United States Department of Labor
Employees' Compensation Appeals Board

R.H., Appellant	)	
and	)	**Docket No. 21-0145**
	)	**Issued: May 3, 2022**
DEPARTMENT OF THE NAVY, MARINE CORPS AIR GROUND COMBAT CENTER, Twentynine Palms, CA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 10, 2020 appellant, through counsel, filed a timely appeal from a September 1, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (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 OWCP's September 1, 2020 decision, appellant submitted 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 compensation benefits, effective February 15, 2020, based on his capacity to earn wages in the constructed position of customer complaint clerk.

FACTUAL HISTORY

This case has previously been before the Board on a different issue.[4] The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On March 5, 2007 appellant, then a 51-year-old materials handler, filed a traumatic injury claim (Form CA-1) alleging that on February 29, 2007 he injured his low back, left hip and leg when he twisted his low back and hip climbing out of a forklift while in the performance of duty. He stopped work on March 2, 2007 and returned on March 5, 2007.

OWCP accepted the claim for sciatica, lumbosacral strain, lumbar fusion, and degenerative disc disease of the lumbar spine. Appellant stopped work on or about November 14, 2008 due to worsening symptoms and OWCP paid him wage-loss compensation on the supplemental rolls as of November 14, 2008 and on the periodic rolls as of December 18, 2011.

Appellant underwent an OWCP-authorized L3-5 lumbar fusion and instrumentation placement on November 17, 2011. On September 27, 2013 he underwent scar tissue/hardware block at L3-5; and on May 7, 2014 he underwent removal of segmental instrumentation L3-5.

In an August 19, 2016 report, Dr. Darren L. Bergey, a regenerative medicine specialist and treating physician, requested authorization for assessment of a functional restoration program for treatment of appellant's chronic pain. He opined that appellant developed psychosocial *sequelae* that limited his function and recovery after the initial incident, including anxiety, fear-avoidance, depression, and sleep disorders. Dr. Bergey noted that consideration should be given to an inpatient detoxification program for opioid dependence.

By report dated November 29, 2016, Dr. Taisha S. Williams, a physiatrist and District Medical Adviser (DMA), indicated that the diagnosis of opioid dependence would have to be accepted by OWCP before she could recommend approval of a detoxification program, as recommended by Dr. Bergey.

On April 6, 2017 OWCP referred appellant for a second opinion examination with Dr. Stephan Simonian, a Board-certified psychiatrist, to obtain an independent assessment of the work-related conditions, extent of disability, and appropriate course of treatment.

By report dated May 2, 2017, Dr. Simonian opined that appellant had developed an opioid dependence due to medication for his accepted employment injury. He advised that the detoxification program would be appropriate, as recommended by appellant's treating physician, if appellant was able to tolerate the pain without such medication.

[4] Docket No. 11-889 (issued November 21, 2011).

On May 18, 2017 OWCP accepted opioid dependence as causally related to the accepted employment injury.

By report dated February 12, 2018, Dr. Bergey advised that appellant could work with limitations of no repetitive lifting, pushing, or pulling greater than 25 pounds. He also advised appellant to limit bending and stooping. Dr. Bergey noted again that in-patient detoxification had been requested.

On September 27, 2018 OWCP referred appellant for vocational rehabilitation services with instructions to begin with consideration of placement with the employing establishment.

In a September 27, 2018 report, Dr. Bergey noted that appellant's conditions were permanent and stationary and recommended that appellant undergo further treatment including facet blocks, a left SI joint block, and then radio frequency ablations of the facets if the blocks were diagnostic, and left SI joint fusion if the blocks were diagnostic. He noted that appellant would not proceed at the present but would leave these as future medical options.

On October 17, 2018 the employing establishment indicated that it was unable to offer appellant modified work.

By letter dated February 6, 2019, OWCP advised appellant that the rehabilitation counselor had developed a plan for him to return to work as an information clerk, Department of Labor's *Dictionary of Occupational Titles* (DOT) #237.367-022, or a customer complaint clerk, DOT #241.367-014. The duties included investigating customer complaints about bills or service, examining documents, notifying customers of findings, examining merchandise, and keying information into computers. The positions were sedentary and required occasional lifting up to 10 pounds. OWCP explained that the job duties were within his limitations and he was expected to cooperate fully so that he could return to work in the specified position or one similar. It noted that appellant had a wage-earning capacity of $11.50 to $15.00 per hour. OWCP explained that at the end of the rehabilitation program, it would reduce his compensation based upon this amount. It advised that if appellant did not cooperate fully with the rehabilitation plan, it would assume that the vocational services would have resulted in the above-noted wage-earning capacity and, therefore, would reduce his compensation by that amount, in accordance with 20 C.F.R. § 10.519.

On April 19, 2019 OWCP referred appellant for a second opinion evaluation with Dr. Mark D. Bernhard, an osteopath specializing in physiatry, regarding appellant's reported chronic pain and opioid treatment.

In a May 1, 2019 report, Dr. C. Edward Anderson, Board-certified in pain medicine, noted that appellant presented to the clinic for prescription refill and that appellant's pain medication reduced his pain from a 7/10 to a 3/10, his Controlled Substance Utilization Review and Evaluation System report was consistent with his prescription history, and he did not complain of any side effects of the pain medication. He noted that he provided appellant with a three-month set of prescriptions and would see him in follow-up in 12 weeks.

In a report dated May 14, 2019, Dr. Bernhard noted appellant's history of injury and medical treatment. He provided appellant's physical examination findings and diagnosed chronic pain due to trauma, L3-4 disc degeneration, L5-S1 facet arthropathy, L3-4 stenosis, bilateral L4 radiculopathy, status post posterior lumbar instrumentation and fusion, bilateral laminotomies facetectomies, and foraminotomies with continued complaint of pain and radicular symptoms.

Dr. Bernhard noted that appellant's opioid medication included OxyContin, 20 milligrams, three times a day, that he disagreed with this regimen, and that concomitant use of oxycodone and benzodiazepines or other central nervous system (CNS) depressants should be avoided. He recommended reduction in the use of OxyContin, given the CNS depressant effects of the combined medications, and that individuals taking these medications be monitored and informed of sedation, breathing problems, CNS depression, and hypotension. Dr. Bernhard advised that appellant was a candidate for a functional restoration program to include psychological management, pain management, control of analgesic prescribing, and use of alternative methods for pain management. He explained that the goals were improved function and increasing activity levels combined with pain management, that appellant's descriptions of his pain were extraordinarily severe and would need psychological and psychiatric intervention, and that appellant was aware of the risks and dangers of opioid medications and the need for a functional restoration program. Dr. Bernhard also recommended drug testing every three months and that appellant should have Narcan® available and a means of notifying emergency personnel of any impending overdose or alteration in consciousness. He also noted that appellant might respond to treatment with buprenorphine, a longer lasting medication and possible anti-depressant, and further treatment to include use of a pain pump or spinal cord stimulator as adjuncts for pain treatment. Dr. Bernhard advised that appellant should be involved in a functional restoration program which addressed the need to reduce the opiate analgesic medication and rely on non-opiate measures and approaches.

On September 5, 2019 OWCP's rehabilitation counselor advised that appellant had not made a sufficient effort to obtain employment and placement services had ceased.

By notice dated January 14, 2020, OWCP advised appellant of their proposal to reduce his wage-loss compensation on the basis that he could work as a customer complaint clerk, DOT#241.367-014, at the rate of $481.62 per week.[5] It further noted that the rehabilitation specialist documented that such positions were available in appellant's commuting area and that the entry pay level for the position was $481.62 per week. OWCP explained that the customer complaint clerk position was determined to be within the provided permanent physical restrictions since it was sedentary. It calculated that appellant's compensation rate should be adjusted to $1,112.00 every four weeks using the *Albert C. Shadrick* formula.[6] OWCP provided him 30 days to submit additional evidence regarding his capacity to earn wages in the position described. Appellant did not respond.

By letter dated February 11, 2020, OWCP requested that Dr. Anderson provide an opinion related to the use of a pain pump or spinal cord stimulator and the use of Narcan® or other opioid overdose reversal medication. It also requested a recent drug screen and an opinion with regard to alternative treatment.

[5] OWCP explained that the customer complaint clerk position was selected because it had a higher specific vocational preparation (SVP) and appellant qualified for the position, which was expected to grow at a higher rate of 16.7 percent over the next few years.

[6] *Albert C. Shadrick*, 5 ECAB 376 (1953).

By decision dated February 14, 2020, OWCP finalized the proposed reduction of compensation, finding that appellant was capable of performing the duties of a customer complaint clerk.

On February 25, 2020 appellant, through counsel, request a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. At the hearing, held on June 15, 2020 appellant testified that he was incapable of working due to his medical conditions and did not believe he could perform the proposed job. He related that his medication made him pass out at work. Counsel argued that the job was outside appellant's physical limitations.

In a report dated March 31, 2020, Dr. Anderson noted that appellant reported that he was doing well with no new complaints and that his pain was under control.

In a letter dated May 19, 2020, OWCP requested that Dr. Anderson explore alternative treatment options to reduce what appeared to be a concerning level of medication.

In a June 23, 2020 report, Dr. Anderson reiterated that appellant was doing well and his pain was under control. He stated that appellant did not have any complaints regarding side effects of his medication.

In a letter dated August 17, 2020, OWCP again requested that Dr. Anderson explore alternative treatment options to reduce what appeared to be a concerning level of medication. No response was received.

By decision dated September 1, 2020, OWCP's hearing representative affirmed the February 12, 2020 decision.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of the compensation benefits.[7] An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity (LWEC).[8]

Under section 8115(a) of FECA, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity.[9] Reemployment may not be considered representative of the injured employee's wage-

[7] *See B.H.,* Docket No. 20-0729 (issued March 19, 2021); *J.F.*, Docket No. 19-0864 (issued October 25, 2019); *C.H.*, Docket No. 19-0136 (issued May 23, 2019).

[8] *Id*.

[9] 5 U.S.C. § 8115(a).

earning capacity when an injured employee has been released to full-time work but working less than full-time hours.[10]

If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, the wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the usual employment, age, qualifications for other employment, the availability of suitable employment, and other factors and circumstances, which may affect the wage-earning capacity in his or her disabled condition.[11] Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions. 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. The fact that an employee has been unsuccessful in obtaining work in the selected position does not establish that the work is not reasonably available in his or her commuting area.[12]

OWCP must initially determine an employee's medical condition and work restrictions before selecting an appropriate position that reflects his or her wage-earning capacity. The medical evidence upon which OWCP relies must provide a detailed description of the employee's medical condition.[13] Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.[14]

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 LWEC that can be attributed to the accepted employment injury and for which the claimant may receive compensation.[15]

When OWCP makes a 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 the employee's capabilities with regard to his or 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, local Chamber

[10] Federal (FECA) Procedure Manual, Part 2-- Claims, *Determining Wage-Earning Capacity Based on Actual Earnings*, Chapter 2.815.2(b) (June 2013).

[11] *C.M.*, Docket No. 18-1326 (issued January 4, 2019).

[12] *Id*.

[13] *J.H.*, Docket No. 18-1319 (issued June 26, 2019).

[14] *Id*.

[15] *Id*.

of Commerce, employing establishment contacts, and actual job postings.[16] Lastly, OWCP applies the principles set forth in *Albert C. Shadrick*,[17] as codified in section 10.403 of OWCP's regulations,[18] to determine the percentage of the employee's LWEC.[19]

ANALYSIS

The Board finds that OWCP has not met its burden of proof to reduce appellant's wage-loss compensation, effective February 14, 2020, based on his capacity to earn wages as a customer complaint clerk.

The issue of whether appellant has the physical capacity to perform a selected position is primarily a medical question that must be resolved by the medical evidence of record.[20] The selected position of customer complaint clerk is a sedentary position with occasional lifting of up to 10 pounds. OWCP determined that appellant's wage-earning capacity was represented by the constructed position of customer complaint clerk, as it was within the medical restrictions provided by the treating physician, Dr. Bergey, to include no repetitive lifting, pushing, or pulling greater than 25 pounds, and limited bending and stooping.

However, Dr. Bergey, also opined that appellant developed psychosocial *sequelae* that limited his function after the initial incident and recommended a detoxification program for opioid dependence. Dr. Williams, a physiatrist and DMA, also indicated that she would recommend a detoxification program, if the diagnosis of opioid addiction was accepted by OWCP. OWCP referred appellant for a second opinion examination with Dr. Simonian, who also opined that appellant had developed an opioid dependence due to medication for his injury and advised that a detoxification program would be appropriate. It subsequently accepted the condition of opioid dependence. In May 2019 OWCP referred appellant for a second opinion examination with Dr. Bernhard who recommended a treatment program for appellant's accepted condition of opioid dependence.

OWCP's procedures provide that in assessing an employee's ability to perform a constructed position, if the evidence is unclear, equivocal, or old enough to be considered stale, the claims examiner should seek clarification from a physician regarding the suitability of the position.[21] The Board finds that the medical evidence of record is not clear and unequivocal in this case, given that there is no indication that appellant was provided with the opioid dependence treatment program recommended by OWCP's second opinion physician, Dr. Bernhard, to deal

[16] *C.M.*, *supra* note 11; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Vocational Rehabilitation Services*, Chapter 2.813.19d (November 2011).

[17] *Supra* note 6.

[18] 20 C.F.R. § 10.403.

[19] 5 U.S.C. § 8115(a).

[20] *See G.F.*, Docket No. 20-1031 (issued December 31, 2020); *G.E.*, Docket No. 18-0663 (issued December 21, 2018); *Dennis D. Owen*, 44 ECAB 475 (1993).

[21] *Id.* at Chapter 2.816.4 (June 2013); *see G.F.*, Docket No. 20-1031 (issued December 31, 2020); *G.E.*, Docket No. 18-0663 (issued December 21, 2018).

with the accepted condition of opioid dependence and there is no specific medical opinion of record from OWCP's second opinion physician addressing whether or not appellant could perform the constructed position, given his accepted condition of opioid dependence, in conjunction with his other prescribed medications.[22] OWCP, consequently, failed to meet its burden of proof to reduce appellant's compensation effective February 14, 2020, based on a proper finding that he had the capacity to earn wages as a customer complaint clerk.[23]

The Board notes that Dr. Anderson, a treating physician, advised that appellant reported that he was doing well, his pain was under control, and he did not have any complaints about side effects of his medication. However, the Board also notes that by letters dated May 19 and August 17, 2020, OWCP requested that Dr. Anderson explore alternative treatment options to reduce what appeared to be a concerning level of medication. Appellant specifically testified at the hearing before an OWCP representative that his medication caused him to fall asleep on the job and as a result he was unable to perform the constructed position.

The Board therefore finds that OWCP has not met its burden of proof to reduce appellant's wage-loss compensation, effective February 14, 2020, based on his capacity to earn wages as a customer complaint clerk.

CONCLUSION

The Board finds that OWCP has not met its burden of proof to reduce appellant's wage-loss compensation, effective February 14, 2020, based on his capacity to earn wages as a customer complaint clerk.

[22] *See W.C.*, Docket No. 17-0562 (issued November 17, 2017).

[23] *Id*.

ORDER

IT IS HEREBY ORDERED THAT the September 1, 2020 decision of the Office of Workers' Compensation Programs is reversed.

Issued: May 3, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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