

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

A.G., Appellant)

and)

GENERAL SERVICES ADMINISTRATION,)
NATIONAL CAPITAL REGION-PUBLIC)
BUILDING SERVICE, Kansas City, MO,)
Employer)

Docket No. 10-2037
Issued: July 21, 2011

Appearances:

Brian P. McIlhargie, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 29, 2010 appellant, through counsel, filed a timely appeal from a February 2, 2010 decision of the Office of Workers' Compensation Programs (OWCP) denying modification of a March 30, 2009 loss of wage-earning capacity decision. Pursuant to the Federal Employees' Compensation Act (FECA)¹ 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 April 12, 2009 based on its determination that the constructed position of dispatcher/maintenance service represented his wage-earning capacity.

¹ 5 U.S.C. § 8101 *et seq.*

On appeal, appellant contends the loss of wage-earning capacity determination was issued in error as there is an unresolved conflict in the medical opinion evidence.

FACTUAL HISTORY

On July 13, 2005 appellant, then a 58-year-old pipefitter, filed a traumatic injury claim alleging that on May 18, 2005 he hit the top of his head and sustained a small cut on an overhang. On December 16, 2005 OWCP accepted the claim for displaced cervical intervertebral disc without myelopathy and authorized C5-6 cervical fusion surgery, which occurred on May 8, 2006. By letter dated August 7, 2007, appellant was placed on the periodic rolls for temporary total disability.

On January 17 and May 21, 2007 Dr. Brian Y. Kim, a treating Board-certified physiatrist, diagnosed chronic cervical pain, significant myofascial restrictions of the levator and trapezius muscles, severe cervical stenosis, severe cervical disc herniation and a May 5, 2006 C5-6 fusion. A physical examination revealed severely reduced cervical range of motion, myofascial tightness throughout the bilateral scapular, upper thoracic and cervical regions and no upper extremity focal atrophy. Dr. Kim concluded that appellant was totally disabled for work as a result of his worsening symptoms. He advised appellant was to avoid sitting or standing more than 30 minutes and encouraged to move frequently.

In a May 17, 2007 report, Dr. Robert F. Draper, Jr., a second opinion Board-certified orthopedic surgeon, diagnosed cervical spondylosis, degenerative disc disease at C5-6, cervical disc herniation with cord impingement at C5-6 and delayed anterior cervical discectomy and fusion at C5-6. He stated that appellant was unable to perform his regular duties of a plumber or pipe fitter. Dr. Draper concluded, however, that appellant was not totally disabled and was capable of working a sedentary job with restrictions including no lifting more than 30 pounds and no overhead work, climbing and crawling. In an attached work capacity evaluation (Form OWCP-5c), he listed appellant's work restrictions of no reaching above the shoulder and climbing and up to eight hours of pulling, pushing and lifting up to 30 pounds.

OWCP referred appellant for vocational rehabilitation services on August 7, 2007.

On January 16, 2008 Dr. Kim diagnosed chronic cervical pain, significant myofascial restrictions of the levator and trapezius muscles, a May 5, 2006 C5-6 fusion, severe cervical disc herniation, multi-level degenerative disc disease and severe cervical spinal stenosis with spine cord impingement. A physical examination revealed moderately reduced range of motion, no upper extremity focal atrophy, myofascial tightness throughout the bilateral scapular, upper thoracic and cervical regions. Dr. Kim reported a neurological examination revealed no sustained hyperreflexia. As a result of appellant's functional limitations and symptoms, he reiterated that appellant remained totally disabled. Dr. Kim related that appellant needed to change from a sitting to standing position every 15 to 20 minutes, and that he may need to lay supine to relieve pressure on his back and pain for an extended period of time. In an attached work capacity evaluation Form OWCP-5c, he diagnosed cervical disc herniation and indicated that appellant was not capable of working due to his need to change posture/position every 15 minutes and need to frequently rest supine. Permanent restrictions included: 15 to 20 minutes of sitting, standing and repetitive movements of the elbow and wrist; 30 minutes of walking;

minimal to no climbing, reaching above the shoulder and stooping/bending; no twisting; minimal pushing and pulling of up to five pounds; rare lifting, squatting and kneeling; and 10 to 15 minute breaks every 15 to 20 minutes.

The vocational rehabilitation specialist identified the positions of dispatcher, maintenance service and identification clerk as within appellant's work restrictions and reasonably available in sufficient numbers in his commuting area. In a letter dated May 29, 2008, OWCP informed appellant that it would provide 90 days of placement services beginning that day to help him obtain employment.

In a June 27, 2008 work capacity evaluation Form OWCP-5c, Dr. Kim advised that appellant needed to rest in a supine position and to frequently change his posture/position. In August 22 and October 3, 2008 reports, he noted similar physical findings as previously reported and stated that appellant remained totally disabled. In an October 3, 2008 report, Dr. Kim attributed appellant's disability from working due to ongoing symptoms and severity of the injury.

In a January 22, 2009 status report, Charles E. Terry, a rehabilitation specialist, noted that vocational rehabilitation services were unsuccessful. He noted that the following positions were suitable for appellant: dispatcher/maintenance service with wages of \$483.00 a week; and identification clerk, with wages of \$384.00 a week. Both jobs were sedentary with no lifting more than 10 pounds and no prolonged standing, walking, pushing, pulling, stooping, bending or squatting. Mr. Terry recommended the positions as the physical requirements do not exceed appellant's medical restrictions. He considered the nature of appellant's injury, his usual employment, age, degree of physical impairment and qualifications as well as availability of employment. Mr. Terry determined the position of dispatcher/maintenance service was appropriate for appellant.

In a February 2, 2009 report, Dr. Kim diagnosed C5-6 cervical fusion, chronic cervical pain, severe multi-level cervical disc herniations, severe multi-level cervical spinal stenosis and myofascial cervical, thoracic and scapular muscles restrictions. Appellant continued to have problems with more than 15 to 20 minutes of prolonged standing or sitting and required lying down to relieve pressure on his spinal column. He also stated that appellant had restricted range of motion as a result of the fusion surgery. Permanent restrictions included: no upper extremity repetitive motion; no lifting more than five pounds; and changing positions every 15 to 20 minutes.

On February 26, 2009 OWCP proposed to reduce appellant's compensation for wage loss, noting that the medical and factual evidence established that he was no longer totally disabled but had the capacity to earn wages as a dispatcher/maintenance service at the rate of \$483.00 a week.

Appellant disagreed with the proposal to reduce his compensation and noted that his physician considered him totally disabled. In a February 2, 2009 work capacity evaluation Form OWCP-5c, Dr. Kim diagnosed cervical disc herniation which indicated that appellant was not capable of working an 8-hour day due to his need to change posture/position every 15 minutes and need to frequently rest supine. Permanent restrictions included: 15 to 20 minutes of sitting,

standing and repetitive movements of the elbow and wrist; 30 minutes of walking; minimal to no climbing, reaching above the shoulder and stooping/bending; no twisting; minimal pushing and pulling of up to five pounds; rare lifting, squatting and kneeling; and 10 to 15-minute breaks every 15 to 20 minutes.

By decision dated March 30, 2009, OWCP adjusted appellant's compensation benefits effective April 12, 2009 finding that the position of dispatcher/maintenance service represented his wage-earning capacity. It noted that appellant's weekly pay rate when injured was \$996.14 and that the current pay rate for job and step when injured was \$1,158.69. OWCP found that appellant was capable of earning \$483.00 a week, that the adjusted wage-earning capacity a week was \$418.38, that the percentage of new wage-earning capacity was 42 percent, that the loss in wage-earning capacity amount a week was \$577.76, leaving appellant with a compensation rate of \$433.32 a week or \$462.75 a week when increased by applicable cost-of-living adjustments. It calculated that this resulted in a new compensation rate every four weeks of \$1,851.00 beginning on April 12, 2009.

On December 17, 2009 appellant's counsel requested reconsideration.

By decision dated February 2, 2010, OWCP denied modification of the March 30, 2009 loss of wage-earning capacity decision.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.² 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.³

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 wage-earning capacity. If the actual earnings do not fairly and reasonably represent the employee's wage-earning capacity or if the employee has no actual wages, the wage-earning capacity is determined with due regards too the nature of the injury, the degree of physical impairment, the employee's usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.⁴

OWCP must initially determine appellant's medical condition and work restrictions before selecting an appropriate position that reflects his vocational wage-earning capacity. The

² *T.F.*, 58 ECAB 128 (2006); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *H.N.*, Docket No. 09-1628 (issued August 19, 2010).

³ 20 C.F.R. §§ 10.402, 10.403.

⁴ 5 U.S.C. § 8115(a); *see N.J.*, 59 ECAB 171 (2007); *T.O.*, 58 ECAB 377 (2007); *Dorothy Lams*, 47 ECAB 584 (1996).

Board has stated that the medical evidence upon which OWCP relies must provide a detailed description of appellant's condition.⁵ Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.⁶

When OWCP makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to OWCP wage-earning capacity specialist for selection of a position, listed in the Department of Labor, *Dictionary of Occupational Titles* (DOT) or otherwise available in the open market, that fit the employee's capabilities with regards to his 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. Finally, application of the principles set forth in *Albert C. Shadrick*⁷ and codified by regulations at 20 C.F.R. § 10.403⁸ should be applied. Subsection(d) of the regulations provides that the employee's wage-earning capacity in terms of percentage is obtained by dividing the employee's actual earnings or the pay rate of the position selected by OWCP, by the current pay rate for the job held at the time of the injury.⁹

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.¹⁰ Any incapacity to perform the duties of the selected position resulting from subsequently acquired conditions is immaterial to the loss of wage-earning capacity that can be attributed to the accepted employment injury and for which appellant may receive compensation. Additionally, 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.¹¹

ANALYSIS

The Board finds that OWCP improperly reduced appellant's compensation effective April 12, 2009 based on its determination that the position of dispatcher/maintenance service represented his wage-earning capacity. OWCP improperly gave decisive weight to the opinion of the second opinion physician, Dr. Draper. The Board finds an unresolved conflict in medical opinion between appellant's treating physician, Dr. Kim and of the second opinion physician, Dr. Draper.

⁵ See *William H. Woods*, 51 ECAB 619 (2000).

⁶ *Carl C. Green, Jr.*, 47 ECAB 737 (1996).

⁷ 5 ECAB 376 (1953).

⁸ 20 C.F.R. § 10.403.

⁹ *Id.* at § 10.403(d).

¹⁰ *James Henderson, Jr.*, 51 ECAB 268 (2000).

¹¹ *Id.*

Dr. Kim opined that appellant was totally disabled from working based on work restrictions of 15 to 20 minutes of sitting, standing and repetitive movements of the elbow and wrist; 30 minutes of walking; minimal to no climbing, reaching above the shoulder and stooping/bending; no twisting; minimal pushing and pulling of up to five pounds; rare lifting, squatting and kneeling; and 10- to 15-minute breaks every 15 to 20 minutes. Dr. Draper opined that appellant was capable of working an eight-hour day with restrictions. He opined that appellant was capable of working an eight-hour day provided there no reaching above the shoulder and climbing and that appellant was capable of pulling, pushing and lifting up to 30 pounds for up to eight hours. Due to this conflict with regard to appellant's restrictions and whether he was totally disabled, OWCP should have referred appellant to an impartial medical examiner.¹² Because there remains an unresolved conflict in the medical opinion with regards to appellant's work restrictions and whether he is capable of working, the Board finds that OWCP did not meet its burden of proof to issue a loss of wage-earning capacity decision.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to reduce appellant's compensation based on its determination that the constructed position of dispatcher/maintenance represented his wage-earning capacity due to an unresolved conflict in medical opinion.

¹² 5 U.S.C. § 8123(a); *see D.L.*, Docket No. 09-1549 (issued February 23, 2010); *Y.A.*, 59 ECAB 701 (2008); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 2, 2010 is reversed.

Issued: July 21, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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