



## FACTUAL HISTORY

This case was previously before the Board.<sup>3</sup> Appellant, a 53-year-old mail handler, sustained injury to his right shoulder twice in the performance of duty. The first injury occurred on June 3, 1994, which OWCP initially accepted for right shoulder strain (File No. xxxxxx077). Appellant underwent surgery on September 4, 1995, and OWCP accepted the right rotator cuff repair. After surgery, he returned to work in a limited-duty capacity as a modified mail handler. On October 28, 1995 appellant suffered another right shoulder strain (File No. xxxxxx102).<sup>4</sup> He subsequently resumed work as a modified mail handler with no loss in pay. By decision dated April 18, 1997, OWCP found that appellant's duties as a modified mail handler fairly and reasonably represented his wage-earning capacity.<sup>5</sup> On December 12, 1997 it granted a schedule award for 11 percent impairment of the right upper extremity. In a November 9, 1999 decision, the Board affirmed OWCP's April 18, 1997 LWEC determination, as well as the December 12, 1997 schedule award.<sup>6</sup>

In October 2007, appellant filed a claim (Form CA-7) for wage-loss compensation beginning August 13, 2007. He stopped work that day because of a disagreement with his employer concerning the need for updated medical documentation regarding his employment-related right shoulder condition. Appellant was not allowed to remain on the employing establishment premises absent the requested medical documentation and because he refused to sign a request for light duty.

In a decision dated November 9, 2007, OWCP found that the August 13, 2007 work stoppage was a noncompensable administrative decision, and appellant had not established a basis for modifying the April 18, 1997 LWEC determination.<sup>7</sup> Accordingly, appellant's claim for wage-loss compensation beginning August 13, 2007 was denied. The Branch of Hearings and Review affirmed this decision on May 19, 2008. Appellant requested reconsideration, and OWCP again denied modification by decision dated September 29, 2008. In a September 16, 2009 appeal, the Board affirmed OWCP's determination that appellant had not established a basis for modifying the April 18, 1997 LWEC determination.<sup>8</sup>

---

<sup>3</sup> Docket Nos. 98-767 and 09-28 (issued November 9, 1999).

<sup>4</sup> Appellant injured his shoulder while attempting to avoid a moving forklift. OWCP combined the two right shoulder injuries under claim File No. xxxxxx077.

<sup>5</sup> Appellant had no (zero percent) loss in wage-earning capacity (LWEC).

<sup>6</sup> Docket No. 98-767 (issued November 9, 1999).

<sup>7</sup> 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 erroneous. *Tamra McCauley*, 51 ECAB 375, 377 (2000). The burden of proof is on the party seeking modification of the wage-earning capacity determination. *Id.*

<sup>8</sup> Docket No. 09-28 (issued September 16, 2009). Additionally, the Board denied reconsideration by order dated June 10, 2010. The Board's September 16, 2009 decision and its June 10, 2010 order denying reconsideration are incorporated herein by reference.

On January 18, 2008 appellant underwent a right shoulder acromioplasty and rotator cuff repair, which OWCP authorized.<sup>9</sup> He received wage-loss compensation and OWCP placed him on the periodic rolls effective March 16, 2008.

Dr. Nolan submitted a May 6, 2009 duty status report (Form CA-17). While appellant's right shoulder condition precluded him from returning to his regular mail handler duties, he noted that appellant was able to work full time with restrictions.<sup>10</sup> Appellant could lift/carry 20 pounds continuously and 30 pounds intermittently. Other restrictions included 2 hours continuous sitting and 6 hours sitting intermittently, 2 hours continuous standing/walking and 7.5 hours standing/walking intermittently and 2 hours bending/stooping intermittently. Dr. Nolan also indicated that appellant could twist at the waist for 7.5 hours intermittently and he could push/pull a wheeled cart weighing 50 pounds intermittently for 4 hours. Appellant could also perform simple grasping for 2 hours continuously and for 7.5 hours intermittently.

Dr. Mohinder S. Nijjar, a Board-certified orthopedic surgeon and OWCP referral physician, examined appellant on October 30, 2009. He diagnosed status post rotator cuff surgical rerepair of the right shoulder. Dr. Nijjar estimated that appellant would have been totally disabled for a period of 8 to 10 weeks following the January 2008 surgery, and afterwards he was capable of performing modified work. He noted that appellant had reached maximum medical improvement and had permanent restrictions that included a four-hour limit on reaching and a two-hour limitation on reaching above shoulder. Dr. Nijjar also imposed a 40-pound limitation on pushing, pulling and lifting over an eight-hour period.

In June 2010, OWCP referred appellant to vocational rehabilitation based on the results of Dr. Nijjar's October 30, 2009 examination.

Appellant initially met with his rehabilitation counselor on July 19, 2010. At that time, he informed her that he was being treated at a Veterans Affairs (VA) Outpatient Clinic for injuries to his back, hips, knees and foot.<sup>11</sup> Appellant was also taking medication for depression. He underwent approximately six hours of vocational testing on August 4, 2010. Appellant later mentioned that his sciatica had bothered him during the vocational testing.

The rehabilitation counselor developed a vocational rehabilitation plan for private placement. The identified positions included order clerk and security guard.<sup>12</sup> The order clerk position was classified as sedentary work, which involved sitting most of the time and occasionally exerting up to 10 pounds of force. The security guard position was classified as light work, involving occasional exertion of 20 pounds of force and frequent exertion of 10

---

<sup>9</sup> The January 18, 2008 surgery was performed by Dr. Richard A. Nolan, a Board-certified orthopedic surgeon.

<sup>10</sup> In an earlier work capacity evaluation (OWCP-5c) dated August 20, 2008, Dr. Nolan released appellant to resume work in a part-time (six hours), limited-duty capacity.

<sup>11</sup> Appellant's VA medical records revealed treatment for a variety of orthopedic and psychiatric conditions, including degenerative joint disease of the lumbar spine with paralysis of the sciatic nerve and depression with schizotypal personality disorder.

<sup>12</sup> Appellant reported having previously worked as a security guard.

pounds of force. One of the responsibilities of a security guard was to apprehend unauthorized persons.<sup>13</sup> The rehabilitation plan included 4½ months of classroom training in basic computer skills, which was a required skill set for employment as an order clerk.<sup>14</sup> The rehabilitation counselor also believed that by acquiring basic office skills, appellant would gain a competitive advantage in obtaining work as a security guard. Appellant was also required to obtain clearance (“Guard Card”) to work as a security guard. He met with the training facility staff on August 23, 2010. Appellant later advised the rehabilitation counselor that he did not want to work with people and did not like the classroom setting because it was too small and people sat too close together, which made him uncomfortable.

On November 17, 2010 OWCP advised appellant that it had approved the rehabilitation plan for training and placement as either a security guard or order clerk. Following training appellant was to receive 90 days of job placement assistance. OWCP noted that the identified positions were within his work limitations as determined by Dr. Nijjar. Based on the rehabilitation plan, it noted that appellant would have a wage-earning capacity of between \$20,800.00 and \$31,200.00 annually.<sup>15</sup>

Appellant successfully completed the “Guard Card” training on or about December 17, 2010 and began computer skills training on January 3, 2011. Less than three weeks after beginning the classroom-training component of his vocational rehabilitation program, he withdrew. Attendance records indicated that, between January 3 and 18, 2011, appellant left class early on four occasions and missed school entirely on another four occasions. His early departure on January 4, 2011 and his absence on January 6, 2011 were due to doctor’s appointments. Back pain was the stated reason for appellant’s early departure on January 7 and 10, 2011 and his absence on the January 11 and 12, 2011.<sup>16</sup> He left two hours early on January 14, 2011 to pick up his son and he was absent on January 18, 2011 due to his back pain.<sup>17</sup> Appellant missed a total of 25 hours during the first 12 days of classes. The program director spoke with him regarding his frequent absences and he explained that the commute from his residence was physically painful and reportedly caused hip and lower back pain. Appellant

---

<sup>13</sup> The 10 prospective employers surveyed by the rehabilitation counselor, 5 indicated that their security guards were not required to physically apprehend individuals.

<sup>14</sup> The training was to be provided by Business Education Technologies (BET) in Oakland, CA. Appellant was expected to attend class Monday through Friday from 9:00 a.m. until 1:00 p.m.

<sup>15</sup> The rehabilitation counselor’s local labor market survey revealed that the security guard position paid \$400.00 a week and the order clerk position paid \$520.00 a week. It is not entirely clear how OWCP arrived at the \$31,200.00 figure, as that would require a weekly wage of \$600.00.

<sup>16</sup> On January 11, 2011 appellant informed the rehabilitation counselor that his back was “killing” him. His injury-related right shoulder condition reportedly did not hurt him as much as his back did.

<sup>17</sup> Appellant informed the rehabilitation counselor on January 19, 2011 that he had a lot of pain in his hip, back, knees and foot and planned on seeing his doctor at the VA. He also indicated that he could not attend training at BET because it was too far to drive. On January 25, 2011 appellant again spoke with the rehabilitation counselor and related that he could not stretch at BET nor could he lie down. He was reportedly in too much pain at that time and could not work.

noted that he was unable to concentrate once at school because of medications and anxieties related to social interaction and coming to downtown Oakland, CA.

On January 20, 2011 OWCP notified appellant that it was aware that he failed to maintain regular attendance at his OWCP-sponsored training program. It advised him of the possible sanctions for failure to undergo vocational rehabilitation and directed him to contact the rehabilitation counselor and resume his computer skills training program. Appellant was also afforded the opportunity to submit in writing his reasons or justification for not participating in the training program. If he did not take the necessary steps within 30 days, OWCP explained that it would terminate rehabilitation services and reduce his compensation based on the previously identified positions.

On January 26, 2011 counsel contacted OWCP regarding appellant's various medical problems. Although appellant had been advised to submit his VA medical records to the rehabilitation counselor, counsel was unsure whether he had followed his advice. He submitted copies of appellant's VA medical records covering the period of March 2006 to September 2010.

Appellant's VA records documented a combined 60 percent service-connected disability for various conditions, which included a bilateral knee condition (10 percent each), residuals of a left foot injury (10 percent), paralysis of the sciatic nerve (10 percent) and degenerative arthritis of the spine (20 percent). The VA treatment records also included a "Problem List" of various chronic medical conditions, which included residual osteotomies of the left first and third metatarsal joints, Osgood-Schlatter disease of the right knee with limited flexion, service-connected degenerative joint disease of the lumbar spine with paralysis of the sciatic nerve, status post right rotator cuff surgery, status post left thumb surgery, depression with schizotypal personality disorder, left knee pain with intermittent effusion, left shoulder pain with suspected tendinopathy or tendinitis, right hip pain of uncertain etiology and probable gastroesophageal reflux disease.

In a letter dated February 4, 2011, Dr. Richard A. Karp, a Board-certified internist, advised OWCP that appellant was a service-connected veteran being followed for multiple problems including foot injuries, lumbar disc disease with radiculopathy, knee pain, bilateral rotator cuff injuries and chronic hip pain.<sup>18</sup> He noted that appellant was significantly limited in his activity and the amount of time he could sit due to chronic pain and reduced function. Dr. Karp indicated that appellant was unable to complete the mandatory training as it was currently scheduled. He asked that OWCP work with appellant to allow him every opportunity to complete the approved training program, and he assured OWCP that he too was working to provide the best medical care possible to address appellant's multiple problems.

As of February 22, 2011, appellant had not contacted his rehabilitation counselor or resumed his training with BET.

By decision dated March 16, 2011, OWCP found that appellant failed, without good cause, to undergo vocational rehabilitation as directed. Effective April 10, 2011, it reduced his wage-loss compensation based on his anticipated weekly earnings (\$559.26) as a security guard.

---

<sup>18</sup> Dr. Karp was appellant's primary care physician at the Oakland VA Outpatient Clinic.

## LEGAL PRECEDENT

OWCP may direct a permanently disabled employee whose disability is compensable to undergo vocational rehabilitation.<sup>19</sup> If an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed, OWCP, after finding that in the absence of the failure the wage-earning capacity of the individual would probably have substantially increased, may reduce prospectively the monetary compensation of the individual.<sup>20</sup> Where a suitable job has been identified, OWCP will reduce the employee's future monetary compensation based on the amount which would likely have been his wage-earning capacity had he undergone vocational rehabilitation.<sup>21</sup> OWCP will determine this amount in accordance with the job identified through the vocational rehabilitation planning process.<sup>22</sup> The reduction will remain in effect until such time as the employee acts in good faith to comply with OWCP's directive.<sup>23</sup>

OWCP must initially determine the employee's medical condition and work restrictions before selecting an appropriate position that reflects his vocational wage-earning capacity.<sup>24</sup> The medical evidence OWCP relies upon must provide a detailed description of the employee's condition and the evaluation must be reasonably current.<sup>25</sup> Where suitability is to be determined based on a position not actually held, the selected position must accommodate the employee's impairment from both injury-related and preexisting conditions, but not impairment attributable to postinjury or subsequently acquired conditions.<sup>26</sup>

## ANALYSIS

Once OWCP has made a determination that an employee is totally disabled as a result of an employment injury and pays compensation, it has the burden of justifying a subsequent reduction of benefits.<sup>27</sup> OWCP reduced appellant's compensation based on his ability to earn wages as a security guard. The Board finds that OWCP did not meet its burden of proof to reduce appellant's compensation.

As noted, OWCP must initially determine the employee's medical condition and work restrictions before selecting an appropriate position that reflects his vocational wage-earning

---

<sup>19</sup> 5 U.S.C. § 8104(a).

<sup>20</sup> *Id.* at § 8113(b).

<sup>21</sup> 20 C.F.R. § 10.519(a).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *M.A.*, 59 ECAB 624, 631 (2008).

<sup>25</sup> *Id.*

<sup>26</sup> *N.J.*, 59 ECAB 171, 176 (2007).

<sup>27</sup> *M.A.*, *supra* note 24.

capacity.<sup>28</sup> The medical evidence OWCP relies upon must provide a detailed description of appellant's condition and the evaluation must be reasonably current.<sup>29</sup> OWCP relied on Dr. Nijjar's October 30, 2009 work restrictions but did not address Dr. Nolan's more restrictive May 6, 2009 work limitations.

In comparison to Dr. Nijjar, appellant's physician, Dr. Nolan, imposed greater restrictions with respect to lifting, pushing and pulling. He also imposed limitations with respect to sitting, standing, walking and twisting. The restrictions differ from Dr. Nijjar's October 30, 2009 work capacity evaluation (OWCP-5c).

FECA provides that if there is disagreement between an OWCP-designated examining physician and the employee's physician, OWCP shall appoint a third physician who shall make an examination.<sup>30</sup> For a conflict to arise, the opposing physicians' viewpoints must be of virtually equal weight and rationale.<sup>31</sup> The Board finds that there is an unresolved conflict in medical opinion regarding appellant's work restrictions between Dr. Nolan and Dr. Nijjar. Also, when selecting the order clerk and security guard positions, OWCP did not address whether appellant's preexisting conditions impacted his ability to perform the selected position. Dr. Karp noted in his February 4, 2011 letter to OWCP that appellant was significantly limited in his activity due to chronic pain. OWCP referenced his letter in its March 16, 2011 decision, but did not address appellant's limitation on the amount of time he could sit. Dr. Nolan limited appellant to two hours of continuous sitting.

Apart from the unresolved conflict in medical opinion, the Board questions whether the security guard position is medically suitable. According to the *Dictionary of Occupational Titles* (DOT No. 372.667-038), one of the responsibilities of a security guard is to apprehend unauthorized persons.<sup>32</sup> Given appellant's employment-related right upper extremity condition and the corresponding limitations identified by both Dr. Nolan and Dr. Nijjar, the medical evidence should substantiate whether appellant is able to perform such activity. Consequently, the Board finds that the selected position of security guard is not medically suitable. As such, OWCP improperly reduced appellant's compensation on the basis that the security guard position was both medically and vocationally suitable.

---

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> 5 U.S.C. § 8123(a); see 20 C.F.R. § 10.321; *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

<sup>31</sup> *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

<sup>32</sup> In preparing her labor market survey, the rehabilitation counselor asked 10 prospective employers whether physically apprehending individuals was a requirement of the job. Five employers (50 percent) indicated that their security guards were not required to physically apprehend individuals. In a February 22, 2011 report, OWCP's rehabilitation specialist mischaracterized the rehabilitation counselor's survey results. He noted that "[a]lthough apprehending unauthorized persons is part of the DOT position description, employers were queried and reported that apprehending unauthorized persons is not a job requirement." Based on the rehabilitation counselor's informal survey, 50 percent of the employers surveyed would expect their security guards to apprehend unauthorized persons consistent with the DOT position description.

**CONCLUSION**

The Board finds that OWCP failed to satisfy its burden in reducing appellant's wage-loss compensation effective April 10, 2011.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 16, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 16, 2012  
Washington, DC

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

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

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