

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

_____)
C.T., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Anaheim, CA, Employer)
_____)

Docket No. 21-0543
Issued: August 22, 2022

Appearances:
Steven E. Brown, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On February 18, 2021 appellant, through counsel, filed a timely appeal from a November 23, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

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 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the issuance of the November 23, 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.*

ISSUE

The issue is whether OWCP has met its burden of proof to reduce appellant's wage-loss compensation, effective March 4, 2018, because she refused an offer of suitable work, pursuant to 20 C.F.R. § 10.500(a), based on her earnings had she accepted a temporary part-time limited-duty assignment.

FACTUAL HISTORY

On May 2, 2013 appellant, then a 45-year-old temporary postal support employee (PSE) mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that on that day she possibly strained her left forearm due to repetitive scanning while in the performance of duty. She stopped work on the date of injury. OWCP initially accepted appellant's claim for left lateral epicondylitis. It subsequently expanded the acceptance of the claim to include left biceps tendinitis. OWCP paid appellant wage-loss compensation on the supplemental rolls as of May 3, 2013 and on the periodic rolls as of October 20, 2013. On April 28, 2014 appellant underwent OWCP-authorized left elbow lateral extensor release, left elbow synovectomy, left elbow arthrotomy, partial capsulectomy, and annular ligament release. On June 22, 2015 she underwent exploration of soft tissue mass with fluid collection, left elbow and forearm debridement and total excision of extensive granulation tissue, left elbow revision of lateral exterior release, and left elbow and forearm local anesthetic of 10 cubic centimeters of five percent Marcaine to surgical soft tissue. Both surgeries were performed by Dr. Hormoz Zahiri, an orthopedic specialist and attending orthopedic surgeon.

In a July 27, 2017 medical report, Dr. Zahiri released appellant to return to modified-duty work with permanent restrictions, which included no lifting, pushing, or pulling more than five pounds with the left upper extremity and no repetitive forceful gripping or grasping with the same upper extremity.

On August 15, 2017 OWCP referred appellant to vocational rehabilitation. On that same day, appellant rejected the employing establishment's August 10, 2017 job offer for a temporary modified clerk position, stating that she wished to complete the vocational rehabilitation process.

On November 1, 2017 the employing establishment offered appellant a modified-duty clerk position, effective August 13, 2017, based on Dr. Zahiri's July 27, 2017 permanent restrictions. The duties included answering telephones and attending a gate with a telephone from two to five hours per day, hanging sacks weighing less than five pounds from two and one-half to six hours per day. The physical requirements of the position were noted as sitting at a desk with occasional standing and answering a telephone by grasping it with the right hand up to four hours per day, and lifting less than five pounds intermittently for 45 minutes with the right hand.

On November 1, 2017 OWCP reviewed an analysis of the offered position which indicated repetitive motion of the right hand with the left arm used for stabilization. As a result, on November 21, 2017 the employing establishment amended the job offer to further accommodate appellant's work restrictions concerning repetitive forceful grasping and gripping with her left upper extremity. The position description permitted appellant to spread out the task of hanging sacks with 45-minute alternating tasks that would not involve any use of the left upper extremity. The duties of the position indicated that they were to be performed by using the right hand.

On November 30, 2017 the employing establishment informed OWCP that the yearly salary of the offered position for a full-time employee was \$43,634.00. It further informed OWCP that appellant would be required to work 30 hours per week in the offered position and her salary would be three-fourths of the \$43,634.00 annual salary.

In a December 4, 2017 notification, OWCP advised appellant of the proposed reduction of her wage-loss compensation, in accordance with 20 C.F.R. §10.500(a), based upon her declination of a temporary light-duty assignment deemed by OWCP to appropriately accommodate her existing work restrictions. It advised her that her current work restrictions were represented by those provided on July 27, 2017 by Dr. Zahiri, appellant's treating physician, and informed her that, if she continued to decline the position, she had to provide adequate justification for such declination. OWCP further advised appellant, that, if she failed to accept the position or provide adequate reasons for refusing the job offer, her wage-loss compensation would be reduced indefinitely since this light-duty assignment had no projected end date. It also advised her that her entitlement to medical benefits and a schedule award would not be affected.

In response, appellant, through her then-representative, submitted a December 21, 2017 statement, contending that the employing establishment's job offer was not within her current medical restrictions.

By decision dated March 12, 2018, OWCP reduced appellant's wage-loss compensation effective March 4, 2018, under 20 C.F.R. § 10.500(a). It found that she did not provide adequate justification for declining the offered temporary light-duty assignment, which was within her medical restrictions set forth by Dr. Zahiri. In reducing appellant's wage-loss compensation, OWCP applied the formula derived from principles (LWEC) contained in the case of *Albert C. Shadrick*⁴ to calculate her loss of wage-earning capacity. It determined that her compensation would be adjusted to \$39.00 every four weeks.

On July 16, 2018 appellant requested reconsideration. In an accompanying letter dated July 10, 2018, she disagreed with the reduction of her compensation. Appellant contended that, effective February 7, 2015, she was converted from a PSE to a full-time clerk and, thus, her entitlement to compensation should be based on that of a career employee salary.

By decision dated November 1, 2018, OWCP denied modification of its March 12, 2018 decision, finding that the fact that appellant was converted to a career full-time clerk position in 2015 was irrelevant, and its calculation of her wage-earning capacity was correct. It explained that, since she was a part-time temporary employee (Level 6, Step A) who had not worked a full year on the date of injury and it did not receive similarly-situated employee pay information from the employing establishment, her date-of-injury payrate was therefore calculated based on the amount earned one year prior to her date of injury and prorated. OWCP noted that appellant worked an average of 37.06 hours per week at \$14.89 per hour which represented a base weekly salary of \$551.82. It further noted that she also earned an average of \$65.09 per week for night differential pay. As such, OWCP determined that appellant's date-of-injury payrate was \$616.91. It indicated that a current level 1 step A PSE earned \$16.98 per hour for 37.06 hours, which resulted in \$629.28 per week plus \$74.23 night differential, totaling \$703.51.

⁴ 5 ECAB 376 (1953); codified at 20 C.F.R. §§ 10.403(d)-(e).

On October 25, 2019 appellant requested reconsideration. In support of her reconsideration request, she submitted a report dated October 2, 2019 from Dr. John B. Dorsey, a Board-certified orthopedic surgeon. Dr. Dorsey related a history of the accepted May 2, 2013 employment injury, noted his review of the medical record, and discussed findings on physical examination. He opined that appellant had not reached maximum medical improvement and restricted her from lifting, pushing, or pulling more than two pounds on the left and grasping or gripping with the left hand.

OWCP, by decision dated January 17, 2020, denied modification of its November 1, 2018 decision.

On March 31, 2020 appellant requested reconsideration. She submitted a March 25, 2020 letter, wherein she contended that OWCP incorrectly determined her LWEC based on a temporary job offer rather than a permanent job offer. Appellant further contended that she was physically unable to perform the duties of the position and submitted a February 12, 2020 report from Dr. Dorsey in support of her contention. Dr. Dorsey reported his review of a statement of accepted facts dated September 10, 2019 and Dr. Zahiri's July 27, 2017 report. He disagreed with Dr. Zahiri's finding that appellant could lift, push, and pull up to five pounds with the left upper extremity and that she could not perform any repetitive forceful gripping or grasping with the left upper extremity. Dr. Dorsey opined that she could not use her left hand for grasping or gripping at all, and that she could lift, push, or pull no greater than two pounds with the left upper extremity. He explained that three months had passed since appellant's evaluation by Dr. Zahiri and he noted that, during that time, she had developed atrophy which she did not have when she was seen by Dr. Zahiri. Dr. Dorsey also noted that her grip strength was exactly half on the left compared to the right, while Dr. Zahiri found almost equal grip strength of both hands. He advised that appellant's condition had significantly deteriorated over the prior three months. Appellant was unable to take anti-inflammatory medication for stomach issues provided to her by Dr. Zahiri, which caused increased pain in her left arm. Dr. Dorsey recommended that a magnetic resonance imaging (MRI) scan be performed to evaluate changes since the previous MRI scan.

By decision dated June 24, 2020, OWCP denied modification of its January 17, 2020 decision. It found that Dr. Dorsey's February 12, 2020 report was insufficient to establish that appellant did not have the capacity to perform the offered limited-duty position.

OWCP subsequently received additional medical evidence from Dr. Zahiri. In a July 13, 2020 letter, Dr. Zahiri provided findings on physical and diagnostic examination. He opined that appellant had acute exacerbation of her left elbow condition that required occupational therapy. Dr. Zahiri advised that she could work with permanent restrictions. In workers' compensation status notes dated August 24 and October 5, 2020, Dr. Zahiri reiterated his prior work restrictions of no lifting, pushing, or pulling more than five pounds and no repetitive forceful gripping and grasping with the left upper extremity. In an October 5, 2020 letter, he reexamined appellant and reported that her symptoms and clinical objective findings in the left elbow and distal tendinitis remained unchanged.

On October 28, 2020 appellant, through counsel, requested reconsideration. She submitted an October 15, 2020 report from Dr. Dorsey. Dr. Dorsey noted a review of the analysis of appellant's work restrictions. He related that she was required to pinch much harder than a five-pound limitation. Dr. Dorsey reiterated that appellant had a two-pound limit, but even with

Dr. Zahiri's five-pound limitation, it was a greater amount of the required grasping and gripping on a more frequent basis than previously noted. Additionally, he noted that the offered position required her to use her left hand for pinching and stabilization, which was not possible for her to perform. Therefore, Dr. Dorsey concluded that the appropriate work activity would require appellant to only use her right upper extremity and right hand.

OWCP, by decision dated November 23, 2020, denied modification of its June 24, 2020 decision.

LEGAL PRECEDENT

Under FECA, once OWCP has accepted a claim it has the burden of justifying termination or modification of compensation benefits.⁵ OWCP may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁶ In general, the term disability under FECA means incapacity because of injury in employment to earn the wages which the employee was receiving at the time of such injury.⁷

Section 10.500(a) of OWCP's regulations provides that 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 claim for wage-loss compensation (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.⁸

When a claimant is on the periodic rolls, OWCP's procedures similarly provide that, if the evidence establishes that injury-related residuals continue and result in work restrictions, light duty within those work restrictions is available, that the employee was notified in writing that such light duty was available, then wage-loss benefits are not payable for the duration of light-duty availability.⁹ OWCP's procedures explain that this is because such benefits are payable 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.¹⁰ When a claimant is on the periodic

⁵ *L.L.*, Docket No. 18-1426 (issued April 5, 2019); *C.C.*, Docket No. 17-1158 (issued November 20, 2018); *I.J.*, 59 ECAB 408 (2008); *Vivien L. Minor*, 37 ECAB 541 (1986).

⁶ *A.D.*, Docket No. 18-0497 (issued July 25, 2018).

⁷ *See* 20 C.F.R. § 10.5(f).

⁸ 20 C.F.R. § 10.500(a); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.9a (June 2013).

⁹ *Id.* at Chapter 2.814.9c(1)(a) (June 2013).

¹⁰ *Id.*

rolls, a pretermination notice must be issued if the claims examiner is removing the claimant from the periodic rolls and ceasing his/her wage-loss compensation payments.¹¹

ANALYSIS

The Board finds that OWCP has met its burden of proof to reduce appellant's wage-loss compensation, effective March 4, 2018, because she refused an offer of suitable work, pursuant to 20 C.F.R. § 10.500(a), based on her earnings had she accepted a temporary part-time limited-duty assignment.

On November 1, 2017 the employing establishment offered appellant a temporary modified-duty clerk assignment on a part-time basis. Appellant did not accept the position and, in a March 12, 2018 decision, OWCP reduced her wage-loss compensation, effective March 4, 2018, under 20 C.F.R. § 10.500(a).

The Board finds that OWCP properly reduced appellant's wage-loss compensation, effective March 4, 2018, under 20 C.F.R. § 10.500(a). Appellant did not accept a temporary light-duty assignment offered by the employing establishment, which was within her medical restrictions. With reference to the wages paid by the assignment, OWCP properly applied the *Shadrick* formula in calculating the proper reduction in appellant's wage-loss compensation given the wages paid by her date-of-injury position.¹² Therefore, the reduction of appellant's wage-loss compensation, effective March 4, 2018, was justified under 20 C.F.R. § 10.500(a).¹³

The Board finds that the medical evidence of record reflects that appellant was capable of performing the temporary light-duty assignment offered by the employing establishment in November 2017. The modified clerk assignment involved working 30 hours per week. The assignment required answering telephones and attending a gate with a telephone from two to five hours per day, hanging sacks weighing less than five pounds from two and one-half to six hours per day. The physical requirements of the position required sitting at a desk with occasional standing and grasping and answering a telephone up to four hours per day, and lifting less than five pounds intermittently for 45 minutes. These duties were to be performed only using appellant's right hand.

The physical requirements of the offered temporary light-duty assignment were within appellant's medical restrictions as provided by her physician, Dr. Zahiri. In reports dated July 27, 2017, and July 13, August 24, and October 5, 2020, Dr. Zahiri determined that she was capable of working with permanent restrictions. He indicated that appellant could not lift, push, or pull more than five pounds with the left upper extremity and engage in repetitive forceful gripping or grasping with the same upper extremity. The Board finds that the medical restrictions provided by Dr. Zahiri, in his reports, constitute an accurate representation of her ability to work around the time that the employing establishment offered her the temporary light-duty assignment.

¹¹ *Id.* at Chapter 2.814.9c(1)(b).

¹² *Supra* note 4.

¹³ *Id.*

After the March 12, 2018 reduction of compensation, appellant contended that the physical requirements of the offered position were outside her work restrictions set forth by Dr. Dorsey. In reports dated October 2, 2019 and February 12, 2020, Dr. Dorsey disagreed with Dr. Zahiri's work restrictions and advised that she was restricted from lifting, pushing, or pulling more than two pounds and grasping or gripping with the left hand. He noted that appellant developed atrophy following her evaluation by Dr. Zahiri. Dr. Dorsey further noted that her grip strength was exactly half on the left compared to the right. The Board finds that his reports are insufficient to establish that appellant was incapable of performing the offered position. While Dr. Dorsey opined that her left-hand condition had worsened, he did not offer any medical rationale to explain why she could not perform the duties of the modified position using her right hand. His opinion is therefore of limited probative value.¹⁴

The evidence of record reflects that appellant did not accept a temporary light-duty assignment offered by the employing establishment, which was suitable and would have paid her wages constituting a portion of those of her date-of-injury job and, therefore, OWCP properly reduced her wage-loss compensation, effective March 4, 2018, under 20 C.F.R. § 10.500(a).

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 has met its burden of proof to reduce appellant's wage-loss compensation, effective March 4, 2018, because she refused an offer of suitable work, pursuant to 20 C.F.R. § 10.500(a), based on her earnings had she accepted a temporary part-time limited-duty assignment.

¹⁴ See *R.S.*, Docket No. 19-1131 (issued April 2, 2020).

ORDER

IT IS HEREBY ORDERED THAT the November 23, 2020 merit decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 22, 2022
Washington, DC

Alec J. Koromilas, 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