

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

S.M., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
TRANSPORTATION SECURITY)
ADMINISTRATION, Mays Landing, NJ,)
Employer)

**Docket No. 11-995
Issued: April 16, 2012**

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

Oral Argument March 7, 2012

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 13, 2011 appellant filed a timely appeal from the October 26, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) reducing his wage-loss compensation. 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 met its burden of proof to reduce appellant's compensation, effective October 24, 2010, based on its determination that the constructed position of a legal investigator fairly and reasonably represented his wage-earning capacity.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On October 15, 2004 appellant, a 30-year-old civil aviation security specialist (air marshal), filed an occupational disease claim alleging that he had developed blood clots due to time spent flying in a seated position. OWCP accepted his claim for left leg deep venous thrombosis and placed him on the periodic rolls.²

In an August 12, 2005 second opinion report, Dr. William J. Schickler, a Board-certified vascular surgeon, reviewed results of an April 2005 venous ultrasound, which confirmed persistent thrombosis of the left superficial femoral and popliteal veins with noncompressibility and extensive thrombosis consistent with a chronic occlusion of this vessel secondary to deep vein thrombosis (DVT). He opined that he was unable to perform a job that required prolonged standing. Further, the fact that there had been no significant recanalization of the major DVT of the left lower extremity made it unlikely that his disability associated with this accepted injury would resolve.

Appellant was referred for vocational rehabilitation services on December 7, 2005. On August 14, 2006 OWCP informed him that it had reviewed the rehabilitation plan for return to work and had determined that the job duties of a private investigator (DOT# 376.267-018) and parole officer (DOT# 195.107-046) were within his medical restrictions, as both positions would allow him the feasibility of no prolonged sitting or standing for more than two hours at a time, as outlined by Dr. Schickler. He was advised that he would be provided with 90 days of placement services and that, at the end of the rehabilitation program, whether he was actually employed or not, OWCP would in all likelihood reduce his compensation.

In a June 6, 2007 second opinion report, Dr. Eric Wellons, a Board-certified vascular surgeon, diagnosed DVT femoropopliteal and chronic venous insufficiency, which he indicated was being treated with Coumadin. He opined that appellant could perform some work. Extended periods of time in a vehicle and extended periods of standing were prohibited.

OWCP referred appellant to Dr. Peter Dovgan, a Board-certified vascular surgeon, for another second opinion examination and an opinion regarding his work capacity. In a November 5, 2008 report, Dr. Dovgan provided examination findings and a history of injury and treatment. Bilateral femoral, popliteal, dorsalis pedis and posterior tibial pulses were both present and normal. There were mild amounts of left leg swelling and mild skin changes on the left which would be most consistent with lipodermal sclerosis near the medial malleolus. There were no active ulcerations or breakdown. Dr. Dovgan diagnosed chronic venous insufficiency status post multiple deep vein thromboses; likely hypercoagulable state, yet unidentified with recurrent DVTs on Coumadin in the past; limb swelling, venostasis disease secondary to prior deep vein thromboses. He opined that appellant's history of DVT would limit his ability to stand or perform activities for long periods of time, and that sitting for long periods of time would be

² Previous claims include December 13, 1999 and February 2, 2000 claims for neck and back injuries (File Nos. xxxxxx285 and xxxxxx983), which were combined under File No. xxxxxx983. Appellant sustained a left ankle injury on April 14, 2004 (File No. xxxxxx555).

disadvantageous and potentially dangerous. Dr. Dovgan stated that the deep venous insufficiency would likely be lifelong and chronic. He opined that appellant was unable to perform the duties of a civil aviation security specialist because of his inability to sit or stand for prolonged periods of time. Dr. Dovgan recommended that appellant continue to take Coumadin for life. In a supplemental report dated November 24, 2008, he opined that appellant could perform the duties of a private investigator or probation and parole officer if he was not required to sit or stand for continuous periods, without relief, in excess of 45 minutes.

On June 26, 2009 OWCP advised appellant of its determination that Dr. Dovgan's November 5, 2008 report constituted the weight of medical evidence in this case and established that he was capable of resuming full-time gainful employment. Accordingly, his case was being referred for appropriate vocational rehabilitation services.

On April 14, 2010 a transferable skills analysis was conducted incorporating appellant's education (college degrees in criminal justice and behavioral psychology), past professional work experience and residual physical functioning. The sedentary positions of legal investigator and research assistant were found to exist in satisfactory numbers within appellant's local labor market and to be consistent with Dr. Dovgan's medical restrictions. Both positions required lifting, carrying, pushing and pulling 10 pounds occasionally and involved mostly sitting and some standing or walking for brief periods of time. The rehabilitation counselor noted that Dr. Dovgan opined that appellant would need to elevate his leg to prevent swelling. He stated that the issues to be clarified before proceeding with placement services were: (1) whether the fact that the jobs require mostly sitting was medically contraindicated; and (2) whether a medical update should be obtained given the fact that the most recent medical was more than a year old.

In a letter dated May 19, 2010, OWCP informed appellant that the positions of legal investigator or research assistant were within his limitations and that, therefore, he was expected to cooperate fully so that he could return to work in one of the specified jobs. Appellant was advised that he would receive 90 days of assistance to obtain employment. At the end of the 90-day period, whether he was actually employed or not, OWCP would in all likelihood reduce his compensation based on his ability to earn wages of \$24,960.00 per year.

Appellant submitted a May 27, 2010 report from Dr. John Ellis, a Board-certified family practitioner, who provided a history of appellant's injuries and treatment and examination findings. Examination of the left hip revealed tenderness over the anterior iliac crest and lateral crest and decreased range of motion due to the DVT in the left leg. Examination of the left knee revealed decreased range of motion due to venous engorgement and enlargement of the calf and thigh. Examination of the calves reveals obvious palpable engorgement and enlargement of the left calf and enlargement of the left thigh and superficial veins. There was tenderness over the deep veins in the calf; depigmentation on the inner aspect of the left calf, left ankle and lateral left calf; and marked superficial engorgement of the veins on the inner aspect of the left ankle and foot. Dr. Ellis diagnosed DVT, left leg; tendinitis, left ankle, knee and hip due to venous engorgement and antalgic gait in the left leg due to DVT; skin changes in the left leg due to venous insufficiency; deranged cervical and lumbar discs with bilateral C5 and S1 nerve root impingement. He noted that appellant's thoracic and lumbar spine and the discs in his lower back had been accepted by OWCP and discussed findings related to appellant's prior claims.

Dr. Ellis opined that appellant was permanently and totally disabled and unable to engage in any type of gainful employment due to the DVT in his left leg, the insufficiency in his left calf and into his thigh, and the continued severe swelling in his left lower leg. He was reportedly not able to work as a private investigator, which required sitting and observing, and he could not do research work on a computer in a library. Appellant was restricted from sitting, because the bending of the knee causes decreased venous flow. He could not stand because standing causes increased pressure and venous insufficiency in his left leg. Dr. Ellis opined that appellant had to be able to lie down frequently and keep his leg elevated. He stated, "Returning to work under supervision would put him at great risk for death."

On September 17, 2010 OWCP notified appellant that it proposed to reduce his compensation for wage loss as the medical and factual evidence established that he was no longer totally disabled. Appellant was found partially disabled with the capacity to earn wages as a legal investigator or researcher, at the rate of \$480.00 per week, based upon Dr. Dovgan's November 5, 2008 second opinion report, which constituted the weight of the medical evidence. Appellant was afforded 30 days to submit additional evidence concerning his capacity to earn wages in the constructed position.

In an October 10, 2010 statement, appellant objected to OWCP's proposed reduction, contending that he was unable to perform the duties of the constructed positions. He argued that Dr. Dovgan's report provided restrictions that precluded the performance of those duties. Appellant also argues that Dr. Dovgan's report was not current.

By decision dated October 26, 2010, OWCP reduced appellant's compensation benefits effective October 24, 2010, based on its determination that the position of a legal investigator was medically and vocationally suitable and represented his wage-earning capacity. It found a new compensation rate every four weeks of \$3,879.00 beginning November 20, 2010.³

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.⁴

Section 8115(a) of FECA provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings if they fairly and reasonably represent his wage-earning capacity. Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.⁵ If the actual earnings do not fairly and reasonably represent wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, his degree of physical impairment, his usual employment,

³ Appellant's net compensation rate every four weeks after a deduction of \$642.87 for court-ordered child support was \$2,807.41.

⁴ *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

⁵ *Hubert F. Myatt*, 32 ECAB 1994 (1981); *Lee R. Sires*, 23 ECAB 12 (1971).

his age, his 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.⁶

OWCP must initially determine appellant's medical condition and work restrictions before selecting an appropriate position that reflects his vocational wage-earning capacity. The Board has stated that the medical evidence upon which OWCP relies must provide a detailed description of appellant's condition.⁷ Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.⁸

ANALYSIS

In its October 26, 2010 decision, OWCP reduced appellant's compensation benefits based upon his ability to earn the wages of a legal investigator. The Board finds that OWCP failed to use a reasonably current medical evaluation in determining whether the constructed position of legal investigator was medically suitable. Therefore, the October 26, 2010 decision must be reversed.

OWCP determined that the selected position was medically suitable on the grounds that the required duties of the position were within the restrictions provided in Dr. Dovgan's November 5, 2008 report. It is well established that a wage-earning capacity determination must be based on a reasonably current medical evaluation.⁹ As Dr. Dovgan's report was issued two years prior to the October 26, 2010 decision, it does not provide probative evidence that the selected position of legal investigator represented appellant's wage-earning capacity on the date of OWCP's determination. The passage of time lessened its relevance on the nature and extent of appellant's current limitations.¹⁰

Dr. Dovgan provided restrictions which precluded standing or sitting for more than 45 minutes. His November 5, 2008 report reflected that appellant's DVT condition was chronic and lifelong. On April 14, 2010 the rehabilitation counselor stated that clarification was needed as to whether the legal investigator position was "medically contraindicated" because it required mostly sitting, and whether a medical update should be obtained, given the fact that the most recent medical report was more than a year old at that time. OWCP was on notice that appellant's medical condition was fluid and continuous. Moreover, there were outstanding concerns as to appellant's ability to perform the duties of the constructed position and the relevancy of the November 2008 medical report on which appellant's restrictions were based.

⁶ See *Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

⁷ See *William H. Woods*, 51 ECAB 619 (2000); *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

⁸ *John D. Jackson*, 55 ECAB 465 (2004); *Carl C. Green, Jr.*, 47 ECAB 737, 746 (1996).

⁹ *Id.*

¹⁰ See, e.g., *Tyrone R. Porter*, Docket No. 05-1779 (issued February 1, 2006) (where the Board reversed OWCP's decision reducing appellant's benefits effective June 28, 2005 on the grounds that the September 29, 2003 medical report on which it relied was not reasonably current).

OWCP relied, however, on the restrictions contained in an outdated report in making its wage-earning capacity determination. It did not give due regard to the factors specified in section 8115 of FECA. Therefore, the Board finds that it did not discharge its burden of proof to justify the reduction of appellant's compensation.¹¹

The Board notes that OWCP did not address Dr. Ellis' opinion that appellant was permanently and totally disabled and unable to engage in any type of gainful employment due to the DVT in his left leg. While Dr. Ellis' opinion may not have been sufficiently rationalized to represent the weight of the medical evidence, this reasonably current report warranted further development of the medical evidence regarding appellant's work capacity.

For reasons stated herein, the Board will reverse the October 26, 2010 decision.¹²

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to justify the reduction of appellant's compensation on the grounds that he had the capacity to earn wages in the constructed position of legal investigator. The medical evidence on which OWCP relied was not reasonably current to establish relevant work limitations.

¹¹ The Board also notes that Dr. Doygan did not review a copy of the position description for the position of legal investigator.

¹² This case can be distinguished from *M.A.*, 59 ECAB 624 (2008), where the Board found that OWCP properly determined the employee's wage-earning capacity effective April 17, 2005 based on medical restrictions dated May 1, 2000. In *M.A.*, the employee's attending physician continued to treat him and submitted periodic reports through February 12, 2004 reaffirming the May 1, 2000 restrictions.

ORDER

IT IS HEREBY ORDERED THAT the October 26, 2010 decision of the Office of Workers' Compensation Programs is reversed.

Issued: April 16, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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