

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

_____)	
T.H., Appellant)	
)	
and)	Docket No. 18-0704
)	Issued: September 6, 2018
U.S. POSTAL SERVICE, POST OFFICE,)	
Dayton, OH, Employer)	
_____)	

Appearances:
Alan J. Shapiro, 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 February 15, 2018 appellant, through counsel, filed a timely appeal from a November 29, 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 appellant has met his burden of proof to modify OWCP's May 18, 2015 loss of wage-earning capacity determination.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts of the case as presented in the prior Board order are incorporated herein by reference. The relevant facts are as follows.

Appellant, an 86-year-old former letter carrier, has an accepted traumatic injury claim (Form CA-1) for aggravation of degenerative disc disease (status post C5-6 laminectomy, performed in 1969) and strain on preexisting neurological condition, which arose on June 26, 1979.⁴ He stopped work for various periods and OWCP paid wage-loss compensation on the periodic rolls beginning June 16, 2002.

In May 2014, OWCP referred appellant for a second opinion examination to Dr. Edward G. Fisher, a Board-certified orthopedic surgeon. It requested that Dr. Fisher indicate whether appellant had work-related residuals and to provide an opinion on his ability to work.

In a June 17, 2014 report, Dr. Fisher discussed appellant's factual and medical history and reported the findings of the physical examination he conducted on that date. He diagnosed status post C5-6 laminectomy (work related by way of aggravation), resolved upper back strain, coronary artery disease with open heart bypass surgery in 1996 (nonwork related), hypertension/hypercholesterolemia controlled by medication (nonwork related), and age-related degenerative spondylosis/degenerative disc disease from C3 through C7 (nonwork related). Dr. Fisher determined that appellant could work for eight hours per day with restrictions of walking/standing no more than two hours per day, avoiding repetitive motion of the neck, lifting no more than 10 pounds frequently, and lifting no more than 20 pounds occasionally.

On June 24, 2014 OWCP referred appellant for participation in a vocational rehabilitation program.

On August 1, 2014 rehabilitation counselor determined that appellant was capable of earning wages in the selected position of receptionist (as described in the U.S. Department of Labor's *Dictionary of Occupational Titles* (DOT) and bearing the DOT # 237.367-038). The rehabilitation counselor indicated that a state labor survey showed that the receptionist position was reasonably available within appellant's commuting area with an average wage of \$360.80 per week. The receptionist position involved such duties as receiving visitors, operating a telephone

³ *Order Remanding Case*, Docket No. 16-1659 (issued July 14, 2017).

⁴ Appellant's June 26, 1979 injury was accepted by OWCP under File No. xxxxxx348. Under File No. xxxxxx528, OWCP previously accepted that he sustained an upper back strain on August 25, 1976. It has consolidated OWCP File No. xxxxxx528 into OWCP File No. xxxxxx348, and has designated OWCP File No. xxxxxx348 as the master file.

console, and some clerical duties such as typing on a computer. The physical requirements of the position, classified as sedentary, included lifting up to 10 pounds on an occasional basis.

The rehabilitation counselor indicated that appellant was vocationally capable of working as a receptionist and that the physical requirements of the position were within the work restrictions recommended on June 17, 2014 by Dr. Fisher.⁵

In an August 8, 2014 report, Dr. Antony T. Jacob, an attending Board-certified physical medicine and rehabilitation physician, reported physical examination findings and diagnosed cervical sprain/strain and myofascial pain syndrome. He indicated that appellant might be able to perform a sedentary type of work which did not involve any use of the upper extremities above the shoulder level. Dr. Jacob noted that appellant should avoid lifting more than 10 pounds at a time and should avoid prolonged sitting. Appellant could not engage in climbing, crawling, or kneeling.

On May 18, 2015 OWCP issued a formal loss of wage-earning capacity determination based upon appellant's ability to earn wages in the selected position of receptionist. Consequently, it adjusted his compensation effective May 16, 2015.

Counsel requested a telephonic hearing with a representative of OWCP's Branch of Hearings and Review, which was held on January 15, 2016.

By decision dated February 25, 2016, OWCP's hearing representative affirmed OWCP's May 18, 2015 loss of wage-earning capacity determination.

In a March 22, 2016 letter, received on March 24, 2016, appellant indicated that he was requesting reconsideration of OWCP's February 25, 2016 decision. In connection with his claim, he submitted evidence that he believed showed he could no longer work as a receptionist.

In a March 16, 2016 report, Dr. Jason Higey, an attending Board-certified cardiologist, reported that appellant's cardiac condition, including coronary artery disease and valvular heart disease, had worsened in severity. With respect to such worsening, he noted, "The root cause of this is multifactorial, but likely includes natural progression of [appellant's] heart disease as well as contributions from his arrhythmias and valvular heart disease and may as well have had a contribution from life stress (due to job retraining). It is impossible to discern the approximate contribution from each factor, but each likely played a role in this relative worsening of [appellant's] condition."

In a March 21, 2016 report, Dr. Jacob noted that appellant reported that, if he tries to sit at a desk for any length of time, his stiffness gets worse, and the pain increases. He indicated that appellant could not use his arms above the shoulder level because of this stiffness and pain in the shoulder muscles. Dr. Jacob noted that appellant was not able to look sideways or up and down because his range of motion was limited from prior surgery. He advised that appellant's physical condition prevented him from sitting for more than 15 minutes at a time, looking at a computer

⁵ Appellant successfully completed a computer skills course on October 10, 2014 in connection with his vocational rehabilitation efforts. His vocational rehabilitation file was closed in November 2014.

screen, holding a telephone for any length of time, or lifting above his waist level. Dr. Jacob further noted that appellant was currently unable to engage in any kind of gainful employment.

On April 7, 2016 counsel requested reconsideration of OWCP's February 25, 2016 decision on behalf of appellant. He also resubmitted copies of the March 16, 2016 report of Dr. Hige and the March 21, 2016 report of Dr. Jacob.

By decision dated June 30, 2016, OWCP denied modification of the hearing representative's February 25, 2016 decision which affirmed the original May 18, 2015 loss of wage-earning capacity determination.

Appellant appealed to the Board and, by order dated July 14, 2017,⁶ it set aside OWCP's June 30, 2016 decision and remanded the case to OWCP for further development. The Board found that his request for reconsideration of OWCP's February 25, 2016 decision raised the issue of whether a modification of OWCP's May 18, 2015 loss of wage-earning capacity determination was warranted. The Board directed OWCP, upon remand, to issue an appropriate decision on this issue.

In an October 17, 2017 development letter, OWCP advised appellant regarding the standards for modifying its May 18, 2015 loss of wage-earning capacity determination. It requested that he submit a rationalized medical report explaining how his injury-related condition had worsened such that he could no longer work as a receptionist. OWCP afforded appellant 30 days to submit such evidence.

Appellant submitted a November 17, 2017 report from Dr. Jacob who reported the physical findings that he obtained on that date. Dr. Jacob indicated that range of motion testing of the neck revealed flexion to 25 degrees, extension to about 5 degrees, lateral flexion to about 5 degrees, and head rotation to 30 degrees bilaterally. Appellant's shoulder abduction was to about 100 degrees and flexion was to 110 degrees. Dr. Jacob noted that appellant could not use his hands for repetitive motion and diagnosed whiplash injury to the neck and cervical spondylosis. He indicated that he did not think that appellant could engage in any gainful employment and noted, "Even doing the job of the receptionist is not easy for [appellant] as he cannot hold the [tele]phone for any length of time or hold his head in one position for any length of time." Dr. Jacob advised that appellant could not lift anything above the shoulder level.

By decision dated November 29, 2017, OWCP determined that appellant did not meet his burden of proof to modify OWCP's May 18, 2015 loss of wage-earning capacity determination. It found that he failed to show that there was a material change in the nature and extent of the injury-related condition, that he had been retrained or otherwise vocationally rehabilitated, or that the original determination was, in fact, erroneous.

⁶ See *supra* note 3.

LEGAL PRECEDENT

Once OWCP accepts a claim it has the burden of proof to justify termination or modification of compensation benefits.⁷ 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.⁸ An employee's actual earnings generally best reflect his or her wage-earning capacity.⁹ Absent evidence that actual earnings do not fairly and reasonably represent the employee's wage-earning capacity, such earnings must be accepted as representative of the individual's wage-earning capacity,¹⁰ but if actual earnings do not fairly and reasonably represent the employee's wage-earning capacity or the employee has no actual earnings, then 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 and circumstances that may affect wage-earning capacity in his disabled condition.¹¹

OWCP must initially determine the employee's medical condition and work restrictions before selecting an appropriate position that reflects his or her vocational wage-earning capacity.¹² The medical evidence OWCP relies upon must provide a detailed description of the employee's condition and the evaluation must be reasonably current.¹³ Where suitability is to be determined based on a position not actually held, the selected position must accommodate the employee's limitations from both injury-related and preexisting conditions, but not limitations attributable to postinjury or subsequently-acquired conditions.¹⁴

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 DOT or otherwise available in the open labor market that fits the employee's capabilities with regard to his or her physical limitations, education, age, and prior experience.¹⁵ 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

⁷ *James B. Christenson*, 47 ECAB 775, 778 (1996); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

⁸ 5 U.S.C. § 8115(a); 20 C.F.R. §§ 10.402, 10.403; *see Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

⁹ *Hayden C. Ross*, 55 ECAB 455, 460 (2004).

¹⁰ *Id.*

¹¹ 5 U.S.C. § 8115(a); *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

¹² *M.A.*, 59 ECAB 624, 631 (2008).

¹³ *Id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.4d (June 2013).

¹⁴ *N.J.*, 59 ECAB 171, 176 (2007); *id.* at Chapter 2.816.4c (June 2013).

¹⁵ *Supra* note 13 at Part 2 -- Claims, *Vocational Rehabilitation Services*, Chapter 2.813.7b (February 2011).

service.¹⁶ Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.¹⁷

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was, in fact, erroneous.¹⁸ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.¹⁹

ANALYSIS

The Board finds that appellant has not met his burden of proof to modify OWCP's May 18, 2015 loss of wage-earning capacity determination.

The Board first finds that appellant has not shown that OWCP's original May 18, 2015 loss of wage-earning capacity determination was, in fact, erroneous.²⁰ On August 1, 2014 rehabilitation counselor properly determined that appellant was capable of earning wages in the selected position of receptionist (DOT # 237.367-038). The rehabilitation counselor indicated that a state labor survey showed that the receptionist position was reasonably available within appellant's commuting area with an average wage of \$360.80 per week.²¹ OWCP properly relied on the rehabilitation counselor's opinion that appellant was vocationally capable of working as a receptionist and that the position was reasonably available.²² Moreover, the evidence of record shows that the physical requirements of the position were within the best measure of appellant's work capability at the time, *i.e.*, the work restrictions recommended on June 17, 2014 by

¹⁶ The job selected for determining wage-earning capacity must be a position that is reasonably available in the general labor market in the commuting area in which the employee resides. *David L. Scott*, 55 ECAB 330, 335 n. 9 (2004); *supra* note 13 at Chapter 2.816.6 (June 2013).

¹⁷ 20 C.F.R. § 10.403(d); *see Albert C. Shadrick*, 5 ECAB 376 (1953).

¹⁸ *C.R.*, Docket No. 14-111 (issued April 4, 2014); *Sharon C. Clement*, 55 ECAB 552 (2004).

¹⁹ *See T.M.*, Docket No. 08-0975 (issued February 6, 2009).

²⁰ *See supra* note 18.

²¹ The receptionist position involved such duties as receiving visitors, operating a telephone console, and some clerical duties such as typing on a computer. The physical requirements of the position, classified as sedentary, included lifting up to 10 pounds on an occasional basis.

²² *See M.P.*, Docket No. 18-0094 (issued June 26, 2018) (finding that the vocational rehabilitation counselor is an expert in the field of vocational rehabilitation and that OWCP may rely on his or her opinion in determining whether the job is vocationally suitable and reasonably available).

Dr. Fisher, OWCP referral physician.²³ OWCP then properly applied the principles set forth in the *Shadrick* decision to calculate the percentage of appellant's loss of wage-earning capacity.²⁴

Moreover, the Board finds that appellant has not shown that there was a material change in the nature and extent of the injury-related condition such that he could no longer work as a receptionist. Appellant submitted several medical reports which he believed showed such a worsening, but the Board finds that these reports do not contain a rationalized medical opinion that a worsening of an injury-related condition prevented him from working as a receptionist.²⁵

In a March 16, 2016 report, Dr. Higey, an attending physician, reported that appellant's cardiac condition, including coronary artery disease, and valvular heart disease, had worsened in severity, and he noted that some unspecified portion of this worsening may have been due to job training. However, he did not provide an opinion that appellant could no longer work as a receptionist and his opinion is of no probative value with respect to whether an injury-related condition prevented appellant from performing such work. The Board has held that medical evidence which does not offer an opinion regarding the cause of a given medical matter is of no probative value on that matter.²⁶ Moreover, Dr. Higey did not provide any medical rationale in support of his suggestion that there was a partial work-related cause for appellant's cardiac condition. The Board has held that a report is of limited probative value regarding causal relationship if it does not contain medical rationale explaining how an employment activity could have caused or aggravated a medical condition.²⁷

In a March 21, 2016 report, Dr. Jacob noted that appellant was unable to look sideways or up and down because his range of motion was limited from prior surgery. He advised that appellant's physical condition prevented him from sitting for more than 15 minutes at a time, looking at a computer screen, holding a telephone for any length of time, or lifting above his waist level. Dr. Jacob further noted that appellant was currently unable to engage in any kind of gainful employment. In a November 17, 2017 report, he indicated that he did not think that appellant could engage in any gainful employment and noted, "Even doing the job of the receptionist is not easy for [appellant] as he cannot hold the [tele]phone for any length of time or hold his head in one position for any length of time." Dr. Jacob advised that appellant could not lift anything above the shoulder level.

Although Dr. Jacob clearly indicated his opinion that appellant could not perform any gainful employment, he did not provide any opinion that this inability to work was due to an injury-related condition. As noted, the Board has held that medical evidence which does not offer an

²³ Dr. Fisher determined that appellant could work for eight hours per day with restrictions of walking/standing no more than two hours per day, avoiding repetitive motion of the neck, lifting no more than 10 pounds frequently, and lifting no more than 20 pounds occasionally. The requirements of the receptionist position also were within the August 8, 2014 work restrictions of Dr. Jacob, an attending physician.

²⁴ See *supra* note 17.

²⁵ See *supra* note 18.

²⁶ See *Charles H. Tomaszewski*, 39 ECAB 461 (1988).

²⁷ See *Y.D.*, Docket No. 16-1896 (issued February 10, 2017).

opinion regarding the cause of a given medical matter is of no probative value on that matter.²⁸ Therefore, Dr. Jacob's reports are of no probative value regarding the question of whether a worsening of appellant's injury-related condition prevented him from working as a receptionist.

The Board further finds that the record does not show that appellant was vocationally rehabilitated after OWCP adjusted his compensation per its May 18, 2015 loss of wage-earning capacity determination.²⁹

For these reasons, appellant has not met his burden of proof to modify OWCP's May 18, 2015 loss of wage-earning capacity determination.

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 appellant has not met his burden of proof to modify OWCP's May 18, 2015 loss of wage-earning capacity determination.

²⁸ See *supra* note 26.

²⁹ See *supra* note 18.

ORDER

IT IS HEREBY ORDERED THAT the November 29, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 6, 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