

On appeal, counsel contends that OWCP used an antiquated system and defunct publication and there is no evidence that the position of gate guard exists in the current economy.

FACTUAL HISTORY

OWCP accepted that appellant, then a 45-year-old transportation security officer (screener), sustained a lumbar sprain and lumbar disc degeneration on June 25, 2009 as a result of falling on the floor in the performance of duty. Appellant also has a claim, under OWCP File No. xxxxxx794, which was accepted for a lumbar sprain sustained in the performance of duty on August 16, 2008. OWCP authorized back surgery, which appellant underwent on May 13, 2010. She was placed on the periodic rolls and received wage-loss and medical compensation benefits.³ Appellant has not returned to work.⁴

On July 11, 2011 Dr. Craig B. Lankford, a Board-certified physiatrist and pain medicine specialist, indicated that appellant had “failed back surgery syndrome” with fusion at L4-5 and L5-S1. He stated that she was out of the pain management program and had not noticed much benefit from it. Dr. Lankford indicated that appellant would continue medication management and opined that her return to work status was unclear.

OWCP referred appellant to Dr. Charles D. Mitchell, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the nature and extent of her employment-related condition. In his September 7, 2011 report, Dr. Mitchell diagnosed failed lumbar disc syndrome with residual chronic pain unresolved from the anterior posterior spinal surgery. He opined that based on appellant’s history she was a year out from her injury and surgery and the accepted condition was interfering with her usual return to work. Dr. Mitchell determined that she was capable of working a full-time, limited-duty position on the basis that she had overall good strength with reasonable function and a normal gait pattern. He noted that it might be difficult for her to return to work because of pain issues and her medications.

OWCP found a conflict in the medical opinion evidence between Drs. Lankford and Mitchell and referred appellant to an impartial medical examiner to resolve the conflict. On January 6, 2012 Dr. Dale R. Allen, a Board-certified orthopedic surgeon, conducted a physical examination and diagnosed chronic back pain. He reviewed appellant’s medical history and

³ On March 5, 2013 OWCP made a preliminary determination that appellant received an overpayment of compensation in the amount of \$3,180.78 because she was paid at an incorrect weekly pay rate. By decision dated April 5, 2013, it finalized the overpayment of compensation and decided not to waive the overpayment, requesting a check in the amount of \$3,180.78 within 30 days. In a May 9, 2013 letter, OWCP indicated that it had not received payment from appellant or any indication that she intended to cooperate in the matter and afforded her 30 days to respond. In a letter dated June 10, 2013, it explained that because 30 days had passed and it had not received payment or an indication that appellant intended to repay her debt, the overpayment of compensation was considered to be delinquent. By letter dated November 8, 2013, OWCP notified appellant that the sum of \$100.00 would be withheld from her continuing compensation payments every 28 days commencing June 30, 2013 until the overpayment of compensation in the amount of \$3,180.78 was fully absorbed.

⁴ On April 8, 2013 OWCP made a preliminary determination that appellant received an overpayment of compensation in the amount of \$147.32 because she was paid at an incorrect weekly pay rate. By letter dated April 8, 2013, OWCP notified appellant of its decision to waive recovery of the overpayment in the amount of \$147.32 because the potential cost to collect the overpayment of compensation would exceed the debt owed.

concluded that she was capable of returning to work for 8 hours per day with the following restrictions: sitting posture for 30 minutes at a time, then needs to get up and move about; stand and walk for 30 minutes, then needs to either sit or change positions or move about; lift up to 20 pounds frequently, up to 40 pounds occasionally; lift overhead up to 20 pounds frequently; push, pull, trunk bend, kneel on right knee frequently; climb, squat with a rail assist available, and crawl with a rail assist available.

A functional capacity evaluation (FCE) dated December 29, 2011 indicated that appellant was capable of lifting up to 20 pounds frequently and 40 pounds occasionally and carrying 20 pounds occasionally and frequently. She demonstrated the ability to work in a sitting, standing or walking posture for 30 minutes at a time up to 6 hours per day. Appellant also demonstrated the ability to climb, squat occasionally with rail assist available, crawl with rail assist available to get to the floor, occasionally and push, pull, trunk bending and kneel on the right knee with rail assist available to get in and out of the kneeling position, frequently.

On August 14, 2012 a vocational rehabilitation counselor identified the position of gate guard, Department of Labor's *Dictionary of Occupational Titles* (DOT) No. 372.667-030 as suitable to appellant's work experience, physical restrictions and education. The gate guard position was identified as light-duty work which involved guarding the entrance gate of industrial plant and grounds, opening the gate, checking credentials, directing visitors and truckers, inspecting outgoing traffic and required reaching and handling occasionally and no climbing, stooping, kneeling, crouching or crawling. The vocational rehabilitation counselor indicated that the position was reasonably available within the general labor market of appellant's commuting area on a full-time basis as confirmed by the State Employment Service.

On August 20, 2012 OWCP received a rehabilitation plan and award, including the gate guard position. As of August 29, 2012, it provided 90 days of placement assistance. Placement was not successful.

Appellant submitted a March 22, 2011 report from Dr. Steve Randall, a Board-certified pain medicine specialist, who indicated that appellant had difficulty in functioning due to the fact that she could not participate in activities such as fishing, sports, picking up her children or driving in a car since her injury. Dr. Randall diagnosed lumbar sprain, lumbosacral disc degeneration, dislocated lumbar vertebrae, disc displacement not otherwise specified, and chronic pain syndrome. He indicated that appellant required narcotics, as well as medication to control her pain, such as anti-inflammatories.

On February 11, 2013 OWCP issued a notice of proposed reduction of benefits finding that appellant was capable of earning wages as a gate guard at the rate of \$380.00 per week. It afforded her 30 days in which to submit evidence or argument regarding her capacity to earn wages in the constructed position.

On March 12, 2013 appellant, through counsel, argued that she was not capable of performing the gate guard position and submitted a March 12, 2013 report from Dr. Lankford who listed the medications she was taking for pain management and stated that she was not able to return to work. Dr. Lankford noted that appellant had "some sedation on the medication but [was] able to function for activities of daily living."

By decision dated March 28, 2013, OWCP finalized the proposed reduction of compensation benefits finding that appellant had the capacity to earn wages as a gate guard. It determined that appellant had a 54 percent loss of wage-earning capacity and her compensation was reduced to a net compensation of \$867.90 every four weeks.

On April 15, 2013 appellant, through counsel, requested an oral hearing before an OWCP hearing representative and submitted a description of the gate guard position.

A telephonic hearing was held before an OWCP hearing representative on August 14, 2013. Appellant provided testimony and counsel argued that the gate guard position was not suitable.

By decision dated March 13, 2014, OWCP hearing representative affirmed the March 28, 2013 decision.

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.⁵

Section 8115(a) of FECA,⁶ provides in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his 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 wage-earning capacity is determined with due regard to the nature of his injury, his degree of physical impairment, his usual employment, 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.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 In determining an employee's wage-earning capacity, OWCP may not select a makeshift or odd lot position or one not reasonably available on the open labor market.¹⁰

OWCP must initially determine a claimant's medical condition and work restrictions before selecting an appropriate position that reflects his or her wage-earning capacity. The medical evidence upon which OWCP relies must provide a detailed description of the

⁵ See *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

⁶ 5 U.S.C. § 8115.

⁷ See *Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

⁸ See *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

⁹ *Id.*

¹⁰ See *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

condition.¹¹ Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.¹²

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, *Dictionary of Occupational Titles* or otherwise available in the open market, that fits that employee's capabilities with regard to 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 principles set forth in *Albert C. Shadrick*¹³ will result in the percentage of the employee's loss of wage-earning capacity. The basic rate of compensation paid under FECA is 66 2/3 percent of the injured employee's monthly pay.¹⁴

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 postinjury or subsequently acquired conditions. 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.¹⁵

ANALYSIS

OWCP accepted appellant's claim for lumbar sprain and lumbar disc degeneration and referred her to vocational rehabilitation. In its March 28, 2013 decision, it reduced appellant's compensation benefits based on her capacity to earn wages as a gate guard. It determined that this position was medically and vocationally suitable for appellant. OWCP found that appellant was capable of earning \$380.00 per week and had a 54 percent wage-earning capacity. The issue is whether OWCP properly established appellant's capacity to earn wages. The Board finds that the weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of gate guard.

The vocational rehabilitation counselor provided a job description for the gate guard position, which was identified as light-duty work. It involved guarding the entrance gate of an industrial plant and grounds, opening the gate, checking credentials, directing visitors and truckers, inspecting outgoing traffic and required reaching and handling occasionally and no climbing, stooping, kneeling, crouching or crawling. The vocational rehabilitation counselor

¹¹ See *William H. Woods*, 51 ECAB 619 (2000).

¹² See *John D. Jackson*, 55 ECAB 465 (2004).

¹³ 5 ECAB 376 (1953).

¹⁴ See *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

¹⁵ See *John D. Jackson*, *supra* note 12.

indicated that the position was reasonably available within the general labor market of appellant's commuting area on a full-time basis as confirmed by the State Employment Service.

The gate guard position was within appellant's medical restrictions. On January 6, 2012 Dr. Allen found that she was capable of returning to work for 8 hours per day with the following restrictions: sitting posture for 30 minutes at a time, then needs to get up and move about; stand and walk for 30 minutes, then needs to either sit or change positions or move about; lift up to 20 pounds frequently, up to 40 pounds occasionally; lift overhead up to 20 pounds frequently; push, pull, trunk bend, kneel on right knee frequently; climb, squat with a rail assist available, and crawl with a rail assist available. The FCE dated December 29, 2011 indicated that appellant was capable of lifting up to 20 pounds frequently and 40 pounds occasionally and carrying 20 pounds occasionally and frequently. Appellant demonstrated the ability to work in a sitting, standing or walking posture for 30 minutes at a time up to 6 hours per day. She also demonstrated the ability to climb, squat occasionally with rail assist available, crawl with rail assist available to get to the floor, occasionally and push, pull, trunk bending and kneel on the right knee with rail assist available to get in and out of the kneeling position, frequently.

The Board finds that OWCP considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment and age and employment qualifications, in determining that the position of gate guard represented her wage-earning capacity.¹⁶ The evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the duties and that the position was reasonably available within the general labor market of her commuting area. The information as set forth by the vocational counselor determined that the wages for the position of gate guard were \$380.00 per week. Applying the *Shadrick*¹⁷ principles, the current pay rate for the date-of-injury position is compared with the wage-earning capacity of \$380.00 per week and a percentage of loss of wage-earning capacity is determined. OWCP determined that appellant had a 54 percent loss of wage-earning capacity and her compensation was reduced to a net compensation of \$867.90 every four weeks. The Board finds that OWCP met its burden of proof to reduce appellant's compensation in this case.

In support of her claim, appellant provided reports from Drs. Randall and Lankford who indicated that appellant was taking medications for her pain. Their reports, however, did not provide findings that were inconsistent with performing the duties required for the selected position of a gate guard.

On appeal, counsel contends that OWCP used an antiquated system and defunct publication and there is no evidence that the position of gate guard exists in the current economy. The Board notes that FECA's procedure manual clearly states that the vocational rehabilitation counselor shall include in her report the Department of Labor, *Dictionary of Occupational Titles* description of all the duties and physical requirements of each job.¹⁸ The rehabilitation

¹⁶ See *James M. Frasher*, 53 ECAB 794 (2002).

¹⁷ See *supra* note 13; codified at 20 C.F.R. § 10.403(c)-(e).

¹⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.4 (June 2013); see also *T.G.*, Docket No. 14-921 (issued September 17, 2014).

counselor found that the selected position was available in sufficient numbers. The 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 vocationally suitable.¹⁹ The fact that appellant was unable to secure a position does not mean that the position was not reasonably available to her in the open labor market.²⁰ Appellant has submitted no evidence supporting her allegation that the gate guard position does not exist nor that the position was not reasonably available to her in the open labor market. For the reasons stated above, the Board finds counsel's arguments are not substantiated.

CONCLUSION

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 gate guard.

ORDER

IT IS HEREBY ORDERED THAT the March 13, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 4, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

¹⁹ *Id.* at Chapter 2.816.6. *See also B.H.*, Docket No. 13-583 (issued September 10, 2013).

²⁰ *See Lawrence D. Price*, 54 ECAB 590 (2003).