United States Department of Labor
Employees' Compensation Appeals Board

T.J., Appellant	)	
and	)	**Docket No. 16-1473**
	)	**Issued: January 26, 2017**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Los Angeles, CA, Employer	)	

Appearances:
Appellant, pro se
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 July 11, 2016 appellant filed a timely appeal from January 14 and May 10, 2016 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether OWCP met its burden of proof to reduce appellant's compensation benefits based on his capacity to earn wages in the selected position of surveillance system monitor; and (2) whether appellant met his burden of proof to establish that a January 14, 2016 loss of wage-earning capacity determination should be modified.

On appeal appellant asserts that, based on the reports of his attending physicians, he is totally disabled.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 19, 2003 appellant, then a 25-year-old transportation security screener, injured his back helping a passenger place luggage on a table. He stopped work on March 24, 2003. Following a brief return to work, on May 1, 2003 appellant filed a recurrence of disability claim (Form CA-2a), starting April 27, 2003 because his back pain continued. OWCP accepted lumbar strain and paid wage-loss compensation. It placed appellant on the periodic compensation rolls.[2]

In June 2003 appellant came under the care of Dr. H. Vincent Mitzelfelt, who specializes in occupational medicine. Dr. Mitzelfelt provided form progress reports at monthly intervals in which he described appellant's complaints, listed diagnoses including persistent symptomatic lumbar radiculopathy, lumbosacral strain/sprain, lumbar disc syndrome, and thoracic spondylosis. He advised that appellant should remain off work.

Dr. Ali Berenji, an orthopedic surgeon, performed authorized percutaneous discectomy at L5-S1 on May 26, 2004.

On April 14, 2011 Dr. Mitzelfelt advised that appellant could not return to his previous occupation and should be considered for vocational rehabilitation.

In June 2011 OWCP referred appellant to Dr. Kevin F. Hanley, a Board-certified orthopedic surgeon, for a second opinion. Following physical examination, Dr. Hanley diagnosed discogenic lumbar spine pain secondary to annular tear due to the May 26, 2004 surgery. He opined that appellant was not totally disabled. Dr. Hanley recommended trunk and core strengthening and a gradual return to work with permanent restrictions of four hours bending, stooping, pushing, pulling, and lifting, and a 25-pound weight restriction.

In August 2011 OWCP referred appellant to Richard D. Hunt, a rehabilitation counselor, for vocational rehabilitation services. Appellant had vocational testing and a transferable skills analysis which indicated that appellant had a bachelor's degree. Mr. Hunt identified the positions of surveillance systems monitor and security guard, and completed a labor market survey for each position on January 19, 2012. These included a job description with physical demands for each position. The security guard position had a light strength level, and the surveillance system monitor was sedentary. Mr. Hunt indicated that each job was available in the local commuting area. A rehabilitation plan was approved. Appellant completed security guard/firearms training in February 2012 and began job placement. Rehabilitation services were closed on July 23, 2012.

An April 4, 2012 MRI scan of the lumbar spine demonstrated an annular tear at L4-5, and disc protrusions at L4-5 and L5-S1. Appellant continued monthly treatment with Dr. Mitzelfelt. On February 24, 2014 Dr. Mitzelfelt noted continued complaints of constant radiating low back pain. He diagnosed failed lumbar spine surgery, multi-level lumbosacral discs, post-traumatic

[2] A June 20, 2003 magnetic resonance imaging (MRI) scan of the lumbar spine demonstrated a disc protrusion at L5-S1. In a September 17, 2003 report, Dr. William C. Boeck, Jr., a Board-certified orthopedic surgeon and OWCP referral physician, diagnosed lumbar sprain. A second lumbar MRI scan on October 7, 2003 demonstrated degenerative disc disease.

sexual dysfunction, and lumbar muscle spasm. Dr. Mitzelfelt prescribed medication, acupuncture, and heat therapy.

Appellant began pain management with Dr. Kamyar Assil, Board-certified in anesthesiology and pain medicine, on March 18, 2014. Dr. Assil described appellant's pain complaints and listed examination findings. He diagnosed chronic low back pain with numbness and tingling down both legs, discogenic low back pain, and lumbar facet arthropathy. Dr. Assil recommended facet injections and/or spinal cord stimulation. He continued to follow appellant. Facet injections were done on June 18 and September 29, 2014. Spinal cord stimulation leads were placed operatively by Dr. Assil on March 11, 2015. These were removed on March 16, 2015 as they were not helpful. Both Dr. Mitzelfelt and Dr. Assil continued to follow appellant.

In April 2015 OWCP referred appellant to Dr. Richard A. Rogachefsky, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a May 13, 2015 report, Dr. Rogachefsky noted the history of injury, his review of the medical record, and appellant's complaint of radiating low back pain. Examination showed a mildly antalgic gait. Lumbar spine range of motion was diminished, and there was tenderness to palpation of the low back region. Sensation was decreased on the left leg and plantar aspects of both feet. Babinski, clonus, and straight leg raise were negative, and reflexes were intact. There was slight atrophy of the left distal quadriceps, and lower extremity muscle strength was 4+/5 to 5/5. Dr. Rogachefsky advised that appellant continued to suffer objective residuals of the March 19, 2003 injury, noting decreased lumbar spine range of motion and weakness of bilateral lower extremities. He reported subjective findings of numbness in bilateral lower extremities and low back pain, radiating to both legs. Dr. Rogachefsky recommended an updated MRI scan and continued therapy. He indicated that appellant was capable of working modified duty. Dr. Rogachefsky advised that appellant should have an evaluation and treatment by an orthopedic spine surgeon.

OWCP referred appellant for additional testing. A June 3, 2015 lumbar spine MRI scan showed a nondisplaced endplate fracture of the L5 vertebral body, and disc desiccation and mild disc height loss with disc bulge at L5-S1. T12 through L4-5 were normal. A June 19, 2015 lower extremity electrodiagnostic study was normal with no evidence to support motor radiculopathy, distal peripheral neuropathy, or entrapment neuropathy.

In a June 3, 2015 supplemental report, Dr. Rogachefsky noted his review of the MRI scan and electrodiagnostic study. He indicated that appellant continued to have objective residuals of the March 19, 2003 work injury and May 26, 2004 surgery, noting decreased lumbar range of motion, weakness of both legs, well-healed scars in the posterior aspect of the lumbar region, and an MRI scan showing an L5 compression fracture. Dr. Rogachefsky further noted subjective numbness in bilateral legs and radiating low back pain. He advised that appellant's prognosis was poor, reiterating his prior recommendations. Dr. Rogachefsky concluded that appellant was no longer totally disabled and could work within the physical limitations of no climbing, bending or stooping with lifting, pushing, and pulling limited to no greater than 10 pounds, and walking to 25 minutes. Appellant was to take 15-minute breaks.

On July 24, 2015 OWCP again referred appellant to Mr. Hunt for vocational rehabilitation services. On August 19, 2015 Mr. Hunt updated the labor market survey information for the security guard and surveillance system monitor positions, with weekly wages of $400.00 to $520.00 for the security guard position and $400.00 to $560.00 for the surveillance

system monitor position. Mr. Hunt noted that appellant had previous employment experience as a transportation security screener, had completed 40 hours of security guard training, and thereafter received a valid State of California Guard Card which authorized him to be employed as an unarmed surveillance system monitor. The employing establishment provided updated earnings information.

In reports dated June 1 and August 17, 2015, Dr. Mitzelfelt noted appellant's complaint of radiating low back pain. He provided physical examination findings and reiterated his diagnoses which, he opined, were caused by employment. Dr. Mitzelfelt advised that appellant was totally disabled, was at maximum medical improvement (MMI), and would be referred for a schedule award.

Dr. Assil submitted reports dated June 23 to August 18, 2015 in which he described appellant's pain management. On September 22, 2015 he described appellant's medical and work history, complaints of constant radiating back pain with back stiffness and numbness and tingling in the legs and feet, and difficulties with activities of daily living. Dr. Assil found tenderness to palpation of the lumbar spine with decreased lumbar range of motion and decreased left leg sensation in the L4-5 sensory dermatomes. He diagnosed discogenic low back pain, history of low back pain and bilateral lower extremity pain with numbness and tingling, worse on the left, MRI scan evidence of lower lumbar disc disease and annular fissure, and left leg sensory and motor radiculopathy. Dr. Assil opined that all diagnoses were due to the March 19, 2003 employment injury. He advised that appellant had permanent residuals as demonstrated on MRI scan and electrodiagnostic studies, and that he had restrictions of no lifting greater than 25 pounds, no repetitive bending, stooping, or twisting of the torso, and no prolonged sitting, standing, or walking. Dr. Assil recommended continued pain management, medication, and recommended evaluation by an orthopedic or neurological surgeon experienced in discogenic disease.[3]

By letter dated December 1, 2015, OWCP proposed to reduce appellant's compensation, based on his capacity to earn wages as a surveillance system monitor, Department of Labor, *Dictionary of Occupational Titles*, DOT No. 379.367-010. It noted that in reports dated May 13 and July 3, 2015, Dr. Rogachefsky advised that appellant could work with restrictions, as had Dr. Assil in his September 22, 2015 report. OWCP noted that, based on Dr. Hanley's opinion, appellant had been referred for vocational rehabilitation services, and that the surveillance system monitor position was selected as being the most appropriate, based upon the rehabilitation counselor's review of appellant's work history and transferrable skills analysis. It described the physical requirements of the surveillance system monitor position as sedentary and within the restrictions provided by Dr. Rogachefsky.[4] OWCP indicated that, based on recent

[3] Dr. Assil also advised that, in accordance with California guidelines, appellant had 13 percent whole person impairment.

[4] The *Dictionary of Occupational Titles* job description for surveillance system monitor, DOT No. 379.367-010, is as follows: Monitors premises of public transportation terminals to detect crimes or disturbances, using closed circuit television monitors, and notifies authorities by telephone of need for corrective action: Observes television screens that transmit in sequence views of transportation facility sites. Pushes hold button to maintain surveillance of location where incident is developing, and telephones police or other designated agency to notify authorities of location of disruptive activity. Adjusts monitor controls when required to improve reception, and notifies repair service of equipment malfunctions.

wage and position information, the surveillance system monitor position was reasonably available at an entry pay level of $560.00 per week.

Dr. Maliheb Massih, a Board-certified physiatrist, advised that a December 3, 2015 lower extremity electrodiagnostic study was slightly abnormal, noting that it demonstrated highly probable L5-S1 subacute lumbosacral radiculopathy bilaterally, and no electrodiagnostic evidence to suggest peripheral neuropathy or other form of focal neuropathy.

A December 4, 2015 work capacity evaluation (OWCP-5c) electronically signed by "Dr. Abdelsalam" indicated that appellant did not have the work capacity to stand, walk, sit, climb, forward bend, kneel, crawl, twist, grasp, push, pull, or perform keyboarding.[5]

On December 28, 2015 appellant disagreed with the proposed reduction. He maintained that he continued to be totally disabled, noting that Dr. Rogachefsky advised that he continued to have residuals of the employment injury.

By decision dated January 14, 2016, OWCP reduced appellant's wage-loss compensation based on his capacity to earn wages as a surveillance systems monitor, effective that day. By utilizing the *Shadrick* formula,[6] it found that appellant had 21 percent loss of wage-earning capacity.

On February 4, 2016 appellant requested reconsideration asserting that the medical evidence established that he was totally disabled. In support, he submitted a December 4, 2015 report in which Dr. Charles Xeller, a Board-certified orthopedic surgeon, provided medical and impairment evaluations. Dr. Xeller noted the history of injury, appellant's complaints of constant, radiating back pain, and his review of some medical evidence, including a lumbar spine MRI scan dated November 23, 2015 and the December 3, 2015 electrodiagnostic study. Physical examination demonstrated diminished lumbar range of motion and decreased sensation in both feet. Dr. Xeller diagnosed lumbar intervertebral disc disorder with myelopathy and lumbar disc displacement. He advised that MMI was reached that day. Dr. Xeller recommended over-the-counter medication and concluded that, based on L5 sensory and motor deficits, appellant had six percent right lower extremity impairment, and one percent on the left.[7]

Appellant also submitted reports dated February 22 and April 4, 2016 in which Dr. Mitzelfelt repeated appellant's complaints of constant and increasing radiating low back pain. He provided physical examination findings of tender areas in the lumbar spine area. With regard to work status, Dr. Mitzelfelt advised that appellant could occasionally lift up to 20 pounds three or four times daily, and could work part time, for four hours a day at most, in a sedentary position.

[5] Dr. Abdelsalam could not be further identified.

[6] *Albert C. Shadrick*, 5 ECAB 376 (1953). *See* discussion *infra*.

[7] Appellant also submitted a schedule award claim dated February 1, 2016. Following review of Dr. Xeller's report by an OWCP medical adviser on February 18, 2016, on February 25, 2016 appellant was granted a schedule award for six percent permanent impairment of the right lower extremity and one percent on the left, for a total 20.16 weeks of compensation, to run from February 7 to June 27, 2016. Appellant did not file an appeal with the Board from the February 25, 2016 schedule award decision.

By decision dated May 10, 2016, OWCP denied modification of the January 14, 2016 decision.

LEGAL PRECEDENT -- ISSUE 1

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-earning capacity.[9]

Section 8115 of FECA and section 10.520 of 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.[10]

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.[11] Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.[12]

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, local Chamber of Commerce, employer contacts, and actual job postings.[13] Finally, application of the principles

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

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

[10] 5 U.S.C. § 8115; 20 C.F.R. § 10.520; *John D. Jackson, id.*

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

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

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.6.a. (June 2013).

set forth in *Albert C. Shadrick*,[14] as codified in section 10.403 of OWCP regulations,[15] will result in the percentage of the employee's loss of wage-earning capacity.[16]

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.[17]

ANALYSIS -- ISSUE 1

OWCP issued its January 14, 2016 loss of wage-earning capacity determination based on appellant's capacity to earn wages as a surveillance system monitor. As noted above, it 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.[18]

In reports dated May 13 and June 3, 2015, Dr. Rogachefsky, OWCP's referral physician, advised that, while appellant continued to have residuals of his accepted conditions, however, he was no longer totally disabled and was capable of employment within the physical limitations of no bending or stooping. Lifting, pushing, and pulling were limited to no greater than 10 pounds, and walking to 25 minutes with no climbing. The Board finds that these limitations are within the restrictions of the sedentary surveillance system monitor position which provides a lifting restriction of 10 pounds or less and requires no bending or stooping.[19]

Dr. Assil, the attending pain management specialist, also provided permanent restrictions, noting on September 22, 2015 that appellant could not lift greater than 25 pounds, with no repetitive bending, stooping, or twisting of the torso, and no prolonged sitting, standing, or walking. These too are within the restrictions of the surveillance system monitor position.[20]

While Dr. Mitzelfelt advised that appellant was totally disabled in reports dated June 1 and August 17, 2015, he did not further elaborate as to the reasons why. The Board has long held that medical conclusions unsupported by rationale are of diminished probative value.[21]

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[14] *Supra* note 6.

[15] 20 C.F.R. § 10.403.

[16] *Supra* note 8.

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

[18] *Supra* note 11.

[19] *Supra* note 4.

[20] *Id.*

[21] *Jacquelyn L. Oliver*, 48 ECAB 232 (1996).

The Board, therefore, finds that appellant had the physical capacity to perform the duties of the selected position.

The Board also finds that appellant had the necessary vocational and educational preparation for the selected position of surveillance system monitor. Appellant successfully completed security guard training and obtained a valid security guard card which authorized employment as a surveillance system monitor. Mr. Hunt, the vocational rehabilitation counselor advised that the surveillance system monitor was reasonably available in the local labor market with weekly wages of $560.00.

The Board concludes that OWCP considered the appropriate factors in determining that the position of surveillance system monitor represented appellant's wage-earning capacity.[22] These factors include availability of suitable employment and appellant's physical limitations, usual employment, age, and employment qualifications.[23] The evidence of record establishes that appellant had the requisite physical ability, skill, and experience to perform the position and that such a position was reasonably available within the general labor market of his commuting area. OWCP therefore properly determined that the position of surveillance system monitor reflected appellant's wage-earning capacity, and properly reduced his compensation on January 14, 2016.[24]

LEGAL PRECEDENT -- ISSUE 2

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless it meets the requirements for modification.[25] OWCP procedures at Chapter 2.1501 contain provisions regarding the modification of a formal loss of wage-earning capacity.[26] The relevant part provides that a formal loss of wage-earning capacity will be modified when: (1) the original rating was in error; (2) the claimant's medical condition has materially changed; or (3) the claimant has been vocationally rehabilitated.[27]

The burden of proof is on the party attempting to show a modification of the loss of wage-earning capacity determination.[28]

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

[23] *Id.*

[24] *James Smith*, 53 ECAB 188 (2001).

[25] *Sue A. Sedgwick*, 45 ECAB 211 (1993).

[26] Federal (FECA) Procedure Manual, *supra* note 13 at Chapter 2.1501 (June 2013).

[27] *Id*. at § 2.1501.3(a).

[28] *Jennifer Atkerson*, 55 ECAB 317 (2004).

ANALYSIS -- ISSUE 2

OWCP issued its loss of wage-earning capacity determination on January 14, 2016. On February 4, 2016 appellant requested reconsideration, asserting that the medical evidence established that he was totally disabled.

As a formal loss of wage-earning capacity determination was in effect at the time appellant claimed total disability, he must show a basis for modification of that decision to be entitled to wage-loss compensation. The Board finds that the evidence submitted is insufficient to establish that the original loss of wage-earning capacity determination was erroneous or to establish a material change in appellant's employment-related conditions.[29]

The accepted conditions in this case are lumbosacral strain and displaced lumbar intervertebral disc. Dr. Xeller did not comment on appellant's work capabilities.[30] Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[31] Dr. Xeller's opinion is therefore insufficient to establish modification of the January 14, 2016 loss of wage-earning capacity determination.

As to Dr. Mitzelfelt's opinion, the issue of whether a claimant's disability is related to an accepted condition is a medical question which must be established by a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disability is causally related to employment factors and supports that conclusion with sound medical reasoning.[32] In his February 22 and April 4, 2016 reports, Dr. Mitzelfelt advised that appellant could occasionally lift up to 20 pounds three or four times daily, well within the requirements of the sedentary surveillance system monitor position. While Dr. Mitzelfelt also indicated that appellant could only work part time, for four hours a day at most, in a sedentary position, he did not provide any reasoned explanation as to why appellant could not perform the sedentary surveillance system monitor position for eight hours a day. Thus, his opinion is of limited probative value and insufficient to establish modification of the loss of wage-earning capacity determination.[33]

The Board finds that appellant did not submit sufficient medical evidence to establish a material change in the nature and extent of his injury-related conditions and, therefore, he did not meet his burden of proof to show that the January 14, 2016 loss of wage-earning capacity determination should be modified.[34]

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[29] *Sue A. Sedgwick*, *supra* note 25.

[30] The Board also notes that the November 23, 2015 lumbar MRI scan referred to by Dr. Xeller is not found in the case record before the Board.

[31] *Willie M. Miller*, 53 ECAB 697 (2002).

[32] *Sandra D. Pruitt*, 57 ECAB 126 (2005).

[33] *See F.B.*, Docket No. 15-1188 (issued November 6, 2015).

[34] *See T.M.*, Docket No. 08-975 (issued February 6, 2009).

Appellant may request modification of the loss of 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 selected position of surveillance system monitor, and that appellant did not meet his burden of proof to establish that a January 14, 2016 loss of wage-earning capacity determination should be modified.

ORDER

IT IS HEREBY ORDERED THAT the May 10 and January 14, 2016 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 26, 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