United States Department of Labor
Employees' Compensation Appeals Board

M.K., Appellant	)	
and	)	**Docket No. 18-0907**
	)	**Issued: February 7, 2019**
U.S. POSTAL SERVICE, SOUTH PARK STATION, Alexandria, LA, Employer	)	

Appearances:
Daniel E. Broussard, Jr., 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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 26, 2018 appellant, through counsel, filed a timely appeal from a September 25, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP).[2] Pursuant to the

[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] Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from OWCP's September 25, 2017 decision was Saturday, March 24, 2018. Because the last day of the 180-day filing period fell on a Saturday, the filing period is extended until the close of the next business day, which was Monday, March 26, 2018. Accordingly, the appeal is timely filed pursuant to 20 C.F.R. § 501.3(f)(2).

Federal Employees' Compensation Act[3] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[4]

ISSUE

The issue is whether OWCP properly reduced appellant's wage-loss compensation effective November 13, 2016 under 20 C.F.R. § 10.500(a) based on his earnings had he accepted a temporary, limited-duty assignment.

FACTUAL HISTORY

This case has previously been before the Board.[5] The facts and circumstances of the case as set forth in the prior Board decision are incorporated herein by reference. The relevant facts are as follows.

On May 13, 1996 appellant, then a 38-year-old rural carrier associate (RCA), filed a traumatic injury claim (Form CA-1) alleging that on that day he sustained whiplash, a broken right shoulder, and lacerations on his head and chin as a result of a motor vehicle accident while in the performance of duty. He stopped work on May 14, 1996.

OWCP accepted the claim for right scapula pain, right knee contusion, rib fracture, right rotator cuff tendinitis, post-traumatic headaches, chest wall contusion, and back sprain

Appellant returned to work in a modified position on October 7, 1997. On November 19, 1997 he filed a claim for compensation (Form CA-7) for wage loss commencing November 5, 1997. After an initial denial of wage-loss benefits, appellant continued to pursue his appeal rights. By decision dated May 18, 2001, OWCP accepted his claim for recurrence of disability compensation effective November 5, 1997 and paid wage-loss compensation on the daily rolls and thereafter on the periodic rolls as of February 24, 2002.

A work capacity evaluation (Form OWCP-5c) dated February 16, 2015 from Dr. Stephen P. Katz, an attending pain medicine specialist advised that appellant could return to full-time sedentary light-duty work with restrictions that included pushing, pulling, and lifting up to 25 pounds for 8 hours, and squatting, kneeling, and climbing up to 30 minutes.

In a June 10, 2015 report, Dr. Erich W. Wolf, II, an attending Board-certified neurosurgeon, diagnosed cervical spondylosis with myelopathy, intervertebral cervical disc disorders with myelopathy, and degeneration of the cervical intervertebral disc. He recommended

[3] 5 U.S.C. § 8101 *et seq.*

[4] The Board notes that appellant submitted additional evidence on appeal. 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.*

[5] Docket No. 00-1772 (issued November 27, 2000).

a computerized tomography (CT) cervical myelogram to better assess osteophytes and nerve root impingement prior to pursuing surgical intervention.

On September 15, 2015 OWCP referred appellant, along with a statement of accepted facts (SOAF), the medical record, and a set of questions, to Dr. Douglas C. Brown, a Board-certified orthopedic surgeon, for a second opinion as to whether he had any continuing employment-related disability.

In an October 26, 2015 report, Dr. Brown reviewed the SOAF and medical record. He noted a history of the May 13, 1996 employment injury and appellant's medical background. Dr. Brown reported appellant's physical examination findings and reviewed diagnostic test results. He provided an impression of C4-5, C5-6 mild degenerative spondylosis and degenerative disc disease, healed right knee sprain, healed lumbar strain, healed right clavicle and scapular fractures by history, and chronic headaches, muscular in nature and possibly psychological.

Dr. Brown advised that appellant could not perform the duties of his rural mail carrier position which he described as heavy-duty work. He noted, however, that although appellant was addicted to Hydrocodone, Soma, and Xanax, he was capable of performing sedentary medium work full time with permanent restrictions that included reaching above the shoulder and twisting up to 4 hours, 1/2 hour of operating a motor vehicle at work, and 1 hour of operating a motor vehicle to and from work due to his Percocet addiction, and pushing, pulling, and lifting up to 35 pounds for 4 hours. Dr. Brown recommended that he undergo a functional capacity evaluation (FCE) and then return to work within identified physical restrictions. On January 12 and 13, 2016 appellant underwent an FCE with Samuel Forester, a physical therapist. By addendum report dated January 27, 2016, Dr. Brown reviewed the January 19, 2016 FCE vocational report and found that it demonstrated appellant's ability to function at a sedentary work level with lifting, carrying, and pushing 10 pounds up to 1/3 of the day. He noted that appellant was balancing well up to 1/3 of the day and was unable to crouch and work at a low level or above the shoulder. Dr. Brown released appellant to return to sedentary light work with the above-noted limitations.

On May 18, 2016 the employing establishment offered appellant a modified temporary position for three hours per day, six days per week, effective June 11, 2016. The job title was an RCA, grade 5, step Z with an hourly salary of $21.40. The job duties consisted of logging in blue box and nil bills/regulations highway contract route drivers, hanging express sacks (waist level work putting empty sacks on a rack), and office duties (sedentary desk work *i.e.*, computer input, reconciling invoices, *etc.*). Physical requirements were intermittent sitting, standing, and walking for three hours, intermittent lifting and pushing no more than 10 pounds for two hours, and intermittent simple grasping and reaching for three hours.

The employing establishment, in a May 19, 2016 e-mail, advised that it was unable to provide appellant with a permanent job offer and that the availability of hours were limited due to the severity of his restrictions.

In correspondence dated May 25, 2016, appellant rejected the employing establishment's offer of a temporary modified-duty assignment as an RCA.

On June 2, 2016 the employing establishment informed OWCP that appellant was a permanent employee. Appellant had worked an average of 32.87 hours per week and had actual earnings of $17,615.84 per year. On November 5, 1997 the date his recurrence of disability began, he had worked 37.68 hours per week and earned $29,118.94 per year.

By letter dated June 2, 2016, OWCP informed the employing establishment that the offered temporary position was not suitable. It explained that appellant was released to return to work 8 hours per day, 40 hours per week, but the offered position was not for at least half of the total hours he was released to work. OWCP further explained that he could not be offered a temporary position under section 8106(c) of FECA as the evidence of record did not establish that he was a temporary employee on the date of injury.

In an amended job offer dated June 2, 2016, the employing establishment noted the revised work hours as four and one-half hours per day, six days per week. The job duties and physical requirements were exactly the same.

On June 16, 2016 appellant again rejected the employing establishment's offer of a temporary modified-duty position.

On June 21, 2016 the employing establishment confirmed to OWCP that the offered position remained available.

By letter dated September 23, 2016, OWCP informed appellant of its proposed reduction of his wage-loss compensation as he had refused to accept a temporary limited-duty assignment which accommodated his work-related limitations as determined by Dr. Brown and would have paid him $449.40 a week for working 21 hours. It advised him of the provisions of 20 C.F.R. § 10.500(a) and explained to him that his entitlement to wage-loss compensation would be reduced under this provision if he did not accept the offered temporary assignment or provide a written explanation with justification for his refusal within 30 days.

In an October 18, 2016 letter, appellant related that he was not accepting the offered assignment due to his medical conditions. He resubmitted Dr. Wolf's June 10, 2015 report and an April 10, 2001 report from Dr. Robert R. Po, a Board-certified orthopedic surgeon and OWCP second opinion physician.[6]

By decision dated November 3, 2016, postmarked November 9, 2016, OWCP reduced appellant's wage-loss compensation, effective November 13, 2016, as he had not accepted the temporary limited-duty position offered on June 2, 2016 by the employing establishment. Using the formula set forth in *Albert C. Shadrick*[7] it noted that his salary on the date when he was injured, May 13, 1996, was $546.71 per week and the current pay rate for his job and step when injured was $787.33, effective August 30, 2016. OWCP found appellant capable of earning $449.40 per week, the pay rate of a modified RCA. It determined that he had 57 percent wage-earning

[6] Dr. Po reported on April 10, 2001 that appellant was totally disabled for work due to the effects of the May 13, 1996 employment injury.

[7] 5 ECAB 376 (1953) (codified by regulation at 20 C.F.R. § 10.403).

capacity which resulted in an adjusted wage-earning capacity of $235.09 per week. This yielded a new compensation rate equal to $934.00 each four weeks.

In a November 18, 2016 appeal request form, postmarked December 7, 2016, appellant, through counsel, requested an oral hearing before an OWCP hearing representative regarding the November 3, 2016 OWCP decision, postmarked on November 9, 2016.[8]

During the July 13, 2017 telephonic hearing, appellant contended that residuals from his work-related conditions, as well as the medication he took for them, prevented him from accepting the temporary limited-duty RCA position offered to him by the employing establishment.

Following the July 13, 2017 telephonic hearing, appellant submitted further medical evidence. A series of medical records from Dr. Michael W. Dole, a Board-certified physiatrist, included a transcript of his deposition taken on May 12, 2017. He noted a history of the May 13, 1996 employment injury and appellant's medical treatment. Dr. Dole examined appellant and diagnosed cervical radiculopathy, chronic low back pain syndrome, depression, and anxiety. He advised that appellant's conditions were due to the accepted work injuries and loss of function. Dr. Dole maintained that appellant showed no signs of malingering and that his subjective complaints were supported by objective test results. He opined that appellant was unable to return to his job at the employing establishment or perform any other job because he had residuals of his accepted employment-related injuries.

In a report and letter dated June 27, 2017, Dr. James W. Quillin, a psychologist, related appellant's history and discussed findings on physical and mental examination. He provided an impression of persisting depressive disorder, chronic pain syndrome, cannabis use, aberrant urine drug testing secondary to cannabis use, somatization with anxiety, obsessive compulsive traits, and interpersonally distressed pain adjustment classification.

By decision dated September 25, 2017, an OWCP hearing representative affirmed OWCP's November 3, 2016 decision. She found that the medical evidence submitted by appellant was insufficient to outweigh Dr. Brown's opinion.

LEGAL PRECEDENT

OWCP's regulations at section 10.500(a) provide in relevant part:

> "(a) Benefits are available only while the effects of a work-related condition continue. Compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents [him or her] from earning the wages earned before the work-related injury. For example, an employee is not entitled to compensation for any wage loss claimed on a [Form] CA-7 to the extent that evidence contemporaneous with the period claimed on a

[8] By decision dated December 20, 2016, OWCP's Branch of Hearings and Review initially determined that appellant's request for an oral hearing was untimely filed. On January 31, 2017 the Chief Judge of the Branch of Hearings and Review found that the December 7, 2016 request was timely filed as the November 3, 2016 decision was not mailed until November 9, 2016.

> [Form] CA-7 establishes that an employee had medical work restrictions in place; that light duty within those work restrictions was available; and that the employee was previously notified in writing that such duty was available. Similarly, an employee receiving continuing periodic payments for disability was not prevented from earning the wages earned before the work-related injury if the evidence establishes that the employing [establishment] had offered, in accordance with OWCP procedures, a temporary light-duty assignment within the employee's work restrictions."[9]

When it is determined that an appellant is no longer totally disabled from work and is on the periodic rolls, OWCP procedures provide that the claims examiner should evaluate whether the evidence establishes that light-duty work was available within his or her restrictions. The claims examiner should provide a pretermination or prereduction notice if appellant is being removed from the periodic rolls.[10] When the light-duty assignment either ends or is no longer available, the claimant should be returned to the periodic rolls if medical evidence supports continued disability.[11]

OWCP procedures further advise, "If there would have been wage loss if the claimant had accepted the light-duty assignment, the claimant remains entitled to compensation benefits based on the temporary actual earnings WEC [wage-earning capacity] calculation (just as if he/she had accepted the light-duty assignment)."[12]

A part-time light-duty assignment may be appropriate if it is for at least half of the total hours that the claimant was released for work, is not less than two hours per day, and there is written verification from the employing establishment verifying that it is not able to provide work for the total hours that the claimant was released for work.[13]

ANALYSIS

The Board finds that OWCP properly reduced appellant's wage-loss compensation effective November 3, 2016 pursuant to section 10.500(a), for refusing a temporary limited-duty position.

On May 18, 2016 the employing establishment offered appellant a temporary limited-duty assignment as an RCA for three hours per day, six days per week. The written job offer noted duties including logging in blue box and nil bills/regulations highway contract route drivers, hanging express sacks (waist level work putting empty sacks on a rack), and office duties

[9] 20 C.F.R. § 10.500(a).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.9(c)(1) (June 2013).

[11] *Id.*

[12] *Id.* at Chapter 2.814.8(c)(10).

[13] *Id.* at Chapter 2.814.9(d).

(sedentary desk work *i.e.*, computer input, reconciling invoices, *etc.*). The assignment required intermittent sitting, standing, and walking for three hours, intermittent lifting and pushing no more than 10 pounds for two hours, and intermittent simple grasping and reaching for three hours.

After OWCP found that the offered position was not suitable due to the hours of work offered, the employing establishment amended the prior job offer on June 2, 2016 to reflect the requirement that appellant work four and one-half hours per day, six days per week. The job duties and physical requirements remained exactly the same.

The determination of whether an employee has the physical ability to perform a position offered by the employing establishment is primarily a medical question that must be resolved by the medical evidence.[14]

The Board finds that the medical evidence of record shows that appellant could perform the temporary limited-duty assignment offered by the employing establishment in June 2016. The physical requirements of the offered temporary limited-duty assignment were within the medical restrictions as provided by Dr. Brown in his October 26, 2015 and January 27, 2016 reports.[15] The Board finds that the medical restrictions provided by Dr. Brown in these reports reflected appellant's ability to work at the time that the employing establishment offered him the temporary limited-duty assignment. Dr. Brown's report, which is detailed and well rationalized, is entitled to the weight of the evidence and establishes that appellant has the ability to perform the offered limited-duty employment.[16]

The Board further finds that OWCP complied with its procedural requirements by advising appellant on September 23, 2016 of the offered assignment in writing and by providing him a pretermination notice, with opportunity to respond, since he was receiving wage-loss benefits on the periodic rolls. The Board notes that no procedural requirements beyond those set forth in 20 C.F.R. § 10.500(a) need be afforded to appellant prior to reduction of his benefits.[17] OWCP properly applied the provisions of *Shadrick* in determining his loss of wage-earning capacity. The offered position was for four and one-half hours per day and the employing establishment verified

[14] *See J.J.*, Docket No. 17-0885 (issued June 16, 2017); *G.C.*, Docket No. 17-0140 (issued April 13, 2017); *N.D.*, Docket No. 15-0027 (issued February 4, 2016); *T.T.*, 58 ECAB 296 (2007).

[15] Dr. Brown noted in his October 26, 2015 report that appellant could perform sedentary medium work for eight hours per day with permanent restrictions. He could reach above the shoulder and twist up to 4 hours, operate a motor vehicle at work for 1/2 hour, operate a motor vehicle to and from work for 1 hour, and push, pull, and lift up to 35 pounds for 4 hours. After the FCE was performed on January 19, 2016, Dr. Brown reviewed the findings in an addendum report of January 27, 2016. He noted that appellant could perform sedentary light work. Appellant could lift, carry, and push 10 pounds up to 1/3 of the day and balance well up to 1/3 of the day. He was unable to crouch and work at low level or above the shoulder.

[16] *See supra* note14.

[17] *G.C.*, *supra* note14.

that it was unable to provide a job offer for more hours per day due to the severity of appellant's work restrictions.[18]

The remaining evidence of record is insufficient to contradict that appellant had the capacity to perform the offered limited-duty position. In a May 12, 2017 deposition, Dr. Dole, an attending physician, diagnosed cervical radiculopathy, chronic low back pain syndrome, depression, and anxiety due to the accepted work injuries and appellant's loss of function. He opined that appellant was unable to return to his position at the employing establishment or perform any other position because he had residuals of his accepted employment injuries. However, this report is of limited probative value regarding appellant's ability to work because Dr. Dole did not explain how appellant's conditions and residuals prevented his return to work in the offered limited-duty position. The Board has held that a medical opinion not fortified by medical rationale is of diminished probative value.[19]

On June 10, 2015 Dr. Wolf diagnosed cervical spondylosis with myelopathy, intervertebral cervical disc disorders with myelopathy, and degeneration of the cervical intervertebral disc, and recommended that appellant undergo a cervical CT myelogram to better asses his cervical condition. However, he did not address the relevant issue of whether appellant could perform the offered limited-duty employment for four and one-half hours, six days per week, and thus his opinion is of limited probative value.[20]

Likewise, Dr. Quillin's June 27, 2017 reports are of limited probative value. He provided an impression of persisting depressive disorder, chronic pain syndrome, cannabis use, aberrant urine drug testing secondary to cannabis use, somatization with anxiety, obsessive compulsive traits, and interpersonally distressed pain adjustment classification, but failed to address appellant's ability to perform the duties of the offered limited-duty position.[21]

The evidence of record reflects that appellant declined the temporary limited-duty assignment offered by the employing establishment, which was suitable and would have provided earnings of $449.40 per week. Therefore, OWCP properly reduced his wage-loss compensation, effective November 13, 2016, pursuant to 20 C.F.R. § 10.500(a) based on his earnings had he accepted the temporary limited-duty assignment.

On appeal, counsel contends that Dr. Brown's opinion cannot constitute the weight of the medical opinion evidence as OWCP engaged in "[physician] shopping." He notes that Dr. Brown was the fifth second opinion physician to examine appellant. The Board notes, however, that there is no indication of record that any of OWCP's medical referrals were improper and that OWCP

[18] *Id.*

[19] *R.P.*, Docket No. 14-1264 (issued March 9, 2015); *F.T.*, Docket No. 09-0919 (issued December 7, 2009); *Elizabeth H. Kramm*, 57 ECAB 117, 124 (2005); *Franklin D. Haislah*, 52 ECAB 457 (2001); *Jimmie H. Duckett*, 52 ECAB 332 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

[20] *G.C.*, *supra* note 14.

[21] *Id.*

has the discretion to have a claimant submit to an examination by a physician designated by OWCP as frequently and at the times and places as may be reasonably required.[22]

Counsel further contends on appeal that OWCP erred in discounting Dr. Dole's deposition testimony regarding appellant's disability and the medical evidence of record which established that appellant's medication limited his ability to drive. As discussed above, however, Dr. Dole failed to provide medical rationale in support of his opinion that residuals of the accepted May 13, 1996 employment injuries prevented appellant from performing the duties of the offered limited-duty position.

Lastly, counsel asserts that OWCP improperly calculated appellant's loss of wage-earning capacity as his annual salary was $37,776.59 in 1995 and $32,632.77 for four months in 1996, and not $28,429.10 as used by OWCP.

The Board notes that section 8101(4) of FECA defines monthly pay for purposes of computing compensation benefits as follows: "[T]he monthly pay at the time of injury, or the monthly pay at the time disability begins, or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater...."[23] The record documents that, on the date of injury and the date disability began, May 13, 1996, he earned $28,429.10 per year or $546.71 per week based on his base pay as a GS-5, Step Z. While appellant sustained an accepted recurrence of disability on November 5, 1997, after returning to modified work on October 7, 1997, the recurrence did not occur more than six months after he resumed regular full-time employment. The Board finds that OWCP properly based its calculations on the $546.71 per week pay rate and correctly applied the *Shadrick* formula to calculate appellant's loss of wage-earning capacity.[24]

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP properly reduced appellant's wage-loss compensation effective November 13, 2016 under 20 C.F.R. § 10.500(a) based on his earnings had he accepted a temporary limited-duty assignment.

[22] *A.C.*, Docket No. 12-1114 (issued March 25, 2013); *William B. Webb*, 56 ECAB 156 (2004).

[23] 5 U.S.C. § 8101(4).

[24] *See N.C.*, Docket No. 18-0172 (issued August 7, 2018).

ORDER

IT IS HEREBY ORDERED THAT the September 25, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 7, 2019
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board