

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

G.C., Appellant)

and)

**SMITHSONIAN INSTITUTION,
ASTROPHYSICAL OBSERVATORY,
Cambridge, MA, Employer**)

**Docket No. 16-0449
Issued: June 8, 2016**

Appearances:

Appellant, pro se

Office of Solicitor, for the Director

Case Submitted on the Record

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On January 11, 2016 appellant filed a timely appeal of a December 22, 2015 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)(1) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether OWCP has met its burden of proof to reduce appellant's compensation benefits effective December 13, 2015 as he had the capacity to earn wages in the constructed position of receptionist.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On August 6, 1997 appellant, then a 44-year-old antenna assembly mechanic, filed a traumatic injury claim (Form CA-1) alleging that on August 4, 1997 he injured his back when helping a coworker lift a 300-pound unit. OWCP accepted his claim for lumbar strain on February 25, 1998. Appellant returned to work in an administrative position on April 27, 1998. OWCP accepted the additional conditions of herniated disc at L4-5.

Appellant filed a recurrence of disability (Form CA-2a) on October 5, 1998 alleging that he returned to light duty and that his low back condition never went away. He stopped work on October 5, 1998. OWCP accepted appellant's claim for recurrence of total disability.

In a report dated December 21, 1998, appellant's attending physician, Dr. Robert C. Cantu, a Board-certified neurosurgeon, found that appellant was living with his herniated disc fairly well. He opined that appellant could work with restrictions of lifting no more than 25 pounds and no continuous bending, stooping, or straining.

The employing establishment offered appellant a light-duty assignment as an administrative support assistant on January 22, 1999. OWCP informed appellant on January 26, 1999 that this position was suitable for his work capacities and allowed him 30 days to accept the position or offer his reasons for refusal.

Dr. Cantu performed a microhemilaminectomy and ruptured discectomy L4-5 on the left on February 16, 1999. Appellant returned to light-duty work on March 29, 1999.

Appellant filed a Form CA-2a notice of recurrence on April 8, 1999 alleging that he sustained a recurrence of total disability on April 2, 1999. He indicated that he was watching his grandsons play baseball and bent to pick up a ball when his left leg collapsed and he fell to the ground. OWCP accepted appellant's recurrence claim on May 6, 1999. Dr. Cantu opined that appellant had sustained a recurrent ruptured disc. He released appellant to return to light duty on May 11, 1999.

In a letter dated October 20, 1999, appellant asserted that his two-year appointment as an antenna assembly mechanic expired on September 29, 1999 and the employing establishment terminated his light-duty position. OWCP entered appellant on the periodic rolls.

Dr. Cantu completed a note on August 10, 2000 and opined that appellant was neurologically normal and could perform all activities that did not involve lifting, or repetitive bending, stooping, or straining of the spine. He completed a work capacity evaluation (Form OWCP-5c) and found that appellant could work only four hours a day with a limitation on lifting up to 25 pounds.

OWCP referred appellant for vocational rehabilitation on August 7, 2000. He enrolled in a vocational training program at Pioneer Computer School. The vocational rehabilitation counselor met with the school director on April 23, 2001 regarding concerns and found that appellant had not been taught the necessary skills as portrayed in the brochure. Appellant was suspended from the school on April 27, 2001. He received his certificates on June 26, 2001. Appellant was unsuccessful in his return to work and rehabilitation services were closed.

Appellant's attending physician, Dr. Eric W. Romanowsky, a family practitioner, completed a note on April 12, 2010 and opined that appellant had continuing disability and residuals due to his accepted employment injury of 1997.

OWCP referred appellant for a second opinion evaluation with Dr. Joel A. Saperstein, a Board-certified orthopedic surgeon, on October 21, 2010. In his November 5, 2010 report, Dr. Saperstein found that appellant's current restrictions were not due to his accepted employment injury, but instead due to a degenerative low back condition.

In a report dated February 22, 2011, Dr. Romanowsky opined that appellant could perform light-duty work. He found appellant could work 8 hours a day with restrictions including sitting for up 45 minutes at a time, walking no more than 0.5 miles, and standing for up to 30 minutes. Dr. Romanowsky indicated that appellant could drive for two hours at a time. He found that appellant could lift up to 25 pounds, and could push or pull up to 50 pounds. Dr. Romanowsky concluded that appellant needed a 10-minute break every hour.

OWCP referred appellant for vocational rehabilitation services on May 11, 2011. The vocational rehabilitation counselor identified the positions of security guard and receptionist as within appellant's training and physical abilities. Appellant applied for the positions identified by the vocational rehabilitation counselor and applied for additional positions on his own. The vocational rehabilitation counselor informed him that he had three months of placement services and that his file would be closed on November 28, 2011.

Dr. Romanowsky continued to provide appellant's work restrictions and to support his partial disability for work on February 13, 2012, March 11, 2013, February 11, 2014, and March 2, 2015. The employing establishment was unable to provide appellant with appropriate light-duty work.

Appellant's vocational rehabilitation counselor reviewed appellant's file on March 28, 2013 and June 24, 2015 and noted that he had good computer skills as well as prior computer training. She found that the positions of receptionist and security guard were within appellant's work limitations. The vocational rehabilitation counselor found that the position of security guard required the ability to communicate effectively, maintain attendance, a professional demeanor, and provide quality customer service. She found the physical requirements of a security guard were within appellant's work restrictions and that it was classified as light lifting up to 20 pounds. The vocational rehabilitation counselor further found that this position was performed in sufficient numbers to make it reasonable available to appellant in his commuting area through identifying positions on the internet and the state unemployment office. The weekly wage for this position was \$534.00.

The vocational rehabilitation counselor noted that the position of receptionist was a sedentary position requiring good communication skills, typing, and knowledge of telephone technique. She concluded that appellant had the specific skills to meet the vocational preparation requirement of three to six months as he had excellent computer skills, previous training in web design and graphic design, as well as prior experience ordering parts and managing inventory at the employing establishment. The vocational rehabilitation counselor found that the job was being performed in sufficient numbers to make it reasonable available through internet research

and noted that this position was expected to grow faster than the average for all occupations. She stated that a large number of positions were available within appellant's commuting distance and that the weekly wage was \$570.40.

Due to the disagreement between Dr. Saperstein and Dr. Romanowsky regarding whether appellant's continuing disability and medical residuals were due to his accepted employment-injury, OWCP referred appellant for an impartial medical examination with Dr. Richard W. Warnock, a Board-certified orthopedic surgeon. In his November 4, 2013, report, Dr. Warnock found that appellant's current conditions of degenerative lumbar disc disease and ruptured lumbar disc at L4-5 were related to his employment injury. He opined that appellant could lift up to 50 pounds occasionally and 25 pounds on a regular basis. Dr. Warnock also restricted appellant from prolonged bending or stooping.

By letters dated November 3 and 4, 2015, OWCP proposed to reduce appellant's compensation for wage loss as he was not totally disabled and had the capacity to earn wages as a receptionist. It found that this position was within appellant's established work restrictions and therefore medically suitable and that the position was vocationally suitable based on appellant's age, education, and experience and that the position was reasonably available within appellant's commuting area. OWCP afforded appellant 30 days to respond.

Appellant responded and disagreed with the proposed reduction asserting that he was totally disabled, that he was unable to obtain a position while working with the vocational rehabilitation counselor, and that he felt that he was not employable due to the possibility that his back would go out. In a note dated November 10, 2015, Dr. Romanowsky indicated that in addition to appellant's documented activity limitations, he did experience occasional days when his limitations were increased. However, he agreed with the history and assessment of job potential, but disagreed that appellant was currently marketable.

By decision dated December 22, 2015, OWCP finalized the reduction of appellant's compensation effective December 13, 2015 finding that he had the capacity to earn wages as a receptionist. It determined that he had wage-earning capacity of 57 percent and reduced his compensation to \$777.38 every four weeks.

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.²

Section 8115 of FECA³ provides that wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, the degree of physical impairment, his usual employment, his age, his

² E.E., Docket No. 15-1072 (issued February 23, 2016).

³ 5 U.S.C. § 8115.

qualifications for other employment, the availability of suitable employment, and other factors or circumstances which may affect his wage-earning capacity in his disabled condition.⁴

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* or otherwise available in the open market, that fits that employee's capabilities with regard to his 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 *Albert C. Shadrick*⁵ will result in the percentage of the employee's loss of wage-earning capacity. The basic range of compensation paid under FECA is 66 2/3 percent of the injured employee's monthly pay.⁶

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.⁷

ANALYSIS

The Board finds that OWCP met its burden of proof to reduce appellant's compensation benefits based on his capacity to earn wages in the constructed position of receptionist.

OWCP accepted appellant's claim for lumbar strain and herniated disc L4-5 as well as resulting surgery. Appellant underwent two periods of vocational rehabilitation. In its December 22, 2015 decision, it reduced his compensation benefits based on his capacity to earn wages as a receptionist. OWCP determined that this position was medically and vocationally suitable for appellant. It further found that he was capable of earning \$570.40 per week and had 57 percent wage-earning capacity. The Board finds that the weight of the evidence of record establishes that appellant had the requisite physical ability, skill, and experience to perform the position of receptionist.

The vocational rehabilitation counselor determined that appellant was able to perform the position of receptionist. She provided a job description for receptionist which was sedentary work requiring good communication skills, typing, and knowledge of telephone technique. The vocational rehabilitation counselor concluded that appellant had the specific skill sets to meet the

⁴ *Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

⁵ 5 ECAB 376 (1953).

⁶ *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

⁷ *See John D. Jackson*, 55 ECAB 465 (2004).

vocational preparation requirement of three to six months as he had excellent computer skills, previous training in web design and graphic design, as well as prior experience ordering parts and managing inventory at the employing establishment. She indicated that the position was reasonably available within appellant's labor market and was growing more quickly than other positions.

As a sedentary position, receptionist duties are within appellant's medical restrictions. Dr. Warnock, the impartial medical examiner, found that appellant could lift up to 50 pounds occasionally and 25 pounds on a regular basis. Dr. Romanowsky noted on November 10, 2015 that the position of receptionist was within appellant's general restrictions, even though he opined that appellant was not marketable. There is no medical evidence supporting appellant's contention that he could not perform the duties of this position.

The Board finds that OWCP considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment and age, and employment qualifications, in determining that the position of call-out operator represented his wage-earning capacity.⁸ The evidence of record establishes that appellant had the requisite physical ability, skill sets, and experience to perform the duties and that the position was reasonably available within the general labor market of his commuting area.

The information as set forth by the vocational counselor determined that the wages for the position of receptionist were \$570.40 per week. Applying the *Shadrick*⁹ principles, the current pay rate for the date-of-injury position is compared with the wage-earning capacity of \$570.40 per week and a percentage of loss of wage-earning capacity is determined. OWCP determined that appellant had 57 percent loss of wage-earning capacity and his compensation was reduced to a net compensation of \$777.38 every four weeks. The Board finds that OWCP met its burden of proof to reduce his compensation.

On appeal, appellant asserts that Dr. Romanowsky supports that he is unable to work. He further argues that he has been unable to find work. As explained, the medical evidence supports that appellant is able to perform the duties of the constructed receptionist position. Furthermore, the fact that a claimant is unable to secure employment does not establish that the constructed position is not vocationally suitable.¹⁰

Appellant may request modification of the wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

CONCLUSION

The Board finds that OWCP met its burden of proof to reduce appellant's compensation benefits based on his capacity to earn wages in the constructed position of receptionist.

⁸ See E.E., Docket No. 15-1072 (issued February 23, 2016); *James M. Frasher*, 53 ECAB 794 (2002).

⁹ *Supra* note 5.

¹⁰ *Lawrence D. Price*, 54 ECAB 590 (2003).

ORDER

IT IS HEREBY ORDERED THAT the December 22, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 8, 2016
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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