United States Department of Labor
Employees' Compensation Appeals Board

D.A., Appellant	)	
and	)	**Docket No. 21-0267**
	)	**Issued: November 19, 2021**
U.S. POSTAL SERVICE, GRAND JUNCTION CARRIER ANNEX, Grand Junction, CO, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On December 18, 2020 appellant filed a timely appeal from a July 22, 2020 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]

ISSUE

The issue is whether OWCP met its burden of proof to reduce appellant's wage-loss compensation, effective June 21, 2020, based on her actual earnings as a medical receptionist.

[1] 5 U.S.C. § 8101 *et seq*.

[2] The Board notes that, following the July 22, 2020 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*.

FACTUAL HISTORY

On January 6, 2017 appellant, then a 56-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that, on December 20, 2016, she sustained a herniated lumbar disc when she shifted heavy mail trays forward in the back of her postal vehicle while in the performance of duty. OWCP accepted the claim for aggravation of degenerative joint disease at L3-4 and herniation of the lateral disc at L2-3. It paid appellant wage-loss compensation on the supplemental rolls as of December 23, 2016 and on the periodic rolls as of June 25, 2017.

In a series of form reports beginning December 27, 2016, Dr. Robert J. McLaughlin, an occupational medicine specialist and appellant's treating physician, recommended that appellant be excused from work beginning December 27, 2016.

In a work capacity evaluation for musculoskeletal conditions (Form OWCP-5c) dated November 8, 2017, Dr. McLaughlin recommended that appellant return to sedentary work at 4 hours per day with restrictions of walking and standing as needed for no more than 10 minutes per hour; pushing, pulling, and lifting no more than 4 hours at a maximum of 10 pounds and 2 pounds routinely; and no squatting, kneeling, or climbing.

On December 14, 2017 appellant was offered a modified duty rural carrier position at four hours per day as a rural carrier associate based upon Dr. McLaughlin's work restrictions. On December 19, 2017 she accepted the modified position of a rural carrier associate. On March 22, 2018 OWCP referred appellant to Dr. Thomas Moore, a Board-certified orthopedic surgeon, for a second opinion evaluation.

On April 2, 2018 appellant was offered and accepted another modified assignment at four hours per day as a rural carrier assistant with the employing establishment.

In a report dated April 20, 2018, Dr. Moore indicated that appellant was unable to return to the position that she held prior to her accepted injury. He noted that she had permanent restrictions, including work limited to four hours a day. In an accompanying Form OWCP-5c, Dr. Moore indicated that she could return to part-time work at 4 hours per day with sedentary work restrictions of pushing no more than 2 hours per day at 20 pounds of weight; pulling and lifting no more than 2 hours per day at 10 pounds of weight; sitting no more than half an hour per day; walking and standing no more than 45 minutes per day; and no bending/stooping, squatting, kneeling, or climbing. He further recommended that she be able to take a 15-minute break every 2 hours. Dr. Moore determined that appellant's restrictions were permanent and that maximum medical improvement (MMI) had been reached.

On June 15, 2018 OWCP referred appellant for vocational rehabilitation to find a suitable position within the restrictions provided by Dr. Moore on April 20, 2018. In a vocational rehabilitation report dated June 20, 2018, the vocational rehabilitation counselor noted that the case had been closed at that time, as appellant was working a light-duty temporary position.

In a letter dated June 26, 2018, the employing establishment noted that, while it had been able to accommodate appellant's work restrictions as provided by Dr. Moore, in a temporary capacity, a job offer on a permanent basis could not be provided.

In a vocational rehabilitation report dated July 18, 2018, the vocational rehabilitation counselor noted that appellant asserted that the work she had been provided by the employing establishment exceeded her work restrictions and had caused increased pain in her back.

On July 20, 2018 appellant again accepted a modified assignment at four hours per day as a rural carrier assistant with the employing establishment.

In a form report dated August 6, 2018, Dr. McLaughlin recommended that appellant return to work at eight hours per day with restrictions of lifting a maximum of 10 pounds and 5 pounds repetitively, pushing/pulling no more than 20 pounds, being able to sit, stand, and change positions as needed, and no crawling, kneeling, squatting, or climbing. He advised that her restrictions were permanent and that MMI had been reached.

In a rehabilitation memorandum dated August 10, 2018, the rehabilitation counselor requested a referral to vocational rehabilitation to obtain a permanent modified work with the employing establishment based upon Dr. McLaughlin's updated August 6, 2018 work restrictions allowing her to work eight hours per day.

In a letter to the employing establishment dated September 5, 2018, OWCP advised that it had determined the weight of the medical evidence rested with Dr. McLaughlin's work restrictions as outlined in the August 6, 2018 report. It requested that the employing establishment offer her a job within these restrictions if possible.

In a letter dated September 7, 2018, OWCP informed appellant that vocational rehabilitation services on her behalf would resume.

On September 13, 2018 appellant was offered and accepted a modified assignment at four hours per day as a rural carrier assistant with the employing establishment.

In a letter dated September 17, 2018, the employing establishment informed OWCP that while it had presented a job offer to appellant within the August 6, 2018 restrictions from Dr. McLaughlin, the position was not permanent.

In a vocational rehabilitation report dated October 6, 2018, the rehabilitation counselor again recommended file closure, as the employing establishment was unable to provide more than four hours of temporary work despite her being released to work eight hours per day. The vocational rehabilitation counselor continued to request file closure through February 13, 2019.

On February 8, 2019 appellant informed OWCP that she had been released from work as of January 5, 2019.

On April 5, 2019 a vocational rehabilitation counselor conducted a labor market survey for employment as a customer service representative and as a receptionist within appellant's commuting area. In a rehabilitation plan dated April 9, 2019, the rehabilitation counselor opined that these occupations were medically suitable, and existed in significant numbers in appellant's commuting area, such that appellant's qualifications enabled her to successfully compete and obtain these jobs.

On June 24, 2019 appellant began full-time private sector employment as a medical receptionist. The salary was $12.00 per hour.

In a vocational rehabilitation report dated September 17, 2019, the rehabilitation counselor noted that appellant had worked for over 60 days in a new permanent full-time position in the private sector. The vocational rehabilitation file was closed as of November 5, 2019.[3]

By decision dated July 22, 2020, OWCP found that appellant was able to perform the duties of the position of medical receptionist and reduced her compensation effective June 21, 2020. It found that the weight of the medical evidence with regard to appellant's work restrictions rested with Dr. Moore as expressed in his April 20, 2018 report. OWCP found that the position of medical receptionist fairly and reasonably represented appellant's wage-earning capacity based upon the wages actually earned. It stated that appellant was entitled to compensation from June 21, 2020 based upon her actual earnings with the private sector employer beginning June 24, 2019. OWCP calculated that her gross compensation rate should be adjusted to $318.00 every four weeks. It indicated that: appellant's salary as of December 20, 2016, the date of her injury, was $562.25 per week; her current adjusted pay rate for her job on the date of injury way $599.73; and she was currently capable of earning $480.00 per week, or $12.00 hourly, as a medical receptionist. OWCP, therefore, determined that appellant had an 80 percent wage-earning capacity, which when multiplied by 66 2/3 percent amounted to a weekly compensation rate with cost-of-living adjustments, of $79.50 per week, and a new compensation rate every four weeks of $318.00. Appellant's loss of wage-earning capacity (LWEC) per week was calculated as $112.45. OWCP found that her current adjusted net compensation rate "each four weeks" was $318.00.

LEGAL PRECEDENT

Section 8115(a) of FECA provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by the employee's actual earnings if the actual earnings fairly and reasonably represent the employee's wage-earning capacity.[4] Generally, wages actually earned are the best measure of a wage-earning capacity, and in the absence of showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such a measure.[5]

OWCP's procedures state that, after a claimant has been working for 60 days, it will make a determination as to whether actual earnings fairly and reasonably represent wage-earning capacity.[6] The formula for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,[7] has been codified at section 10.403 of OWCP

[3] In a letter dated March 4, 2020, appellant informed OWCP that her employment with private sector employment had ended on March 2, 2020 and that she had been terminated from the position.

[4] 5 U.S.C. § 8115(a); *V.H.*, Docket No. 20-1012 (issued August 10, 2021); *Loni J. Cleveland*, 52 ECAB 171 (2000).

[5] *K.B.*, Docket No. 20-0358 (issued December 10, 2020); *Lottie M. Williams*, 56 ECAB 302 (2005).

[6] *See K.B., id.*; *L.J.*, Docket No. 14-0970 (issued August 21, 2014); Federal (FECA) Procedure Manual, Part 2– Claims, *Determining Wage-Earning Capacity Based on Actual Earnings*, Chapter 2.815.2(b) (June 2013).

[7] 5 ECAB 376 (1953); *see V.H., supra* note 4; 20 C.F.R. §§ 10.403(d)-(e).

regulations. OWCP first calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury position.[8]

If the injured employee is no longer working in the alternative position upon which a rating is being considered, OWCP may consider a retroactive LWEC.[9] However, this is rare and should only be made where the employee worked in the position for at least 60 days, the employment fairly and reasonably represented his or her wage-earning capacity as outlined under FECA Chapter 2.815.5, and the subsequent work stoppage or change in the alternative position(s) did not occur because of any change in the employee's injury-related condition affecting his or her ability to work.[10]

ANALYSIS

The Board finds that OWCP failed to meet its burden of proof to reduce appellant's wage-loss compensation, effective June 21, 2020, based on her actual earnings as a medical receptionist.

In its July 22, 2020 decision, OWCP found that appellant's wage-earning capacity was represented by her actual earnings as a medical receptionist and the weight of medical evidence with regard to her work restrictions rested with Dr. Moore as outlined in his report of April 20, 2018 wherein he indicated that appellant was unable to return to date-of-injury position. Dr. Moore also related that appellant had permanent work restrictions, including a restriction of work limited to four hours a day. In an accompanying Form OWCP-5c, he indicated that she could return to part-time work at four hours per day with sedentary work restrictions.

The Board finds that OWCP improperly determined that appellant's actual earnings in the full-time medical receptionist position fairly and reasonably represented her wage-earning capacity, based upon appellant's work restrictions provided by Dr. Moore in his report of April 20, 2018.[11] The record indicates that the position of medical receptionist was a full-time position, but the April 20, 2018 report of Dr. Moore released appellant to work only four hours per day, which he concluded was a permanent work restriction. In its July 22, 2020 decision, OWCP found that the weight of medical evidence rested with Dr. Moore as expressed in his April 20, 2018 report. It did not forward a copy of the medical receptionist position description to Dr. Moore, and it did not ask that he address whether appellant could perform the duties of the full-time medical receptionist position. The Board, therefore, finds that Dr. Moore's April 20, 2018 report did not establish that appellant was medically able to perform the duties of the full-time medical receptionist position. The Board, therefore, finds that OWCP has not met its burden

[8] *See* 20 C.F.R. § 10.403(d). The pay rate for compensation purposes is then multiplied by the wage-earning capacity percentage. This amount is subtracted from the pay rate for compensation purposes to determine the LWEC. *Id*. at § 10.403(e). The Board notes that under FECA, the term disability is defined as an inability, due to an employment injury, to earn the wages the employee was receiving at the time of the injury, *i.e.*, an impairment resulting in an LWEC. *See generally, Y.O.*, Docket No. 16-1886 (issued February 24, 2017); *Prince W. Wallace*, 52 ECAB 357 (2001).

[9] *M.F.*, Docket No. 18-0323 (issued June 25, 2019); *D.M.*, Docket No. 16-1527 (issued July 25, 2017); *D.P.*, Docket No. 14-0301 (issued July 16, 2014); Federal (FECA) Procedure Manual, *supra* note 6 at Chapter 2.815.7.

[10] *Id*.

[11] *Id*.

to reduce appellant's wage-loss compensation, effective June 21, 2020, based on her actual earnings as a medical receptionist.

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to reduce appellant's wage-loss compensation, effective June 21, 2020, based on her actual earnings as a medical receptionist.

ORDER

IT IS HEREBY ORDERED THAT the July 22, 2020 decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 19, 2021
Washington, DC

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

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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