United States Department of Labor
Employees' Compensation Appeals Board

J.F., Appellant	)	
and	)	**Docket No. 18-0923**
	)	**Issued: July 5, 2019**
U.S. POSTAL SERVICE, POST OFFICE, Lawrence, MA, Employer	)	

Appearances:
Appellant, pro se
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 2, 2018 appellant filed a timely appeal from a March 7, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the March 7, 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, effective April 1, 2018, pursuant to 20 C.F.R. § 10.500(a), based on her earnings had she accepted a temporary, limited-duty assignment.

FACTUAL HISTORY

On May 23, 2011 appellant, then a 39-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on October 16, 2010 she injured her lower back and both legs when she bent down and twisted to lift a tray of mail off of a rack while in the performance of duty. She stopped work on October 16, 2010. OWCP accepted appellant's October 16, 2010 traumatic injury claim for aggravation of herniated disc at L5-S1.[3] Appellant received continuation of pay from October 17 through November 30, 2010, and OWCP paid her wage-loss compensation on the supplemental rolls beginning December 1, 2010. It placed her on the periodic compensation rolls, effective August 28, 2011. For several years appellant continued to receive treatment for her lumbar condition and OWCP continued to pay her wage-loss compensation for temporary total disability on the periodic rolls.

In a September 15, 2017 report, Dr. Anthony G. Eaton, an internist, diagnosed lumbar disc herniation with chronic back pain.[4] He noted that appellant's diagnostic studies, including an electromyography and lumbar magnetic resonance imaging scan, revealed lumbar disc herniation (L4-5) and chronic radiculopathy (L5). Dr. Eaton indicated that her condition had not resolved and that she was not a candidate for surgery. He advised that appellant was able to return to work with restrictions, which included no lifting in excess of five pounds and the ability to change position (sitting, standing, and lying down) at will. Dr. Eaton indicated that her current restrictions were "a direct result of her work-related injury." He also advised that appellant continued to receive monthly pain management therapy, which included medication.

On December 5, 2017 the employing establishment offered appellant a modified position as a rural carrier associate, effective December 6, 2017. Appellant's duties included Express Mail pick-up and delivery for three and a half hours per day, Tuesday through Sunday. Her hours were 9:00 a.m. to 12:30 p.m., and her salary was $46,361.00. The modified position included driving 30 minutes to North Reading, MA, retrieving Express Mail for 10 minutes, and then 30 minutes driving back to the delivery area, followed by 2 hours, 20 minutes of delivering Express Mail. The physical requirements were driving for up to three and a half hours intermittently, walking one and a half hours intermittently, standing one hour intermittently, and lifting up to five pounds for one

[3] OWCP assigned the present claim File No. xxxxxx244. Appellant had previously filed a claim for May 23, 2009 work-related injury to her lower back. OWCP assigned that claim File No. xxxxxx108 and accepted it for L5-S1 lumbar disc displacement. Appellant subsequently filed a notice of recurrence (Form CA-2a) under that claim, which OWCP denied. OWCP has administratively combined File Nos. xxxxxx244 and xxxxxx108, with File No. xxxxxx108 serving as the master file.

[4] Dr. Eaton's treatment of appellant dated back to September 6, 2012, at which time he advised that she was totally disabled from work for the foreseeable future.

and a half hours intermittently. The position was based upon Dr. Eaton's September 15, 2017 restrictions of no lifting greater than five pounds and the ability to change positions at will.

Appellant declined the modified job offer and provided a December 8, 2017 note from Dr. Eaton. Dr. Eaton reported that he had seen her earlier that day and noted that she received a limited-duty offer from the employing establishment. He indicated that appellant "[stated] that she is unable to perform duties involving lifting as well as driving."

By letter dated December 8, 2017, the employing establishment requested that OWCP determine whether the limited-duty job offer was in compliance with Dr. Eaton's September 15, 2017 work restrictions. It also noted that the offer would remain available indefinitely.

On January 16, 2018 the employing establishment provided OWCP with pay rate information. It indicated that the current pay rate, as of December 6, 2017, for appellant's date-of-injury job was $21.81 an hour and noted that appellant had averaged 29 hours per week at the date-of-injury pay rate of $632.49 weekly.[5]

In a notice dated January 30, 2018, OWCP proposed to reduce appellant's compensation based on her refusal of the December 5, 2017 temporary light-duty assignment. It advised her that it had reviewed the work restrictions provided by Dr. Eaton and determined that the position offered her was within her restrictions.[6] OWCP informed appellant of the provisions of 20 C.F.R. § 10.500(a) and advised her that a claimant who declined a temporary light-duty assignment, deemed appropriate by OWCP, was not entitled to compensation for total wage loss. It calculated that her compensation should be adjusted to $498.00 every four weeks using the *Shadrick* formula. OWCP afforded appellant 30 days to accept the modified job offer and report to duty or provide a written explanation of her reasons for not accepting the offer of employment.

In a February 13, 2018 note, Dr. Simon Faynzilberg, Board-certified in pain medicine, indicated that he had been treating appellant for chronic low back pain since 2014, which initially began as a result of a work-related injury as a mail carrier. He related that appellant reported limitations in her functional capacity, which included difficulty walking, siting, standing, and difficulty lifting objects. Dr. Faynzilberg noted that appellant believed she was unable to lift more than a few pounds on a consistent basis. He explained that although there were no motor deficits identified on physical examination, it was difficult to determine appellant's capacity to perform the duties required, even on a modified/limited assignment. Therefore, Dr. Faynzilberg recommended a functional capacity evaluation to determine if appellant could fulfill the tasks outlined in the limited-duty assignment.

In a February 16, 2018 examination note, Dr. Faynzilberg reported no recent changes in appellant's clinical presentation. He related that she still experienced significant discomfort in her back radiating to her lower extremities. Dr. Faynzilberg reviewed appellant's history and provided

[5] The employing establishment also noted that the correct annual salary was $45,361.00, not $46,361.00 as noted on the December 5, 2017 job offer.

[6] OWCP also noted that Dr. Eaton's December 8, 2017 medical note was not well rationalized and failed to establish that appellant was unable to perform the duties of the December 5, 2017 modified job offer.

examination findings. He explained that regarding her disability, appellant had significant limitations with lifting and ambulation. Dr. Faynzilberg indicated that he was not sufficiently equipped to determine her level of disability and again recommended a functional capacity evaluation.

OWCP received an e-mail dated March 7, 2018 from the employing establishment confirming that the December 5, 2017 modified job offer remained available.

By decision dated March 7, 2018, OWCP reduced appellant's compensation, effective April 1, 2018, because she failed to accept the December 5, 2017 temporary light-duty assignment in accordance with 20 C.F.R. § 10.500(a). It noted that she had not accepted the modified job offer, which was within the restrictions provided by Dr. Eaton in his September 15, 2017 report. OWCP further determined that appellant had not submitted sufficient medical evidence to support her refusal of the temporary limited-duty job offer. It provided a final computation memorandum, which demonstrated that her compensation should be adjusted to $509.00 every four weeks using the *Shadrick* formula. OWCP noted that the base weekly pay rate for appellant's date-of-injury position was $541.94 (based on a 29-hour workweek). It then indicated that her current pay rate for her date-of-injury position, effective December 5, 2017, was $632.49 (based on a 29-hour workweek). OWCP indicated that appellant was currently capable of earning $458.01 a week (based on a 21-hour workweek) as a part-time rural carrier associate. It then determined that she had 72 percent loss of wage-earning capacity, resulting in a new net compensation rate of $509.00 every four weeks.

LEGAL PRECEDENT

OWCP regulations at 20 C.F.R. § 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 [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."[7]

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

[7] 20 C.F.R. § 10.500(a).

claims examiner should provide a pretermination or prereduction notice if appellant is being removed from the periodic rolls.[8] When the light-duty assignment either ends or is no longer available, the claimant shall be returned to the periodic rolls if the medical evidence supports continued disability.[9]

OWCP's 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)."[10]

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.[11]

ANALYSIS

The Board finds that OWCP properly reduced appellant's wage-loss compensation, effective April 1, 2018, pursuant to 20 C.F.R. § 10.500(a) because she declined a temporary light-duty assignment that was within her identified work restrictions.

On December 5, 2017 the employing establishment offered appellant a limited-duty assignment as a part-time rural carrier associate, working 21 hours a week. Appellant's duties included Express Mail pick-up and delivery for 3½ hours per day, Tuesday through Sunday. The modified position included driving 30 minutes to North Reading, MA, retrieving Express Mail for 10 minutes, then 30 minutes driving back to the delivery area, followed by 2 hours, 20 minutes delivering Express Mail. The physical requirements were driving for three and a half hours intermittently, walking one and a half hours intermittently, standing one hour intermittently, and lifting up to 5 pounds one and a half hours intermittently.

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.[12]

The Board finds that the medical evidence of record establishes that the physical requirements of the offered assignment were within the medical restrictions as provided by

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

[9] *Id.* at Chapter 2.814.9c(1)(d).

[10] *Id.* at Chapter 2.814.9c(8).

[11] *Id.* at Chapter 2.814.9c(2)(d).

[12] *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).

Dr. Eaton in his September 15, 2017 report.[13] The offered part-time assignment for 21 hours per week was also appropriate because, at the time of the October 16, 2010 employment injury, appellant was working an average of 29 hours per week.[14] The Board notes that Dr. Eaton did not indicate in his September 15, 2017 report whether appellant was restricted to a certain number of hours of work per day.

The Board further finds that OWCP complied with its procedural requirements. The employing establishment provided appellant a written job offer on December 5, 2017. In its January 30, 2018 prereduction notice, OWCP provided her another copy of the December 5, 2017 job offer, along with the relevant medical evidence from Dr. Eaton. It also provided appellant an opportunity to respond to its prereduction notice because she was receiving wage-loss compensation on the periodic rolls. OWCP properly applied the provisions of *Shadrick*[15] in determining her loss of wage-earning capacity.

The remaining medical evidence of record is insufficient to contradict that appellant had the capacity to perform the offered limited-duty position. In a December 8, 2017 report, Dr. Eaton noted that she believed that she was unable to perform duties involving light lifting and driving. The Board finds that Dr. Eaton's December 8, 2017 report is insufficient to establish that appellant could not work the December 5, 2017 limited-duty assignment. Dr. Eaton merely repeated appellant's belief that she was unable to lift or drive as part of her employment. His opinion is unsupported by adequate medical rationale explaining how appellant was unable to perform the limited-duty assignment.[16]

The remaining medical evidence submitted after OWCP's January 30, 2018 prereduction notice is likewise insufficient to establish that appellant could not perform the work of the December 5, 2017 limited-duty assignment. In a February 13, 2018 treatment note and letter, Dr. Faynzilberg indicated that it was difficult to determine her capacity to perform the required work duties. He further related in a February 16, 2018 note that he was not sufficiently equipped to determine appellant's level of disability. The Board finds that Dr. Faynzilberg did not provide a firm, medical opinion that she was unable to work the December 5, 2017 limited-duty assignment.

The evidence of record establishes that appellant declined the limited-duty assignment offered by the employing establishment on December 5, 2017, which was suitable, and would have provided earnings of $509.00 every four weeks. Therefore, the Board finds that OWCP properly reduced her wage-loss compensation, effective April 1, 2018, pursuant to 20 C.F.R. § 10.500(a), based on her earnings had she accepted the temporary limited-duty assignment.[17]

[13] Dr. Eaton noted in his September 15, 2017 report that appellant could work with restrictions of no lifting in excess of five pounds and the ability to change positions (sitting, standing, and laying down) at will.

[14] *Supra* note 12.

[15] *Albert C. Shadrick*, 5 ECAB 376 (1953) (codified by regulation at 20 C.F.R. § 10.403).

[16] *K.W.*, Docket No. 10-0098 (issued September 10, 2010).

[17] *See M.K.*, Docket No. 18-0907 (issued February 7, 2019); *S.V.*, Docket No. 17-1268 (issued March 23, 2018).

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 OWCP properly reduced appellant's wage-loss compensation, effective April 1, 2018, pursuant to 20 C.F.R. § 10.500(a), based on her earnings had she accepted a limited-duty assignment.

ORDER

IT IS HEREBY ORDERED THAT the March 7, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 5, 2019
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