United States Department of Labor
Employees' Compensation Appeals Board

J.K., Appellant	)	
and	)	**Docket No. 15-0856**
	)	**Issued: August 1, 2016**
U.S. POSTAL SERVICE, POST OFFICE, Bellevue, WA, Employer	)	

Appearances:
Ron Watson, for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 9, 2015 appellant, through his representative, filed a timely appeal from a September 11, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[3]

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

[3] Appellant timely requested oral argument pursuant to section 501.5(b) of the Board's *Rules of Procedures*. 20 C.F.R. § 501.5(b). By order dated February 9, 2016, the Board exercised its discretion and denied the request, finding that the arguments on appeal could adequately be addressed based on the case record. *Order Denying Request for Oral Argument*, Docket No. 15-0856 (issued February 9, 2016). The Board's *Rules of Procedure* provide that any appeal in which a request for oral argument is not granted by the Board will proceed to a decision based on the case record and any pleadings submitted. 20 C.F.R. § 505.5(b).

ISSUE

The issue is whether OWCP met its burden of proof to reduce appellant's compensation benefits based on his capacity to earn wages in the selected position of cashier II.

On appeal appellant's representative asserts that the selected position requires physical activities beyond those identified by treating and OWCP's physicians, and that OWCP improperly relied on the opinion of its medical adviser.

FACTUAL HISTORY

On January 2, 2006 appellant, then a 52-year-old letter carrier, filed an occupational disease claim (Form CA-2), alleging that employment duties caused right lateral epicondylitis. This current claim was accepted and adjudicated under OWCP file number xxxxxx716. On May 21, 2007 appellant filed a second claim for left lateral epicondylitis that was also accepted, and was assigned OWCP file number xxxxxx758. He continued working and received intermittent compensation for medical and physical therapy appointments.

In January 2010, appellant's work assignment was changed, requiring increased arm motions. He stopped work on March 22, 2010 and did not return.[4] On June 10, 2010 OWCP combined file numbers xxxxxx716 and xxxxxx758, with the former becoming the master file. It paid wage-loss compensation for the period May to October 8, 2010.[5] Appellant was placed on the periodic compensation rolls in February 2011.

To determine appellant's work capacity, OWCP referred to Dr. William Dinenberg, a Board-certified orthopedic surgeon and OWCP referral physician, for a second opinion examination. Dr. Dinenberg provided a January 12, 2012 report in which he discussed findings and conclusions regarding the accepted left lateral epicondylitis and aggravation of left knee arthritis. He reported physical examination findings of left elbow pain with slight decrease in full extension, and slight loss of flexion and extension of the left knee. Dr. Dinenberg diagnosed left lateral epicondylitis and aggravation of degenerative joint disease of the left knee, both of which he claimed were employment related. He advised that appellant could not return to letter carrier duties, but could perform modified duty.[6] In an attached work capacity evaluation,

[4] The record indicates that appellant has a third claim accepted for aggravation of degenerative arthritis of the left knee, adjudicated by OWCP under file number xxxxxx651. Under that claim he underwent authorized total knee replacement on April 20, 2010.

[5] OWCP initially denied appellant's claims for compensation for the period May 29 to July 23, 2010. By decision dated October 15, 2010, it rescinded an August 20, 2010 decision and granted wage-loss compensation for the period May 29 through October 8, 2010.

[6] In August 2011, OWCP had referred appellant for a second-opinion evaluation. Appellant did not attend the scheduled examination, and on October 6, 2011 OWCP proposed to suspend his compensation for failure to attend. Counsel then advised that appellant was willing to attend the examination. On November 8, 2011 OWCP referred appellant to Dr. Dinenberg. The examination was scheduled to be held on November 30, 2011. In a December 12, 2011 letter, it informed appellant that, because the examiner had only considered the accepted right lateral epicondylitis, a second examination was being scheduled. OWCP also wrote Dr. Dinenberg asking that he reexamine appellant with regard to left lateral epicondylitis and degenerative arthritis of the left knee. It referenced Dr. Dinenberg's November 30, 2011 report. A report from the physician dated November 30, 2011 is not found in either file numbers xxxxxx716 or xxxxxx758.

Dr. Dinenberg advised that lifting, pushing, and pulling was limited to 20 pounds, that appellant could walk and stand for six hours, and could perform repetitive wrist and elbow movements for two hours, with pushing, pulling, and lifting limited to three hours, and squatting, kneeling, and climbing to one hour each.

In duty status reports (Form CA-17) and work capacity evaluations (Form OWCP-5c) dated May 11, 2012, Dr. Jillian Worth, an attending Board-certified family physician, advised that appellant could not perform his regular job duties because he was restricted due to pain with activity. She provided permanent physical restrictions, advising that, with regard to the bilateral/lateral epicondylitis, he could lift 20 pounds continuously and 35 pounds intermittently for one to two hours daily. Sitting, walking, standing, reaching, reaching above the shoulder, twisting, bending, and stooping were limited to four hours a day; pulling and pushing to two hours a day; and simple grasping to six hours a day. Repetitive movements of the wrist and elbow and fine manipulation were limited to 30 minutes each hour. Dr. Worth advised that appellant could drive if not on narcotic medication. She also provided permanent restrictions regarding the degenerative joint disease of the left knee, accepted under file number xxxxxx651,[7] noting painful, limited range of motion due to osteoarthritis, and a total knee replacement. Dr. Worth advised that appellant needed to extend the knee while sitting, could walk four to eight hours, stand six hours, and was very limited in bending, stooping, squatting, kneeling, and climbing.

On July 5, 2012 OWCP referred appellant for vocational rehabilitation with Carole Barron, a rehabilitation counselor. On July 5, 2012 Dr. Worth reiterated her physical restrictions.

A functional capacity evaluation (FCE), completed on July 31 and August 1, 2012 demonstrated that appellant was capable of light-to-medium category work on a full-time basis. Functional tolerances were reported as sitting within normal limits and standing and walking frequently. Upper extremity functioning demonstrated that appellant could continuously exert light force with partial reaching and frequently with extended reaching. He could exert moderate-to-heavy force frequently with partial and extended reaching, had sustained grasping/pinching of 2 to 4 seconds at a time, repetitive pinching, and grasping for 10 to 45 minutes at a time. Computer keyboarding was within normal limits. Lower extremity repetitive motion tolerance was frequent to continuous. The examiner noted that appellant demonstrated continuous pain behavior throughout the examination. Grip and pinch testing showed inconsistency of effort. Appellant had weakness and subjective complaints around the left lateral epicondyle, and decreased range of motion and mild weakness of the left knee. The report concluded that he was permanently unable to perform letter carrier duties because he could not handle 70 pounds of weight, could not walk 4 to 12 miles a day for up to six hours, and could not case 400 to 800 flats.

In a treatment note dated November 2, 2012, Dr. Worth reviewed the FCE. She reported that appellant wanted to work as a letter carrier. Dr. Worth advised that she did not concur with the conclusions of the FCE, noting that appellant could perform the duties of a letter carrier with the restrictions she had provided in her May 11, 2012 work capacity evaluation. She reported

[7] *Supra* note 3.

that his restrictions were related to repetitive motion activities, advising that he was limited to 30 minutes each hour or working with the elbows, and could push and pull 5 to 35 pounds for 1 to 2 hours daily. Lifting was restricted to 70 pounds rarely.

OWCP asked its medical adviser to review the FCE. In a November 6, 2012 report, Dr. L.J. Weaver, a Board-certified internist and OWCP medical adviser, noted the accepted conditions of bilateral/lateral epicondylitis and aggravation of left knee degenerative joint disease. She noted review of the file number xxxxxx716 record, including the FCE. Dr. Weaver indicated that the medical findings in the record were consistent with limitations of the "light" level as outlined by Dr. Dinenberg and Dr. Worth, but advised that, although appellant might be able to sustain light-to-medium work over several days, it was medically unlikely that he would be able to sustain this category over several weeks to months because he had chronic bilateral/lateral epicondylitis that had failed to respond to maximal medical therapy, as reported by both his treating physician Dr. Worth and by Dr. Dinenberg in his January 12, 2012 second opinion evaluation. The medical adviser completed a work capacity evaluation, noting that appellant had permanent restrictions of no lifting greater than 35 pounds. Walking and standing were restricted to four to six hours; repetitive movements of the wrists and elbows to two hours; pushing and pulling 20 pounds to two hours; and lifting 35 pounds intermittently and 20 pounds continually limited to two hours. Squatting, kneeling, and climbing were limited to one hour.

Appellant had vocational testing in March 2013. On April 9, 2013 Ms. Barron, the rehabilitation counselor, completed a transferable skills analysis. She indicated that appellant had the functional capacity for light to medium work with limitation on repetitive movements that would not impact computer work. Ms. Barron concluded that he had transferable skills in several areas, including stock checker, material coordinator, cashier, and clerk. In June 2013, she identified the positions of cashier II and courier/messenger. Ms. Barron completed a labor market survey for each position on June 28, 2013. These included a job description and noted that the strength level was light for each position, and noted that each position was available in the local labor market. The rehabilitation counselor advised that appellant was to begin a short cashier-training program and job placement services on July 15, 2013, but that he had not participated. She noted that she had no further contact with him after July 18, 2013.

Labor market surveys for both positions were updated on September 20, 2013. Rehabilitative services were closed on November 7, 2013.

By letter dated November 8, 2013, OWCP proposed to reduce appellant's compensation benefits based on his capacity to earn wages as a cashier II. It indicated that, based on the FCE, he could return to an eight-hour workday, and that the cashier II position was within his restrictions. OWCP noted that Dr. Worth disagreed with the functional capacity assessment, but that she had maintained that appellant could return to letter carrier duties even though the restrictions she provided were outside those of the letter carrier position. It further noted that the labor market survey prepared by the rehabilitation counselor indicated that the cashier II position was reasonably available in the local labor market and that the entry-level weekly wage was $368.00.

The strength level of the cashier II position was described as light, with frequent reaching, handling, fingering, talking, hearing, and use of ear acuity. OWCP noted that the physical requirements did not exceed the work restrictions provided by the medical adviser.

In a brief note dated November 12, 2013, appellant disagreed with the notice of proposed reduction.

By decision dated December 16, 2013, OWCP reduced appellant's compensation benefits based on his capacity to earn wages as a cashier II, effective December 17, 2013. By utilizing the *Shadrick* formula,[8] OWCP found that he had a 66 percent loss of wage-earning capacity. Appellant timely requested a hearing before an OWCP hearing representative.

At the hearing, held on June 27, 2014, counsel accepted the restrictions provided by Dr. Weaver, the OWCP medical adviser, noting that the cashier II position required frequent handling, and the medical adviser limited appellant's elbow movement to two hours repetitively. Appellant testified that he wanted to return to his letter carrier job, with restrictions. Counsel maintained that a second opinion evaluation was needed to establish his physical restrictions. In a July 17, 2014 pleading, he cited several Board decisions in which the Board found that OWCP had not met its burden of proof to reduce a claimant's compensation based on a selected position.[9] Counsel maintained that, based on Dr. Weaver's restrictions, the selected position of cashier II was outside appellant's limitations.

In a September 11, 2014 decision, the OWCP hearing representative affirmed the December 16, 2013 decision. She noted that the limitations provided by the medical adviser were less physically demanding than those provided by the attending physician. The hearing representative found that the labor market description indicated that there were many types of cashier jobs available that did not require the physical demands appellant's counsel indicated the cashier II job required.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[10] An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.[11]

Section 8115 of FECA and OWCP regulations provide 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, the wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the employee's usual employment, age, qualifications for other employment, the

[8] *Albert C. Shadrick*, 5 ECAB 376 (1953).

[9] The cases cited were: *P.H.*, Docket No. 13-1375 (issued March 25, 2014); *R.R.*, Docket No. 13-851 (issued September 9, 2013); and *Pauletta L. Roberts*, Docket No. 05-1875 (issued May 16, 2006).

[10] *James M. Frasher*, 53 ECAB 794 (2002).

[11] 20 C.F.R. §§ 10.402, 10.403; *John D. Jackson*, 55 ECAB 465 (2004).

availability of suitable employment, and other factors or circumstances which may affect his or her wage-earning capacity in the disabled condition.[12]

OWCP must initially determine a claimant's medical condition and work restrictions before selecting an appropriate position that reflects his or her wage-earning capacity. The medical evidence upon which OWCP relies must provide a detailed description of the condition.[13] Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.[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 for selection of a position listed in the Department of Labor's *Dictionary of Occupational Titles* (DOT) 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.[15] Finally, application of the principles set forth in *Albert C. Shadrick*,[16] as codified in section 10.403 of OWCP regulations,[17] will result in the percentage of the employee's loss of wage-earning capacity.[18]

In determining an employee's wage-earning capacity based on a position deemed suitable, but not actually held, OWCP must consider the degree of physical impairment, including impairments resulting from both injury-related and preexisting conditions, but not impairments resulting from post injury or subsequently acquired conditions. Any incapacity to perform the duties of the selected position resulting from subsequently acquired conditions is immaterial to the loss of wage-earning capacity that can be attributed to the accepted employment injury and for which appellant may receive compensation.[19]

ANALYSIS

Under file number xxxxxx716 OWCP accepted right lateral epicondylitis. Under file number xxxxxx758, it accepted left lateral epicondylitis. The files were combined with claim file number xxxxxx716 becoming the master file. Appellant has a separate claim, adjudicated by OWCP under file number xxxxxx651, accepted for aggravation of degenerative arthritis of the left knee.

[12] 5 U.S.C. § 8115; *id*. at § 10.520; *John D. Jackson, id*.

[13] *William H. Woods*, 51 ECAB 619 (2000).

[14] *John D. Jackson, supra* note 11.

[15] *Supra* note 10.

[16] *Supra* note 8.

[17] 20 C.F.R. § 10.403.

[18] *Supra* note 10.

[19] *John D. Jackson, supra* note 11.

Appellant stopped work on March 22, 2010 and was placed on the periodic compensation rolls. In July 2012, he was referred for vocational rehabilitation services. OWCP reduced appellant's compensation effective December 17, 2013 based on its determination that he could earn wages in the selected position of cashier II. While it properly relied on the opinion of the rehabilitation counselor in finding that he had the educational qualifications for the position and that it was reasonably available in his commuting area,[20] the Board finds that OWCP failed to meet its burden of proof to reduce his compensation as the physical requirement of the position of cashier II are not within his physical limitations. The job requirements of the position of cashier II require up to 5 hours and 20 minutes of handling objects in a workday while the record of evidence establishes that appellant can handle objects for a maximum of only 2 hours per day.

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.[21]

In her November 6, 2012 report, Dr. Weaver noted the accepted conditions of bilateral/lateral epicondylitis and aggravation of left knee degenerative joint disease, and her review of the file number xxxxxx716 record, including the FCE. She indicated that the medical findings in the record were consistent with limitations of the "light" level as outlined by Dr. Dinenberg and Dr. Worth, but advised that, although appellant might be able to sustain light-to-medium work over several days, it was medically unlikely that he would be able to sustain this category over several weeks to months because he had chronic bilateral/lateral epicondylitis that has failed to respond to maximal medical therapy, as reported by both his treating physician Dr. Worth and by Dr. Dinenberg is his January 12, 2012 second opinion evaluation. The medical adviser completed a work capacity evaluation, noting that appellant had permanent restrictions of no lifting greater than 35 pounds, with walking and standing restricted to four to six hours; repetitive movements of the wrists and elbows to two hours; pushing and pulling 20 pounds to two hours; and lifting 35 pounds intermittently and 20 pounds continually limited to two hours. Squatting, kneeling, and climbing were limited to one hour.

The position of cashier II, as defined in the DOT, has a light strength level, and requires frequent reaching, handling, and fingering. All physicians including the OWCP medical adviser, restricted appellant's upper extremity from repetitive use. As noted, Dr. Worth limited elbow use to 30 minutes each hour, and Dr. Dinenberg restricted repetitive wrist and elbow movements to 2 hours. Lastly, Dr. Weaver, an OWCP medical adviser, upon which OWCP based its decision, advised that it was medically unlikely that appellant could sustain light-to-medium work over several weeks and limited repetitive movements of the wrists and elbows to two hours.

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.[22] The Board finds that the medical evidence is not clear and unequivocal in this case, as the physical

[20] *See Harley Sims, Jr.*, 56 ECAB 320 (2005).

[21] *See Maurissa Mack*, 50 ECAB 498 (1999).

[22] 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).

requirements of the selected position of cashier II are not in conformance with those provided by Dr. Dinenberg and Dr. Worth, as reviewed by Dr. Weaver.[23]

As the medical evidence regarding whether appellant can work in the selected position is not clear and unequivocal, OWCP failed to meet its burden of proof.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to reduce appellant's compensation benefits based on his capacity to earn wages in the selected position of cashier II.

ORDER

IT IS HEREBY ORDERED THAT the September 11, 2014 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 1, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

[23] *F.W.*, Docket No. 14-1772 (issued January 28, 2015).