

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

P.W., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
San Diego, CA, Employer**

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**Docket No. 12-1561
Issued: December 28, 2012**

Appearances:

William Sims, Jr., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 18, 2012 appellant, through her attorney, filed a timely appeal from a January 25, 2012 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.

ISSUE

The issue is whether OWCP properly reduced appellant's compensation effective June 5, 2011 on the grounds that the selected position of receptionist represented her wage-earning capacity.

FACTUAL HISTORY

This case was previously before the Board. In an order dated June 1, 2009, the Board remanded the case on the grounds that the March 25, 2008 OWCP wage-earning capacity

¹ 5 U.S.C. § 8101 *et seq.*

decision was not properly issued.² The Board noted that appellant had an authorized representative, but the March 25, 2008 decision was not sent to the representative as required by OWCP regulations. In a decision dated June 3, 2010, the Board reversed a June 17, 2009 OWCP decision.³ The Board noted that, when a claimant has actual earnings, OWCP must determine whether such earnings fairly and reasonably represent her wage-earning capacity. The March 25, 2008 OWCP decision had reduced appellant's compensation based on the selected position of receptionist, without making findings as to why the actual earnings did not fairly and reasonably represent her wage-earning capacity. The history of the case as provided in the Board's prior decision is incorporated herein by reference.

In a letter dated September 7, 2010, appellant's representative stated that appellant worked approximately 23 hours per week from September 4, 2007 to January 19, 2008. The representative included time sheet records.

In a report dated September 13, 2010, Dr. Andre Eglevsky, a Board-certified orthopedic surgeon, stated that appellant was still having problems with carpal tunnel. He indicated that she was showing signs of arthritis with some joint swelling and subluxation about the base of the thumbs bilaterally. Dr. Eglevsky submitted a duty status report dated September 13, 2010 which indicated that appellant could work eight hours with restrictions that included five minutes of keying each hour.

By letter dated November 26, 2010, OWCP advised appellant of a proposal to reduce her compensation for wage loss. It stated that she had the capacity to perform the position of receptionist, *Dictionary of Occupational Titles* No. 237.367-038 at \$536.00 per week.⁴ A worksheet indicated that the current pay rate for the date-of-injury position was \$915.52.⁵ These figures were the same as provided in OWCP's December 14, 2007 notice of proposed reduction. With respect to actual earnings, it found that appellant had worked part time and her date-of-injury position was full time and, therefore, her actual earnings did not represent her wage-earning capacity.

In a report dated April 19, 2011, Dr. Eglevsky stated that there was evidence of a borderline right carpal tunnel syndrome and that appellant definitely had arthritis. He diagnosed arthritis/tendinitis about the hands.

In a decision dated June 7, 2011, OWCP reduced appellant's compensation effective June 5, 2011. It found that she had the capacity to earn \$536.00 in the selected position of receptionist. The date-of-injury pay rate was reported as \$915.52 as of March 1, 2007. In

² Docket No. 08-2167 (issued June 1, 2009).

³ Docket No. 09-2160 (issued June 3, 2010).

⁴ As the Board noted in its prior decision, a rehabilitation counselor had submitted an October 22, 2007 report stating that anticipated wages for receptionist position in appellant's area was \$21,424.00 per year. An OWCP rehabilitation specialist, asserted in an October 29, 2007 report that the evidence from the rehabilitation counselor established weekly wages of \$536.00 (27,872.00 annually) for the receptionist position.

⁵ This pay rate was based on a date of injury pay rate as of March 1, 2007.

response to the argument from appellant's representative that the vocational information was dated, OWCP stated "the provenance of the decision stems from the original proposed reduction." As to medical evidence, OWCP stated that the April 19, 2011 report did not show appellant was incapable of working.

On June 29, 2011 appellant requested a hearing before an OWCP hearing representative. A hearing was held on October 21, 2011. Appellant submitted a September 26, 2011 report from Dr. Eglevsky regarding continuing treatment.

By decision dated January 25, 2012, the hearing representative affirmed the June 7, 2011 decision.

LEGAL PRECEDENT

Once OWCP has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction in such benefits.⁶

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. 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 his or her wage-earning capacity in his disabled condition.⁷

When OWCP makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an OWCP wage-earning capacity specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* 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 labor market should be made through contact with the state employment service or other applicable service.⁸ Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.⁹

⁶ *Carla Letcher*, 46 ECAB 452 (1995).

⁷ *See Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); *see also* 5 U.S.C. § 8115(a).

⁸ *See Dennis D. Owen*, 44 ECAB 475 (1993).

⁹ 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.303.

ANALYSIS

In the present case, the Board had directed OWCP to consider the issue of whether actual earnings fairly and reasonably represented wage-earning capacity, prior to a determination based on a selected position. With respect to actual earnings, the record indicated that appellant had part-time earnings at approximately 23 hours per week. According to OWCP procedures, part-time earnings are not appropriate for a wage-earning capacity determination unless the claimant was a part-time employee at the time of injury.¹⁰ Since there was no indication that appellant was a part-time employee on the date of injury, a part-time position would not be appropriate for a wage-earning capacity determination.

Having determined that actual earnings did not fairly and reasonably represent appellant's wage-earning capacity, OWCP proceeded to reissue its prior findings with respect to the position of receptionist and reduce appellant's compensation effective June 5, 2011. The Board finds several deficiencies in OWCP's determination as to wage-earning capacity.

As a preliminary matter, the Board notes that OWCP found that appellant was capable of earning \$536.00 per week in the selected position. The wage information was provided by an OWCP rehabilitation specialist on October 29, 2007, who stated that the wage information came from the rehabilitation counselor. The evidence of record from the rehabilitation counselor stated that receptionist wages were \$21,424.00 annually, which is \$412.00 per week. The rehabilitation counselor provided this information on a May 23, 2007 CA-66 form as well as an October 22, 2007 report. If OWCP's rehabilitation specialist had contrary evidence, it is not evident from the record and the specialist provided no explanation as to how the specific wage information was established.

In addition, the vocational rehabilitation evidence on which OWCP relied was not current. The June 7, 2011 decision relied on evidence from 2007 as to wages and reasonable availability of the selected position. This is not a retroactive wage-earning capacity determination, but a determination that as of June 7, 2011 the selected position of receptionist represented wage-earning capacity.¹¹ Office procedures indicate that a proposed wage-earning capacity determination based on a constructed position should be issued within 30 days of vocational rehabilitation reports from the counselor and specialist.¹² In this case, the information from the rehabilitation counselor was provided more than three years prior to the proposed reduction on compensation dated November 26, 2010. The Board finds OWCP's decision was not based on current vocational information.

A proper wage-earning capacity determination must be based on an adequate review of the medical evidence to determine if the selected position is within appellant's work restrictions.

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (October 2009).

¹¹ A retroactive wage-earning capacity determination would not be appropriate as appellant was being paid compensation for total disability. *See id.* at Chapter 2.814.8(f).

¹² *Id.* at Chapter 2.814.8(e).

Preexisting conditions as well as employment-related conditions must be considered.¹³ In this case, OWCP did not discuss the duty status report from Dr. Eglevsky dated September 13, 2010 which outlined appellant's work restrictions and included restrictions on keying activity. Unless the evidence is clear and unequivocal, it should secure medical evidence that specifically addresses whether a claimant could perform the duties of the selected position.¹⁴ OWCP did not make adequate findings with respect to the medical evidence of record.

It is OWCP's burden of proof to reduce compensation. For the above reasons, the Board finds that OWCP did not meet its burden to reduce appellant's compensation as of June 5, 2011.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to reduce appellant's compensation effective June 5, 2011 on the grounds that the selected position of receptionist represented her wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 25, 2012 is reversed.

Issued: December 28, 2012
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

¹³ *William Ray Fowler*, 31 ECAB 1817, 1822 (1980).

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(d) (October 2009).