

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

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**K.C., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Solen, OH, Employer**

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**Docket No. 16-0733  
Issued: January 11, 2017**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On March 7, 2016 appellant, through counsel, filed a timely appeal from a January 29, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## ISSUE

The issue is whether OWCP properly reduced appellant's compensation effective April 5, 2015 based on his capacity to earn wages in the constructed position of a heating, ventilating, and air conditioning (HVAC) installer/servicer.

On appeal, appellant contends that he cannot work as an HVAC installer/servicer due to a prior felony conviction and lack of experience.

## FACTUAL HISTORY

On July 28, 2011 appellant, then a 46-year-old letter carrier (transitional employee), filed a traumatic injury claim (Form CA-1) alleging that, while delivering mail that day, he tripped on exposed roots and injured his left knee. OWCP accepted the claim for left knee sprain and subsequently expanded accepted conditions to include left medial meniscus tear with repair surgery and left knee chondromalacia. Appropriate treatment and compensation benefits were authorized. Appellant worked in limited-duty capacity with restrictions until July 17, 2012, when he was placed off work due to disciplinary reasons. He underwent left knee surgery on September 6, 2012. Following surgery, OWCP retained appellant on the periodic compensation rolls.

In an April 26, 2013 report, Dr. Bruce T. Cohn, a Board-certified orthopedic surgeon, indicated that appellant was partially disabled as a result of the work injury. He noted that appellant was in HVAC school. Dr. Cohn advised that appellant should remain on light duty and gradually increase his walking for an additional hour each month and would be at full duty with no restrictions on July 1, 2013.

Based on Dr. Cohn's opinion, OWCP referred appellant for vocational rehabilitation services.

On July 18, 2013 OWCP received a report from the vocational rehabilitation counselor. In this report the counselor related that she had met with appellant on July 8, 2013. Employment history included working as a Cleveland police officer from 1990 through 2000. He was convicted of two class 1 felonies in 2000 and was incarcerated for three years. He had worked as a car salesman from 2005 through 2010 and thereafter worked for the employing establishment until September 3, 2012 when he was discharged. He has an associate of arts degree from community college and a bachelor of art's degree in public safety management where he graduated in 2005. At the time of the July 18, 2013 meeting, appellant was attending HVAC training at Fortis College and had received "As" in all of his classes to date.

The rehabilitation counselor discussed with appellant a possible referral to Towards Employment, an agency that assisted felons with finding employment by contracting with local employers who agreed to hire these individuals on a contractual basis. The counselor related that he informed appellant that all employers now performed background checks and appellant might find it a large barrier to employment. Appellant believed, however, that he did not feel that he would have difficulty finding employment.

Following a vocational assessment and interview, the vocational rehabilitation specialist identified the position of HVAC installer/servicer and furnace installer as being within appellant's age, experience, education, medical restrictions and a labor market survey. The rehabilitation counselor noted that she would develop a plan retroactively for the HVAC training. OWCP paid for appellant's final quarter of training at Fortis College from March 11 to November 16, 2013. Appellant was advised that, following his HVAC training after he graduated on November 16, 2013, he would also receive 90 days of placement assistance. On May 5, 2014 appellant's placement assistance was extended and concluded on August 5, 2014.<sup>3</sup>

On February 5, 2014 Dr. Cohn indicated that appellant was at maximum medical improvement. He also provided restrictions based on the letter carrier position.

As Dr. Cohn had not provided restrictions applicable to the targeted HVAC position, OWCP referred appellant to Dr. William Bohl, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a September 25, 2014 report, Dr. Bohl noted that the history of injury, reviewed appellant's medical history and the statement of accepted facts, and presented findings on examination. He reviewed the job descriptions for a furnace installer and HVAC installer and indicated that appellant was capable of performing such jobs. In an October 27, 2014 supplemental report, Dr. Bohl stated that appellant's main disabling condition was chondromalacia. Since the job of furnace installer required more kneeling and crouching than the job of HVAC installer, he opined that the job of HVAC installer would be more preferable for appellant and less likely to cause problems in the long term.

On January 28, 2015 the vocational rehabilitation counselor performed updated market analysis on the position of HVAC installer/servicer (DOT No. 637.261.014) and furnace installer (DOT No. 862.361.010) and found those positions vocationally suitable and reasonably available to appellant. The Department of Labor, *Dictionary of Occupational Titles* describes the position of HVAC installer/servicer as "installs, services, and repairs environmental control systems in residences, department stores, office buildings, and commercial establishments, utilizing knowledge of refrigeration theory, pipefitting, and structural layout. Mounts compressor and condenser units on platform or floor, using hand tools, following blueprints or engineering specifications. Fabricates, assembles, and installs ductwork and chassis parts, using portable metalworking tools and welding equipment." The physical requirements of the HVAC installer/servicer position are medium strength, which means able to exert force of 20 to 50 pounds occasionally, 10 to 25 pounds frequently, or up to 10 pounds constantly. Occasional climbing, stooping, kneeling, crouching, reaching, handling and fingering are also involved. The Specific Vocational Preparation (SVP) for the position of HVAC installer/servicer required an SVP of 7, which requires two to four years education, training and/or experience.<sup>4</sup>

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<sup>3</sup> The record reflects that appellant worked as a pipefitter technician with Budzar Industries effective March 3, 2014 and changed jobs on March 17, 2014 to work as an HVAC technician with Arctic Air. Appellant was released from Arctic Air because of lack of available work. As appellant had not completed a 60-day work status, the rehabilitation specialist allowed him to go back into job search for another period of 90 days.

<sup>4</sup> In addition to his college degree, appellant was noted to have completed HVAC training at Fortis College.

In a February 19, 2015 notice, OWCP advised appellant that it proposed to reduce his compensation for wage loss because the medical and factual evidence of record established that he was no longer totally disabled. It found that he had the physical and vocational capacity to earn the wages of an HVAC installer/servicer, DOT No. 637.261.014 at the rate of \$512.00 per week. OWCP requested that appellant submit additional evidence or argument within 30 days if he disagreed with the proposed action.

A March 9, 2015 treatment note from Dr. Cohn was received. Dr. Cohn noted that appellant was self-employed. He did not provide an opinion regarding appellant's ability to perform the duties of an HVAC installer/servicer.

By decision dated April 1, 2015, OWCP reduced appellant's compensation based on his capacity to earn wages in the constructed position of HVAC installer/servicer. It found that the evidence showed that he was vocationally and physically capable of working as an HVAC installer/servicer and was capable of earning \$512.00 per week.

On April 9, 2015 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative, which was held on November 13, 2015. Counsel contended that while appellant was physically and vocationally able to perform the job of an HVAC installer/servicer,<sup>5</sup> he could not perform such position as his felony conviction had not been erased from his record and neither he nor his employers could obtain bonding, as required by insurance requirements, for appellant to perform HVAC services in private residences. Counsel acknowledged that appellant had obtained employment with Ford Motor Company on October 5, 2015 and earned approximately \$631.20 weekly, which is a higher salary than the HVAC position. However, counsel continued to contend that appellant was entitled to temporary total compensation until he started working with Ford Motor Company on October 5, 2015. Appellant testified that, because of his felony conviction, he obtained a judgment entry from the state to certify that he could work in HVAC, but nonetheless he could not get any of the jobs because of his lack of experience.<sup>6</sup> In a June 19, 2015 report, Dr. Cohn reported that appellant was self-employed and found that appellant could perform light duty.

By decision dated January 29, 2016, an OWCP hearing representative found OWCP had met its burden of proof to establish that the position of HVAC installer/servicer represented appellant's wage-earning capacity.

### **LEGAL PRECEDENT**

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.<sup>7</sup> An injured employee who is either unable to return to

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<sup>5</sup> Appellant testified that he had completed his course work for the HVAC certification. Counsel conceded that appellant was vocationally trained for the position, but was lacking the experience necessary to be employable.

<sup>6</sup> Appellant described the different positions which he had held and those for which he had applied. He indicated that he worked for Arctic Air Conditioning for a little less than a month, but they let him go as he only had limited experience.

<sup>7</sup> *H.N.*, Docket No. 09-1628 (issued August 19, 2010); *T.F.*, 58 ECAB 128 (2006); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

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.<sup>8</sup>

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 the employee's wage-earning capacity or if the employee has no actual wages, 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 and circumstances which may affect his or her wage-earning capacity in his or her disabled condition.<sup>9</sup> Additionally, 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.<sup>10</sup>

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, *Dictionary of Occupational Titles* or otherwise available in the open market, that fit the 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 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*<sup>11</sup> and codified by regulations at 20 C.F.R. § 10.403<sup>12</sup> should be applied. Subsection (d) of the regulations provide that the employee's wage-earning capacity in terms of percentage is obtained by dividing the employee's actual earnings or the pay rate of the position selected by OWCP, by the current pay rate for the job held at the time of the injury.<sup>13</sup>

### ANALYSIS

The Board finds that OWCP properly reduced appellant's compensation benefits based on his wage-earning capacity as an HVAC installer/servicer.

OWCP found in its April 1, 2015 decision, which a hearing representative affirmed on January 29, 2016, that appellant had the capacity to earn wages as an HVAC installer/servicer.

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<sup>8</sup> 20 C.F.R. §§ 10.402, 10.403.

<sup>9</sup> 5 U.S.C. § 8115(a); *see N.J.*, 59 ECAB 171 (2007); *T.O.*, 58 ECAB 377 (2007); *Dorothy Lams*, 47 ECAB 584 (1996).

<sup>10</sup> *Id.*

<sup>11</sup> 5 ECAB 376 (1953).

<sup>12</sup> 20 C.F.R. § 10.403.

<sup>13</sup> *Id.* at § 10.403(d).

It is the responsibility of OWCP to confirm that the claimant has the necessary vocational ability to perform the requirements of the position.<sup>14</sup> To determine wage-earning capacity, OWCP relies upon its wage-earning capacity specialist for selection of an appropriate position.<sup>15</sup>

The Board finds that OWCP properly found that appellant had obtained the educational and vocational background to perform the duties of an HVAC installer/servicer, which had been identified by the rehabilitation counselor. The Department of Labor, *Dictionary of Occupational Titles* identifies the SVP for the position as a level seven, requiring from two to four years of education, training, and/or experience. This training may be acquired in a school, work, military, institutional, or vocational environment.<sup>16</sup> The rehabilitation counselor properly determined, and counsel for appellant conceded, that appellant met the vocational requirements of two to four years of education, training, and/or experience. In addition, it found that the position of HVAC installer/servicer was reasonably available in his commuting area.

The physical requirements of the HVAC installer/servicer included the exertion of physical force at medium strength, described as 20 to 50 pounds occasionally, 10 to 25 pounds frequently, or up to 10 pounds constantly. The position also involved occasional climbing, stooping, kneeling, crouching, reaching, handling, and fingering. Upon review of the physical requirements, Dr. Bohl, the second opinion specialist, concluded that as appellant's main disabling condition was chondromalacia, the position of HVAC installer/servicer met his physical requirements as it entailed less kneeling and crouching and would pose fewer problems long term. The Board finds that the medical evidence establishes that the physical demands of the position of HVAC installer/servicer were within appellant's work restrictions as established by Dr. Bohl.

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 HVAC installer/servicer represented his wage-earning capacity. The weight of the evidence in the record establishes that appellant had the requisite physical ability, skill and experience to perform the position of HVAC installer/servicer and that such a position was reasonably available within the general labor market of his commuting area. The Board therefore finds that OWCP met its burden of proof to reduce appellant's compensation benefits based on his capacity to earn the wages of an HVAC installer/servicer.

Counsel argued that appellant's felony conviction should have been considered when determining whether positions would have been available. However, the Board notes that appellant had already received a petition from the state to allow him to serve in the capacity of an

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<sup>14</sup> *Robert W. Carlisle*, Docket No. 97-1299 (issued December 3, 1998).

<sup>15</sup> *Id.*

<sup>16</sup> *Kim C. Marr*, Docket No. 00-1275 (issued March 27, 2002); *see also J.S.*, Docket No. 08-2270 (issued August 19, 2009).

HVAC installer/servicer, despite his felony, so that alone would not have been a bar to his employment.<sup>17</sup>

**CONCLUSION**

The Board finds that OWCP met its burden of proof to reduce appellant's compensation benefits effective April 1, 2015 based on his capacity to earn wages in the constructed position of HVAC installer/servicer.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 29, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 11, 2017  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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

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<sup>17</sup> See *James R. Verhine*, 47 ECAB 460 (1996).