

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

E.D., Appellant)	
)	
and)	Docket No. 17-1064
)	Issued: March 22, 2018
DEPARTMENT OF TRANSPORTATION,)	
FEDERAL AVIATION ADMINISTRATION,)	
Honolulu, HI, Employer)	
)	

Appearances:
Capp Peterson Taylor, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 18, 2017 appellant, through counsel, filed a timely appeal from a January 30, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly reduced appellant's compensation, effective January 14, 2015 based on its finding that she had the capacity to earn wages in the selected position of mail clerk.

FACTUAL HISTORY

In 1974 appellant, then a 26-year-old air traffic control specialist, filed an occupational disease claim (Form CA-2) alleging that she developed depression, fatigue, and colitis causally related to factors of her federal employment. OWCP accepted the claim for a prolonged depressive reaction and ulcerative enterocolitis. It paid appellant wage-loss compensation for total disability beginning in 1974.³

On May 8, 2013 OWCP requested that appellant's attending physician, Dr. John J. Harris, a psychiatrist, provide updated medical information regarding her current condition and the extent of any disability.

By letter dated August 21, 2013, OWCP referred appellant to Dr. Robert Sullivan, a Board-certified psychiatrist, for a second opinion examination. In a report dated September 11, 2013, Dr. Sullivan discussed appellant's work history and history of alcohol abuse that began prior to her employment. He diagnosed adjustment disorder with depressive and anxious features in remission, alcohol abuse in remission, diabetes, and irritable bowel syndrome or alcoholic gastritis. Dr. Sullivan indicated that appellant's "original chief complaints of depression, fatigue, and bowel problems could seem directly attributable" to her work duties given the inherent stressfulness of her position as an air traffic controller. He further noted, however, that alcohol use could also contribute to her gastrointestinal complaints, noting that her duties could be "exacerbating elements." Dr. Sullivan related that in his "experience with alcoholics, depressed mood, anxiety, and decrements in their occupational functioning are universal and independent of the nature or difficulty of their occupations. Her duties as an [air traffic controller] would then be best characterized as being *associated* with her symptoms, rather than causative." (Emphasis in the original.) Dr. Sullivan concluded that even if appellant had experienced a "work-related aggravation of her preexisting alcohol-related emotional and gastrointestinal symptoms, such deleterious effects would be relevant for no more than a year." He found that she had no further psychiatric condition due to her employment. In a work capacity evaluation for psychiatric/psychological conditions (OWCP-5a) dated September 23, 2013, Dr. Sullivan determined that appellant could work full time, but that it would be "unwise to attempt to return her to a position" as an air traffic controller given her extensive absence from the position.

³ On January 26, 2010 Dr. Eugene Spiotta, Jr., a Board-certified gastroenterologist and internist and OWCP referral physician, diagnosed irritable bowel syndrome improved since the 1980s. He found that appellant's current symptoms did not preclude employment in a low-stress position. In a February 16, 2010 supplemental report, Dr. Spiotta diagnosed irritable bowel syndrome that would likely recur in a high-stress environment. On March 8, 2010 he found that appellant could return to work as an air traffic controller. In a report dated February 2, 2010, Dr. Naveed J. Mirza, a Board-certified psychiatrist and OWCP referral physician, diagnosed an adjustment disorder with depressed mood and anxiety. He advised that he did not see reasons to relate her current condition to her accepted work injury. Dr. Mirza opined that appellant could work in "a low stress environment."

OWCP, on April 11, 2014, referred appellant to a vocational rehabilitation counselor for vocational rehabilitation. On April 17, 2014 the vocational rehabilitation counselor discussed appellant's assertion that she was unable to engage in vocational rehabilitation due to diabetes, a history of breast cancer, and the need for future cataract and hip replacement surgeries. Appellant also maintained that she did not remain long enough in one location to participate.

By letter dated April 28, 2014, OWCP advised appellant of the penalties for failing to cooperate with vocational rehabilitation without good cause. It afforded her 30 days to participate with vocational rehabilitation or provide reasons for any failure to participate.

In a report dated May 8, 2014, the vocational rehabilitation counselor discussed appellant's work history as a secretary for one year and as an air traffic controller for seven years. She further noted that she worked as a clerk-typist for one year.

Appellant, in a letter dated May 18, 2014, advised that she was unable to look for employment, noting that she required cataract and hip replacement surgeries.

In a report dated June 4, 2014, the vocational rehabilitation counselor identified the positions of file clerk, office helper, and mail clerk as vocationally suitable. She noted that appellant's medical restriction consisted of not resuming work as an air traffic controller. The vocational rehabilitation counselor provided the wages for each position as set forth in the U.S. Department of Labor's Bureau of Labor Statistics for April 1, 2014. She related, "It is my opinion that based on [appellant's] education, training, and work experience, she would more likely than not, obtain employment at least at the 25th percentile [of wages], even though she has not worked for many years." The vocational rehabilitation counselor opined that appellant's age would "not be a barrier to employment."

The vocational rehabilitation counselor, on June 4, 2014, completed a job classification (Form OWCP-66) for the position of mail clerk. She indicated that the position was sedentary and required specific vocational preparation of a short demonstration only to 30 days. The vocational rehabilitation counselor found that appellant met the specific vocational preparation for the position as it was an unskilled position which did not require experience and as she had previously worked as a typist and secretary. She advised that the job was performed in adequate numbers in the relevant geographical area based on April 1, 2014 information from the Bureau of Labor Statistics at a weekly wage of \$522.00.

OWCP's vocational rehabilitation specialist, on October 2, 2014, found that appellant could work full time as a mail clerk earning \$522.00 per week. He noted that the position of mail clerk required a light strength level. The rehabilitation specialist concurred with the recommendation of the vocational rehabilitation counselor that appellant be rated based on wages slightly higher than entry level based on her past training and work history.

On November 18, 2014 OWCP notified appellant of its proposed reduction of her compensation benefits based on its finding that she could earn wages as a mail clerk (clerical), Department of Labor's *Dictionary of Occupational Titles* (DOT) No. 209.687.026, earning \$522.00 per week. It found that Dr. Sullivan's opinion constituted the weight of the evidence and

established that she had the capacity to work in the selected position.⁴ OWCP further determined that the position was vocationally suitable based on the findings of the vocational rehabilitation counselor.

Counsel, in a December 4, 2014 response, argued that a conflict in medical opinion existed. In the alternative, he asserted that OWCP had not met its burden of proof to show that the accepted condition had resolved.

By decision dated January 13, 2015, OWCP reduced appellant's compensation based on its finding that she had the vocational and physical capacity to earn wages as a mail clerk at a rate of \$522.00 per week, effective January 14, 2015. Utilizing the formula set forth in *Albert C. Shadrick*,⁵ it found that she had a wage-earning capacity of 37 percent.

On January 23, 2015 appellant, through counsel, requested a telephone hearing before an OWCP hearing representative.

In a report dated December 8, 2014, received by OWCP on July 15, 2015, Dr. Michael Archibeck, a Board-certified orthopedic surgeon, related that appellant was scheduled for a hip replacement in December 2014 and could not perform "a job requiring significant standing, walking, bending or stopping or sitting for prolonged periods." He further noted that she would need to limit bending, stooping, and some walking after surgery.

During the telephone hearing, held on July 22, 2015, counsel asserted that appellant was not able to perform the standing and walking required by the selected position due to her hip condition. He maintained that subsequently acquired conditions were to be considered when making a suitability determination. Appellant related that she also had diabetes, a history of breast cancer, and colitis. She advised that she was unable to participate in vocational rehabilitation due to her scheduled hip replacement and diabetes.

By decision dated September 30, 2015, OWCP's hearing representative affirmed the January 13, 2015 decision. She found that appellant had not submitted medical evidence sufficient to establish that she was unable to perform the position of mail handler due to either her work injury or a preexisting condition.

On January 11, 2016 Dr. Paul Sanchez, an ophthalmologist, advised that appellant could not function as a mail clerk because her cataracts made reading difficult.

Dr. Harris, in a report dated August 10, 2016, advised that he had treated appellant since June 1995 for depression. He indicated that she had not responded well to medication as she lacked the appropriate "transport mechanism in her brain..." Dr. Harris found that appellant had a "schizoid personality organization" that was most noticeable when OWCP questioned "her continuing disability status." He opined that she was "totally and permanently disabled since 1976. Due to the aforementioned emotional disorders [appellant] would not be capable to participating

⁴ OWCP mistakenly indicated that Dr. Sullivan was a Board-certified orthopedic surgeon rather than a Board-certified psychiatrist.

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

in vocational rehabilitation nor perform as a mail clerk.... Her emotional conditions would not allow her to concentrate and focus to perform.” Dr. Harris noted that psychological testing performed in May 2010 showed elements of schizophrenia.

On August 19, 2016 counsel requested reconsideration. He asserted that newly submitted medical evidence from Dr. Sanchez and Dr. Harris established that appellant was unable to work as a mail clerk. Counsel argued that subsequently acquired conditions should be considered as she had residuals of her work injury.

By decision dated January 30, 2017, OWCP denied modification of its September 30, 2015 decision. It found that appellant had not provided reasoned medical evidence supported by objective findings establishing that she was unable to perform the position of mail clerk.

On appeal counsel contends that the medical report of Dr. Sanchez and the August 10, 2016 report from Dr. Harris refute the opinion of Dr. Sullivan and establish that appellant was unable to work as a mail clerk. He argues that subsequently-acquired conditions are relevant in determining work capacity as OWCP has not shown that her disability had resolved.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.⁶ 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 from all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.⁷

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.⁸

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.⁹

⁶ *James M. Frasher*, 53 ECAB 794 (2002).

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

⁸ 5 U.S.C. § 8115; *id.* at § 10.520; *see T.O.*, 58 ECAB 377 (2007).

⁹ *See William H. Woods*, 51 ECAB 619 (2000).

Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.¹⁰

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 that 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.¹¹

The formula for determining loss of wage-earning capacity, developed in the case of *Albert C. Shadrick*,¹² has been codified at section 10.403(c)-(e) of OWCP's regulations.¹³ Under the *Shadrick* formula, OWCP calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's actual earnings (or constructed earnings) by the current or updated pay rate for the position held at the time of injury.¹⁴ The employee's wage-earning capacity in dollars is computed by first multiplying the pay rate for compensation purposes, as the pay rate at the time of injury, the time disability begins or the time disability recurs, whichever is greater, by the percentage of wage-earning capacity. The resulting dollar amount is then subtracted from the pay rate for compensation purposes to obtain loss of wage-earning capacity.¹⁵

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.¹⁶ 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

¹⁰ See *John D. Jackson*, *supra* note 7.

¹¹ See *supra* note 8.

¹² See *supra* note 5.

¹³ 20 C.F.R. § 10.403(c)-(e).

¹⁴ *Id.* at § 10.403(c)-(d).

¹⁵ *Id.* at § 10.403(e).

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

¹⁷ See *B.W.*, *id.*

ANALYSIS

OWCP accepted that appellant sustained a prolonged depressive reaction and ulcerative enterocolitis due to factors of her federal employment. It paid her compensation for total disability beginning in 1974.

On August 21, 2013 OWCP referred appellant to Dr. Sullivan for a second opinion examination. Dr. Sullivan diagnosed an adjustment disorder with depression and anxious features in remission, alcohol abuse in remission, diabetes, and irritable bowel syndrome versus alcoholic gastritis. He initially noted that appellant's work duties were intrinsically stressful and found that her symptoms of depression, fatigue, and bowel issues could possibly result from her duties as an air traffic controller. Dr. Sullivan further opined, however, that alcohol was also a possible cause of her symptoms, and that while her work duties might have exacerbated her condition, the relationship might be one of association rather than causation. He found that appellant might have sustained a temporary aggravation of preexisting alcohol-related depression but that any aggravation would have ceased within one year. In a work capacity evaluation, Dr. Sullivan concluded that she could work full time with a limitation on not returning to a position as an air traffic controller.

The Board finds that Dr. Sullivan's opinion is insufficient to establish that appellant is capable of performing the selected position of mail clerk. He found that her work duties were inherently stressful and might have exacerbated her condition by association, but that alcohol might also account for her symptoms. Dr. Sullivan further concluded that any temporary aggravation of her preexisting depression would have ceased within one year but failed to provide sufficient supporting rationale for his conclusion.¹⁸ As his opinion is vague, speculative, and internally inconsistent, it is of diminished probative value.¹⁹ OWCP, consequently, failed to meet its burden of proof to reduce appellant's compensation, effective January 14, 2015, based on its finding that she had the capacity to earn wages as a mail clerk.²⁰

CONCLUSION

The Board finds that OWCP improperly reduced appellant's compensation, effective January 14, 2015, based on its finding that she had the capacity to earn wages in the selected position of mail clerk.

¹⁸ See *C.C.*, Docket No. 10-0259 (issued November 30, 2010).

¹⁹ See *I.B.*, Docket No. 11-1796 (issued March 23, 2012).

²⁰ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the January 30, 2017 decision of the Office of Workers' Compensation Programs is reversed.

Issued: March 22, 2018
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