

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

G.A., Appellant

and

DEPARTMENT OF DEFENSE,
San Antonio, TX, Employer

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**Docket No. 12-1826
Issued: June 25, 2013**

Appearances:
John S. Evangelisti, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 31, 2012 appellant, through her attorney, filed a timely appeal of a May 7, 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 to consider the merits of the case.

ISSUE

The issue is whether OWCP met its burden to establish that the constructed position of teller represented appellant's wage-earning capacity.

On appeal, counsel argues that the selected position was not within appellant's physical or vocational abilities. He further argued that there is an unresolved conflict of medical opinion and that OWCP should have accepted fibromyalgia as work related.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 16, 2001 appellant, then a 42-year-old cashier, filed a traumatic injury claim alleging that she sustained shoulder and neck pain that day in the performance of duty. OWCP accepted her claim for cervical strain on January 24, 2002. It accepted a right shoulder sprain as work related on January 21, 2003. Appellant underwent a right shoulder arthroscopic acromioplasty with subacromial decompression on February 18, 2003. She returned to light-duty work on July 9, 2003. In a note dated December 11, 2003, appellant's physician stated that she had permanent restrictions of 30 minutes of upper extremity activity per hour and lifting no more than 25 pounds.

By decision dated March 5, 2004, appellant received a schedule award for 11 percent impairment of her right upper extremity.

Appellant underwent a functional capacity evaluation on April 20, 2004 which demonstrated that she was capable of performing medium work of lifting 10 pounds consistently and 25 pounds frequently.

Appellant underwent an electromyogram (EMG) and nerve conduction study on June 9, 2005 which demonstrated mild median sensory nerve entrapment at the left wrist. The remainder of her upper extremity studies were normal. Appellant underwent a second functional capacity evaluation on June 22, 2005 which again indicated that she was capable of performing medium work.

OWCP referred appellant for vocational rehabilitation services on January 27, 2006. The vocational rehabilitation counselor found that she was a high school graduate who had worked as cashier checker, fast food worker and sales clerk.

In a letter dated August 17, 2006, Dr. Timothy V. Sandell, a physician Board-certified in physical medicine and rehabilitation, stated that appellant required equal work to rest time. He stated that she could not do repetitive work more than 15 minutes at a time and then required 15 minutes of rest or nonrepetitive activity. Dr. Sandell stated that there was also a concern regarding her cognitive function and ability to drive to and from work due to her medications. On April 26, 2007 OWCP accepted the additional condition of calcifying tendinitis of the right shoulder as due to appellant's employment.

On May 1, 2007 OWCP referred appellant for a second opinion evaluation to Dr. Hendrick J. Arnold, a Board-certified orthopedic surgeon. In a report dated May 31, 2007, Dr. Arnold noted her history of repetitive lifting as a cashier. On examination he stated that appellant had full range of motion and no findings other than tenderness in the neck and right shoulder region. Dr. Arnold stated that she should not drive while taking her prescribed medications and should not have to do mentally exacting maneuvers such as cashiering or figuring change and would not be able to do reports. He indicated that appellant could work eight hours a day with restrictions including no reaching above the shoulder and no operating a motor vehicle while on her medication. Dr. Arnold found that appellant could push, pull and lift 35 pounds, eight hours a day.

On April 2, 2009 appellant underwent a second opinion examination by Dr. William V. Watson, a Board-certified orthopedic surgeon, who noted appellant's history of injury and medical history. Dr. Watson found tenderness of the right shoulder, cervical spine and right trapezial muscle with no other objective findings. He stated that appellant's medications of Percocet and Valium should not be used when she was driving or any activities involving higher cognitive skills. Dr. Watson recommended Tramadol for pain and Flexeril for muscle relaxer as medications that would not reduce her work capacity. He indicated that appellant could work with no reaching above the shoulder, no operating a motor vehicle when on medication and pushing, pulling and lifting up to 35 pounds. Dr. Watson did not indicate that appellant required any breaks.

In a report dated February 18, 2010, Dr. Sandell diagnosed cervical strain, right upper extremity pain with history of rotator cuff repair and carpal tunnel release as well as left carpal tunnel syndrome and chronic pain/fibromyalgia.

OWCP referred appellant for vocational rehabilitation counseling on August 31, 2010. In a letter dated September 28, 2010, it noted that she refused to participate in vocational rehabilitation and explained the penalties for failing to cooperate with vocational rehabilitation. Appellant signed a vocational plan on October 28, 2010 and chose the goals of bank teller and sales attendant.

On February 23, 2011 OWCP noted that in addition to the accepted conditions of neck sprain, right shoulder sprain and right shoulder tendinitis, appellant had another claim which had been accepted for right carpal tunnel syndrome. It noted that left carpal tunnel syndrome was not an accepted condition and requested additional information if she believed that she had developed a consequential injury.

The vocational rehabilitation counselor identified the position of teller as physically and vocationally appropriate for appellant. The position required light strength levels including occasionally lifting up to 20 pounds and frequently lifting up to 10 pounds within appellant's established work restrictions. The vocational rehabilitation counselor concluded that appellant's high school diploma and a work history of handling money, balancing cash drawers and working with customers as well as her nine years' experience as cashier-checker met the specific vocational preparation for the position of teller. The vocational rehabilitation counselor further found that the job was being performed in sufficient numbers as to make it reasonably available to appellant according to Pikes Peake Workforce Center. She noted full-time openings with three employers.

On May 3, 2011 Dr. Sandell repeated his prior work restrictions of 15 minutes of repetitive work with 15 minutes rest time and again directed appellant to exercise caution getting to and from work with taking medications. He recommended a functional capacity evaluation.

The vocational rehabilitation counselor submitted a copy of appellant's résumé, which included a statement that she received a high school diploma in 1977.

In a letter dated June 13, 2011, OWCP proposed to reduce appellant's compensation benefits based on her capacity to earn wages as a teller. It allowed 30 days for a response.

Counsel responded on July 11, 2011 and requested that the additional condition of fibromyalgia be accepted, alleged that there was an unresolved conflict of medical opinion evidence between Dr. Sandell and Dr. Watson and stated that the position did not comport with Dr. Watson's restrictions of no reaching above the shoulder and no driving to and from work on medications. He further alleged that the specific vocational preparation required of five to six years' experience was not met.

By decision dated September 21, 2011, OWCP finalized the proposed reduction of appellant's compensation effective September 25, 2011. It found that the position of teller was medically and vocationally suitable for her and reasonably represented her wage-earning capacity.

Counsel requested an oral hearing before an OWCP hearing representative on October 19, 2011. Appellant testified at the oral hearing on February 16, 2012 and stated that she used several medications for treatment of her symptoms resulting in drowsiness. She stated that her physician restricted her from operating a motor vehicle. Appellant stated that she did not graduate from high school only completing the eleventh grade.

In a report dated March 21, 2012, Dr. Sandell stated that appellant's diagnosis of fibromyalgia came about over time beginning in 2007. He recommended restrictions due to this condition including limiting repetitive activity to equal work and rest time or 15 minutes of repetitive work at a time.

By decision dated May 7, 2012, an OWCP hearing representative found that the position of teller fairly and reasonably represented appellant's wage-earning capacity.

LEGAL PRECEDENT

Section 8115 of FECA² provides that 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 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, the 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 or circumstances which may affect his or her wage-earning capacity in his or her disabled condition.

When OWCP makes a medical 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 Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open market, that fits that 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 or other applicable service. Finally, application of the

² 5 U.S.C. §§ 8101-8193, 8115.

principles set forth in *Albert C. Shadrick*³ will result in the percentage of the employee's loss of wage-earning capacity. The basic range of compensation paid under FECA is 66 2/3 percent of the injured employee's monthly pay.⁴

ANALYSIS

The Board finds that OWCP met its burden of proof to reduce appellant's compensation benefits based on her capacity to earn wages in the constructed position of teller.

OWCP accepted appellant's claims for cervical and right shoulder strain, right shoulder calcifying tendinitis and right carpal tunnel syndrome. Appellant's attending physician, Dr. Sandell, repeatedly found that she could work with 15 minutes of repetitive activity followed by 15 minutes of rest. The Board notes that Dr. Sandell's reports from August 2006 through March 21, 2012 are generally only brief statements on treatment and not sufficient to establish appellant's disability for work due to the lack of supporting physical findings and medical reasoning. In a March 21, 2012 report, Dr. Sandell attributed appellant's work restrictions of 15 minutes rest and 15 minutes work to her fibromyalgia, a nonemployment-related condition.

Dr. Arnold and Dr. Watson both second opinion physicians, found no objective findings on examination. Each opined that appellant could work with no reaching above the shoulder and a pushing, pulling and lifting limitation of 35 pounds. Dr. Arnold and Dr. Watson noted that appellant should not operate a motor vehicle while on medications. Neither physician supported the need for breaks. The Board finds that these reports represent the weight of the medical opinion evidence and establish that appellant could physically perform the duties of a teller which requires light strength levels of lifting up to 20 pounds occasionally and 10 pounds frequently. Contrary to counsel's argument, the Board finds no conflict of medical opinion evidence and that the position was within appellant's medical restrictions.

The Board also finds that the identified position of teller was vocationally suitable. The vocational rehabilitation counselor stated that appellant met the specific vocational preparation of five to six months to one year as she had a high school diploma and a work history of handling money, balancing cash drawers and working with customers. She stated that appellant's nine years' experience as cashier-checker would meet the specific vocational preparation for the position of teller. The vocational rehabilitation counselor further found that the job was being performed in sufficient numbers as to make it reasonably available to appellant according to Pikes Peake Workforce Center. She noted full-time openings with three employers.⁵ Because the vocational rehabilitation counselor is an expert in the field of vocational rehabilitation, OWCP may rely on his or her opinion as to whether the job is reasonably available and

³ *Id.* at 376.

⁴ *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

⁵ The lack of current job openings does not equate to a finding that the position was not performed in sufficient numbers to be considered reasonably available. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8d (October 2009). *M.P.*, Docket No. 12-1458 (issued May 9, 2013).

vocationally suitable.⁶ The Board finds that OWCP properly reduced appellant's wage-loss compensation based on her capacity to earn wages as teller.

Appellant may request modification of the wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

CONCLUSION

The Board finds that the position of teller represented appellant's wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the May 7, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 25, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

⁶ *Id.*