

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

S.W., Appellant)	
)	
and)	Docket No. 15-0598
)	Issued: June 22, 2015
U.S. POSTAL SERVICE, POST OFFICE,)	
Sutter Creek, CA, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On January 23, 2015 appellant filed a timely appeal from a January 13, 2015 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 benefits effective January 13, 2015 based on her capacity to earn wages in the constructed position of surveillance system monitor.

FACTUAL HISTORY

On December 13, 1996 appellant, then a 49-year-old rural mail carrier, filed an occupational disease claim alleging that the repetitive motion of her job caused or aggravated her

¹ 5 U.S.C. § 8101 *et seq.*

bilateral carpal tunnel syndrome. OWCP accepted the claim for bilateral carpal tunnel syndrome, right elbow contusion,² and right lesion of ulnar nerve. It authorized compensation benefits as well as surgical releases on January 6, March 2, and June 2, 1997 and November 15, 2012. By decision dated December 2, 2000, OWCP awarded appellant a schedule award for 19 percent permanent impairment of the right arm, and 10 percent permanent impairment of the left arm. The period of the award ran 90.48 weeks from August 21, 2000 to May 16, 2002. Appellant was subsequently retained on OWCP's periodic compensation rolls.

On February 15 and May 16, 2013 Dr. Peter N. Sfakianos, a Board-certified orthopedic surgeon, stated that appellant had right cubital tunnel syndrome. He opined that she could return to modified work with restrictions of no repetitive motion of the right elbow.

On June 6, 2013 appellant was referred to vocational rehabilitation services for reemployment plan development. The employing establishment offered appellant a limited-duty assignment on June 19, 2013, which appellant refused on June 20, 2013.

In a July 15, 2013 CA-17 duty status report, Dr. Sfakianos stated that appellant was able to do modified work, but needed to avoid repetitive motion of the right elbow. He opined that appellant could resume work as of July 15, 2013 with the following restrictions: work 8.5 hours per day with sitting intermittently 5 hours; walking intermittently 4 hours; standing intermittently 4 hours; climbing intermittently 4 hours; kneeling intermittently 4 hours; bending/stooping intermittently 4 hours; twisting intermittently 4 hours; pushing/pulling 25 pounds 1 hour intermittently; simple grasping 4 hours intermittently; fine manipulation 4 hours intermittently; reaching above shoulder 4 hours intermittently; driving vehicle 4 hours intermittently; and operating machinery 4 hours intermittently.

Following vocational rehabilitation testing, a vocational assessment, and interview, Michael Frank, the vocational rehabilitation counselor, identified the position of surveillance system monitor and call-out operator³ as being available within appellant's physical limitations, vocational skills, and geographical area. The surveillance system monitor position, as it appeared in DOT No. 379.367-010, was described as follows: "monitors premises of public transportation terminals to detect crimes or disturbances using closed circuit television monitors, and notifies authorities by telephone of need for corrective action. Observes television screens that transmit in sequence views of transportation facility sites. Pushes hold button to maintain surveillance of location where incident is developing, and telephones police or other designated agency to notify authorities of location of disruptive activity. Adjusts monitor controls when required to improve reception, and notifies repair service of equipment malfunctions." The position was classified as a sedentary position which entailed exertion of up to 10 pounds of force occasionally and /or a negligible amount of force frequently to lift, carry, push, pull, or otherwise move objects, including the human body. Sedentary work involved sitting most of the time, but may require walking or standing for brief periods of time. The vocational rehabilitation

² Case number xxxxxx625 with date of injury of February 20, 1996 which was accepted for right elbow contusion was combined into the current case. Under case number xxxxxx366, OWCP accepted that on January 2, 1998 appellant sustained temporary aggravation of bilateral basal joint arthrosis.

³ The call-out operator has Department of Labor, *Dictionary of Occupational Titles* (DOT) 237.367-014.

counselor noted that appellant was a high school graduate and attended Colorado State University for two years taking general education courses. Appellant worked as a rural mail carrier at the Lone Post Office from 1988 to 2012 and worked for three months as a census clerk SVP-4 in 2010. To meet the specific vocational preparation (SVP) requirements, the vocational rehabilitation counselor noted that appellant would attend one day of level I guard card training at the Security Academy at McClelland.

On August 19, 2013 appellant completed her level I security guard training at the Security Academy at McClelland and completed level II guard card training on September 3 and 5, 2013.

Appellant underwent 90 days of placement services from August 20 to November 17, 2013, which were unsuccessful. It was noted during the September 25, 2013 conference that appellant on her own had sought training for becoming a bus driver. Appellant was made aware that work restrictions had been placed on her upper extremities and that a bus driver position was not an authorized vocational rehabilitation position.

In July 15 and September 6, 2013 progress reports, Dr. Sfakianos noted the diagnosis of right cubital tunnel syndrome and status post cubital tunnel release. He continued to opine that appellant could return to modified work with no repetitive motion of the right elbow.

In a November 20, 2013 letter, Mr. Frank explained that job placement was not successful. He noted that appellant participated in job searches primarily online and did not provide those documented contacts to him. Appellant preferred to be a commercial driver and paid for her own training to obtain a class B commercial driver's license. She had one interview for a scanning clerk during the placement period at the employing establishment, but was not hired.

Tory Keaton, the rehabilitation specialist, found in his December 20, 2013 closure report that appellant met the SVP-2 level (unskilled up to 30 days to learn) for the targeted positions of surveillance system monitor and call-out operator as she was a high school graduate, attended college for two years, worked as a rural carrier from 1988 to 2012, and as a census clerk for three months in 2010. This was supplemented by level I and level II guard card training for three days at the Security Academy at McClelland. Mr. Keaton found that both targeted positions were medically and vocationally suitable and existed in sufficient numbers in the commuting area. He noted the salary for the surveillance system monitor position ranged from \$9.50 to \$10.75 per hour (\$380.00 to \$430.00 per week) and recommended that the surveillance system monitor position be used with a salary of \$9.50 per hour for an entry-level position.

Mr. Keaton stated that the guard card training prepared appellant for a guard position and qualified her to obtain employment as a surveillance system monitor. He noted that while the Department of Labor, *Dictionary of Occupational Titles* indicated that the position of surveillance system monitor was a government service position, the Department of Labor, *Dictionary of Occupational Titles* has not been updated since 1991 and this position also existed in the private sector and the public sector. Mr. Frank noted that all employers surveyed were private-sector employers.

In a May 16, 2014 report, Dr. Sfakianos noted that appellant no longer was working for the employing establishment as they were not able to accommodate her long-term restrictions. Appellant was sent to vocational rehabilitation and she wanted to be a commercial bus driver. Dr. Sfakianos noted that appellant passed her driver's test and had a valid commercial license. He concluded that she could return to modified work and perform any task that did not require repetitious motion of the right elbow.

In a June 12, 2014 notice, OWCP advised appellant that it proposed to reduce her compensation for wage loss because the medical and factual evidence of record established that she was no longer totally disabled. It found that she had the capacity to earn the wages of a surveillance system monitor. OWCP based her wage-earning capacity at the rate of \$402.60 per week and attached a July 26, 2013 Form OWCP-66 created by Mr. Frank, the rehabilitation counselor, for the Department of Labor, *Dictionary of Occupational Titles* position of call-out operator, which had a weekly wage of \$402.60. It requested that appellant submit additional evidence or argument within 30 days if she disagreed with the proposed action.

Appellant responded, stating that she had three conditions covered by this case number, but her condition under case number xxxxxx366 was not included even though it involved the same part of the body.⁴ She stated that this last claim was not reflected in the determination of suitable jobs. Appellant stated that the surveillance system monitor job did not exist and relevant numbers of availability could not be determined. She also argued that she could not medically perform the job requirements of either targeted position and no one would hire her because of her age.

In a May 16, 2014 report, Dr. Sfakianos continued to opine that appellant could work modified duty that did not require repetitious motion of the right elbow. In a June 2, 2014 letter, he stated her underlying industrial condition was that of overuse syndrome affecting both upper extremities. Dr. Sfakianos noted that appellant did well status post right cubital tunnel release in response to right cubital tunnel syndrome and improvements were noted status post right elbow cubital tunnel release. However, appellant still had bilateral overuse syndrome causing permanent dysfunction, which restricted her activities, particularly repetitive activities of the upper extremities. Dr. Sfakianos opined that, as of appellant's last visit on May 16, 2014, she was permanently partially disabled and could return to modified work but was prohibited from performing any activity that required repetitive motion of the elbow.

Updated 2014 labor market research and OWCP-66 forms prepared by Mr. Frank for the targeted positions of surveillance systems monitor and call-out operator were provided, with both targeted positions stated as being medically and vocationally suitable and existing in sufficient numbers in appellant's commuting area. The salary range for the surveillance system monitor position was from \$9.50 to \$10.75 per hour and the salary range for the call-out operator was from \$9.75 to \$10.80 per hour.

By decision dated January 13, 2015, OWCP reduced appellant's compensation effective January 13, 2015 based on her capacity to earn wages in the constructed position of surveillance

⁴ See *supra* note 2. Under case number xxxxxx366, OWCP accepted that on January 2, 1998 appellant sustained temporary aggravation of bilateral basal joint arthrosis.

system monitor. It found that the evidence established that she was vocationally and physically capable of working as a surveillance system monitor and was capable of earning \$402.60 per week.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.⁵ 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.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 the employee's wage-earning capacity or if the employee has no actual wages, the wage-earning capacity is determined with due regard to 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 or her wage-earning capacity in his or her 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 counselor or specialist for selection of a position, listed in the Department of Labor, *Dictionary of Occupational Titles* or otherwise available in the open market, that fit 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. Finally, application of the principles set forth in *Albert C. Shadrick*⁸ and codified by regulations at 20 C.F.R. § 10.403⁹ should be applied. Subsection(d) of the regulations provide 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.¹⁰

⁵ *H.N.*, Docket No. 09-1628 (issued August 19, 2010); *T.F.*, 58 ECAB 128 (2006); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

⁶ 20 C.F.R. §§ 10.402, 10.403.

⁷ 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).

⁸ 5 ECAB 376 (1953).

⁹ 20 C.F.R. § 10.403.

¹⁰ *Id.* at § 10.403(d).

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.¹¹ 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.¹²

ANALYSIS

OWCP accepted appellant's claim for bilateral carpal tunnel syndrome, contusion of right elbow, and lesion of the right ulnar nerve and paid compensation benefits and for surgical releases. Appellant was placed on the periodic compensation rolls for total disability resulting from this injury and subsequently referred for vocational rehabilitation services and direct placement as the employing establishment did not have a position available within her restrictions.

On February 15 and May 16, 2013 Dr. Sfakianos opined that appellant could return to modified work with restrictions of no repetitious motion of the right elbow. In a July 15, 2013 Form CA-17 duty status report, he stated that appellant was able to do modified work and needed to avoid repetitive motion of the right elbow. Dr. Sfakianos opined that appellant could work with the following restrictions: work 8.5 hours per day with sitting intermittent 5 hours; walking intermittent 4 hours; standing intermittent 4 hours; climbing intermittent 4 hours; kneeling intermittent 4 hours; bending/stooping intermittent 4 hours; twisting intermittent 4 hours; pushing/pulling 25 pounds 1 hour intermittent; simple grasping 4 hours intermittent; fine manipulation 4 hours intermittent; reaching above shoulder 4 hours intermittent; driving vehicle 4 hours intermittent; and operating machinery 4 hours intermittent.

OWCP's vocational rehabilitation specialist determined that she was able to perform the position of surveillance system monitor and that state employment services showed the position was available in sufficient numbers so as to make it reasonably available within her commuting area. The surveillance system monitor would monitor public transportation terminals to detect crimes or disturbances using closed circuit television monitors, and notify authorities by telephone of need for corrective action. The monitor would observe television screens that transmitted in sequence views of transportation facility sites, push a hold button to maintain surveillance of a location where an incident was developing, and telephone police or other designated agency to notify authorities of the location of disruptive activity. Adjustments would be made to monitor controls when required to improve reception, and repair service would be notified of equipment malfunctions. The position was classified as a sedentary position which entailed exertion of up to 10 pounds of force occasionally and/or a negligible amount of force frequently to lift, carry, push, pull, or otherwise move objects, including the human body.

¹¹ *James Henderson, Jr.*, 51 ECAB 268 (2000).

¹² *Id.*

Sedentary work involved sitting most of the time, but may also require walking or standing for brief periods of time.

Appellant's vocational rehabilitation counselor and specialists are experts in the field of vocational rehabilitation and OWCP may rely on his opinion regarding reasonable availability and vocational suitability of the surveillance system monitor position.¹³ In addition, a review of the medical evidence of record reveals that appellant was physically capable of performing the position. Appellant's physician agreed that appellant could perform modified work, but could not perform any tasks which involved repetitive motion of the right elbow. The Board finds that the work restrictions recommended by Dr. Sfakianos would allow appellant to work as a surveillance system monitor, a position which is essentially sedentary in nature. While appellant argued that she could not physically perform the surveillance system monitor position, she did not submit any medical evidence to support her allegation.

OWCP considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment, age and employment qualifications, in determining that the position of surveillance system monitor represented her wage-earning capacity.¹⁴ While she also argued before OWCP and on appeal that her other medical conditions were not taken into account. The evidence of record establishes that appellant had the requisite physical ability, skill, and experience to perform the position of surveillance system monitor and that such a position was reasonably available within the general labor market of her commuting area.

The Board finds however that OWCP did not properly calculate appellant's compensation effective January 13, 2015 based on her capacity to earn wages as a surveillance system monitor. The vocational rehabilitation specialist determined that an entry-level salary of \$9.50 per hour ($\$9.50 \times 40 = \380.00) be used to calculate appellant's wage-earning capacity as a surveillance system monitor, but OWCP used a weekly wage of \$402.60, based upon the earlier July 26, 2013 OWCP Form 66 for a call-out operator, in determining her wage-earning capacity. OWCP made no findings as to why the recommendation regarding the surveillance system monitor wage rate was disregarded.¹⁵ The Board will, therefore, remand the case to OWCP for a recalculation of appellant's wage-earning capacity based upon the entry-level salary for the surveillance system monitor position.

¹³ G.A., Docket No. 13-1351 (issued January 10, 2014).

¹⁴ *Clayton Varner*, 37 ECAB 248, 256 (1985).

¹⁵ See 20 C.F.R. § 10.126.

CONCLUSION

The Board finds that OWCP properly reduced appellant's compensation effective January 13, 2015 based on her capacity to earn wages in the constructed position of surveillance system monitor; however, it did not properly calculate her wage-earning capacity based on the recent weekly wages for surveillance system monitor position.

ORDER

IT IS HEREBY ORDERED THAT the January 13, 2015 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this decision.

Issued: June 22, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board