

ISSUE

The issue is whether OWCP has met its burden of proof to reduce appellant's wage-loss compensation, effective September 14, 2018, under 20 C.F.R. § 10.500(a) based on his earnings had he accepted a temporary, limited-duty assignment.

FACTUAL HISTORY

On June 21, 2017 appellant, then a 45-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that on June 20, 2017 he injured his neck and shoulder while in the performance of duty.⁴ He stopped work on June 21, 2017. OWCP accepted appellant's claim for right shoulder rotator cuff strain and right shoulder subluxation. Appellant received continuation of pay (COP) from June 21 through August 4, 2017 and was paid wage-loss compensation on the supplemental rolls beginning August 5, 2017.

On January 25, 2018 appellant underwent authorized right shoulder arthroscopic surgery.

Appellant continued to receive medical treatment. In an April 18, 2018 narrative report, Dr. Jonathan Ticker, a Board-certified orthopedic surgeon, recounted appellant's complaints of right shoulder pain after a case fell on his arms. He reviewed appellant's history and noted that he underwent right shoulder surgery on January 25, 2018. Upon examination of appellant's right shoulder, Dr. Ticker observed tenderness in his anterior shoulder upon palpation. Range of motion testing was completed and Dr. Ticker reported that impingement testing was positive and neurological testing showed no sensory deficits. He diagnosed partial tear of the right subscapularis tendon and right biceps tendinitis. Dr. Ticker related that appellant was "not ready at all for the demands of his job, nor any [light-duty] option."

On May 1, 2018 OWCP referred appellant, along with a statement of accepted facts (SOAF) and the medical record, to Dr. David Benatar, a Board-certified orthopedic surgeon, for a second opinion examination. In a June 1, 2018 report, Dr. Benatar reviewed appellant's history, medical records, including the SOAF. He recounted appellant's current complaints of pain, stiffness, and weakness of the right shoulder. Upon examination of appellant's right shoulder, Dr. Benatar observed tenderness anteriorly along the biceps and posteriorly and minimally along the acromioclavicular (AC) joint. Impingement testing was positive. Dr. Benatar diagnosed status post right shoulder arthroscopy with subscapularis repair.

Dr. Benatar reported that appellant's objective findings were consistent with his subjective complaints. He explained that limited range of motion and complaints of pain and weakness were consistent with appellant's prior surgical procedure. Dr. Benatar opined that appellant's accepted condition had not resolved and still required medical treatment. He reported that appellant could not return to his date-of-injury job, but was capable of working in a full-time, limited-duty capacity. Dr. Benatar completed a work capacity evaluation form (OWCP-5c), which indicated that appellant could work full time with limitations of lifting or carrying up to 10 pounds for one to two hours, pushing/pulling up to 20 pounds for two to three hours, reaching and reaching above the shoulder up to three hours with the left shoulder and no reaching above the shoulder with the right arm, and no climbing ladders.

⁴ Appellant alleged that the top shelf and case fell, causing discomfort to his neck and right shoulder.

In a May 30, 2018 report, Dr. Ticker recounted appellant's complaints of worsening right shoulder pain. Upon examination of appellant's right shoulder, he observed tenderness at the anterior shoulder upon palpation and positive impingement testing. Neurological examination showed no sensory deficits. Dr. Ticker reported that appellant was not ready for all the demands of his job nor any light-duty option. He recommended appellant continue with physical therapy. Dr. Ticker diagnosed partial tear of the right subscapularis tendon and biceps tendinitis on the right.

On July 17, 2018 the employing establishment offered appellant a part-time, modified position, effective July 21, 2018, as a city carrier. Appellant's duties included casing mail up to 10 pounds for three hours. The physical requirements of the job were pushing/pulling up to 20 pounds for three hours, lifting up to 10 pounds for three hours, and no reaching above the shoulder with his right arm. Appellant's hours were 8:00 a.m. to 11:00 a.m. and his salary was \$62,499.00. The position was based upon Dr. Benatar's June 1, 2018 restrictions of lifting/carrying up to 10 pounds for one to two hours, pulling/pushing up to 20 pounds for one to three hours, reaching for one to three hours, and no reaching above the shoulder with the right arm. The employing establishment related that the job offer was available indefinitely while the restrictions were temporary in nature. It further noted that, since his physician had authorized him to work eight hours, all efforts would be made to increase the hours as other work became available.

On July 20, 2018 appellant refused to accept the July 17, 2018 modified job offer.

On July 24, 2018 the employing establishment informed OWCP that the light-duty job offer remained available and that appellant had not returned to work. It further noted that it was unable to offer full-time (eight hours) work within appellant's restrictions, and that the job offer would remain available indefinitely.

On July 26, 2018 the employing establishment provided OWCP with pay rate information. It indicated that the current weekly pay rate, as of July 26, 2018, for appellant's date-of-injury job was \$1,201.90 and that the weekly pay rate when appellant's disability began, as of June 20, 2017, was \$1,151.13.

In a notice dated August 1, 2018, OWCP proposed to reduce appellant's compensation based on his refusal of the July 17, 2018 light-duty assignment. It advised him that it had reviewed the work restrictions provided by Dr. Benatar and determined that the position offered him was within his restrictions.⁵ OWCP informed appellant of the provisions of 20 C.F.R. § 10.500(a) and advised him that any claimant who declined a temporary light-duty assignment deemed appropriate by OWCP was not entitled to compensation for total wage loss. It calculated that appellant's compensation should be adjusted to \$2,141.10 every four weeks using the formula set forth in *Albert Shadrick*.⁶ Appellant was afforded 30 days to accept the assignment and report to duty or provide a written explanation of his reasons for not accepting the job assignment.

OWCP received additional medical evidence. In an August 22, 2018 work status note, Dr. John Muratori, Board-certified in family medicine, indicated that he had examined appellant

⁵ OWCP also noted that appellant's treating physician, Dr. Ticker had not explained why he remained totally disabled from work despite surgical intervention and conservative treatment.

⁶ 5 ECAB 376 (1953); *see* 20 C.F.R. § 10.403.

on July 23, 2018 for his right shoulder injury and that appellant was totally disabled due to swelling and pain.

On September 10, 2018 the employing establishment verified that the light-duty job offer remained available.

By decision dated September 14, 2018, OWCP reduced appellant's compensation, effective September 14, 2018, because he failed to accept the July 17, 2018 temporary light-duty assignment in accordance with 20 C.F.R. § 10.500(a). It noted that appellant had not accepted the modified job offer, which was within the restrictions provided by Dr. Benatar in his June 1, 2018 report. OWCP further determined that appellant had not submitted sufficient medical evidence to support his refusal of the light-duty job offer. It also provided a final computation memorandum, which demonstrated that appellant's compensation should be adjusted to \$2,141.10 every four weeks using the *Shadrick* formula. OWCP noted that the base weekly pay rate for appellant's date-of-injury position was \$1,151.13, effective June 20, 2017. It then indicated that appellant's current pay rate for his date-of-injury position, effective July 26, 2018, was \$1,201.90. OWCP indicated that appellant was currently capable of earning \$450.75 a week. It then determined that appellant had 38 percent loss of wage-earning capacity, resulting in a new net compensation rate of \$2,141.10 every four weeks.

On October 12, 2018 appellant, through counsel, requested a review of the written record by an OWCP hearing representative.

Appellant continued to file claims for wage-loss compensation (Form CA-7) due to total disability from work. OWCP paid wage-loss compensation based on his loss of wage-earning capacity and placed appellant on the periodic rolls, effective March 3, 2019.

By decision dated March 7, 2019, an OWCP hearing representative affirmed the September 14, 2018 decision.

LEGAL PRECEDENT

OWCP 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 [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

OWCP procedures 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)."⁸

OWCP procedures further advise that, if a part-time, temporary light-duty assignment is offered to a claimant who is not on the periodic rolls, the claims examiner should not pay for the hours when light duty within the claimant's work restrictions was available if there is evidence that the claimant was previously performing light duty or was notified in writing that such light duty was available.⁹

ANALYSIS

The Board finds that OWCP properly reduced appellant's wage-loss compensation, effective September 14, 2018, pursuant to 20 C.F.R. § 10.500(a) because he declined a temporary light-duty assignment that was within his identified work restrictions.

On July 17, 2018 the employing establishment offered appellant a light-duty assignment as a part-time modified city carrier, working 15 hours a week. Appellant's duties included casing mail weighing up to 10 pounds for up to three hours. The physical requirements were pulling/pushing up to 20 pounds for three hours, lifting up to 10 pounds for three hours, and no reaching above the right shoulder with the right arm.

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.¹⁰

OWCP relied on the opinion of Dr. Benatar, an OWCP second opinion examiner, in finding that the July 17, 2018 temporary job offer was within appellant's physical limitations. In a June 1, 2018 report, Dr. Benatar reviewed appellant's history, including the SOAF, and provided examination findings. He indicated that appellant's accepted condition had not resolved and that he still required medical treatment. Dr. Benatar reported that appellant could not return to his date-of-injury job, but was capable of working in a full-time, limited-duty capacity. He completed a work capacity evaluation form with specified restrictions.

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

⁷ 20 C.F.R. § 10.500(a).

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

⁹ *Id.* at Chapter 2.814.9(b)(4).

¹⁰ 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. Benatar in his June 1, 2018 second-opinion report.¹¹ The offered part-time, light-duty assignment was also appropriate because appellant was notified in writing that such light duty was available when the employing establishment issued the July 17, 2018 job offer.¹² Furthermore, in its July 17, 2018 job offer, the employing establishment indicated that it would make all efforts to increase work hours as work became available.

The Board further finds that OWCP complied with its procedural requirements. The employing establishment provided appellant a written job offer on July 17, 2018. In its August 1, 2018 prereduction notice, OWCP provided him another copy of the July 17, 2018 job offer, along with relevant medical evidence from Dr. Benatar and provided appellant an opportunity to respond to its prereduction notice. Additionally, it properly applied the provisions of *Shadrick* in determining appellant's loss of wage-earning capacity.¹³

Dr. Ticker, appellant's treating physician, submitted multiple reports detailing his treatment of appellant. In reports dated March 14 to May 30, 2018, he provided examination findings and diagnosed partial tear of the right subscapularis tendon and right biceps tendinitis. Dr. Ticker opined that appellant was not able to perform the demands of his job nor any light-duty option. The Board finds that Dr. Ticker's medical reports do not establish that appellant could not perform the July 17, 2018 light-duty assignment. Dr. Ticker did not attribute appellant's inability to work to his accepted June 20, 2017 employment injury. As he did not attribute appellant's inability to work to his accepted June 20, 2017 right shoulder strain and subluxation injury, his opinion is of limited probative value to establish that appellant was unable to perform the July 17, 2018 light-duty assignment and insufficient to create a conflict in medical opinion evidence.¹⁴

The remaining medical evidence submitted after OWCP's August 1, 2018 prereduction notice is likewise insufficient to establish that appellant could not perform the offered July 17, 2018 light-duty assignment. In an August 22, 2018 work status note, Dr. Muratori indicated that on July 23, 2018 he had treated appellant for his right shoulder injury and opined that appellant was totally disabled due to swelling and pain. He did not, however, provide any medical reasoning to support his opinion on disability, nor did he opine that appellant was unable to perform the July 17, 2018 light-duty assignment.¹⁵ Dr. Muratori's note is therefore of limited probative value and insufficient to create a conflict in medical opinion evidence.

The Board thus finds that OWCP properly reduced appellant's wage-loss compensation, effective September 14, 2018, pursuant to 20 C.F.R. § 10.500(a), based on his earnings had he accepted a light-duty assignment.

On appeal counsel argues that OWCP's decision was contrary to law and fact. He did not, however, provide any evidence or additional explanation to support his argument.

¹¹ Dr. Benatar noted that appellant could work with restrictions of lifting or carrying up to 10 pounds for one to two hours, pushing/pulling up to 20 pounds for two to three hours, reaching and reaching above the shoulder up to three hours with the left shoulder and no reaching above the shoulder with the right arm, and no climbing ladders.

¹² *Supra* note 7.

¹³ *J.F.*, Docket No. 18-0923 (issued July 5, 2019).

¹⁴ *C.B.*, Docket No. 18-0040 (issued May 7, 2019).

¹⁵ *R.C.*, Docket No. 17-0748 (issued July 20, 2018); *P.W.*, Docket No. 17-0154 (issued June 9, 2017).

CONCLUSION

The Board finds that OWCP properly reduced appellant's wage-loss compensation, effective September 14, 2018, pursuant to 20 C.F.R. § 10.500(a), based on his earnings had he accepted a light-duty assignment.

ORDER

IT IS HEREBY ORDERED THAT the March 7, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 7, 2019
Washington, DC

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

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

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