

ISSUE

The issue is whether OWCP properly reduced appellant's compensation effective November 16, 2014 based on its finding that he had the capacity to earn wages as an administrative assistant.

FACTUAL HISTORY

On December 30, 2010 appellant, then a 60-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on December 29, 2010 he injured his right lower back and groin in the performance of duty. He stopped work on December 30, 2010. OWCP accepted the claim for a right hip and thigh strain and paid appellant compensation for total disability beginning February 14, 2011.

On March 30, 2011 Dr. Alejandro Gonzalez Della Valle, a Board-certified orthopedic surgeon, performed an authorized total right hip arthroplasty.

On May 29, 2012 OWCP referred appellant to Dr. Phillip D'Ambrosio, a Board-certified orthopedic surgeon, for a second opinion examination to determine appellant's work capacity. In a report dated June 15, 2012, Dr. D'Ambrosio diagnosed a right hip sprain/strain that was "superimposed on preexisting osteoarthritis status post right total hip replacement." He found that appellant had a "superb functional result" from his surgery with mild residual right hip instability. Dr. D'Ambrosio opined that appellant could not return to his usual employment, but could work eight hours in a sedentary or light position with no stooping, squatting, climbing stairs, or lifting more than 10 pounds. In a June 15, 2012 work restriction evaluation, he found that appellant could sit, walk, stand, reach, perform repetitive movements, operate a motor vehicle both at work and to and from work, and push, pull, and lift up to 10 pounds for eight hours per day.

In a supplemental report dated June 28, 2012, Dr. D'Ambrosio opined that appellant's employment injury aggravated his preexisting hip arthritis. He found that appellant could walk eight hours a day on even ground, but could not twist, bend, or stoop. Dr. D'Ambrosio further found that appellant could push and pull 8 to 10 pounds.

OWCP referred appellant to a rehabilitation counselor on July 27, 2012 for vocational rehabilitation services. Vocational testing performed October 9 to 15, 2012 identified the positions of social services aide, customer service representative, and administrative assistant as suitable for direct placement. The counselor noted that appellant required training with a computer to increase marketability.

Dr. Della Valle, in a January 10, 2013 report, found an intact right hip reconstruction on examination with continued symptoms of hip discomfort. He related, "I would recommend that [appellant's] working and commute hours are maximized. [Appellant] should limit the amount of time that he spends commuting particularly sitting in a car or using public transportation. Ideally, he should find a job that allows him to have a short commute and a full day at work."

On January 28, 2013 OWCP authorized computer technology training for appellant from January 28 to June 7, 2013. Appellant successfully completed a 90-day training course for the position of office technician on May 6, 2013. On May 14, 2013 OWCP's rehabilitation specialist changed the status of his vocational rehabilitation to job placement with a new employing establishment in the areas of information clerk, administrative assistant, and receptionist.

The rehabilitation counselor, in reports dated June 23 and 30, 2013, described the job search services provided.

OWCP closed vocational rehabilitation services on August 9, 2013.

On March 12, 2014 OWCP expanded acceptance of appellant's claim based Dr. D'Ambrosio's June 15 and 28, 2012 reports to include a permanent aggravation of right localized primary osteoarthritis of the thigh and pelvic region.

The rehabilitation counselor completed a job classification for the position of administrative assistant on September 27, 2014. The position was sedentary with a Specific Vocational Preparation (SVP) of two to four years. The rehabilitation counselor advised that appellant met the SVP through his work as a letter carrier and his training in software and keyboard skills. The rehabilitation counselor indicated that state employment statistics indicated that the position was reasonably available in his geographical area at a weekly wage of \$529.00.

On October 6, 2014 OWCP notified appellant of its proposed reduction of his compensation as he had the capacity to earn wages in the selected position of administrative assistant. It found that the June 15 and 28, 2012 reports from Dr. D'Ambrosio established that the position was within his physical capabilities and that the September 27, 2014 report from the rehabilitation counselor confirmed vocational suitability.

In a progress report dated October 15, 2014, Dr. Joseph D'Angelo, an orthopedic surgeon, discussed appellant's history of a total right hip replacement. He noted that appellant worked as a letter carrier and "will ultimately be able to return to regular duty though [at] the present time [appellant] is struggling...."

Appellant, in a November 3, 2014 response, noted that he unsuccessfully searched for employment. He advised that he had instability and pain in his hip after standing and walking for brief periods and resubmitted May 2012 and January 2013 reports from Dr. Della Valle.

By decision dated November 6, 2014, OWCP reduced appellant's compensation effective November 16, 2014 based on its finding that he had the capacity to earn wages of \$520.00 per week as an administrative assistant. It utilized the formula set forth in *Albert C. Shadrick* to calculate his loss of wage-earning capacity.³

In a report dated November 4, 2014 and received by OWCP on November 21, 2014, Dr. Anna Dunevsky, a Board-certified physiatrist, evaluated appellant for right hip stiffness and

³ 5 ECAB 376 (1943); codified by regulation at 20 C.F.R. § 10.403.

pain that worsened with extensive standing or sitting. She diagnosed status post a work-related right hip injury, status post total right hip replacement, gait abnormalities, and morbid obesity. Dr. Dunevsky found that appellant was disabled from his usual employment.

On November 4, 2014 Dr. D'Angelo referred appellant for a magnetic resonance imaging (MRI) scan to determine whether he had a herniated lumbar disc.⁴ On November 25, 2014 he related that right hip x-rays showed sufficient alignment and referred appellant for a neurological examination.

Dr. D'Angelo, in a work restriction evaluation dated December 2, 2014, diagnosed traumatic degenerative joint disease of the right hip. He found that appellant could sit for five hours, walk and stand for four hours, operate a motor vehicle at work and to and from work for two hours, and push, pull, and lift up to five pounds for four hours per day.

On October 1, 2015 Dr. D'Angelo related that he treated appellant after September 15, 2006 and December 29, 2010 accidents. He noted that appellant had undergone a right hip replacement on March 30, 2011 after which he experienced pain that worsened over the last couple of years. Dr. D'Angelo discussed appellant's symptoms of back pain and pain radiating into the right lower extremity and groin and noticed that he had an antalgic gait. He related that the left lower extremity was shorter than the right lower extremity by one and one-eighth inches. Dr. D'Angelo opined that the variation in leg length resulted in disabling back pain. He asserted, "Based on my examination, [appellant] is totally disabled as a result of the leg length discrepancy being over an inch."

Dr. D'Angelo, on October 20, 2015, indicated that appellant was unable to work as an administrative assistant as he could not travel to and from work or sit for prolonged periods. He advised that appellant would need surgery including the right hip area to resolve the discrepancy in leg length.

Counsel, on October 22, 2015, requested reconsideration. He maintained that the accepted conditions should be expanded. Counsel further argued that the medical evidence from Dr. D'Angelo established that appellant was unable to perform the position or commute to and from work. He asserted that a conflict existed between Dr. D'Ambrosio and Dr. D'Angelo.

In a progress report dated November 24, 2014, Dr. D'Angelo advised that a lumbar spine MRI scan showed degenerative changes and arthritis.

By decision dated April 1, 2016, OWCP denied modification of its November 6, 2014 decision. It found that appellant had failed to submit evidence establishing that he was unable to perform the position of administrative assistant.

On appeal counsel asserts that an inability to commute is an acceptable reason for refusing a job according to OWCP's procedures.

⁴ On October 15, 2014 Dr. D'Angelo evaluated appellant for possible de Quervain's stenosis of the right thumb.

LEGAL PRECEDENT

Once OWCP has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of benefits.⁵ Under section 8115(a), 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 his wage-earning capacity, or if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his usual employment, age, qualifications for other employment, the availability of suitable employment, and other factors or circumstances which may affect wage-earning capacity in his disabled condition.⁶

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's *Dictionary of Occupational Titles* or otherwise available in the open market, that fits the employee's capabilities with regard to his physical limitations, education, age and prior experience.⁷ 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*⁸ will result in the percentage of the employee's loss of wage-earning capacity.

ANALYSIS

OWCP accepted that appellant sustained right hip and thigh strain and a permanent aggravation of right localized primary osteoarthritis of the thigh and pelvic region due to a December 29, 2010 employment injury. Appellant underwent a right total hip replacement on March 30, 2011. He received compensation for total disability beginning February 14, 2011.

OWCP referred appellant to Dr. D'Ambrosio for a second opinion examination. On June 15, 2012 Dr. D'Ambrosio diagnosed a right hip strain/sprain superimposed on preexisting right hip osteoarthritis. He found that appellant was unable to perform his usual employment, but could work eight hours in a sedentary or light position lifting no more than 10 pounds and performing no stooping, squatting, or stair climbing. Dr. D'Ambrosio further determined that appellant could sit, walk, stand, reach, perform repetitive movement, and operate a motor vehicle at work and to and from work for eight hours per day.

In a supplemental report dated June 28, 2012, Dr. D'Ambrosio opined that appellant could walk up to eight hours a day on even ground with limitations on pushing and pulling up to 10 pounds. The Board finds that OWCP properly referred appellant to vocational rehabilitation

⁵ *T.O.*, 58 ECAB 377 (2007).

⁶ *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

⁷ *Mary E. Marshall*, 56 ECAB 420 (2005); *James A. Birt*, 51 ECAB 291 (2000).

⁸ 5 ECAB 376 (1953); codified by regulation at 20 C.F.R. § 10.403.

on July 27, 2012 as Dr. D'Ambrosio's opinion establishes that appellant was no longer totally disabled due to residuals of his employment injury.⁹

On January 10, 2013 Dr. Della Valle discussed appellant's complaints of discomfort following his total hip replacement. He recommended that he limit appellant's commuting time and find a position ideally with a "short commute and a full day at work."

The Board also finds that OWCP properly determined that appellant had the capacity to perform the duties of an administrative assistant. The position is classified as sedentary work requiring lifting of up to 10 pounds, which is within the restrictions set forth by Dr. D'Ambrosio. Dr. Della Valle further found that appellant could work full time with a short commute being an optimal situation. The medical evidence, consequently, established that he had the requisite physical ability to earn wages as an administrative assistant at the time OWCP reduced appellant's compensation benefits.

In assessing the claimant's ability to perform the selected position, OWCP must consider not only physical limitations, but also take into account work experience, age, mental capacity, and educational background.¹⁰ The rehabilitation counselor determined that appellant had the skills necessary to perform the position of administrative assistant based on his prior work as a letter carrier and his job training in computer skills. He further found that the position was reasonably available within the appropriate geographical area at a wage of \$529.00 per week. As the rehabilitation counselor is an expert in the field of vocational rehabilitation, OWCP may rely on his opinion in determining whether the job is vocationally suitable and reasonably available.¹¹ The Board finds that OWCP considered the proper factors, including the availability of suitable employment, appellant's physical limitations, and employment qualifications in determining that he had the capacity to perform the position of administrative assistant.¹² OWCP further properly determined his loss of wage-earning capacity in accordance with the formula developed in *Shadrick* and codified at 20 C.F.R. § 10.403.¹³ The Board thus finds that the position of administrative assistant reflected appellant's wage-earning capacity effective November 16, 2014.

Subsequent to the reduction of his compensation, appellant submitted a November 4, 2014 report from Dr. Dunevsky. Dr. Dunevsky diagnosed status post a right hip injury at work with a total hip replacement, gait abnormalities, and morbid obesity. She opined that appellant

⁹ See *N.J.*, 59 ECAB 171 (2007).

¹⁰ *Id.*

¹¹ *Dorothy Jett*, 52 ECAB 246 (2001).

¹² See *supra* note 9.

¹³ See *supra* note 8. OWCP divided appellant's employment capacity to earn wages of \$529.00 a week by his current pay rate of the position held when injured of \$1,123.96 per week to find a 47 percent wage-earning capacity. It multiplied the pay rate at the time of injury of \$1,067.88 by the 47 percent wage-earning capacity percentage. The resulting amount of \$501.90 was subtracted from appellant's date-of-injury pay rate of \$1,067.88, which provided a loss of wage-earning capacity of \$565.98 per week. OWCP multiplied this amount by the appropriate compensation rate of three-fourths which, after deductions, yielded compensation of \$1,456.68 every four weeks.

was unable to perform his regular work duties. The issue, however, is whether appellant could perform the sedentary work duties of an administrative assistant. As Dr. Dunevsky does not address the duties of that position, her report is of little probative value.¹⁴

Dr. D'Angelo provided a December 2, 2014 work restriction evaluation diagnosing degenerative joint disease of the right hip and limiting appellant's lifting to five pounds. He did not, however, support appellant's work restrictions with medical rationale. Medical conclusions unsupported by rationale are of diminished probative value.¹⁵

In an October 1, 2015 evaluation, Dr. D'Angelo advised that appellant sustained disabling back pain as a result of a leg length discrepancy. He did not, however, explain the reason for the leg length discrepancy and back pain or attribute these conditions to the accepted work injury. Consequently, Dr. D'Angelo's opinion is of diminished probative value.

On appeal counsel maintains that appellant's inability to commute is a valid reason for refusing an offered position. In determining an employee's wage-earning capacity, OWCP must consider the degree of physical impairments from both injury-related and preexisting conditions, but not impairments resulting from post injury or subsequently acquired conditions.¹⁶ As discussed, appellant failed to submit medical evidence sufficient to establish that he was unable to commute due to either a preexisting condition or the accepted work injury.

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

CONCLUSION

The Board finds that OWCP properly reduced appellant's compensation effective November 16, 2014 based on its finding that he had the capacity to earn wages as an administrative assistant.

¹⁴ See *Phillip S. Deering*, 47 ECAB 692 (1996).

¹⁵ See *P.M.*, Docket No. 12-0825 (issued November 6, 2012); *Jacqueline L. Oliver*, 48 ECAB 232 (1996).

¹⁶ See *Gary L. Moreland*, 54 ECAB 628 (2003); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.3(b) (June 2013).

ORDER

IT IS HEREBY ORDERED THAT the April 1, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 5, 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