

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

B.C., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Portland, OR, Employer**

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**Docket No. 15-1861
Issued: October 3, 2016**

Appearances:

*Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On September 15, 2015 appellant, through counsel, filed a timely appeal from a May 11, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 met its burden of proof to reduce appellant's compensation benefits based on her capacity to earn wages in the constructed position of production assembler.

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.*

FACTUAL HISTORY

On November 9, 2009 appellant, then a 54-year-old part-time mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that on November 6, 2009 she sustained a right shoulder injury. She reported that her foot caught on webbing, causing her to lose her balance. When she grabbed a general purpose container (GPC) to keep from falling, her right shoulder popped. OWCP accepted the claim for closed dislocation of the right shoulder, other joint derangement of the right shoulder, and dislocation of the right shoulder. On February 10, 2010 appellant underwent right shoulder arthroscopic rotator cuff repair and subacromial decompression performed by Dr. Stuart Montgomery, a Board-certified orthopedic surgeon. On June 30, 2010 she underwent a right shoulder arthroscopy, manipulation, lysis of adhesions, arthroscopic debridement, and arthroscopic redo subacromial decompression performed by Dr. Montgomery. Appellant stopped work and received wage-loss compensation. She was placed on the periodic rolls effective June 5, 2011.³

In a February 29, 2012 physical capacity evaluation, Patrick Pua, a physical therapist, reported that appellant had been referred for physical therapy by Dr. Montgomery to determine her current function and ability to return to work. Mr. Pua reported that appellant could sit for one hour at a time for six to seven hours per day, could stand for two hours at a time, and could walk for two hours at a time within an eight-hour day. He noted that sitting was limited to one hour at a time due to shoulder pain and that material handling should be restricted to light level (20 pounds) on an occasional basis for lifting, except for overhead lifting which was at a sedentary level restricted to 10 pounds.

In an April 9, 2012 medical report, Dr. Montgomery provided an impairment rating and reported that appellant had reached maximum medical improvement. He also noted that her final work restrictions would be based on her physical capacities evaluation.

By letter dated August 1, 2012, OWCP notified appellant that she was being referred for vocational rehabilitation as Dr. Montgomery indicated that she was capable of returning to work with restrictions.

On September 11, 2012 appellant was again referred for a functional capacity evaluation to determine her current work tolerances. Appellant was found to be in the "light-medium" range of physical demands. On October 17, 2012 the vocational rehabilitation counselor completed a transferable skills analysis and identified target positions for appellant using the FCE results and work history.

By letter dated November 27, 2012, OWCP notified appellant that the target positions of retail clerk and production assembly worker had been identified as vocationally and medically suitable. It advised her that she would be provided with 90 days of vocational placement services starting on December 1, 2012, and if placement services were not successful at the end

³ OWCP noted the physical demands of the date of injury position, mail processing clerk, were heavy lifting up to 70 pounds, heavy carrying 45 pounds and over, straight pulling, reaching above the shoulder, use of both hands, walking, standing, and repeated bending.

of the 90-day period, OWCP would reduce compensation benefits to reflect the wage-earning capacity in a targeted position.

Appellant actively participated in the job search, but her efforts were unsuccessful. Placement services ended on March 1, 2013.

On May 23, 2013 vocational rehabilitation services were terminated without job placement. The vocational rehabilitation counselor noted that appellant was capable of earning \$582.40 per week (\$14.56 per hour) as a production assembler (DOT #706.687.010).⁴

By letter dated May 30, 2013, OWCP proposed to reduce appellant's compensation benefits based on her capacity to earn wages as a production assembler. It found that the position was medically and vocationally consistent with appellant's medical restrictions and work experience. OWCP noted that the labor market survey prepared by the rehabilitation counselor indicated that the position was reasonably available in the local labor market and that the entry-level wage was \$582.40 per week which was equal to or greater than the current pay of the job held at the time of injury. Therefore, it would result in a return to work with no loss of wage-earning capacity and, accordingly, her compensation would be reduced to zero. OWCP informed appellant that she could submit additional evidence or argument within 30 days either in writing or electronically. Appellant did not respond to the proposed reduction.

By decision dated July 10, 2013, OWCP reduced appellant's compensation benefits, effective July 11, 2013, based on her capacity to earn wages as a production assembler, which yielded a zero percent loss of wage-earning capacity.

On July 15, 2013 appellant, through counsel, requested a telephone hearing before an OWCP hearing representative.

In an August 19, 2013 note, Dr. Montgomery indicated that the "same work restrictions" applied. In medical reports dated August 19 through October 10, 2013, he noted an exacerbation of post-traumatic rotator cuff tendinitis.

By decision dated November 21, 2013, the Branch of Hearings and Review vacated the July 10, 2013 decision and remanded the case for further development. It found that appellant was referred to vocational rehabilitation services without accepted work tolerances in the medical record. While a functional capacity evaluation had been secured, OWCP failed to complete the medical development of work tolerances by securing an opinion from a qualified

⁴ The Department of Labor, *Dictionary of Occupational Titles* (DOT) describes the position of production assembler (DOT #706.687.010) as follows, "Performs repetitive bench or line assembly operations to mass-produce products, such as automobile or tractor radiators, blower wheels, refrigerators, or gas stoves: Places parts in specified relationship to each other. Bolts, clips, and screws cements or otherwise fastens parts together by hand, or using hand tools or portable power tools. May tend machines, such as arbor presses or riveting machine, to perform force fitting or fastening operations on assembly line. May be assigned to different workstations as production needs require. May work on line where tasks vary as different model of same article moves along line. May be designated according to part or product produced." Strength level is considered light and the position required frequent reaching, handling, fingering, and use of near acuity; and occasional stooping, crouching, and use of depth perception and accommodation.

physician and improperly used the work capacities offered by the occupational therapist in identifying target positions. The case was remanded to obtain a medical opinion on the suitability of the target position from a treating physician or second opinion examiner.

On remand, OWCP referred appellant to Dr. Aleksandar Curcin, a Board-certified orthopedic surgeon, for a second opinion on the suitability of the target position. Appellant was evaluated on February 8, 2014. Dr. Curcin provided physical examination findings, a history of injury, and review of medical and diagnostic reports. He reported that residuals from appellant's work-related injury included continued pain and limited range of motion which was disabling her from returning to her date-of-injury job. Dr. Curcin further reported that she was capable of handling paperwork in a modified-duty position. He stated that he disagreed with her physician's restrictions, especially since she "passed the requirements to get back to working." In an attached OWCP work capacity evaluation (OWCP-5c), Dr. Curcin provided permanent work restrictions of no reaching and no reaching above the shoulder, and restrictions of pushing, pulling, and lifting no more than 10 pounds for zero to two hours per day.

By letter dated March 10, 2014, OWCP requested clarification from Dr. Curcin regarding whether appellant was capable of performing work in the light category as assembly production or retail sales clerk. It provided the job descriptions and stipulated the demands of light work.⁵

In a March 18, 2014 supplemental report, Dr. Curcin responded that after reviewing the job analyses for assembly production and retail sales clerk, appellant was capable of performing work in the light category.

On April 24, 2014 the vocational rehabilitation specialist, provided an updated labor market survey for production assembler and retail sales clerk. She noted that based on the reports of Dr. Curcin, these positions remained consistent with appellant's physical limitations, skills, and abilities. According to the Oregon Labor Market Information System (OLMIS), appellant was capable of earning \$9.19 per hour as a retail sales clerk and \$16.52 per hour as a production assembler. The vocational rehabilitation specialist indicated that the wages were based on the Occupational Employment statistics for May 2013 from the United States Department of Labor, Bureau of Labor Statistics.

On June 10, 2014 OWCP proposed to reduce appellant's compensation to zero based on her capacity to earn wages as a production assembler. It determined that the duties of the production assembler position, based on the DOT, were within her work capacity, based on the work restrictions provided by Dr. Curcin, and that the position was reasonably available within her commuting area. OWCP further noted that the position was found to be vocationally suitable based on a vocational assessment and transferable skills analysis that showed she had significant

⁵ Light Work -- Light Work involves exerting up to 20 pounds of force occasionally or up to 10 pounds of force frequently, or a negligible amount of force constantly to move objects. Physical demand requirements are in excess of those for sedentary work. Even though the weight lifted may be only a negligible amount, a job/occupation is rated as light work when it requires: (1) walking or standing to a significant degree; (2) sitting most of the time while pushing or pulling arm or leg controls; or (3) working at a production rate pace while constantly pushing or pulling materials even though the weight of the materials is negligible. (The constant stress and strain of maintaining a production rate pace, especially in an industrial setting, can be and is physically demanding of a worker even though the amount of force exerted is negligible.)

background in production work and the position was consistent with her physical limitations, skills, and abilities. It advised appellant that she was capable of earning greater than the entry level wage based on her prior 15 years of experience and skills, and thus determined that she was capable of earning \$660.80 per week. By utilizing the *Shadrick* formula,⁶ OWCP recommended that appellant's wage-loss compensation be reduced to zero as she was no longer totally disabled and the position of production assembler was medically and vocationally suitable, and represented her wage-earning capacity. It informed her that she could submit additional evidence or argument within 30 days either in writing or electronically.

In support of her claim, appellant provided Dr. Montgomery's previously submitted April 9, 2012 report as well as a new June 12, 2014 report. In his June 12, 2014 report, Dr. Montgomery reported that appellant had previously been cleared for a light-duty job which included 20-pound occasional lifting and 10-pound frequent lifting. His recommendation for work restrictions remained the same with a light-duty job. Dr. Montgomery noted that, if the work analyses for assembly production and retail clerk are within that limit, then he would release her to do those jobs. If the positions were beyond that, then he did not think that was something she was likely able to do. Dr. Montgomery concluded that appellant's shoulder was doing relatively well and he would continue with her light-duty restrictions.

By decision dated August 1, 2014, OWCP finalized its proposal and reduced appellant's compensation to zero, effective August 2, 2014, as the evidence of record established that she had the capacity to earn wages as a production assembler at the rate of \$680.80 per week. It found that the weight of the medical evidence rested with Dr. Curcin which indicated that her condition was stable, no further improvement was necessary, and that appellant's partial disability rendered her capable of working as a production assembler.

On August 11, 2014 appellant, through counsel, requested a telephone hearing before an OWCP hearing representative.

At the March 10, 2015 hearing, appellant testified that she had held various jobs prior to working for the postal service and had spent three years as a production assembler of umbrellas. She noted that she could not find any jobs that required her to lift less than 50 pounds and OWCP had previously denied any additional expenses for training. Appellant reported that she could not perform the position of production assembler as it required work as a repetitive bench or line assemble operator to mass produce products such as automobile or tractor radiators which she would not be able to lift. She further indicated that the job required assembling machinery, stoves, refrigerators, etc. which did not exist in the Portland area. Counsel argued that the position of production assembler was heavy work which required a great deal of lifting and physical activity that was outside of appellant's restrictions. He further noted that assembling machinery was a highly technical job which was outside of appellant's training and capabilities. Counsel argued that the position for production assembler fell outside of the restrictions provided by the second opinion physician, who restricted appellant to lifting no more than 10 pounds for zero to two hours per day. The record was held open for 30 days.

⁶ *Albert C. Shadrick*, 5 ECAB 376 (1953); codified at 20 C.F.R. § 10.403.

By decision dated May 11, 2015, OWCP's hearing representative affirmed the August 1, 2014 decision, finding that OWCP properly reduced appellant's compensation based on her capacity to earn wages as she had the requisite physical ability, skills, and experience to perform the position of production assembler and the position was reasonably available in her commuting area. It noted that the medical evidence established that she was capable of full-time light-duty employment as per the restrictions provided by the second opinion examiner Dr. Curcin.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.⁷ 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.⁸

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 availability of suitable employment, and other factors or circumstances which may affect his or her wage-earning capacity in the disabled condition.⁹

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.¹⁰ Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.¹¹

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, *Dictionary of 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

⁷ *James M. Frasher*, 53 ECAB 794 (2002).

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

⁹ 5 U.S.C. § 8115; 20 C.F.R. § 10.520; *John D. Jackson*, *id.*

¹⁰ *William H. Woods*, 51 ECAB 619 (2000).

¹¹ *John D. Jackson*, *supra* note 8.

service.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 the commuting area.¹³ Finally, application of the principles set forth in *Albert C. Shadrick*, as codified in section 10.403 of OWCP regulations,¹⁴ will result in the percentage of the employee's loss of wage-earning capacity.¹⁵

OWCP regulations and procedures provide that if a claimant refuses or impedes rehabilitation training, the claims examiner shall notify the injured worker in writing, of the provisions of section 8113(b) of FECA¹⁶ and direct the injured worker to apply for, participate in, or resume participation in the training program. If the injured worker fails to comply or provide a written explanation of his or her failure to comply within 30 days, section 8113(b) will be applied and benefits will be reduced based on the jobs targeted in the approved training plan.¹⁷

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 postinjury 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.¹⁸

ANALYSIS

OWCP accepted appellant's claim for closed dislocation of the right shoulder, other joint derangement of the right shoulder, and dislocation of the right shoulder as a result of the November 6, 2009 employment injury. On February 10 and June 30, 2010 appellant underwent right shoulder arthroscopic rotator cuff repair, subacromial decompression, arthroscopic debridement, and arthroscopic redo subacromial decompression. She stopped work and received wage-loss compensation for which she was placed on periodic rolls. On September 11, 2012 appellant underwent an FCE and was referred for vocational rehabilitation services on November 27, 2012. While appellant actively participated in the job search, her efforts were unsuccessful and vocational rehabilitation services were terminated without job placement on May 23, 2013. Effective August 2, 2014, OWCP reduced her compensation to zero based on the

¹² *Supra* note 7.

¹³ *See Leon A. Cartier*, 32 ECAB 652, 657 (1981).

¹⁴ *Supra* note 6.

¹⁵ *Supra* note 7.

¹⁶ 5 U.S.C. § 8113(b).

¹⁷ 20 C.F.R. § 10.519(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Vocational Rehabilitation Services*, Chapter 2.813 (February 2011).

¹⁸ *John D. Jackson*, *supra* note 8.

determination that she could earn wages in the selected position of production assembler at the rate of \$680.80 per week.

The Board finds that OWCP did not meet its burden of proof to reduce appellant's compensation as the medical evidence upon which OWCP based its determination was inconsistent and did not reflect a clear understanding of the selected position of production assembler.¹⁹ 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.²⁰

OWCP indicated that the weight of the medical evidence rested with Dr. Curcin serving as the second opinion physician. In his report dated February 8, 2014, Dr. Curcin advised that appellant had passed a test for a modified duty but that appellant's treating physician had provided physical restrictions which precluded her from performing the job. Dr. Curcin believed those restrictions were not correct as appellant had "passed the requirements to get back to working." He completed a work capacity evaluation and provided restrictions of no reaching, no reaching above the shoulder, and no pushing, pulling, or lifting over 10 pounds for zero to two hours.

OWCP provided to Dr. Curcin a copy of the position descriptions for production assembler and retail sales clerk and requested clarification of whether appellant could perform either position. It noted that the physical demand requirements were in excess of those for sedentary work.

In his March 18, 2014 supplemental report, Dr. Curcin reported that appellant "was capable of performing work in the light category." Although Dr. Curcin advised that appellant could work in the light-category position, in his February 8, 2014 evaluation, he provided permanent work restrictions of no reaching, no reaching above the shoulder, and no pushing, pulling, and lifting more than 10 pounds for zero to two hours per day. The physical demands of the position were described in the position description as exerting up to 20 pounds of force occasionally, and/or up to 10 pounds of force frequently and/or a negligible amount of force constantly to move objects and frequent reaching, handling, and fingering. Dr. Curcin's work restrictions are therefore inconsistent with his conclusory statement that "appellant was capable of performing work in the light category."

The Board finds that the medical evidence is not clear and unequivocal in this case, as the physical restrictions provided by Dr. Curcin are inconsistent.²¹ As the medical evidence

¹⁹ *S.B.*, Docket No. 15-0106 (issued March 15, 2016).

²⁰ *See Maurissa Mack*, 50 ECAB 498 (1999).

²¹ FECA Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity*, Chapter 2.816.4(d) (June 2013). If the medical evidence is not clear and unequivocal, the claims examiner should seek clarification from the attending physician, second opinion or referee specialist as appropriate. *F.W.*, Docket No. 14-1772 (issued January 28, 2015).

regarding whether appellant can work in the selected position is not clear and unequivocal, OWCP did not meet its burden of proof.²²

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to reduce appellant's compensation benefits based on her capacity to earn wages in the constructed position of production assembler.

ORDER

IT IS HEREBY ORDERED THAT the May 11, 2015 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 3, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

²² *R.R.*, Docket No. 13-851 (issued September 9, 2013).