

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

W.C., Appellant

and

**U.S. POSTAL SERVICE, COLLEGE STATION,
Fairbanks, AK, Employer**

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**Docket No. 17-0562
Issued: November 17, 2017**

Appearances:
Coby Jones, for the appellant¹
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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On January 17, 2017 appellant, through his representative, filed a timely appeal from a July 21, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP).² Pursuant to the Federal Employees' Compensation Act³ (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 Appellant timely requested oral argument before the Board. By order dated July 5, 2017, the Board exercised its discretion and denied the request as the matter could be adequately adjudicated based on a review of the case record. *Order Denying Oral Argument*, Docket No. 17-0562 (issued July 5, 2017).

³ 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly reduced appellant's compensation, effective December 17, 2014, based on its finding that he had the capacity to earn wages in the selected position of general clerk.

FACTUAL HISTORY

On December 14, 2007 appellant, then a 54-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that he injured his hip and left shoulder on that date while in the performance of duty. He stopped work on December 15, 2007. OWCP accepted the claim for lumbar sprain, a sprain of the left shoulder and upper arm, left bicipital tenosynovitis, a left superior glenoid labrum lesion, and a permanent aggravation of lumbosacral spondylosis at L5-S1 without myelopathy.

On March 14, 2008 appellant accepted a limited-duty position at the employing establishment. After authorized left shoulder surgery on April 29, 2008, he again resumed modified employment. Appellant stopped work again on May 27, 2009 and did not return.⁴ OWCP paid him wage-loss compensation beginning August 4, 2009.

OWCP, by letter dated August 2, 2012, referred appellant to Dr. Douglas Bald, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated September 21, 2012, Dr. Bald discussed the history of a December 14, 2007 work injury and reviewed the medical evidence of record. He diagnosed a left shoulder and upper arm strain, left shoulder biceps tenosynovitis, a left shoulder superior glenoid labral lesion stable and stationary after surgery, lumbar sprain, preexisting degenerative disc disease, and a permanent aggravation of lumbosacral spondylosis without myelopathy at L5-S1. Dr. Bald opined that appellant was unable to work as a letter carrier due to permanent restrictions. He found that he could participate in vocational rehabilitation and recommended a functional capacity evaluation (FCE).

Appellant underwent an FCE on November 7, 2012. The evaluator determined that he could work at "a light demand with limitations on frequent material handling as well as prolonged or constant standing or walking activities."

In a November 16, 2012 addendum, Dr. Bald reviewed the FCE and concurred with the findings. He advised that appellant could work in a light-duty capacity lifting, pushing, and pulling 15 pounds regularly and 20 pounds occasionally. In a work restriction capacity evaluation (OWCP-5c) dated December 7, 2012, Dr. Bald found that he could work 8 hours per day sitting for 4 hours, walking and standing for 2 hours, and lifting up to 25 pounds for eight hours with a 15-minute break every 2 to 3 hours.

⁴ On September 14, 2009 OWCP denied appellant's claim for compensation (Form CA-2) for total disability beginning August 4, 2009. In a November 25, 2009 decision, a hearing representative vacated the September 14, 2009 decision and accepted that appellant was totally disabled as of August 4, 2009 due to his December 14, 2007 work injury.

On February 27, 2013 OWCP referred appellant for vocational rehabilitation. On May 7, 2013 it reassigned him to another vocational rehabilitation counselor.

In a June 8, 2013 vocational rehabilitation report, the vocational rehabilitation counselor noted that appellant had completed high school, worked as a mail carrier for 28 years, and worked as a bartender. He did not know how to type or use a computer.

On December 18, 2013 OWCP's rehabilitation specialist approved training classes for appellant from January 20 to May 30, 2014 in computer keyboarding and an introduction to computers with the goal of returning him to work as a clerk.⁵

The vocational rehabilitation specialist noted on January 7, 2014 that appellant was approved for computer training, but was missing three fingers to the first knuckle of his right hand. The vocational rehabilitation counselor confirmed that he was missing the tips of his fingers due to an accident and advised that she did not know if it would affect his ability to type.

Appellant underwent an evaluation by a psychological associate on January 23, 2014 at the request of the vocational rehabilitation counselor. The evaluator noted that appellant sustained an injury to his right hand in 2000 which "resulted in the fingertips of his middle, ring, and pinky fingers being severed." Appellant was diagnosed with Hepatitis C in September 2007 and with Parkinson's disease in February 2008, though he began to have symptoms of Parkinson's disease two years before the diagnosis. The evaluator noted that appellant had "significant tremoring of his right arm and hand, dysarthria, impaired balance (requiring the use of a cane), and reported back and leg pain." He recommended voice recognition software if using a computer, but noted that appellant's dysarthria made it difficult to attain speech accuracy. The evaluator advised that "[appellant's] ability to keyboard will be much more affected by the Parkinson's symptoms than the severed fingertips."

The vocational rehabilitation counselor, in a report dated June 6, 2014, noted that appellant's instructor advised her on May 13, 2014 that he could not keep up in class due to his Parkinson's disease and the injury to his hand.⁶ The instructor indicated that he would pass appellant "based on his knowledge versus his performance."

In a duty status report dated July 3, 2014, Dr. Michael Swenson, a Board-certified internist, diagnosed chronic back pain and found that appellant was disabled from employment.

On September 14, 2014 the vocational rehabilitation counselor completed a job classification (Form OWCP-66) for the position of clerk, general. The position required light strength and frequent reaching, handling, and fingering. The vocational rehabilitation counselor noted that the FCE results showed that appellant had limitations on frequent material handling.

⁵ On July 2, 2013 OWCP's rehabilitation specialist informed the rehabilitation counselor that the second opinion found light lifting restrictions, but also that appellant could not sit or stand more than four hours per day, which constituted sedentary restrictions.

⁶ In a formal training evaluation report, appellant's training school indicated that his progress typing was slower than others most likely due to his handicap, but that he was passing. On June 2, 2014 the vocational rehabilitation counselor advised that the instructor indicated that he had passed all of his classes and would obtain a certificate.

She found that appellant met the specific vocational preparation due to his work history and computer training and that the position was available in adequate numbers in his geographical area at a weekly wage of \$531.20 based on state employment information.

OWCP, on October 16, 2014, notified appellant of its proposed reduction of his compensation based on its finding that he could earn wages as a general clerk, Department of Labor's *Dictionary of Occupational Titles* (DOT) No. 209.562.010, earning \$531.20 per week. It found that Dr. Bald's opinion constituted the weight of the medical evidence and established that appellant had the capacity to work in the selected position. OWCP further determined that the position was vocationally suitable based on the findings of the vocational rehabilitation counselor.

In a report dated October 9, 2014, received by OWCP on October 27, 2014, Dr. Carlo Bellabarba, a Board-certified orthopedic surgeon, discussed appellant's symptoms of back and left leg pain beginning with a fall in 2007. He related that imaging studies showed "left-sided severe foraminal stenosis at L4-5 and L5-S1."

By decision dated December 16, 2014, OWCP reduced appellant's compensation based on its finding that he had the vocational and physical capacity to earn wages as a general clerk at a rate of \$531.20 per week, effective December 17, 2014. Utilizing the formula set forth in *Albert C. Shadrick*,⁷ it found that he had a wage-earning capacity of 38 percent.

In a March 21, 2014 report, received by OWCP on December 13, 2015, Dr. Janice Onorata, a Board-certified neurologist, advised that she evaluated appellant on February 19, 2008 for a right hand tremor that began two years earlier. Appellant's symptoms were consistent with Parkinson's disease and included "an intermittent resting tremor, cogwheel rigidity, masked facies, decreased blink rate, and hypophonia." Dr. Onorata related, "Again, since [appellant's] symptoms had been present for two years prior to my initial evaluation, I suspect his Parkinson's disease actually started in 2006."

Dr. Onorata, in a report dated December 10, 2014, indicated that appellant received a formal diagnosis of Parkinson's disease in 2008. She related, "By [his] history, he [stated that] his tremor started in 2006. Based on the progression of the disease, *i.e.*, the fact that it is bilateral, it is probable that his disease could have started back in 2006." Dr. Onorato found that appellant would have difficulty typing or writing and that it was "highly doubtful at this time that he would be employable."

On January 4, 2015 Dr. Cary S. Keller, an orthopedic surgeon, asserted that appellant's degenerative disc disease had progressed and that he should not work.

On December 14, 2015 appellant, through his representative, requested reconsideration. He contended that the position of general clerk was outside of the restrictions set forth by Dr. Bald and the FCE as it required frequent fingering. Appellant's representative also asserted that Dr. Bald's report was stale and that appellant had limitations from preexisting Parkinson's disease.

⁷ 5 ECAB 3767 (1953); codified by regulation at 20 C.F.R. § 10.403.

Dr. Peter S. Jiang, a Board-certified internist, in a report dated January 21, 2016, diagnosed lumbar disc disease and neural foraminal narrowing on the left at L5. He provided pain management treatments on March 21, June 21, August 15 and December 13, 2016.

In a decision dated July 21, 2016, OWCP denied modification of its December 16, 2014 decision.

On appeal appellant's representative contends that OWCP failed to consider that the position was not within his physical capability as it required frequent fingering and that the medical evidence it relied upon in reaching its loss of wage-earning capacity determination was stale.

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-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's *Dictionary of*

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; *see T.O.*, 58 ECAB 377 (2007).

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

¹² *See John D. Jackson*, *supra* note 9.

Occupational Titles or otherwise available in the open market, that fits that employee's capabilities with regard to his 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.¹³ Finally, application of the principles set forth in *Albert C. Shadrick*¹⁴ will result in the percentage of the employee's loss of wage-earning capacity.

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 postinjury or subsequently acquired conditions.¹⁵ 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.¹⁶

ANALYSIS

OWCP accepted that appellant sustained lumbar sprain, a sprain of the left shoulder and upper arm, left bicipital tenosynovitis, a left superior glenoid labrum lesion, and a permanent aggravation of lumbosacral spondylosis at L5-S1 without myelopathy due to a December 14, 2007 employment injury. It paid him compensation for total disability beginning August 2009.

OWCP reduced appellant's compensation effective December 17, 2014 after finding that he had the capacity to earn wages in the selected position of clerk, general. It determined that the September 21, 2012 report from Dr. Bald constituted the weight of the medical evidence and established that appellant had the physical ability to perform the position.

Dr. Bald based his opinion regarding appellant's ability to work on a September 21, 2012 examination. He provided a supplemental report on November 12, 2012 following a November 2012 FCE. The Board has had occasion to evaluate the probative value of noncontemporaneous medical reports, however, because cases differ, in their factual presentation it has not adopted a rigid standard. In *J.A.*,¹⁷ the Board held that medical reports from November 2010 were of limited probative value regarding the claimant's medical condition as of October 2012. In *G.M.*,¹⁸ given the facts in that case the Board held that a medical report dated May 14, 2013, more than two years before OWCP reduced the claimant's compensation effective July 21, 2015, was of insufficient probative value to rely on in reducing compensation as it was stale.

¹³ See *supra* note 8.

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

¹⁵ See *B.W.*, Docket No. 15-1709 (issued August 16, 2016); *James Henderson, Jr.*, 51 ECAB 268 (2000).

¹⁶ See *B.W.*, *id.*

¹⁷ Docket No. 13-1657 (issued February 3, 2014).

¹⁸ Docket No. 16-1032 (issued January 4, 2017).

Dr. Bald examined appellant on September 21, 2012 and OWCP reduced his compensation on December 17, 2014, after the second opinion examination. The length of time between Dr. Bald's examination and the determination to reduce wages, in this case, is particularly important due to alleged progression of appellant's work-related and nonwork-related medical conditions as set forth in the medical reports of Drs. Bellabarba, Onorata, Keller, and Jiang, all of which were dated subsequent to the second opinion examination. Consequently, the medical evidence on which OWCP based its reduction of compensation was stale.¹⁹ The Board, therefore, will reverse the reduction of appellant's compensation.

CONCLUSION

The Board finds that OWCP improperly reduced appellant's compensation effective December 17, 2014, based on its finding that he had the capacity to earn wages in the selected position of general clerk.

ORDER

IT IS HEREBY ORDERED THAT the July 21, 2016 decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 17, 2017
Washington, DC

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

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

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

¹⁹ *Id.*