrative report and his work capacity evaluation form dated September 18, 2013. Dr. Hawthorne stated, "After reviewing these reports I agree with Dr. Lotman's opinion in the independent medical examination regarding Dr. Lotman's clinical impression and his conclusions on the six specific questions you required in the examination."

Appellant's vocational rehabilitation counselor determined that she was able to perform the position of receptionist and that state employment services showed the position was available in sufficient numbers so as to make it reasonably available within her commuting area. The position of receptionist involved receiving callers at establishments, directing callers to

[16] *Dennis D. Owen*, 44 ECAB 475, 479-80 (1993); *Albert C. Shadrick*, 5 ECAB 376 (1953).

destinations, preparing correspondence, answering telephones, and collecting and delivering mail and messages. Under the Department of Labor's *Dictionary of Occupational Titles*, the position of receptionist is classified under the category of "sedentary" which means that it does not require lifting more than 10 pounds and that the work involves sitting most of the time, but may involve walking or standing for brief periods of time. The job does not require climbing, stooping, kneeling, or crouching.

Appellant's vocational rehabilitation counselor is an expert in the field of vocational rehabilitation and OWCP may rely on her opinion regarding reasonable availability and vocational suitability of the receptionist position.[17] In addition, a review of the medical evidence of record reveals that appellant is physically capable of performing the position. Both Dr. Lotman and Dr. Hawthorne indicated that she could perform modified work within the parameters of specific work restrictions. The Board finds that the work restrictions recommended by Dr. Lotman and Dr. Hawthorne (including those regarding walking and standing) would allow appellant to work as a receptionist, a position which is essentially sedentary in nature. Appellant did not submit any evidence or argument showing that she could not vocationally or physically perform the receptionist position.

On appeal appellant argued that the opinion of Dr. Hawthorne showed that she could not work as a receptionist. However, in October 2013, Dr. Hawthorne indicated that he agreed with Dr. Lotman's assessment of appellant's medical condition and capacity to work. As noted, the work restrictions provided by Dr. Lotman would have allowed appellant to work as a receptionist. In January 21 and May 23, 2014 form reports, Dr. Hawthorne did indicate that appellant could not perform her regular work as a letter carrier. However, these brief reports provide no indication that she could not carry out the limited physical requirements of the receptionist position.[18]

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 her wage-earning capacity.[19] 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 appellant's compensation effective August 24, 2014 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.

[17] *G.A.*, Docket No. 13-1351 (issued January 10, 2014).

[18] On appeal appellant asserted that Dr. Lotman recommended that she take medicines and herbs that were not approved by the U.S. Food and Drug Administration. The Board notes that Dr. Lotman only made a general recommendation that appellant consider herbal foods and/or medications to achieve some relief and that he committed no impropriety by making such a recommendation.

[19] *Clayton Varner*, 37 ECAB 248, 256 (1985).

CONCLUSION

The Board finds that OWCP properly reduced appellant's compensation effective August 24, 2014 based on her capacity to earn wages in the constructed position of receptionist.

ORDER

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

Issued: February 13, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board