United States Department of Labor
Employees Compensation Appeals Board

G.M., Appellant	)	
and	)	**Docket No. 16-1032**
	)	**Issued: January 4, 2017**
DEPARTMENT OF THE NAVY, CORPS OF ENGINEERS, Philadelphia, PA, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On April 20, 2016 appellant, through counsel, filed a timely appeal from a January 19, 2016 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.

[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.*

ISSUE

The issue is whether OWCP met its burden of proof to reduce appellant's compensation benefits, based on its finding that he had the capacity to earn wages in the selected position of surveillance system monitor.

FACTUAL HISTORY

OWCP accepted that on January 20, 2000 appellant, then a 32-year-old marine oiler, sustained a left ankle sprain when he slipped on a loose deck plate and fell into the bilge. On November 17, 2000 he underwent left ankle arthroscopy with loose body removal and chondroplasty of the talus. Appellant received total disability compensation for work absences. He returned to limited, full-time duty on February 5, 2001.

OWCP accepted a recurrence of disability commencing February 11, 2002. Appellant returned to limited, full-time duty on April 2, 2002. On November 6, 2002 Dr. Stuart G. Dubowitch, an attending osteopathic physician Board-certified in orthopedics, diagnosed post-traumatic osteochondritis dessicans of the left talus. He limited appellant to part-time, sedentary-duty work.

Dr. Wen Chao, an attending Board-certified orthopedic surgeon, treated appellant beginning on April 1, 2003. He diagnosed a loose body in the left ankle.

OWCP accepted that appellant sustained a second recurrence of disability commencing April 8, 2003.[3] Appellant received wage-loss compensation for temporary total disability beginning on April 8, 2003 on the daily and later on the periodic rolls.

Dr. Chao explained on August 27, 2003 that narcotic medication hindered appellant's "ability to perform activities of daily living" or "performing any work duty." He found that appellant was able to work four hours a day as of March 17, 2004. Dr. Chao noted that appellant's functioning was affected by prescription narcotic pain medication. On June 2, 2004 he noted that appellant had built up a substantial tolerance to narcotics. Dr. Chao opined that appellant had right knee, ankle, and lumbar pain due to compensating for his accepted injury and prescribed a brace.

In a May 2, 2005 report, Dr. Chao noted that an August 3, 2004 MRI scan revealed osteochondral fractures in the lateral corner of the talar dome with a small loose fragment. He explained that, while surgery could remove the loose fragment, the osteochondral defect of the talus was permanent. Dr. Chao found that appellant was totally and permanently disabled from work.[4]

[3] A July 3, 2003 magnetic resonance imaging (MRI) scan of the left ankle showed bone marrow edema around an osteochondral defect of the talus and distal tibia. A January 27, 2004 MRI scan showed a persistent osteochondral defect with marrow edema in the talus, consistent with a stress fracture.

[4] A May 22, 2006 MRI scan demonstrated osteochondritis dessicans of the talar dome without a visible free fragment, with tendinosis versus partial tear of the peroneus brevis.

In a May 29, 2007 report, Dr. Chao opined that appellant had attained maximum medical improvement (MMI). He again found appellant totally and permanently disabled from work due to an osteochondral defect of the talus with marrow edema. Appellant required an ankle brace and a cane to walk. Dr. Chao noted that appellant needed narcotic medications for pain control. He submitted periodic reports through 2009 finding appellant's condition unchanged.

On June 24, 2009 OWCP obtained a second opinion from Dr. Kevin Hanley, a Board-certified orthopedic surgeon. He reviewed the statement of accepted facts and the medical record. On examination, Dr. Hanley found minimal atrophy of the left calf and mild loss of left ankle motion. He diagnosed status post left ankle sprain with osteochondritis dessicans as a direct consequence of the accepted left ankle sprain. Dr. Hanley found appellant able to perform full-time sedentary duty.

On August 31, 2010 Dr. Chao found that appellant's range of left ankle motion had decreased. He continued to prescribe narcotic medications, use of an ankle brace, and a cane for ambulation. Dr. Chao continued to submit periodic reports through November 16, 2012 finding appellant totally disabled.[5] Appellant remained on the periodic rolls.

OWCP obtained a second opinion on November 6, 2012 from Dr. Kenneth Heist, an osteopath Board-certified in orthopedic surgery. Dr. Heist reviewed the medical record and a statement of accepted facts. On examination, he found mildly limited motion of the left ankle. In a December 27, 2012 supplemental report, Dr. Heist opined that appellant had attained MMI. He released appellant to full-time medium-duty work.

OWCP found a conflict of medical opinion between Dr. Chao, for appellant, and Dr. Heist, for the government. To resolve the conflict, it selected Dr. Thomas J. O'Dowd, a Board-certified orthopedic surgeon, as impartial medical examiner.[6] In a May 14, 2013 report, Dr. O'Dowd reviewed the medical record and statement of accepted facts. On examination, he observed that appellant was morbidly obese, had nearly equal callus formation on both feet indicating significant weight bearing on both lower extremities, and slight limitation of left ankle motion. Dr. O'Dowd opined that MRI scans between 2006 and 2012 showed very little change, demonstrating a stable lesion. He found appellant able to perform full-time sedentary work, with lifting limited to 10 pounds, walking less than one hour, and standing up to two hours. Dr. O'Dowd reported that appellant was "very clearly addicted to long-term narcotic medications," with dosages out of proportion to his objective arthritic degeneration. He posited that appellant's "significant psychiatric illness," requiring psychotropic medications, "may affect his sensation and his perception of pain. This is of course unrelated to his underlying orthopedic problem." Dr. O'Dowd noted that, "The amount of narcotic medication [appellant] is taking may preclude him from returning to gainful employment, but that is unrelated to the work-related issue of January 20, 2000."

[5] A December 10, 2012 MRI scan showed an os trigonum with adjacent edema in the posterior talus, osteochondral defect in the talar dome, and subchondral edema in the anterior distal tibia indicative of an old fracture.

[6] The record contains a Form ME023 appointment schedule notification form, and bypass screen captures documenting Dr. O'Dowd's selection.

Dr. Chao provided July 15, 2013 reports continuing to find appellant permanently and totally disabled for work. In a July 26, 2013 report, he found appellant permanently disabled due to use of the ankle brace, cane, and narcotic medication. Dr. Chao reiterated that appellant had attained MMI.

In a September 9, 2013 supplemental report, Dr. O'Dowd specified that appellant was able to lift, push, and pull up to 10 pounds, and stand for up to two hours a day. He would also require breaks "because of the arthritic condition of his ankle." Appellant was unable to use a clutch or "heavy devices of that type on the left side."

Based on Dr. O'Dowd's opinion that appellant was no longer totally disabled from work, OWCP referred him for vocational rehabilitation services on November 7, 2013. In a January 16, 2014 report, Dr. Sally Kneipp, a licensed clinical psychologist, administered vocational testing. She noted that appellant graduated high school and was a boiler technician for six years in the U.S. Navy prior to beginning work at the employing establishment. Appellant did not have additional vocational training. Dr. Kneipp commented that appellant did not have computer skills. She identified vocational goals of service dispatcher, food and beverage order clerk, information clerk, and surveillance system monitor as within appellant's vocational aptitudes and physical limitations.

On February 10, 2014 a vocational rehabilitation counselor performed a labor market survey and found that entry level positions as a Surveillance System Monitor, DOT# 379.367-010, were reasonably available in appellant's commuting area. The position required occasional lifting up to 10 pounds and sitting for a minimum of three hours a day. The counselor identified available positions and provided appellant job contacts from February through April 2014. Appellant participated in a placement effort from April 17 to July 17, 2014. He cooperated in following up on job contacts, and maintained detailed records of his efforts.

In July 1 and 18, 2014 reports, Dr. Chao found appellant's condition unchanged, and that he remained totally disabled. He noted in a December 12, 2014 report that appellant had injured his right hip and ankle when he fell because his left leg gave way.

On February 4, 2015 the vocational rehabilitation counselor performed an updated labor market survey. She confirmed that entry level Surveillance System Monitor positions remained available in appellant's commuting area, with wages of $437.00 a week.

By notice dated June 8, 2015, OWCP advised appellant that it proposed to reduce his compensation, based on his ability to earn $437.00 a week in the constructed position of Surveillance System Monitor.

Counsel responded by June 18, 2015 letter, contending that OWCP failed to develop the psychological aspect of the claim, and the effect of prescribed narcotic pain medication on appellant's work capacity. He noted that Dr. O'Dowd agreed that the "amount of narcotic medication [appellant] is taking may preclude him from returning to gainful employment," unrelated to the accepted injury.

By decision dated July 21, 2015, OWCP finalized the June 8, 2015 notice, reducing his compensation based on his ability to earn $437.00 a week in the constructed position of surveillance system monitor.

In a July 24, 2015 letter, appellant, through counsel, requested a hearing, which was held November 13, 2015. At the hearing, he asserted that he was severely limited in daily functioning by bilateral ankle injuries, for which he wore braces and used a cane. Appellant explained that he applied for paratransit services, but was found ineligible as he did not meet the criteria for age or disability. He contended that job listings identified by the vocational rehabilitation counselor were located at least five and a half miles from his home, and that there was no public transportation available. Appellant submitted additional evidence.

In July 1 and September 1, 2015 reports, Dr. Chao found appellant's condition unchanged.

Counsel asserted in a December 10, 2015 letter that a new medical report from Dr. Louis Spagnoletti, an attending Board-certified physiatrist, established that appellant was medically unable to perform the selected surveillance system monitor position because he could not drive to and from work, and no public transportation was available. He cited the Board's precedent in *Donna M. Stroud*,[7] holding that "the inability to travel to work because of the residuals of an employment injury is an acceptable reason for not accepting a position."

In a December 1, 2015 report, Dr. Spagnoletti opined that appellant required prescription opioid medications for pain control. He explained that it was possible for appellant's medication to cause problems with high-level executive skills. For this reason, Dr. Spagnoletti did not believe that appellant was able to work nor would he be work eligible in the future because of the chronic persistent nature of his injuries. He advised appellant not to drive a car if he were impaired by the opioid medication.

By decision dated January 19, 2016, an OWCP hearing representative affirmed OWCP's July 21, 2015 decision, finding that the constructed position of Surveillance System Monitor was within appellant's educational and vocational capacities. The hearing representative further found that Dr. O'Dowd's opinion was sufficiently rationalized to represent the weight of the medical evidence. The hearing representative noted that although the issue of appellant's ability to drive to and from work had been raised, there was insufficient evidence to support that there was no public transportation available.

LEGAL PRECEDENT

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

[7] Docket No. 98-0476 (issued January 5, 2000).

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

earning capacity.[9] A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages. Compensation payments are based on the wage-earning capacity determination.[10]

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.[11]

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.[12] Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.[13] 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 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.[14] Finally, application of the principles set forth in *Albert C. Shadrick*,[15] as codified in section 10.403 of OWCP regulations,[16] will result in the percentage of the employee's loss of wage-earning capacity.[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,

[9] 20 C.F.R. §§ 10.402, 10.403; *John D. Jackson*, 55 ECAB 465 (2004).

[10] *See Sharon C. Clement*, 55 ECAB 552 (2004).

[11] 5 U.S.C. § 8115; 20 C.F.R. § 10.520; *John D. Jackson*, *supra* note 9.

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

[13] *John D. Jackson*, *supra* note 9.

[14] *Supra* note 8

[15] 5 ECAB 376 (1953).

[16] 20 C.F.R. § 10.403.

[17] *Supra* note 8

including impairments resulting from both injury-related and preexisting conditions, but not impairments resulting from post injury or subsequently acquired conditions.[18]

Section 8123(a) of FECA provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.[19] When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.[20] In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[21]

The Board has held that stale medical evidence cannot form the basis for current evaluation of residual symptomatology, disability determination, or other medical determinations. For example, in the case of *J.A.*,[22] the Board held that medical reports from November 2010 were of limited probative value regarding the claimant's medical condition as of October 2012.[23]

ANALYSIS

OWCP accepted that on January 20, 2000, appellant sustained a left ankle sprain when he slipped on a loose deck plate and fell into the bilge. Following periods of limited-duty work, appellant sustained a recurrence of disability commencing April 8, 2003. He stopped work and did not return. Appellant received appropriate wage-loss compensation.

OWCP reduced appellant's compensation effective July 21, 2015, based on his capacity to earn wages in the constructed position of Surveillance System Monitor. The determination that appellant was physically able to perform the position of Surveillance System Monitor was based on the opinion of Dr. O'Dowd, a Board-certified orthopedic surgeon and impartial medical examiner. OWCP found that his reports constituted the weight of the medial evidence and that they resolved the conflict in medical opinion with respect to these matters.

[18] *R.M.*, Docket No. 15-0368 (issued August 24, 2015); *John D. Jackson, supra* note 9.

[19] 5 U.S.C. § 8123(a); *Robert W. Blaine*, 42 ECAB 474 (1991).

[20] *Delphia Y. Jackson*, 55 ECAB 373 (2004).

[21] *Anna M. Delaney*, 53 ECAB 384 (2002).

[22] Docket No. 13-1657 (issued February 3, 2014).

[23] *See also J.R.*, Docket No. 15-1847 (issued March 4, 2016); *R.B.*, Docket No, 14-0594 (issued September 4, 2015); *Keith Hanselman*, 42 ECAB 680 (1991); *Ellen G. Trimmer*, 32 ECAB 1878 (1981) (reports almost two years old deemed invalid basis for disability determination and loss of wage-earning capacity determination); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.4(d) (June 2013) (a wage-earning capacity determination must be based on a recently current medical evaluation).

The Board notes that OWCP properly referred appellant to Dr. O'Dowd, in that there was a conflict of medical opinion between Dr. Chao, an attending Board-certified orthopedic surgeon, and Dr. Heist, a Board-certified orthopedic surgeon and second opinion physician, regarding appellant's work capacity. However, OWCP improperly relied on Dr. O'Dowd's opinion to determine that appellant was physically able to work as a Surveillance System Monitor. The medical evidence upon which OWCP relied to determine appellant's ability to work was stale.

Dr. O'Dowd's opinion regarding appellant's ability to work from an orthopedic standpoint was based on a physical examination of appellant conducted on May 14, 2013. He provided a supplemental report on September 9, 2013 to clarify the prior report. However, Dr. O'Dowd did not reexamine appellant. The Board has had occasion to evaluate the probative value of older medical reports, and, because cases differ, it has not adopted a rigid standard. However, in *J.A.*,[24] the Board held that in that case, medical reports from November 2010 were of limited probative value regarding the claimant's medical condition as of October 2012, approximately two years. In this case, Dr. O'Dowd examined appellant on May 14, 2013, more than two years before OWCP reduced appellant's compensation effective July 21, 2015. His opinion is therefore of very limited probative value, and was insufficient basis on which to reduce appellant's wage-loss compensation.

On appeal, counsel contends that Dr. O'Dowd's opinion was stale, as he examined appellant on May 14, 2013, more than two years before OWCP reduced his compensation on July 21, 2015. He argues that OWCP's reliance on Dr. O'Dowd's May 14, 2013 examination contravenes Board precedent in *Carl C. Green, Jr.*,[25] *Anthony Pestana*,[26] and *Keith Hanselman*[27] against basing a finding regarding residual disability on medical evidence more than two years old. As set forth above, Dr. O'Dowd's opinion was stale at the time OWCP reduced appellant's wage-loss compensation. Therefore, OWCP's January 19, 2016 decision affirming the prior reduction of appellant's compensation must be reversed.

CONCLUSION

The Board finds that OWCP has not met its burden of proof to reduce appellant's compensation benefits, based on its finding that he had the capacity to earn wages in the selected position of surveillance system monitor.

[24] *Supra* note 22.

[25] 40 ECAB 737 (1996).

[26] 39 ECAB 980 (1988).

[27] 42 ECAB 680 (1991).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 19, 2016 is reversed.

Issued: January 4, 2017
Washington, DC

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

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board