United States Department of Labor
Employees' Compensation Appeals Board

C.C., Appellant	)	
and	)	**Docket No. 17-0016**
	)	**Issued: July 5, 2017**
U.S. POSTAL SERVICE, POST OFFICE, Duluth, GA, Employer	)	

Appearances:
Appellant, pro se
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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 5, 2016 appellant filed a timely appeal from a June 2, 2016 merit decision and a July 1, 2016 nonmerit decision 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 to consider the merits of this case.

ISSUES

The issues are: (1) whether OWCP met its burden of proof to reduce appellant's monetary benefits based on her capacity to earn wages in the constructed position of receptionist; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On July 31, 2001 appellant, then a 32-year-old data conversion operator, filed an occupational disease claim (Form CA-2) alleging that she was forced to stand while working for a prolonged period of time at an automation machine despite the fact that she had chronic tarsal tunnel syndrome. She listed the nature of her disease or illness as pain in her legs, knees, and ankle area. On November 27, 2001 OWCP accepted appellant's claim for bilateral aggravation of tarsal tunnel syndrome.

Appellant stopped work on August 17, 2002. On September 22, 2003 she underwent a tarsal tunnel release on her left foot. Appellant received compensation on the supplemental rolls from August 17, 2002 until November 1, 2003. She returned to work on November 2, 2003 in a modified assignment as a distribution clerk. Appellant was prohibited from lifting, pushing, or pulling over 10 pounds, and her walking and standing were limited to two to three hours per day.

In a decision dated June 21, 2005, OWCP determined that appellant was disabled from the job she held at the time of her injury, but was capable of working. It found that the position of modified part-time flexible clerk at the employing establishment, with wages of $886.10 per week, represented her wage-earning capacity. OWCP determined that as these wages exceeded the current wages of the position she held when injured, that she had no loss of wage-earning capacity (LWEC). Therefore, appellant's entitlement to compensation for wage loss ended the date she was reemployed by the employing establishment with no loss in earning capacity.

However, the employing establishment withdrew appellant's job under the National Reassessment Process (NRP), as the employing establishment determined that no work was available for appellant within her restrictions. On September 27, 2010 appellant filed a recurrence claim (Form CA-2a) listing the date of recurrence as September 23, 2010. On October 6, 2010 OWCP issued a schedule award for four percent permanent impairment of appellant's left foot. In a decision dated December 23, 2010, it determined that the formal LWEC determination issued on June 21, 2005 should be modified. OWCP found that the job offer was not an actual *bona fide* position, but rather was a position that was made to accommodate appellant's disability. It determined that the evidence substantiated that appellant's work-related condition had not resolved and that she was unable to perform the date-of-duty position, but that she was capable of working full time with restrictions. OWCP noted that, because the June 21, 2005 LWEC determination had been modified, appellant's claim would be paid from September 25, 2010. It again paid appellant's wage-loss compensation benefits on the supplemental and then the periodic rolls commencing September 25, 2010.

In a November 19, 2010 report, Dr. Gary A. Levengood, a Board-certified orthopedic surgeon, noted that he had been treating appellant for foot complaints since March 30, 2009. At that time, he had diagnosed tarsal tunnel syndrome of both feet. Dr. Levengood noted that appellant was status post release of one of her tarsal tunnels, but had no relief. He noted that current tests showed no change in her tarsal tunnel, as this is an ongoing condition of entrapment. Dr. Levengood indicated that he had repeatedly offered appellant surgery and she had not decided to go forward with surgery. He noted that appellant's tarsal tunnel did create difficulty with standing, therefore it was necessary that appellant sit for at least five minutes of every hour. With regard to appellant's back complaints, Dr. Levengood noted that appellant had been

returned to regular duty and to pain management for these issues. In an April 13, 2011 work capacity evaluation (Form OWCP-5c), he indicated that appellant was able to work eight hours a day, but must have a sitting job and be able to elevate her legs as needed. He noted that appellant was limited to pushing, pulling, and lifting 10 pounds. Dr. Levengood further noted that appellant could not climb, was limited to 45 minutes each for walking and standing, and was limited to minimal squatting, kneeling, bending, and stooping. In response to OWCP's query, he indicated that appellant was capable of performing a sedentary position.

Based on the medical opinion of Dr. Levengood, OWCP referred appellant to vocational rehabilitation on January 26, 2011. In a June 30, 2011 report, the vocational counselor noted that appellant was a high school graduate who received further education at Hinds Community College and Coastal Training Institute. He noted that appellant had not worked since NRP was put into effect and that during this time she had continued her education at Gwinnett Technical College, with a focus on studying computer networking. The vocational counselor also considered appellant's physical capabilities. A plan was developed for appellant to find work as a secretary or receptionist, however, efforts to secure placement were unsuccessful. In a July 2, 2012 report, the vocational counselor determined that suitable employment for appellant would be available as a receptionist. He noted that appellant had obtained certificates in secretarial skills in 1988 and business administration in 1998, that appellant had built clerical skills while working for the employing establishment performing data entry and tasks utilizing computer software, and that appellant attended Gwinnett Technical College in 2011 and had taken classes in computer software/programming, office administration, and English composition. The vocational rehabilitation counselor indicated that the position of receptionist was sedentary and was performed in sufficient numbers so as to make it reasonably available to appellant in her commuting area. He determined that appellant possessed the required skills, education, and experience for this occupation.

Appellant continued to receive regular treatment from Dr. Levengood. In a May 22, 2015 work capacity evaluation, Dr. Levengood indicated that appellant had bilateral tarsal tunnel syndrome and indicated that appellant was capable of working her usual job without restriction. He further explained that appellant was able to work eight hours a day, but must have a sitting job and be able to elevate her legs as needed. Dr. Levengood limited appellant to walking and standing for 45 minutes each; minimal twisting, bending, stooping, squatting, and kneeling; pushing, pulling, and lifting limited to 15 pounds; and no climbing. He indicated that appellant could perform a sedentary position.

On March 15, 2016 OWCP contacted vocational rehabilitation services and requested a task-based rehabilitation assignment. It indicated that placement services conducted in 2012 were unsuccessful, but a prereduction notice was never issued. OWCP noted that it had been determined, at that time, that based on appellant's transferable skills, she was vocationally qualified for jobs as a receptionist and secretary without any additional retraining. It noted that the physical demands for these positions did not exceed the limitations imposed by Dr. Levengood. OWCP asked the vocational rehabilitation counselor to confirm that these positions were still available within appellant's commuting area. On March 16, 2016 the vocational rehabilitation counselor conducted an updated labor market survey and verified that there were sufficient job openings in appellant's community and that the weekly wages were $413.60 to $536.40 for a receptionist.

On April 21, 2016 OWCP proposed to reduce appellant's compensation for wage loss based on her capacity to earn wages as a receptionist at the rate of $536.60 per week. It explained that using the formula in *Albert C. Shadrick*,[2] appellant's salary on the date her disability recurred, was $749.42 a week and the current adjusted pay rate for her job on the date of injury was $811.69. Appellant was found currently capable of earning $536.60 a week as a receptionist. OWCP determined that she had a 66 percent wage-earning capacity, which resulted in an adjusted wage-earning capacity of $494.62 a week. This yielded a new compensation rate equal to $876.00 every four weeks, and net compensation every four weeks of $466.72. Appellant was afforded 30 days to challenge the proposed reduction and to submit further evidence.

Appellant requested reconsideration of the proposed reduction in a letter received by OWCP on May 16, 2016. She alleged that she returned to work from June 2000 to August 2008 as a part-time flexible mail processing clerk until she was converted to a full-time status mail processing clerk. However, appellant noted that, due to NRP, and through no fault of her own, the employing establishment notified her that there was no work available due to her medical restrictions. She argued that there was work available at the employing establishment. Appellant contended that a formal LWEC decision had been issued, and she was requesting modification. She believed that the facts established that the original LWEC determination was in error because it was based on an odd-lot or make-shift job. Appellant asked that the LWEC be set aside and that the decision denying her wage-loss compensation be vacated, and that she be awarded for the appropriate full compensation.

By letter to appellant dated May 27, 2016, OWCP advised that the proposed reduction of wage loss was not a final order. It explained that appellant was notified of plans to reduce compensation for wage loss on the basis that the medical and factual evidence established that she was no longer totally disabled and had the capacity to earn wages as a receptionist. OWCP did not receive any additional information.

On June 2, 2016 OWCP finalized the proposed reduction of compensation. It found that appellant had the capacity to earn wages as a receptionist at the rate of $536.60 per week.

On June 23, 2016 appellant requested reconsideration. In support of her reconsideration request, appellant submitted a bound volume containing items already in evidence. These documents included duplicate copies of OWCP's decisions dated December 23, 2010 and April 21, 2016, copies of prior correspondence written by appellant, documents with regard to NRP, copies of modified limited-duty job assignments, and multiple medical reports including reports by Dr. Levengood. The volume also contained a statement by a union representative before the U.S. House of Representatives on May 12, 2011 with regard to the claims process for postal workers.

By decision dated July 1, 2016, OWCP denied appellant's reconsideration request.

[2] 5 ECAB 376 (1953).

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[3] 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.[4]

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 reasonable represent wage-earning capacity or 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 the other factors or circumstances which may affect his or her wage-earning capacity in the disabled condition.[5]

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.[6] Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.[7]

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 the employee's capabilities with regard to 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.[8] Finally, application of the principles set forth in *Albert C. Shadrick*[9] as codified in section 10.403

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

[4] 20 C.F.R. §10.402 and 10.403*; John D. Jackson*, 55 ECAB 465 (2004).

[5] 5 U.S.C. § 8115; *Id.* at § 10.520, *John D. Jackson, id.*

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

[7] *John D. Jackson, supra* note 4.

[8] *Id*.

[9] 5 ECAB 376 (1953).

of OWCP regulations,[10] will result in the percentage of the employee's loss of wage-earning capacity.[11]

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.[12]

ANALYSIS -- ISSUE 1

OWCP accepted that appellant suffered bilateral aggravation of tarsal tunnel syndrome causally related to the duties of her federal employment as a conversion operator. Appellant underwent tarsal tunnel release on November 2, 2003, and returned to a modified assignment as a distribution clerk with the employing establishment on November 2, 2003. By decision dated June 21, 2005, OWCP determined that this position represented appellant's LWEC, and reduced appellant's compensation payment to zero. On or about September 23, 2010, the employing establishment terminated appellant's employment as a result of NRP and in a decision dated December 23, 2010 OWCP modified the LWEC determination. OWCP determined that the position appellant held at the employing establishment was not an actual *bona fide* position, and resumed appellant's compensation for wage loss.

Dr. Levengood, in an April 13, 2011 report, indicated that appellant was able to work eight hours a day, but must have a sitting job and be able to elevate her legs as needed. In a July 2, 2012 report, the vocational counselor indicated that appellant could work as a receptionist. He noted that the job was available in sufficient numbers so as to make it reasonably available to appellant within her commuting area. The vocational counselor also noted that, based on labor market research and employer surveys, appellant possessed the required skills, education, and experience for this occupation. Dr. Levengood continued to issue reports indicating that appellant was capable of sedentary work.

In a May 22, 2015 work capacity evaluation, Dr. Levengood confirmed that appellant was capable of working eight hours a day, but must have a sitting job and be able to elevate her legs as needed. He placed further limitations on appellant as follows: walking and standing limited to 45 minutes each; minimal twisting, bending, stooping, squatting, and kneeling; pushing, pulling, and lifting limited to 15 pounds, and no climbing. On March 16, 2016 the rehabilitation counselor conducted an updated labor market survey for the receptionist position and verified that there were sufficient job openings in appellant's community and that the weekly wages were $416.60 to $536.40 for a receptionist.

[10] 20 C.F.R. § 10.403.

[11] *Supra* note 2.

[12] *John D. Jackson, supra* note 4.

The Board finds that OWCP has met its burden of proof to justify modification of appellant's wage-loss compensation benefits.[13] The duties of the constructed position of receptionist include receiving callers, determining the nature of their business, directing callers to a destination, and potentially performing a variety of clerical duties. The record establishes that the selected position of receptionist is medically suitable. Dr. Levengood indicated that appellant could perform a sedentary position, and the position of receptionist is classified as sedentary. The position is also vocationally suitable. The vocational counselor indicated that appellant was a high school graduate who had completed various post-graduation secretarial and business classes, as well as computer networking training. The vocational counselor further indicated that the job was performed in sufficient numbers so as to make it reasonably available to the claimant in her commuting area.[14]

OWCP properly applied the principles set forth in the *Shadrick*[15] decision to determine appellant's employment-related LWEC. It calculated that appellant's compensation should be adjusted to $466.72 every four weeks using the *Shadrick* formula. OWCP calculated that the current pay rate for the job when injured was $811.69 and appellant was capable of earning $536.60. However, the correct earning capacity should be calculated at the weekly rate of $536.40. Therefore appellant had a 66 percent wage-earning capacity, with a LWEC of $254.80 per week. After applying appellant's 2/3 compensation rate, cost-of-living adjustments, and deductions for insurance premiums, OWCP determined that appellant's adjusted net compensation rate was $466.72 every four weeks.

On appeal appellant makes various arguments with regard to modification of the LWEC decision. Appellant argues, *inter alia*, that there was work available for her at the employing establishment, that the job she worked at the employing establishment was a make-shift job, and that any LWEC determination based on that job was improper. However, OWCP already issued a decision modifying appellant's LWEC determination on December 23, 2010. At that time, it determined that the position appellant held at the employing establishment that was withdrawn due to NRP, was not a *bona fide* position, and reinstated appellant's benefits. The decision on appeal is not based on that position, but rather on appellant's ability to earn wages as a receptionist. Appellant also contends that her LWEC may only be based on a temporary or part-time position if the position held by the employee at the time of injury was a temporary or part-time position. She indicated on her claim form that she worked seven hours a day, five to six days a week. The supervisor indicated that appellant's regular work hours were from 15:50 to 24:00 with Friday as her day off. Therefore, it appears that at the time appellant filed her claim, she was working full time.[16] Appellant may be referring to her work from June 2000 until August 2007 as part time, however, as already noted, that position was determined to not be a *bona fide* position.

[13] *A.R.*, Docket No. 15-0447 (issued September 28, 2016).

[14] *L.G.*, Docket No. 15-0788 (issued June 16, 2015).

[15] *Albert C. Shadrick, supra* note 2; *see also D.V.*, Docket No. 15-1533 (issued December 2, 2015).

[16] Part-time employment is defined by OWCP procedures as between 16 and 32 hours of work per week. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.3(a)(2) (March 2011).

The Board finds that OWCP properly found the position of receptionist to be medically and vocationally suitable. As such, OWCP met its burden of proof to justify modification of appellant's wage-loss compensation benefits.

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

LEGAL PRECEDENT -- ISSUE 2

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,[17] OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.[18] When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.[19]

ANALYSIS -- ISSUE 2

OWCP reviewed appellant's request for reconsideration under the appropriate criteria for a timely filed request for reconsideration.

The Board finds that appellant did not attempt to show that OWCP erroneously applied or interpreted a specific point of law, nor has she advanced a relevant legal argument not previously considered by OWCP.

Furthermore, appellant has not submitted relevant and pertinent new evidence not previously considered by OWCP. In support of her reconsideration request, appellant submitted a bound volume containing items already in evidence, including copies of prior OWCP decisions, copies of prior correspondence, copies of previously submitted medical reports, and copies of vocational assignments. The Board notes that evidence that is cumulative, duplicative, or repetitive in nature is insufficient to warrant reopening a claim for merit review.[20] The only new evidence submitted with appellant's reconsideration request was a statement by a union representative before the U.S. House of Representatives on May 12, 2011 with regard to the claims process for postal workers. This statement is of a general nature and does not specifically address appellant's case, and is therefore also insufficient to warrant further review.[21]

[17] 5 U.S.C. § 8128(a).

[18] 20 C.F.R. § 10.606(b)(3).

[19] *Id.* at § 10.608(b).

[20] *Denis M. Dupor*, 51 ECAB 482 (2000).

[21] *See D.H.*, Docket No. 11-2130 (issued May 11, 2012).

Accordingly, as appellant has not met any of the criteria warranting reopening her claim for further merit review, pursuant to 20 C.F.R. § 10.608, OWCP properly denied reconsideration.

CONCLUSION

The Board finds that OWCP met its burden of proof to reduce appellant's monetary benefits based on her capacity to earn wages in the constructed position of receptionist. However, the amount of reduction must be calculated based on the weekly rate of $536.40. The Board further finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 1 and June 2, 2016 are affirmed, as modified.

Issued: July 5, 2017
Washington, DC

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

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

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