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

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| **W.C., Appellant** | ) | |
| **and** | ) | **Docket No. 13-705** |
| | ) | **Issued: September 4, 2013** |
| **U.S. POSTAL SERVICE, POST OFFICE, Rochester, NY, Employer** | ) | |

*Appearances:*
*Elaine Cole, Esq.,* for the appellant
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

### ***JURISDICTION***

On February 5, 2013 appellant, through his representative, filed a timely appeal from a September 21, 2012 decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (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 appellant met his burden of proof to establish that a June 30, 2011 wage-earning capacity decision should be modified.

On appeal appellant asserts that there was no conflict in medical opinion evidence regarding the number of hours he could work at the time he was referred for an impartial evaluation and that the physician selected was biased.

[1] 5 U.S.C. §§ 8101-8193. By order dated May 2, 2013, the Board denied appellant's request for oral argument.

## ***FACTUAL HISTORY***

On January 16, 1997 appellant, then a 49-year-old letter carrier, filed a traumatic injury claim alleging that he injured his lower back and both knees when he slipped and fell while delivering mail. He did not stop work.[2] OWCP accepted that appellant sustained a left knee strain, a lumbar strain, and a right knee abrasion and that he sustained a recurrence of disability on September 9, 2004. Appellant returned to six hours of modified duty on March 7, 2005. On July 25, 2005 OWCP reduced his compensation based on his reemployment. In a September 16, 2008 report, Dr. Robert A. Caifano, an attending Board-certified internist, diagnosed spinal stenosis. He advised that appellant's back pain had increased and advised that he should not work for the rest of the month. The employing establishment withdrew appellant's limited-duty position, effective November 12, 2008, and he was placed on the periodic compensation rolls.

In December 2008, appellant was referred for vocational rehabilitation and underwent vocational assessment in March 2009. In May 2009, OWCP referred appellant to Dr. Arlen K. Snyder, a Board-certified orthopedic surgeon, for a second-opinion evaluation.

In an initial evaluation dated June 2, 2009, Dr. Clifford J. Ameduri, an attending Board-certified physiatrist, described the history of injury and appellant's complaint of increasing back pain. He noted that appellant had last worked in November 2008. Dr. Ameduri described appellant's physical examination findings and diagnosed back pain due to nuclear bulge, discogenic spondyloarthrosis, stable facet syndrome, spinal stenosis, and lumbar sacral sprain and strain, all due to the January 16, 1997 work injury. He recommended diagnostic studies, physical therapy and trigger point injections.

Dr. Snyder provided a second-opinion evaluation on June 8, 2009 in which he noted his review of the statement of accepted facts and medical record. He described the January 16, 1997 work injury and appellant's symptoms of constant radiating right low back pain. Dr. Snyder discussed physical examination findings and diagnosed chronic low back pain involving the right lower back and right leg, caused by the January 16, 1997 employment injury. He advised that appellant could never carry out the duties of a letter carrier because of subjective low back pain, and that he had reached maximum medical improvement. Dr. Snyder advised that appellant could work, beginning four hours a day, with sitting limited to three hours; walking and standing to two hours; occasional bending and stooping; one hour of operating a motor vehicle to and from work; pushing and pulling of 20 pounds for two hours; and lifting 15 pounds for two hours.

In July 2009, a vocational rehabilitation counselor identified the positions of information clerk and customer complaints clerk as within appellant's physical limitations. A rehabilitation plan was approved on July 14, 2009 and appellant began a training program in office and computer skills in August 2009. Appellant completed the program in November 2009.

[2] A May 7, 1997 computerized tomography (CT) scan of the lumbosacral spine demonstrated a tiny L5-S1 herniation on the right. An October 16, 1998 magnetic resonance imaging (MRI) scan of the lumbar spine indicated that the L5-S1 herniation had extended with impingement on the thecal sac. A June 4, 1999 electrodiagnostic study of the lower extremities showed minimal evidence of right S1 radiculopathy.

Dr. Ameduri continued to submit reports reiterating his diagnoses and describing appellant's condition and treatment. By letter dated November 20, 2009, OWCP asked the physician whether appellant continued to be partially disabled due to the January 16, 1997 work injury, whether he was at maximum medical improvement, and for a description of his current restrictions. In a work capacity evaluation dated November 30, 2009, Dr. Ameduri advised that appellant could not perform his usual job and could work four hours a day with limitations that would apply for 90 days. He indicated that appellant could sit for two hours, walk and stand for 30 minutes each, could not bend or stoop and could operate a motor vehicle to/from work for one hour. Pushing, pulling and lifting were restricted to 10 pounds, 30 minutes each. On December 4, 2009 Dr. Ameduri responded to OWCP's inquiry, indicating that appellant was still partially disabled due to the January 16, 1997 employment injury and was not at maximum medical improvement.

In December 2009, OWCP determined that a conflict in medical opinion had been created between Dr. Ameduri and Dr. Snyder regarding appellant's physical restrictions, specifically that Dr. Ameduri limited appellant's walking, standing, pushing, pulling and lifting to no more than 30 minutes a day whereas Dr. Snyder opined that appellant could walk, stand, push, pull, or lift for up to two hours daily. It referred appellant to Dr. Austin Leve, a Board-certified orthopedic surgeon, for an impartial evaluation. Dr. Leve was provided a statement of accepted facts, a set of questions and the medical record. In a December 17, 2009 letter, OWCP informed appellant of the scheduled appointment, indicating that a conflict in medical evidence had been created regarding the necessity of surgery for treatment of the accepted condition.

In a December 4, 2009 work capacity evaluation, Dr. Ameduri diagnosed severe back pain and recommended surgical evaluation. He indicated that appellant could not work but also indicated that appellant could sit for two hours; walk, stand, operate a motor vehicle, repetitively move his wrists and elbows, push and pull for 15 minutes; and could not reach, reach above shoulder, twist, bend, stoop, lifting squat, kneel or climb.

A January 11, 2010 lumbar myelogram demonstrated mild degenerative changes. A post-myelogram CT scan of the lumbar spine demonstrated protrusion/extrusion at L5-S1 with foraminal spurring on the right; a tiny protrusion at L4-5; anterolisthesis and a small protrusion at L3-4 and multilevel facet arthropathy.

In a January 15, 2010 report, Dr. Leve noted the history of injury and his review of the statement of accepted facts and extensive review of the medical record. He indicated that appellant reported that his back pain was located in the right lumbar region. Dr. Leve provided a thorough description of physical examination findings, including full neck range of motion with no spasm, full range of motion of upper extremity joints with good grip bilaterally, no spasm and some limitation of low back range of motion. He advised that appellant could not return to his regular job but was capable of eight hours of daily light, largely sedentary-type work at a job where he is able to sit, stand and move about at will, with a 10-pound intermittent lifting limit for comfort. Dr. Leve indicated that appellant had been at maximum medical improvement since he began light-duty work, and did not think any benefit would be derived from a work hardening or conditioning program or a functional capacity evaluation. He concluded that appellant's restrictions were the result of the 1997 work injury and that he had no nonwork-related disabling conditions. In an attached work capacity evaluation, Dr. Leve advised that appellant remained

partially disabled but could work eight hours. He provided permanent restrictions of eight hours sitting in a comfortable chair; *ad lib* walking and standing for comfort; and advised that he should avoid twisting, bending, stooping, pushing and pulling with intermittent lifting of 10 pounds.

In a February 24, 2010 treatment note, Dr. Steven Lasser, a Board-certified orthopedic surgeon, noted appellant's complaint of radiating low back pain. Physical examination findings included tenderness around the L5-S1 level on the right. Lower extremity neurologic examination was intact. Dr. Lasser reviewed the diagnostic studies and diagnosed L5-S1 disc protrusion with right-sided foraminal stenosis, L5-S1 facet arthropathy and L3-4 degenerative spondylolisthesis. He recommended continued conservative care and weight loss and indicated that appellant had a marked, partial disability.

On March 26, 2010 a vocational rehabilitation counselor identified the positions of information clerk and receptionist as within appellant's physical limitations. On June 15, 2010 Dr. Ameduri advised that appellant could work four hours a day with sitting restricted to two hours; walking, standing, driving, repetitive wrist and elbow movements, pushing and pulling limited to 15 minutes; no reaching, twisting, bending, stooping, lifting, squatting, kneeling or climbing. Appellant began a part-time residential support staff position at the Veterans Outreach Center, Inc., on July 1, 2010.[3] In a July 14, 2010 treatment note, Dr. Lasser reported that appellant was doing well and had begun part-time work of two- to six-hour shifts, which the physician found reasonable. He reiterated his diagnoses and conclusions.

On September 21, 2010 OWCP reduced appellant's compensation to reflect his part-time earnings.[4] Dr. Ameduri continued to submit reports describing appellant's condition and care.

On October 29, 2010 a vocational rehabilitation counselor, M. Susie Webster, identified the positions of customer service representative, information clerk and customer complaint clerk as within appellant's physical limitations. She advised that the positions were reasonably available in the local labor market at weekly wages of $407.69, $374.23 and $407.69 respectively. OWCP obtained updated salary information from the employing establishment.

By letter dated December 29, 2010, OWCP proposed to reduce appellant's compensation benefits based on his capacity to earn wages as a customer service representative. It indicated that, based on the opinion of Dr. Leve, appellant could return to full-time work, and that the customer service representative position was within the permanent restrictions identified by Dr. Leve. OWCP further noted that the labor market survey prepared by the rehabilitation counselor indicated that the position was reasonably available in the local labor market at a weekly wage of $407.69. The physical demands indicated that the position was sedentary with

[3] OWCP reimbursed the Veterans Outreach Center 70 percent of appellant's wages.

[4] On September 17, 2010 OWCP made a preliminary determination that an overpayment of compensation in the amount of $495.58 had been created because appellant continued to receive compensation at the full rate after he returned to work on July 1, 2010. By letter dated October 18, 2010, it notified him that it had elected not to pursue collection actions.

no climbing, balancing, stooping, kneeling, crouching, crawling, and occasional reaching, handling and fingering.

Appellant disagreed with the proposed reduction and submitted reports from Dr. Ameduri dated January 24, March 3 and April 11, 2011, who noted appellant's complaint of continued back and leg pain, provided physical examination findings and advised that appellant could work four hours a day.

On April 19, 2011 Ms. Webster updated the job classification information regarding customer service representative, information clerk and customer complaint clerk positions, noting that they remained reasonably available with the previously reported weekly wages. OWCP obtained updated salary information from the employing establishment.

By letter dated May 11, 2011, OWCP again proposed to reduce appellant's compensation based on his capacity to earn wages as a full-time customer service representative. It again found that the weight of the medical evidence rested with the opinion of Dr. Leve.

In a May 11, 2011 treatment note, Dr. Ameduri reported that appellant's job at the Veterans Outreach Center entailed driving, filing, and using the computer, and that he was able to change positions frequently. He reiterated that appellant could work only four hours daily.

On June 30, 2011 OWCP found that the weight of the medical evidence rested with the opinion of Dr. Leve and reduced appellant's compensation benefits, effective July 2, 2011, based on his capacity to earn wages as a full-time customer service representative, which yielded a 62 percent loss of wage-earning capacity.[5]

On June 21, 2012 appellant requested reconsideration. He disagreed with Dr. Leve's opinion that he could work full time, asserting that, based on Dr. Ameduri's opinion, he could work a maximum of four hours daily. Appellant also noted that an OWCP referral physician also advised that he could only work four hours a day. He submitted treatment notes from Dr. Ameduri dated August 10, 2011 to March 7, 2012 in which the physician noted complaints of radiating low back pain. Dr. Ameduri reiterated his diagnoses and recommended that appellant continue the same medication regimen. On March 16, 2012 he advised that appellant could sit for four hours daily, stand for one-half hour, walk for one-quarter hour, and not bend, squat, kneel, twist, lift, climb, reach above the shoulder or perform repetitive activities. Dr. Ameduri could perform normal hand functions and fine manipulation and drive a motor vehicle.

In reports dated May 14, July 24 and September 6, 2012, Dr. Svetlana Trounina, a physiatrist, described the January 16, 1997 fall and stated that at that time appellant was diagnosed with a herniated disc and radiculopathy but continued to work until 2008 and currently worked four hours a day. She described complaints of radiating low back pain and repeated the diagnoses of Dr. Ameduri.[6] On a work capacity evaluation dated July 24, 2012, Dr. Trounina

[5] On September 26, 2011 OWCP suspended appellant's compensation because he failed to submit a requested OWCP 1032 form. Compensation was reinstated when he returned the completed form.

[6] Dr. Trounina and Dr. Ameduri are associates at the New York Physical Medicine Center in Rochester, NY.

advised that appellant could work for four hours daily and would never achieve an eight-hour workday, noting that he was 65 years old. She provided restrictions that appellant could sit for 5 hours a day; walk, stand, and reach for 1/4 hour daily; push and pull five pounds for 6-1/4 hours; and lift five pounds for 1/4 hour daily, with 15-minute breaks every 4 hours.

In a merit decision dated September 21, 2012, OWCP stated that appellant's request for reconsideration and the new evidence submitted had been reviewed on the merits and found that the evidence submitted did not support how his partial disability was not based on his wage-earning capacity and his ability to earn wages in the open labor market under normal employment conditions, given the nature of his injury and degree of physical impairment, age, vocational qualifications and the availability of suitable employment.[7]

## ***LEGAL PRECEDENT***

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.[8]

OWCP procedures in effect at the time OWCP rendered its December 21, 2012 decision provided that, "[i]f a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In this instance the [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity."[9]

The procedures contained provisions regarding the modification of a formal loss of wage-earning capacity. The relevant part provides that a formal loss of wage-earning capacity will be modified when: (1) the original rating was in error; (2) the claimant's medical condition has changed; or (3) the claimant has been vocationally rehabilitated. OWCP procedures further provided that the party seeking modification of a formal loss of wage-earning capacity decision has the burden to prove that one of these criteria has been met. If OWCP is seeking modification, it must establish that the original rating was in error, that the injury-related condition has improved or that the claimant has been vocationally rehabilitated.[10]

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[7] In August 13, 2012 correspondence, OWCP notified appellant that his compensation was being reduced because it had recently learned that he was receiving social security retirement benefits. On August 14, 2012 it issued a preliminary determination that an overpayment of compensation in the amount of $27,485.89 had been created because appellant had been receiving both social security retirement benefits and OWCP disability compensation for the period July 1, 2009 through July 28, 2012. Appellant timely requested a hearing regarding the overpayment but no decision was issued before this appeal was filed on February 5, 2013. Thus, the Board has no jurisdiction over this matter. *See Eugene Van Dyk*, 53 ECAB 706 (2002).

[8] *Katherine T. Kreger*, 55 ECAB 633 (2004).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995); *see* Chapter 2.1501.3 (June 2013).

[10] *Id.* at Chapter 2.814.11 (June 1996).

Section 8123(a) of FECA provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[11] The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination, and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[12] When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[13]

## ***ANALYSIS***

The June 30, 2011 wage-earning capacity determination was premised on appellant's ability to work full time as a customer service representative. The Board finds that OWCP failed to establish that the full-time position of customer service representative represented appellant's wage-earning capacity because a conflict in medical evidence has been created between the opinions of Dr. Ameduri, an attending physiatrist, and Dr. Leve, an orthopedic surgeon, who provided a referee opinion for OWCP regarding appellant's physical restrictions. A conflict did not exist regarding whether appellant could work part or full time when he was referred to Dr. Leve because both appellant's physician, Dr. Ameduri, and OWCP's referral physician, Dr. Snyder, advised that appellant could work four hours a day. Rather, OWCP properly determined that a conflict had been created between Dr. Ameduri and Dr. Snyder regarding appellant's physical restrictions for walking, standing, pushing, pulling and lifting.

In his January 15, 2010 report, Dr. Leve, however, advised that appellant could work eight hours of sedentary to light duty daily, and OWCP inappropriately accorded special weight to Dr. Leve with regard to whether appellant could perform the full-time duties of the customer service representative position. He only served as an impartial medical examiner with regard to appellant's physical restrictions, specifically regarding his capabilities in walking, standing, pushing, pulling and lifting. OWCP did not specifically ask Dr. Leve to render an opinion regarding the number of hours appellant could work each day. Therefore, Dr. Leve's opinion that appellant could work eight hours was not entitled to the special weight accorded to impartial medical examiners on this issue. Instead, he created a new conflict with the opinion of Dr. Ameduri regarding whether appellant could work part or full time and the June 30, 2011 decision was erroneous in this regard.[14]

[11] 5 U.S.C. § 8123(a); *see Y.A.*, 59 ECAB 701 (2008).

[12] 20 C.F.R. § 10.321.

[13] *V.G.*, 59 ECAB 635 (2008).

[14] *See R.M.*, Docket No. 11-1093 (issued November 18, 2011).

Moreover, as noted above, OWCP issued its formal decision on appellant's wage-earning capacity on June 30, 2011 and appellant requested reconsideration on June 21, 2012. Board precedent and OWCP procedures direct the claims examiner to consider the criteria for modification when a claimant requests resumption of compensation for total wage loss.[15] While appellant used the term reconsideration in his June 21, 2012 correspondence, he asserted that the previous decision was in error. The Board finds that OWCP should have adjudicated the issue of modification of the wage-earning capacity determination.[16]

Finally, the Board notes that OWCP misinformed appellant regarding the conflict in medical evidence, stating in its December 17, 2009 letter informing him of the appointment with Dr. Leve that a conflict had been created with regard to the necessity of surgery for the accepted conditions.

For these reasons, OWCP's September 21, 2012 decision must be reversed.

## ***CONCLUSION***

The Board finds that OWCP did not properly determine that the selected position of customer service representative represented appellant's wage-earning capacity.

[15] *Katherine T. Kreger, supra* note 8; *Sharon C. Clement*, 55 ECAB 552 (2004); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995) (if a formal decision on loss of wage-earning capacity is issued, the rating should be left in lace unless the claimant requests resumption of compensation for total wage loss, in which instance OWCP will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity determination).

[16] *W.W.*, Docket No. 09-1934 (issued February 24, 2010).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the September 21, 2012 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 4, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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