

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

L.V., Appellant)	
)	
and)	Docket No. 17-1260
)	Issued: August 1, 2018
U.S. POSTAL SERVICE, POST OFFICE,)	
Grand Rapids, MI, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On May 19, 2017 appellant, through counsel, filed a timely appeal from a March 21, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.³

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

³ The record provided to the Board includes evidence received after OWCP issued its March 21, 2107 decision. The Board's jurisdiction is limited to the evidence that was before OWCP at the time of its final decision. Therefore, the Board is precluded from reviewing this additional evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

ISSUE

The issue is whether appellant met her burden of proof to establish that modification of OWCP's July 25, 2016 loss of wage-earning capacity (LWEC) determination is warranted.

FACTUAL HISTORY

On April 29, 2005 appellant, then a 55-year-old flat sorter clerk, filed a traumatic injury claim (Form CA-1) alleging that, on April 26, 2005, she felt pain in her left knee as she turned after picking up a tub of mail in the performance of duty. She stopped work on April 29, 2005 and returned to work the next day on April 30, 2005. OWCP accepted the claim for left knee strain, posterior horn left medial meniscus tear, and osteoarthritis of the left knee and paid appellant intermittent compensation benefits on the supplemental rolls as of July 29, 2005.

Appellant underwent an OWCP-authorized left knee arthroscopy on June 21, 2005 and arthroscopy of the left knee and partial posterior horn medial meniscectomy on July 26, 2006, which were performed by Dr. Thomas M. Matelic, a Board-certified orthopedic surgeon. On September 5, 2006 Dr. Matelic performed a left total knee arthroplasty and on January 4, 2007 he performed a left knee manipulation under anesthesia.

Appellant returned to limited-duty work for six hours per day on February 14, 2007. Effective March 18, 2007, she began performing sedentary work on a full-time basis. Effective July 21, 2007, appellant performed limited-duty work as a modified flat sorting machine operator. By decision dated October 12, 2007, OWCP determined that the modified flat sorting machine operator position appellant had performed since July 21, 2007 reasonably and fairly represented her wage-earning capacity and she had no loss of wage-earning capacity.

In a January 22, 2010 report and work capacity evaluation, Dr. Michael E. Holda, a Board-certified orthopedic surgeon and OWCP referral physician,⁴ related that appellant was permanently restricted to sedentary work.

Appellant continued to perform limited-duty work until June 26, 2010, when she stopped work as the employing establishment no longer had work available within her restrictions.

In an August 2, 2010 letter, OWCP requested that Dr. Gregory J. Golladay, appellant's attending physician and a Board-certified orthopedic surgeon, review the statement of accepted facts and provide an opinion as to whether appellant had any residuals from her accepted conditions. Dr. Golladay was also asked whether she was capable of performing the full duties of her date-of-injury position as a flat sorter clerk with or without restrictions.

In a September 20, 2010 progress note, Dr. Golladay opined that appellant had to work in a sedentary capacity. He further indicated that this restriction had been consistent over the last couple of years. In his September 20, 2010 duty status report, Dr. Golladay noted that appellant had permanent sedentary restrictions as of May 1, 2007.

⁴ Dr. Holda performed an impairment evaluation of appellant's left knee

In a February 12, 2011 report, Dr. Emmanuel N. Obianwu, a Board-certified orthopedic surgeon, opined that appellant was permanently restricted to sedentary tasks with a lifting restriction.⁵

On February 24, 2011 OWCP referred appellant to vocational rehabilitation services to assist her in returning to work. It noted that she was capable of performing sedentary work.

On March 1, 2011 vocational rehabilitation services were initiated by a vocational rehabilitation counselor. In his March 11, 2011 initial vocational assessment, the vocational rehabilitation counselor noted appellant's employment history and determined that she had transferable skills in sales, customer service, telephone work, and bench work type of positions. He noted that she did not have a high school diploma or specific vocational skills, which translated to a specific, existing career opportunity.

On April 21, 2011 OWCP advised appellant that the employing establishment was unable to identify a job which met her restrictions.

Appellant was scheduled for vocational testing with Dr. Barbara Homrich, PhD, a licensed clinical psychologist. Dr. Homrich evaluated appellant on May 20 and 21, 2011 for psychological, neuropsychological, and vocational testing. In her May 21, 2011 report, she opined that appellant's current emotional state was a manifestation of compounded grief and loss issues related to the loss of her employment of 20 plus years in the employing establishment and the consequent physical disabilities affecting her otherwise socially active lifestyle. Dr. Homrich indicated that appellant was within an average range of intelligence. However, a deeper look at appellant's general academic achievement abilities indicated marked deficiencies. Dr. Homrich noted that learning disabilities involved difficulties in developing skills in reading (most commonly), writing, listening, speaking, reasoning, spelling, and math. She indicated that, consistent with the literature, appellant appeared to perform best on tasks requiring holistic, right brain, simultaneous processing, and worse on those requiring sequential processing, which was expressed in difficulties with planning, reading, and numerical ability. Essentially, this indicated a poorly functioning executive ability in which appellant experienced difficulty attending to stimuli while simultaneously performing other mental tasks. Dr. Homrich indicated that appellant demonstrated the capacity to learn new skills, and a genuine willingness to adapt within a new working environment. She further indicated that appellant's elevated symptoms of depression and anxiety would likely remit with increased social involvement, meaningful employment, and regained feelings of self-worth and productivity.

In a July 30, 2011 report, the vocational rehabilitation counselor summarized the results of Dr. Homrich's report. He also administered a wide range achievement test in response to appellant's report of longstanding problems with short-term memory and learning. The vocational rehabilitation counselor indicated that a simple repetitive job with only a few different tasks would be appellant's most successful job choice. Various testing, including a Career Assessment Inventory, Weschler's Adult Intelligence Scales, and Sheehan Disability Scale, were also

⁵ Dr. Obianwu was selected to resolve a conflict in medical opinion regarding the permanent partial impairment of appellant's left lower extremity.

performed. The vocational rehabilitation counselor also noted that Dr. Obianwu had provided work restrictions which indicated that appellant could work eight hours a day in a sedentary job.

In March 2012, the vocational rehabilitation counselor completed a job classification form (OWCP-66) for the position of ticket sales and mail clerk (private industry) from the Department of Labor's *Dictionary of Occupational Titles*. The positions were listed as sedentary and within appellant's vocational and physical abilities.

On April 13, 2012 appellant indicated that her disability retirement had been approved. On June 28, 2012 she retroactively elected FECA benefits, effective April 26, 2005.

In an October 8, 2012 report, Dr. Golladay advised that appellant could return to work with permanent sedentary restrictions up to eight hours a day. She was restricted to lifting no more than 50 pounds and she should avoid kneeling, stooping, ladders, and stairs.

In an October 9, 2012 report, Dr. Thomas G. Akre, an osteopath and OWCP referral physician, indicated that appellant had a failed left total knee replacement with ankyloses and secondary complex regional pain syndrome and possible malrotation of knee replacement. He indicated that revision knee replacement was indicated. Dr. Akre opined that appellant could continue with permanent sedentary work restrictions with occasional walking and a 10-pound weight limit.

In a January 2, 2013 report, Dr. Golladay agreed with Dr. Akre's permanent work restrictions of a sit-down job with occasional walking and a 10-pound weight limit. He opined, however, that appellant did not require a revision knee replacement as her knee could be rotated.

In a March 21, 2013 letter, OWCP advised appellant that the position of ticket seller or a similar position was suitable to her medical and vocational limitations. She was further advised that she would receive 90 days of placement assistance to help her locate work in this position. OWPC indicated that appellant's wage-loss compensation benefits would be reduced based upon the salary of a ticket seller or similar job at the end of the 90-day placement assistance period.

Following the 90-day placement assistance period, vocational rehabilitation services were extended until the conclusion on April 14, 2015. While appellant underwent on-the-job training as a ticket seller, she was unable to secure work during the placement assistance period.

An updated labor market survey dated April 21, 2015 identified the positions of receptionist, customer service representative, and cashier as being medically and vocationally appropriate for appellant's accepted work-related conditions. The positions were also noted to be reasonably available within appellant's commuting area.

In May 11, 2015 and June 6, 2016 reports, Dr. Thomas M. Matelic, a Board-certified orthopedic surgeon, reported that appellant's continued problems with her left knee were related to the total knee arthroplasty which was a result of and directly related to work injury that she sustained. He noted that no further surgery was indicated. In a June 10, 2016 note, Dr. Matelic advised that appellant had permanent restrictions of sedentary work only with lifting no greater than 10 pounds.

Updated CA-66 forms for the targeted positions of customer service representative and cashier were provided. The customer service representative position, DOT # 239.362-014, was noted as having alternative titles of adjustment clerk, application clerk, order clerk, outside contact clerk, and service representative. The job description indicated that a customer service representative would interview applicants and record interview information into a computer for water, gas, electric, telephone, or cable television system service; talk with customers by telephone or in person and receive orders for installation, turn-on, discontinuance, or change in service; fill out contract forms, determine charges for service requested, collect deposits, prepare change of address records, and issue discontinuance orders, using computer; may solicit sale of new or additional services; may adjust complaints concerning billing or service rendered, refer complaints of service failures to designated departments for investigation; may visit customers at their place of residence to investigate conditions preventing completion of service-connection orders and to obtain contract and deposit when service is being used without contract; and may discuss cable television equipment operation with customer over telephone to explain equipment usage and to troubleshoot equipment problems. The physical requirements of the customer service representative was noted as sedentary work with no lifting greater than 10 pounds, no climbing, balancing, stooping, kneeling, crouching, crawling, occasional reaching, handling, frequent fingering, no feeling, constant talking, and hearing. The vocational rehabilitation counselor indicated that the specific vocational preparation of 6 to 12 months was met based on appellant's past experience as a grocery clerk/cashier and a residential property manager prior to joining the employing establishment. The position paid a weekly wage of \$340.00 and was found to be performed in sufficient numbers to make it reasonably available to appellant within her commuting area.

On June 22, 2016 OWCP informed appellant of its proposed notice of reduction of her compensation benefits based on her capacity to earn wages as a customer service representative, DOT # 239.362-014, at the rate of \$340.00 per week. Appellant was afforded 30 days to submit any evidence or argument for any disagreement with the proposed reduction notice.

In a July 25, 2016 report, Dr. Matelic continued to opine that appellant had permanent restrictions of sedentary work only with lifting no greater than 10 pounds.

By decision dated July 25, 2016, OWCP reduced appellant's compensation, effective July 26, 2016, after determining that she had the capacity to earn wages of \$340.00 per week as a customer service representative. It applied the formula set forth in *Albert C. Shadrick*⁶ in calculating her wage-earning capacity.

On August 1, 2016 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative. The telephonic hearing took place on February 17, 2017. Counsel argued that appellant's life-long learning disability was not detected when a transferable skills analysis was done. Accordingly, counsel argued that the customer service representative position, which involved dealing with customers and resolving problems, was not suitable for appellant.

Evidence received included a February 28, 2017 cover letter from appellant's counsel and a duplicative copy of Dr. Homrich's May 21, 2011 psychological evaluation.

⁶ 5 ECAB 376 (1953); codified by regulation at 20 C.F.R. § 10.403.

In an August 9, 2016 report Dr. Matelic continued to opine that appellant's condition had not changed and no further surgery was indicated. He indicated that appellant had the same permanent restrictions.

By decision dated March 21, 2017, an OWCP hearing representative denied modification of the July 25, 2016 wage-earning capacity determination. He found that an evaluation of Dr. Homrich's report did not establish a lack of appellant's vocational ability to be gainfully employed as a customer service representative. Thus, there was no error in the original determination. There was also no evidence which indicated that the selected position was not vocationally or medically suitable to appellant.

LEGAL PRECEDENT

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 wage-earning capacity, or if the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of her injury, degree of physical impairment, usual employment, age, qualifications for other employment, the availability of suitable employment, and other factors and circumstances which may affect their wage-earning capacity in their disabled condition.⁷ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.⁸ 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.⁹

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was, in fact, erroneous.¹⁰ The burden of proof is on the party attempting to show a modification of the loss of wage-earning capacity determination.¹¹

ANALYSIS

The Board finds this case is not in posture for decision.

Appellant has not alleged a change in the nature and extent of her injury-related condition or that she had been retrained or otherwise vocationally rehabilitated. Instead, through counsel,

⁷ *E.W.*, Docket No. 14-584 (issued July 29, 2014); 5 U.S.C. § 8115(a).

⁸ *Albert L. Poe*, 37 ECAB 684, 690 (1986).

⁹ *Id.*

¹⁰ *C.R.*, Docket No. 14-111 (issued April 4, 2014); *Sharon C. Clement*, 55 ECAB 552 (2004).

¹¹ *See T.M.*, Docket No. 08-975 (issued February 6, 2009).

she contended that Dr. Homrich's May 21, 2011 report established that the selected position of customer service representative was not suitable.

In her May 21, 2011 report, Dr. Homrich opined, in pertinent part, that appellant's learning disabilities involved difficulties in reading, writing, listening, speaking, reasoning, spelling, and math. Essentially, this related to appellant having a poorly functioning executive ability to attend to stimuli while simultaneously performing other mental tasks. Dr. Homrich indicated that appellant appeared to perform best on tasks which required holistic, right brain, simultaneous processing, and worse on those tasks which required sequential processing, such as planning, reading, and numerical ability. Appellant also demonstrated the capacity to learn new skills and a willingness to adapt within a new working environment. The vocational rehabilitation counselor found that the specific vocational preparation of 6 to 12 months of the selected customer service representative position was satisfied and the position was vocationally suitable based on appellant's prior work experience as a grocery clerk/cashier and as a residential property manager prior to working for the employing establishment.

The position description of the selected customer service representative position indicates that appellant not only would not only interview applicants and record information into a computer, but would also determine charges for service requested, collect deposits, prepare change of address records, and issue discontinuance orders, using a computer. Additionally, appellant may be involved in other duties which involved sales, complaints concerning billing or service rendered, investigation into conditions which prevented completion of service-connection orders, and having to obtain contract and deposit when service was being used without contract. She may also have to discuss and explain equipment usage and to troubleshoot equipment problems. Dr. Homrich specifically opined that appellant had a poorly functioning executive ability to attend to stimuli while simultaneously performing other mental tasks. She also did not do well on tasks which required sequential processing, such as planning, reading, and numerical ability.

OWCP procedures provide that in assessing an employee's ability to perform in a constructed position, if the evidence is unclear, equivocal, or if the evidence is old enough to be considered stale (generally greater than eighteen months old), the claims examiner should seek clarification from the attending physician, second opinion, or referee specialist as appropriate.¹² Dr. Homrich's 2011 report required clarification as to whether appellant could actually perform the duties of the constructed customer service position, given her learning disabilities and mental status. Dr. Homrich was never specifically asked whether appellant could perform the duties of this position. Thus, the question of whether the duties involved in the constructed position would require appellant to simultaneously perform mental tasks which require sequential processing, such as planning, reading, and numerical ability, must be addressed by Dr. Homrich before it can be determined whether the selected position is vocationally suitable for appellant. Furthermore, the Board notes that Dr. Homrich's 2011 report was stale by the time OWCP made its LWEC determination on July 25, 2016.

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.4(d) (June 2013).

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter.¹³ While appellant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is done.¹⁴ Accordingly, once OWCP undertakes to develop the medical evidence, it has the responsibility to do so in the proper manner.¹⁵ As it undertook development of the medical evidence by referring appellant to Dr. Homrich, it had an obligation to secure an opinion adequately addressing the relevant issues.¹⁶ For this reason, the Board finds that the case is not in posture for decision as a supplemental opinion is required. The case will be remanded to OWCP for a supplemental report. After such further development as OWCP deems necessary, an appropriate decision should be issued regarding this matter.

CONCLUSION

The Board finds that this case is not in posture for decision.

¹³ *Vanessa Young*, 55 ECAB 575 (2004).

¹⁴ *Richard E. Simpson*, 55 ECAB 490 (2004).

¹⁵ *Melvin James*, 55 ECAB 406 (2004).

¹⁶ *Mae Z. Hackett*, 34 ECAB 1421 (1983) wherein the Board has held that, once OWCP begins to develop the medical evidence, it has the responsibility to obtain an evaluation which will resolve the issue involved in the case.

ORDER

IT IS HEREBY ORDERED THAT the March 21, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 1, 2018
Washington, DC

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

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

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