

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

G.E., Appellant)	
)	
and)	Docket No. 18-0663
)	Issued: December 21, 2018
U.S. POSTAL SERVICE, POST OFFICE,)	
Orlando, FL, Employer)	
)	

Appearances:
Wayne Johnson, Esq., 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 February 7, 2018 appellant, through counsel, filed a timely appeal from a November 16, 2017 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, through counsel, timely requested oral argument before the Board pursuant to 20 C.F.R. § 501.5(b). In an order dated October 11, 2018, the Board, after exercising its discretion, denied the request as his arguments on appeal could be adequately addressed in a decision based on a review of the case as submitted on the record. *Order Denying Request for Oral Argument*, Docket No. 18-0663 (issued October 11, 2018).

³ 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly reduced appellant's wage-loss compensation benefits, effective November 17, 2017, based on his capacity to earn wages in the selected position of receptionist.

FACTUAL HISTORY

On May 13, 2014 appellant, then a 49-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that he sustained an aggravation of his lumbar degenerative disc disease and developed arthritis and pinched nerve damage as a result of years of repetitive movements at work. He noted that he first became aware of his claimed conditions on May 15, 2013 and of their relationship to his federal employment on June 28, 2013. On the reverse side of the claim form, appellant's supervisor indicated that appellant was currently working and that limited-duty assignments were provided to him based on medical documentation related to his accepted May 13, 2013 traumatic injury.⁴

By decision dated July 14, 2014, OWCP denied appellant's occupational disease claim, finding that the evidence of record was insufficient to establish fact of injury. It determined that a medical report indicated that he sustained an injury on May 13, 2014. OWCP noted that there was no mention of an injury sustained on that date. It further found that the evidence of record did not support a finding that the alleged injury or event occurred as alleged and the medical evidence of record did not establish a diagnosed medical condition causally related to the alleged work injury or event.

On August 12, 2014 appellant requested a telephone hearing before an OWCP hearing representative. By decision dated February 19, 2015, the hearing representative set aside the July 14, 2014 decision. He found that appellant had established fact of injury as he previously provided a clear description of his employment history and explained his daily work duties. The hearing representative, however, remanded the case for OWCP to combine the current case record with OWCP File No. xxxxxx260 and properly adjudicate the issue of whether appellant had established a causal relationship between his diagnosed conditions and the accepted factors of his federal employment.

On February 24, 2015 OWCP administratively combined the two OWCP files, with File No. xxxxxx616 serving as the master file. In addition, on March 19, 2015 it referred appellant, together with a statement of accepted facts, the medical record, and a set of questions, to Dr. Richard C. Smith, a Board-certified orthopedic surgeon, for a second opinion evaluation to

⁴ Appellant has a prior claim, in which OWCP accepted that he sustained a lumbar sprain while working as a mail handler on May 13, 2013. OWCP assigned that claim File No. xxxxxx260. It paid him disability compensation on the supplemental rolls. Subsequently, by decision dated August 26, 2014, OWCP terminated appellant's wage-loss compensation and medical benefits effective that day, finding that he no longer had any residuals or disability causally related to his accepted May 13, 2013 employment injury. On June 25, 2015 an OWCP hearing representative affirmed the May 13, 2013 termination decision.

determine whether there was a causal relationship between his lower back condition and accepted employment factors.

In an April 14, 2015 medical report, Dr. Smith discussed findings on physical examination including evaluation of appellant's cervical, thoracic, and lumbar spines. He diagnosed herniated discs at C4-C5, C5-C6, T5-T6, T8-T9, L4-L5, and L5-S1. Dr. Smith opined that the diagnosed conditions were directly caused by factors of appellant's federal employment. He advised that while appellant was unable to perform his usual job, he could work eight hours a day with restrictions, as outlined in his attached work capacity evaluation (Form OWCP-5c).

On May 1, 2015 OWCP accepted appellant's claim for displacement of intervertebral discs at C4-C5, C5-C6, T5-T6, T8-T9, L4-L5, and L5-S1. It paid appellant disability compensation on the supplemental rolls commencing September 16, 2014.

Subsequently, on February 13, 2017 OWCP again referred appellant to Dr. Smith for a second opinion evaluation to determine his disability status. In a March 13, 2017 report, Dr. Smith related that appellant's accepted cervical, thoracic, and lumbar conditions had not resolved. He advised that the conditions were unlikely to resolve or return to his predate-of-injury baseline because they were permanent in nature. Dr. Smith opined that appellant was unable to return to his date-of-injury mail handler position due to its lifting requirements, but he could return to work in a sedentary capacity with restrictions outlined in an attached OWCP-5c form. In the March 13, 2017 OWCP-5c form, he indicated that appellant could work eight hours a day with restrictions of sitting and standing up to two hours, walking up to four hours, and pushing, pulling, and lifting up to 10 pounds. He could not bend/stoop.

OWCP referred appellant for vocational rehabilitation services on April 10, 2017. It noted that Dr. Smith's report and work restrictions were considered to be the weight of the medical opinion evidence. On May 8, 2017 the rehabilitation counselor identified the positions of customer service representative, receptionist, and service dispatcher as suitable work. She indicated that appellant had a cell phone with computer access and a desktop computer. Appellant knew Word, but did not know Microsoft Excel or PowerPoint. The rehabilitation counselor indicated that appellant's other transferable skills included communication, interpersonal, customer service, dispatching, sales ability, time management, training, and good to excellent math and reading skills. She related that the plan was to have him complete two free online computer software training courses to enhance his employability. In a job classification (Form CA-66) dated May 8, 2017, the rehabilitation counselor noted that the Department of Labor, *Dictionary of Occupational Titles* (DOT) indicated that the selected position of receptionist, No. 237.367.038, was sedentary in nature⁵ and involved such duties as receiving visitors, answering telephone calls, and limited typing of documents. She further indicated that the position required three to six months of vocational preparation, which appellant could meet through his work experience as a security guard, which involved escorting guests and as a real estate agent, which involved answering the telephone. The rehabilitation counselor conducted a labor market survey to verify that the identified position was reasonably available in his commuting area with wages of \$409.20 per

⁵ Sedentary work, according to the DOT, involves occasionally exerting up to 10 pounds of force and sitting most of the time, but may involve walking or standing for brief periods of time. Occasionally, performing an activity means that the activity is performed up to one third of the time during the workday.

week. Appellant's participation in the vocational rehabilitation program did not result in his return to work.

On May 30, 2017 OWCP further expanded acceptance of appellant's claim to include cervical and lumbar radiculopathy. Effective June 15, 2017, appellant retired from the employing establishment on disability.

By letter dated September 25, 2017, OWCP proposed to reduce appellant's wage-loss compensation based on his capacity to earn wages as a receptionist. It applied the principles set forth in *Albert C. Shadrick*,⁶ as codified in section 10.403 of OWCP's regulations,⁷ to determine that appellant's monthly wage-loss compensation benefits should be reduced by 37 percent. Appellant was advised that, if he disagreed with the proposed decision, he had 30 days to submit additional evidence or argument regarding his capacity to earn wages.

In response to the proposed reduction of his wage-loss compensation benefits, appellant submitted a number of medical reports from his treating physicians, which outlined his current conditions. Appellant also submitted his own statement in which he noted that Dr. Smith had limited his ability to sit two hours each workday; however, he indicated that the selected position was sedentary and required additional sitting beyond two hours each workday and reaching, twisting, and standing intermittently.

By decision dated November 16, 2017, OWCP reduced appellant's wage-loss compensation, effective November 17, 2017, based on his capacity to earn wages as a receptionist at the rate of \$409.20 per week. It found that the physical requirements of the position did not exceed the medical restrictions provided by Dr. Smith.

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 (LWEC).⁹

Under section 8115(a) of FECA, 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 the employee's wage-earning capacity or if 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,

⁶ 5 ECAB 376 (1953).

⁷ 20 C.F.R. § 10.403.

⁸ *James M. Frasher*, 53 ECAB 794 (2002); *J.E.*, Docket No. 16-0006 (issued November 16, 2016).

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

and other factors and circumstances which may affect the employee's wage-earning capacity in his or her disabled condition.¹⁰

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, DOT or otherwise available in the open market, that fit the 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 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*¹¹ and codified by regulations at 20 C.F.R. § 10.403¹² should be applied. Subsection(d) of the regulations provide that the employee's wage-earning capacity in terms of percentage is obtained by dividing the employee's actual earnings or the pay rate of the position selected by OWCP, by the current pay rate for the job held at the time of the injury.¹³

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.¹⁴ Any incapacity to perform the duties of the selected position resulting from subsequently acquired conditions is immaterial to the LWEC that can be attributed to the accepted employment injury and for which appellant may receive compensation. Additionally, the job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.¹⁵

ANALYSIS

The Board finds that OWCP improperly reduced appellant's wage-loss compensation benefits, effective November 17, 2017, based on his capacity to earn wages in the selected position of receptionist.

The selected position of receptionist involved receiving visitors, answering telephone calls, and limited typing of documents. The issue of whether appellant has the physical ability to perform a selected position is primarily a medical question that must be resolved by the medical evidence

¹⁰ 5 U.S.C. § 8115(a); see *N.J.*, 59 ECAB 171 (2007); *T.O.*, 58 ECAB 377 (2007); *Dorothy Lams*, 47 ECAB 584 (1996).

¹¹ See *supra* note 5.

¹² See *supra* note 6.

¹³ *Id.* at § 10.403(d).

¹⁴ *James Henderson, Jr.*, 51 ECAB 268 (2000).

¹⁵ *Id.*

of record.¹⁶ OWCP relied on the opinion of Dr. Smith, an OWCP second opinion physician, in finding that the selected position was within appellant's physical limitations. In a March 13, 2017 work capacity evaluation, Dr. Smith limited appellant to, among other restrictions, two hours of sitting. The job description listed the selected position as sedentary in nature, a physical requirement listed conflicts with one of Dr. Smith's work restrictions. The position required sitting most of the time, but the position description did not address or specify the length of time which would be required for sitting, and it remains unclear whether the position would violate the restriction that appellant could not sit more than two hours. Thus, Dr. Smith's report calls into question whether appellant could physically perform the duties of the receptionist position. The Board notes that OWCP did not request that he review the job description for the selected receptionist position and provide an opinion as to whether appellant could perform the duties of the position. Dr. Smith's report is, therefore, of limited probative value and insufficient to establish that appellant has the physical capacity to perform the duties of a receptionist.¹⁷ Notwithstanding Dr. Smith's explicit restriction, a rehabilitation counselor selected a position as a receptionist that necessitated a level of physical exertion, which exceeded appellant's physical restriction as to sitting.

OWCP procedures provide that, unless the medical evidence is clear and unequivocal, OWCP should seek the advice of a physician regarding the suitability of the position.¹⁸ The Board finds that the medical evidence of record is not clear and unequivocal in this case, as the selected position of receptionist requires sitting most of the time.¹⁹

CONCLUSION

The Board finds that OWCP improperly reduced appellant's wage-loss compensation benefits, effective November 17, 2017, based on his capacity to earn wages in the selected position of receptionist.

¹⁶ See *Dennis D. Owen*, 44 ECAB 475 (1993).

¹⁷ See *R.D.*, Docket No. 09-1237 (issued February 18, 2010).

¹⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity*, Chapter 2.816.4 (June 2013). If the medical evidence is not clear and unequivocal, the claims examiner should seek clarification from the attending physician, second opinion, or referee specialist as appropriate. *F.W.*, Docket No. 14-1772 (issued January 28, 2015).

¹⁹ See *B.C.*, Docket No. 15-1861 (issued October 3, 2016); *E.W.*, Docket No. 14-584 (issued July 29, 2014); *Arthur E. Ostergard*, Docket No. 04-1118 (issued November 2, 2004).

ORDER

IT IS HEREBY ORDERED THAT the November 16, 2017 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 21, 2018
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