United States Department of Labor
Employees' Compensation Appeals Board

F.W., Appellant	)	
and	)	**Docket No. 14-1772**
	)	**Issued: January 28, 2015**
U.S. POST SERVICE, BULK MAIL CENTER, Jersey City, NJ, Employer	)	

Appearances:
Thomas R. Uliase, 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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On August 13, 2014 appellant, through counsel, filed a timely appeal from a May 9, 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.

ISSUE

The issue is whether OWCP properly reduced appellant's compensation effective September 22, 2013 based on its finding that he had the capacity to earn wages in the constructed position of receptionist.

FACTUAL HISTORY

On February 19, 2002 appellant, then a 54-year-old mail handler, filed an occupational disease claim alleging a torn right knee ligament causally related to factors of his federal

[1] 5 U.S.C. § 8101 *et seq.*

employment. He stopped work on October 23, 2001. OWCP accepted the claim for bilateral tears of the medial meniscus and bilateral traumatic arthropathy of the lower legs. Appellant underwent multiple bilateral knee surgeries, including revisions of his left total knee replacement in 2007 and his right total knee replacement in 2008. OWCP paid him compensation for periods of total and partial disability until 2008, when he stopped work and did not return. Appellant was placed on the periodic rolls.

On September 19, 2012 OWCP referred appellant to Dr. James Bethea, a Board-certified orthopedic surgeon, for a second opinion examination as to appellant's capacity.

On October 5, 2012 appellant informed OWCP that his attending physician was retiring and requested authorization to change attending physicians.[2]

In a report dated October 15, 2012, Dr. Bethea discussed appellant's complaints of knee pain bilaterally. He noted that appellant had a history of low back pain and bilateral carpal tunnel syndrome. On examination, Dr. Bethea found full range of motion of the knees bilaterally "without any effusion, tenderness, erythema, or warmth." He determined that x-rays showed "well-seated knee replacements" without complications. Dr. Bethea diagnosed continued knee pain after total knee replacements. He opined that the accepted condition had not resolved but that appellant could work eight hours per day with restrictions. In a work restriction evaluation dated October 15, 2012, Dr. Bethea provided limitations of walking and standing for four hours per day and pushing, pulling, and lifting up to 25 pounds for six hours per day. He further determined that appellant could squat and climb for one hour per day but could not kneel.

On December 20, 2012 appellant requested that OWCP authorize Dr. Dewey N. Ervin, a Board-certified orthopedic surgeon, as his attending physician. On December 28, 2012 OWCP authorized Dr. Ervin to treat appellant for the accepted conditions of a bilateral medial meniscus tear and bilateral traumatic arthropathy of the bilateral lower legs.

In a report dated January 7, 2013, Dr. Ervin discussed appellant's work history of total knee replacements in 2005 on the left and 2008 on the right, his complaints of pain and periodic swelling of the knees bilaterally and his use of a cane to walk. On examination, he found mild effusion of the right knee, moderate lateral laxity and mild-to-moderate anterior/posterior instability. For the left knee, Dr. Ervin found mild effusion, moderate lateral laxity and mild instability. He interpreted x-rays as showing an undersized femoral component of both knees. Dr. Ervin diagnosed painful knees after bilateral total knee arthroplasty and referred appellant to Dr. Harold D. Schutte, a Board-certified orthopedic surgeon, for further evaluation.

On February 4, 2013 OWCP referred appellant to a vocational rehabilitation counselor.

[2] In a report dated August 1, 2012, Dr. Alfred G. Dawson, an attending Board-certified orthopedic surgeon, found left hand thenar atrophy and a positive Tinel's sign. He requested authorization for a left carpal tunnel release. On August 9, 2012 Dr. Dawson evaluated appellant for left thumb pain over the past nine months. Dr. Dawson diagnosed traumatic arthritis of the left thumb. On October 1, 2012 he evaluated appellant for tenderness of the bilateral lateral tibia. Dr. Dawson found a positive straight leg test on the right and absent reflexes of the lower extremity.

In a report dated February 13, 2013, Dr. Schutte discussed appellant's symptoms of bilateral knee pain and tingling, and numbness of the legs. He noted that appellant worked as a preacher. Dr. Schutte diagnosed knee pain greater on the left. He found that x-rays showed a total knee replacement with a possible loosening of the femoral. Dr. Schutte recommended prosthetic joint replacement.[3]

In a rehabilitation report dated February 20, 2013, the rehabilitation counselor discussed appellant's work history as a mail handler, cashier, and commodities trader. On March 22, 2013 she discussed the results of vocational and psychological evaluation. The rehabilitation counselor noted that appellant had a history of carpal tunnel surgery on his left hand and was scheduled for surgery on his right hand.

In an April 2, 2013 report, the rehabilitation counselor identified the positions of customer service representative and receptionist as suitable for appellant. She noted that appellant worked as a commodities trader for 33 years, a mail handler from 1999 until 2008, a manager at a grocery chain from 1992 to 1994, and as an accounting clerk. The rehabilitation counselor indicated that he had the transferrable skills to work as a receptionist.

In a form used to determine disability by the Social Security Administration (SSA) dated April 12, 2013, Dr. Richard A. Boiardo, a Board-certified orthopedic surgeon, diagnosed bilateral total knee replacements and noted that appellant required a cane to walk. He found that appellant could walk for only two hours without shortness of breath and pain and sit for two hours without stiffness and the need to elevate his leg. Dr. Boiardo opined that appellant required breaks every two hours during an eight-hour workday. He further determined that he could occasionally lift and carry up to 10 pounds.

In an April 15, 2013 labor market survey, the rehabilitation counselor identified the position of receptionist DOT No. xxxxxx038 in the Department of Labor's *Dictionary of Occupational Titles* as suitable. She noted that the position was sedentary and required lifting, carrying, pushing, and pulling up to 10 pounds occasionally. The specific vocational preparation was level 4, or 3 to 6 months.

On April 15, 2013 OWCP approved job placement assistance for 90 days in the positions of customer service representative or receptionist.

In a job classification dated July 10, 2013, the rehabilitation counselor found that appellant met the specific vocational preparation for the position of receptionist as he was a clerk for a bank and assisted customers by telephone. She further advised that the state job service and employing establishment contacted during the labor market survey established that there were sufficient openings in his geographical area. The weekly wage for an entry level position was $360.00 per week and the median wage was $400.00 per week.

On July 10, 2013 an OWCP medical adviser recommended that OWCP approve a left total knee arthroplasty revision. He stated, "The complaint of constant pain may be due to [an] undersized femoral component."

[3] On February 27, 2013 Dr. Schutte treated appellant with a steroid injection.

On July 18, 2013 an OWCP rehabilitation specialist determined that the positions of receptionist and customer service representative were reasonably available in appellant's area at a salary that ranged from $360.00 to $400.00 per week.[4] He noted that appellant had clerical skills from working as a commodity clerk and trader and a grocery cashier store manager and had some college courses in business and computers.

On August 9, 2013 OWCP advised appellant of its proposed reduction of his compensation based on its finding that he had the capacity to earn wages of $360.00 per week as a receptionist.

In a response dated August 20, 2013, appellant's counsel asserted that he was awaiting authorization for surgery. He maintained that Dr. Bethea's October 15, 2012 report was "now obsolete and not an indication of the claimant's current medical picture."

On August 20, 2013 appellant disagreed with the proposed reduction of his compensation, noting that OWCP had approved his left knee revision surgery. He asserted that new x-rays revealed that his left knee was separating from his bone. Appellant noted that SSA had found that he was totally disabled.

By decision dated September 12, 2013, OWCP reduced appellant's compensation based on its finding that he had the capacity to work in the selected position of receptionist at a salary of $360.00 per week. It applied the formula set forth in *Albert C. Shadrick*[5] to determine his wage-earning capacity.

On September 17, 2013 appellant, through counsel, requested an oral hearing.

In a report dated October 18, 2013, Dr. Schutte asserted that he was treating appellant for total knee arthroplasties that had failed. He stated:

> "[Appellant] has been scheduled several times for revisions; however, his medical condition did not allow him to go forward with the surgery. As soon as he is cleared by his medical [physicians], we will once again put him back on the surgery schedule. In the meantime, from an orthopedic standpoint, I would consider [appellant] totally disabled until he can proceed with the planned surgery."

On December 9, 2013 appellant related that an August 7, 2013 preadmission test for his knee surgery revealed blood sugar levels too high for surgery. Dr. Bethea postponed the surgery and subsequent testing continued to reveal blood levels too high for surgery. Appellant questioned the accuracy of Dr. Bethea's findings, noting that other physicians found that he had permanent disability.

[4] In a closure report dated July 16, 2013, the rehabilitation counselor noted that appellant's physician advised him that he was disabled.

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

In a letter dated February 19, 2014, appellant's counsel indicated that both Dr. Ervin and the medical adviser found that appellant's pain might be due to an undersized femoral component. He noted that OWCP had approved revision surgery as necessary due to the prior authorized total knee replacement and maintained that OWCP erred in relying on a medical report that predated the authorization. Counsel submitted an April 25, 2013 report from Dr. Schutte. He believed that the femoral components in appellant's knees were undersized and likely causing his pain and lack of stability.

At the hearing, held on February 18, 2014, appellant related that he was currently unable to have his knee revision surgery due to his diabetes. He was diagnosed with diabetes around 1998. Appellant asserted that he had a claim accepted for carpal tunnel syndrome under file number xxxxxx753. He indicated that his carpal tunnel syndrome began in 1999 and that he underwent surgery for carpal tunnel syndrome on January 16, 2013. Appellant related that his blood sugar level was too high for further knee surgery and that he was not able to sit for long periods. His counsel argued that the statement of accepted facts provided to Dr. Bethea was not accurate as it identified the bilateral carpal tunnel syndrome as a nonemployment-related condition. He also contended that Dr. Bethea did not support his conclusion with medical reasoning or consider the preexisting bilateral carpal tunnel syndrome and diabetes. Counsel further argued that Dr. Bethea's opinion was not current as it was issued prior to OWCP's authorization for left knee surgery. He asserted that Dr. Schutte's opinion constituted the weight of the evidence as the attending physician who would perform the anticipated knee surgery.

By decision dated May 9, 2014, the hearing representative affirmed the September 12, 2013 decision.

On appeal, appellant's counsel contends that OWCP did not meet its burden of proof to reduce his compensation benefits. He asserts that Dr. Bethea's evaluation is stale as it was performed prior to the deterioration of appellant's left knee condition and OWCP's authorization for a left knee replacement revision. Counsel also argues that Dr. Bethea failed to consider appellant's preexisting bilateral carpal tunnel syndrome and diabetes. He maintains that OWCP erred in finding that appellant had the burden to submit evidence showing that his preexisting conditions prevented him from performing the job duties of receptionist.

LEGAL PRECEDENT

Once OWCP has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of benefits.[6] Under section 8115(a), 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 his or her 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 the injury, the degree of physical impairment, his or her usual employment, age, qualifications for other employment, the availability of suitable

[6] *T.O.*, 58 ECAB 377 (2007).

employment and other factors or circumstances which may affect wage-earning capacity in his or her disabled condition.[7]

When OWCP makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case 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 market, that fits the employee's capabilities with regard to his or her physical limitations, education, age, and prior experience.[8] 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 *Albert C. Shadrick*[9] will result in the percentage of the employee's loss of wage-earning capacity.

ANALYSIS

OWCP accepted that appellant sustained bilateral medial meniscal tears and bilateral traumatic arthropathy of the lower legs due to factors of his federal employment. Appellant received compensation for total disability beginning in 2008. OWCP reduced his compensation effective September 22, 2013 based on its determining that he could earn wages in the selected position of receptionist.

The Board finds that OWCP did not meet its burden of proof to reduce appellant's compensation as the medical evidence does not clearly demonstrate that the selected position of receptionist was within his physical limitations. The issue of whether an employee has the physical ability to perform a selected position is a medical question that must be resolved by probative medical evidence.[10]

With respect to the issue of medical suitability of the accepted position, OWCP relied on the October 15, 2012 report of Dr. Bethea, a referral physician. Dr. Bethea found that appellant could work eight hours per day with limitations on walking and standing for four hours per day and pushing, pulling, and lifting up to 25 pounds for six hours per day. The position of receptionist, DOT No. xxxxxx038 in the Department of Labor's *Dictionary of Occupational Titles*, is defined as sedentary, which involves sitting most of the time but may involve walking or standing for brief periods of time and requires the ability to lifting, carry or push up to 10 pounds occasionally. It is thus within the restrictions set forth by Dr. Bethea.

Subsequent to Dr. Bethea's report, however, on February 13, 2013 Dr. Schutte found that x-rays revealed a possible femoral loosening following a total knee replacement and recommended replacing the prosthetic joint. On July 10, 2013 an OWCP medical adviser recommended that OWCP approve a revision of a total knee replacement on the left side.

[7] *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

[8] *Mary E. Marshall*, 56 ECAB 420 (2005); *James A. Birt*, 51 ECAB 291 (2000).

[9] 5 ECAB 376 (1953); codified by regulations at 20 C.F.R. § 10.403.

[10] *See Maurissa Mack*, 50 ECAB 498 (1999); *Robert Dickinson*, 46 ECAB 1002 (1995).

In a report dated October 18, 2013, Dr. Schutte diagnosed failed knee arthroplasties. He noted that appellant had not been able to have revision surgery due to another medical condition. Dr. Schutte opined that appellant was totally disabled orthopedically pending the revision surgery.

OWCP's procedures state that, unless the medical evidence is clear and unequivocal, OWCP should seek the advice of a physician regarding the suitability of the position.[11] The Board finds that the medical evidence is not clear and unequivocal in this case.[12] Following Dr. Bethea's finding that appellant had the capacity to work for eight hours with limitations, OWCP approved a revised left total knee replacement and Dr. Schutte, his attending physician, opined that he was disabled pending the surgery.[13] Consequently, as the medical evidence regarding whether appellant can work in the selected position is not clear and unequivocal, OWCP did not meet its burden of proof.

CONCLUSION

The Board finds that OWCP improperly reduced appellant's compensation effective September 22, 2013 based on its finding that he had the capacity to earn wages in the constructed position of receptionist.

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity*, Chapter 2.816.4 (June 2013). OWCP's procedures further provide that the medical evidence "should indicate that the claimant's condition is stable." *Id*. at Chapter 2.816.4(b) (June 2013).

[12] *See D.C.*, Docket No. 13-747 (issued June 25, 2013).

[13] Appellant asserted that he was not able to undergo surgery due to diabetes that was first diagnosed in 1998. The Board notes that preexisting conditions are considered in determining the medical suitability of a position. *See* Federal (FECA) Procedure Manual, *supra* note 11 at Chapter 2.816.4(b) (June 2013).

ORDER

IT IS HEREBY ORDERED THAT the May 9, 2014 decision of the Office of Workers' Compensation Programs is reversed.

Issued: January 28, 2015
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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