

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

_____)	
Z.W., Appellant)	
)	
and)	Docket No. 18-1000
)	Issued: June 24, 2019
DEPARTMENT OF THE NAVY, NAVAL SEA)	
SYSTEMS COMMAND, San Diego, CA,)	
Employer)	
_____)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 16, 2018 appellant filed a timely appeal from a February 21, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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 record provided to the Board includes evidence received after OWCP issued its February 21, 2018 decision. 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 met its burden of proof to reduce appellant's wage-loss compensation benefits, effective April 13, 2017, based on her capacity to earn wages in the constructed position of administrative assistant.

FACTUAL HISTORY

On October 23, 2014 appellant, then a 58-year-old shipbuilding specialist, filed a traumatic injury claim (Form CA-1), alleging that she injured her lower back and right thigh that day when taking chairs off her desk while in the performance of duty. OWCP accepted the claim for aggravation of herniated disc at L4-5 and paid her compensation on the periodic rolls. It further authorized two lumbar spine surgeries, which appellant underwent on March 1, 2010 and June 23, 2015.

On December 4, 2015 OWCP referred appellant to Dr. Jon Pembroke Kelly, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the nature and extent of her accepted employment-related conditions. In his January 14, 2016 report, Dr. Kelly reviewed a statement of accepted facts (SOAF), history of the injury, and the medical evidence of record. He conducted a physical examination and found that no abnormal pain behaviors were evident other than incomplete compliance with motor testing of the lower extremities. Appellant walked slowly with a slightly exaggerated gait with the use of a cane in the left hand. She demonstrated some cogwheel resistance of both the tibialis anterior and extensor hallucis longus strength testing and was able to demonstrate no more than 3/5 dorsiflexion. Straight leg raise testing revealed 90 degrees without radicular symptoms. X-rays of the lumbar spine showed no scoliotic curvature and diminished lordosis. Dr. Kelly reported that appellant continued to complain of right leg weakness despite an appropriate surgery having been performed. He opined that appellant's "statements are subjective, but the clinical examination which reveals a weakness in dorsiflexion of the foot (dependent on full patient participation)." Dr. Kelly determined that appellant had reached maximum medical improvement and no longer had residuals of her accepted lumbar conditions. He provided work restrictions of no activities which required bending and stooping at the waist and lifting no more than 20 pounds from ground to waist level and 25 pounds from waist to shoulder level.

In an April 7, 2016 report, Dr. M. Hertzell Soumekh, a Board-certified neurosurgeon, noted that appellant was seen urgently that day because she could not stay seated longer than three or four hours. She advised that appellant was "reaching the point that she [wa]s not able to return to modified job duties" and her best option was disability retirement.

OWCP referred appellant to Deborah Raphael, a rehabilitation counselor, for vocational rehabilitation services. On June 8, 2016 Ms. Raphael identified the position of administrative assistant, Department of Labor, *Dictionary of Occupational Titles* (DOT) No. 169.167-010 as

suitable to appellant's work experience, physical restrictions, and education.³ The administrative assistant position was identified as sedentary work which involved coordinating office services, preparing reports, and reviewing and answering correspondence. The physical requirements included exerting up to 10 pounds of force occasionally. The vocational rehabilitation counselor indicated that the position was reasonably available within the general labor market of appellant's commuting area on a full-time basis as confirmed by the State of California's Employment Development Department.

On June 16, 2016 OWCP received a rehabilitation plan and award, including the administrative assistant position. As of November 15, 2016, it provided 90 days of placement assistance. Placement was not successful. In a February 16, 2017 memorandum, OWCP stated that appellant did not obtain employment because she had only minimally participated in the job search most likely because of complaints of pain and discomfort in her back and lower extremity.⁴

By letter dated March 13, 2017, OWCP issued a notice of proposed reduction of benefits, finding that appellant was capable of earning wages as an administrative assistant at the rate of \$600.00 per week. It applied the principles set forth in *Albert C. Shadrick*,⁵ as codified in section 10.403 of OWCP's regulations,⁶ to determine that appellant's monthly wage-loss compensation benefits should be reduced by 30 percent. OWCP advised appellant that, if she disagreed with the proposed decision, she had 30 days to submit additional evidence or argument regarding her capacity to earn wages.

In response, appellant submitted a March 14, 2017 narrative statement arguing that she was incapable of performing the administrative assistant position. She also submitted medical evidence, including a January 5, 2017 report from Dr. Soumekh who opined that appellant had "some degree of right femoral nerve injury/neuropathy" and he had "no explanation for that."

³ The Department of Labor, *Dictionary of Occupational Titles*' job description for administrative assistant, DOT No. 169.167-010, is as follows: Aids executive in staff capacity by coordinating office services, such as personnel, budget preparation and control, housekeeping, records control, and special management studies. Studies management methods in order to improve workflow, simplify reporting procedures, or implement cost reductions. Analyzes unit operating practices, such as performance standards to create new systems or revise established procedures. Analyzes jobs to delimit position responsibilities for use in wage and salary adjustments, promotions, and evaluation of workflow. Studies methods of improving work measurements or performance standards. Coordinates collection and preparation of operating reports, such as time-and-attendance records, terminations, new hires, transfers, budget expenditures, and statistical records of performance data. Prepares reports including conclusions and recommendations for solution of administrative problems. Issues and interprets operating policies. Reviews and answers correspondence.

⁴ By decisions dated June 28 and October 19, 2016, OWCP had found that appellant had refused to participate in an OWCP-approved training program in computer software applications as recommended by her vocational rehabilitation counselor. By decision dated October 20, 2016, it denied her claim for consequential injuries to her right buttock, right leg, and right heel, finding that the medical evidence of record was insufficient to establish that these conditions were causally related to her accepted lumbar conditions. On April 25, 2017 appellant requested reconsideration of the October 20, 2016 decision. On July 24, 2017 OWCP denied modification of that decision.

⁵ 5 ECAB 376 (1953).

⁶ 20 C.F.R. § 10.403.

Dr. Soumekh further opined that appellant's continued complaints of right leg pain, numbness, and weakness were causally related to her accepted employment injury.

By decision dated April 13, 2017, OWCP finalized the proposed reduction of compensation benefits, effective April 13, 2017, based on her capacity to earn wages as an administrative assistant at the rate of \$600.00 per week. It found that the physical requirements of the position did not exceed the medical restrictions provided by Dr. Kelly. On February 2, 2018 appellant requested reconsideration of the April 13, 2017 decision. She submitted additional medical evidence, including a January 31, 2018 report from Dr. Thomas D. Harpley, a clinical psychologist, who diagnosed major depressive disorder, recurrent, of moderate severity.

By decision dated February 21, 2018, OWCP denied modification of its April 13, 2017 decision.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.⁷

Section 8115(a) of FECA,⁸ provides in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his or her actual earnings if his or her actual 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 if the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of his or her injury, his or her degree of physical impairment, his or her usual employment, his or her age, his or her qualifications for other employment, the availability of suitable employment, and other factors and circumstances which may affect her wage-earning capacity in her disabled condition.⁹ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.¹⁰ The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.¹¹ In determining an employee's wage-earning capacity, OWCP may not select a makeshift or odd-lot position or one not reasonably available on the open labor market.¹²

OWCP must initially determine a claimant's medical condition and work restrictions before selecting an appropriate position that reflects her wage-earning capacity. The medical

⁷ See *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

⁸ 5 U.S.C. § 8115.

⁹ See *Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

¹⁰ See *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

¹¹ *Id.*

¹² See *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

evidence upon which OWCP relies must provide a detailed description of the condition.¹³ Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.¹⁴

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 DOT 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. Finally, application of the principles set forth in *Albert C. Shadrick*¹⁵ will result in the percentage of the employee's loss of wage-earning capacity. The basic rate of compensation paid under FECA is 66 2/3 percent of the injured employee's monthly pay.¹⁶

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. 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

ANALYSIS

The Board finds that OWCP properly reduced appellant's wage-loss compensation benefits, effective April 13, 2017, based on her capacity to earn wages in the constructed position of administrative assistant.

In Dr. Kelly's second opinion report dated January 14, 2016, he opined that appellant was capable of working eight hours per day with restrictions of: sitting up to four hours per day; standing, reaching, and twisting up to one hour per day; pushing, pulling, and lifting up to approximately two hours per day; and no bending or stooping.

Ms. Raphael, appellant's vocational rehabilitation counselor, determined that, appellant was able to perform the position of an administrative assistant. She provided a job description for the administrative assistant position, which was identified as sedentary work which involved coordinating office services, preparing reports, and reviewing and answering correspondence. The physical requirements included exerting up to 10 pounds of force occasionally. Ms. Raphael

¹³ See *William H. Woods*, 51 ECAB 619 (2000).

¹⁴ See *John D. Jackson*, 55 ECAB 465 (2004).

¹⁵ *Supra* note 5.

¹⁶ See *Karen L. Lonon-Jones*, 50 ECAB (1999).

¹⁷ See *John D. Jackson*, *supra* note 14.

indicated that the position was reasonably available within the general labor market of appellant's commuting area on a full-time basis as confirmed by the State of California's Employment Development Department. The Board finds that the administrative assistant position conforms to work restrictions set forth by Dr. Kelly who addressed appellant's work capacity and opined that she was capable of working eight hours per day with some restrictions.

The Board finds that the weight of the evidence of record establishes that appellant had the requisite physical ability, skill, and experience to perform the position of administrative assistant.

The Board further finds that OWCP considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment and age and employment qualifications, in determining that the position of administrative assistant represented her wage-earning capacity.¹⁸ Therefore, OWCP met its burden of proof to reduce appellant's wage-loss compensation, effective April 13, 2017, based on her capacity to earn wages as an administrative assistant.

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

CONCLUSION

The Board finds that OWCP met its burden of proof to reduce appellant's wage-loss compensation benefits, effective April 13, 2017, based on her capacity to earn wages in the constructed position of administrative assistant.

¹⁸ See *James M. Frasher*, 53 ECAB 794 (2002).

ORDER

IT IS HEREBY ORDERED THAT the February 21, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 24, 2019
Washington, DC

Patricia H. Fitzgerald, Deputy 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