United States Department of Labor
Employees' Compensation Appeals Board

B.W., Appellant	)	
and	)	**Docket No. 19-0207**
	)	**Issued: August 23, 2019**
U.S. POSTAL SERVICE, POST OFFICE, Laguna Niguel, CA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
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
JANICE B. ASKIN, Judge

JURISDICTION

On November 5, 2018 appellant, through counsel, filed a timely appeal from a September 10, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[3]

[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.*

[3] The Board notes that following the September 10, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether OWCP has met its burden of proof to reduce appellant's wage-loss compensation benefits, effective January 17, 2018, based on her capacity to earn wages in the constructed position of information clerk.

FACTUAL HISTORY

On May 17, 2007 appellant, then a 39-year-old clerk, filed an occupational disease claim (Form CA-2) alleging that on April 17, 2007 she experienced pain in her neck, shoulders, back, knees, ankles, and feet due to factors of her federal employment including standing for long periods. On June 28, 2007 OWCP accepted her claim for bilateral plantar fibromatosis and lateral collateral ligament knee sprain. It initially paid appellant wage-loss compensation benefits on the supplemental rolls. OWCP paid compensation on the periodic rolls as of August 29, 2010.

On July 24, 2014 OWCP referred appellant to Dr. Steven M. Ma, a Board-certified orthopedic surgeon, for a second opinion examination to assess the status of her accepted conditions and to evaluate her work capacity.

In a report dated August 28, 2014, Dr. Ma reviewed the statement of accepted facts (SOAF) and the available medical records. He noted that, following appellant's employment injury of April 17, 2007, she had continued working in a supervisory role with restrictions which included no standing or walking more than four hours per day, no reaching, no heavy lifting, and no kneeling. Dr. Ma indicated that appellant worked as a supervisor for five years until 2012 when she was off work again because there was no light-duty work available for her. He indicated that appellant received wage-loss compensation payments for the 1.5 years she was off work. Dr. Ma related that in September 2013 appellant was rehired to work as a clerk with the same aforementioned restrictions, but she only worked four hours per day, and appellant received compensation payments for the four hours per day that she did not work.[4] He indicated that on the date of the examination she complained of pain and throbbing in both knees and pain and burning on the balls of her feet and heels. Based upon his examination and review of appellant's diagnostic studies, Dr. Ma diagnosed bilateral plantar fibromatosis/plantar fasciitis and mild age-related bilateral knee osteoarthritis. He related that the plantar fasciitis was directly caused by the accepted April 17, 2007 employment injury, but the knee arthritis was not medically connected to the employment injury. Dr. Ma further noted that appellant's mild arthritis was nonindustrial and normal for her age. He indicated that she could perform her usual and customary duties with regard to her knees and feet.

In a work capacity evaluation form of the same date, Dr. Ma marked the box marked "no" when asked whether appellant was capable of performing her usual job, but did not explain. He checked the box marked "yes" when asked whether she was able to work for eight hours per day with restrictions, and noted that such restrictions would apply indefinitely.

On November 11, 2014 appellant underwent left foot plantar fascial release surgery on her left foot.

[4] Dr. Ma noted that appellant was terminated from her employment on August 22, 2014.

In a progress report dated April 23, 2015, Dr. Hosea Brown, III, Board-certified in internal medicine, diagnosed bilateral plantar fibromatosis and bilateral degenerative joint disease of the knees. He noted that appellant could return to modified work on April 23, 2015 with restrictions.

In a progress report dated April 30, 2015, Dr. Domenic Signorelli, a podiatrist specializing in orthopedic surgery, related that appellant did not have complications with a prior plantar fascia procedure, and that she could return to work in adherence with Dr. Brown's assessment.

On May 19, 2015 OWCP referred appellant for vocational rehabilitation services.

On November 9, 2015 OWCP referred appellant to Dr. Joseph Klemek, a Board-certified orthopedic surgeon, for a second opinion examination to determine the status of her work-related condition, along with treatment recommendations and appropriate work restrictions.

In a report dated December 1, 2015, Dr. Klemek indicated that he examined appellant, and reviewed the SOAF and available medical records. He related that she complained of pain on the bottom of both feet, pain at the back of both Achilles and in the ankles, aching in both knees, frequent feeling of instability, and persistent swelling in both knees. Dr. Klemek noted impressions of nonindustrial, bilateral mild patellar subluxation and chondromalacia; nonindustrial mild degeneration of both knees; resolved history of bilateral knee sprain; and release of the long plantar ligament at the left heel without obvious scarring and without acute symptoms regarding bilateral plantar fasciitis. He noted that the first two diagnoses were not medically connected to the April 17, 2007 employment injury, but the third and fourth diagnoses were medically connected by direct cause. Dr. Klemek indicated that appellant reached maximum medical improvement (MMI) again on or about April 2015, and she had no need for ongoing medical treatment. He noted that, as it related to her knees and feet, appellant's physical limitations included no standing and walking in excess of five hours out of an eight-hour workday, and lifting, pushing, and pulling limited to 20 pounds and not for more than four hours per day out of an eight hour day. In a work capacity evaluation of the same date, Dr. Klemek indicated that appellant could resume sedentary work with the aforementioned restrictions.

In a January 14, 2016 report, Dr. Brown related that he strongly disagreed with Dr. Klemek's assertions that appellant's knee conditions were nonwork related. He indicated that the repetitive extending and flexing of her knees clearly increased the biomechanical load to these areas thereby causing significant cumulative trauma, and therefore a permanent aggravation of bilateral degenerative arthritis of her knees. With regard to appellant's plantar fasciitis, Dr. Brown noted that she had reached a point of MMI. He related that she could return to work on January 14, 2016 with restrictions including no lifting over 30 pounds intermittently, no standing in excess of one to five hours per day, no walking in excess of two to five hours per day, no climbing in excess of one hour per day, and no kneeling.

In his February 4, 2016 report, Dr. Signorelli indicated that he agreed with Dr. Klemek's evaluation and assessment.

In a letter dated March 1, 2016, OWCP informed appellant that she was being referred for vocational rehabilitation services based on Dr. Brown's assessment that she was capable of performing modified duties with restrictions.

In a vocational rehabilitation report dated April 4, 2016, D.P., a rehabilitation counselor, reiterated appellant's occupational and medical history. She indicated that she had contacted appellant's former employer, but no job offer had been received.

OWCP received subsequent vocational rehabilitation reports dated May 5, June 10, and July 5, 2016. In her July 5, 2016 report, D.P. developed vocational goals of receptionist or information clerk.

In a letter dated July 25, 2016, OWCP informed appellant that it reviewed the rehabilitation counselor's plan for her to return to work as an information clerk or receptionist, and that the job duties were within her limitations.

In a letter dated November 27, 2017, OWCP proposed to reduce appellant's wage-loss compensation because the medical and factual evidence of record established that she was no longer totally disabled, but rather was partially disabled and that she had the capacity to earn wages as an information clerk, DOT #237.367-022, at the rate of $520.00 per week. It found that the position of information clerk was medically and vocationally suitable, and existed in sufficient numbers in the commuting area. As appellant's wage-earning capacity was less than the current pay of the job she held when injured, 48 percent, OWCP proposed to reduce her wage-loss compensation to $1,743.00 every four weeks. Appellant was afforded 30 days in which to submit contrary evidence.

In a letter dated December 22, 2017, counsel argued against the proposed reduction of compensation. In support thereof, he submitted a report dated November 30, 2017, and two duty status reports (Form CA-17) dated November 2 and 30, 2017 from Dr. Brown. In the November 30, 2017 report, Dr. Brown noted that appellant complained of neck discomfort. He indicated that she could return to modified work on November 2, 2017. In the CA-17 of the same date, Dr. Brown related that appellant could resume modified duties with restrictions on November 30, 2017. In the November 2, 2017 Form CA-17, he indicated that she could resume modified work with restrictions on November 2, 2017.

By decision dated January 24, 2018, OWCP reduced appellant's wage-loss compensation, effective January 17, 2018, based on her capacity to earn wages as an information clerk earning $520.00 per week, as the position was found to be medically and vocationally suitable.

On February 12, 2018 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative. During the hearing, held on July 6, 2018, counsel argued that appellant did not have the physical capacity to maintain any kind of sustained work, regardless of the findings of the vocational rehabilitation counselor.

By decision dated September 10, 2018, OWCP's hearing representative affirmed the January 24, 2018 decision finding that the position of information clerk was physically and vocationally suitable for appellant, and reasonably represented her wage-earning capacity.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[5] 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).[6]

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, and other factors and circumstances which may affect her wage-earning capacity in his or her disabled condition.[7]

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.[8] 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.[9]

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, *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 labor market should be made through contact with the state employment service or other applicable service.[10] Finally, application of the principles set forth in *Albert C. Shadrick*[11] and codified by regulations at 20 C.F.R. § 10.403[12]

[5] *M.K.*, Docket No. 17-0208 (issued April 17, 2018); *H.N.*, Docket No. 09-1628 (issued August 19, 2010); *T.F.*, 58 ECAB 128 (2006); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

[6] 20 C.F.R. §§ 10.402 and 10.403; *J.H.*, Docket No. 18-1319 (issued June 26, 2019).

[7] 5 U.S.C. § 8115(a); *M.K.*, *supra* note 5; *see N.J.*, 59 ECAB 171 (2007); *T.O.*, 58 ECAB 377 (2007); *Dorothy Lams*, 47 ECAB 584 (1996).

[8] *M.K.*, *supra* note 5; *James Henderson, Jr.*, 51 ECAB 268 (2000).

[9] *G.E.*, Docket No. 18-0663 (issued December 21, 2018); *James Henderson, Jr.*, 51 ECAB 268 (2000).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.6.a (June 2013).

[11] 5 ECAB 376 (1953).

[12] 20 C.F.R. § 10.403.

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]

ANALYSIS

The Board finds that OWCP has met its burden of proof to reduce appellant's wage-loss compensation benefits, effective January 17, 2018, based on her capacity to earn wages in the constructed position of information clerk.

OWCP accepted appellant's claim for bilateral plantar fibromatosis and lateral collateral ligament knee sprain. Appellant was initially paid compensation on the supplemental rolls, was later paid compensation on the periodic rolls, and was eventually referred for vocational rehabilitation services. OWCP based its January 24, 2018 LWEC determination on her capacity to earn wages as an information clerk.

OWCP must initially determine a claimant's medical condition and work restrictions before selecting an appropriate position that reflects her wage-earning capacity.[14] In his medical report dated January 14, 2016, Dr. Brown supported appellant's return to modified employment with restrictions including no lifting over 30 pounds intermittently, no standing in excess of one to five hours per day, no walking in excess of two to five hours per day, no climbing in excess of one hour per day, and no kneeling. In various reports in 2016, the vocational rehabilitation counselor selected the position of information clerk as possessing the specific vocational and medical requirements for appellant to resume work. The position selected was sedentary in nature requiring no lifting in excess of 10 pounds. It required no climbing, balancing, stooping, kneeling, crouching, crawling, fingering, feeling, tasting/smelling, far acuity, depth perception, accommodation, color or field vision, and only required occasional reaching and handling and frequent talking, hearing, and near acuity. Appellant, thus, has the physical capacity to perform the duties of the selected position of information clerk.[15]

The vocational rehabilitation specialist also found that the position of information clerk was reasonably available in appellant's local labor market with an entry level weekly wage of $520.00.[16]

The Board finds that OWCP considered the appropriate factors in determining that the information clerk position represented appellant's wage-earning capacity.[17] These factors included availability of suitable employment and her physical limitations, usual employment, age, and employment qualifications.[18] The evidence established that appellant had the requisite

[13] *Id.* at § 10.403(d).

[14] *M.K., supra* note 5; *William H. Woods,* 51 ECAB 619 (2000).

[15] *Id.*

[16] *See J.E.*, Docket No. 16-0006 (issued November 16, 2016).

[17] *M.K., supra* note 5; *John D. Jackson,* 55 ECAB 465 (2004).

[18] *Id.*

physical ability, skill, and experience to perform the position and that such a position was reasonably available within the general labor market of her commuting area. Counsel argued that she was not capable of performing the selected position due to the additional conditions of neck pain and residuals from bilateral plantar fibromatosis. As noted, 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.[19] The record presently before the Board does not substantiate a preexisting or causally related diagnosed neck condition. With regard to appellant's residuals from the accepted condition of bilateral plantar fibromatosis, there is no evidence that this condition limited appellant's ability to perform the duties of the selected position. Therefore, OWCP properly determined that the position of information clerk reflected her wage-earning capacity.[20]

OWCP also properly reduced her compensation pursuant to the principles set forth under *Shadrick* to $1,743.00 every four weeks, effective January 17, 2018, because the pay rate of the selected position was less than her date-of-injury salary. The wages in the selected position were reported as $13.00 per hour ($520.00 per week). OWCP applied the *Shadrick* formula to determine the LWEC. The earnings of $520.00 per week were divided by the current rate of pay for appellant's date-of-injury job, to determine the wage-earning capacity of 48 percent.[21] The pay rate for compensation purposes was then multiplied by the wage-earning capacity percentage.[22] This amount was subtracted from the pay rate for compensation purposes to determine the LWEC.[23] OWCP found that appellant's LWEC was $435.75 per week or $1,743.00 every four weeks. The record does not contain an error with respect to these calculations.[24]

The Board thus finds that OWCP met its burden of proof to reduce appellant's wage-loss compensation benefits, effective January 17, 2018.

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

CONCLUSION

The Board finds that OWCP has met its burden of proof to reduce appellant's wage-loss compensation benefits, effective January 17, 2018, based on her capacity to earn wages in the constructed position of information clerk.

[19] *Supra* note 10.

[20] *M.K., supra* note 5; *James Smith,* 53 ECAB 188 (2001).

[21] 20 C.F.R. § 10.403(d).

[22] *Id.* at § 10.403(e).

[23] *Id.*

[24] *See T.D.,* Docket No. 16-0028 (issued November 28, 2016).

ORDER

IT IS HEREBY ORDERED THAT the September 10, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 23, 2019
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board