



Board-certified orthopedic surgeon, who was not properly selected from the Physicians Directory System (PDS). Specifically, counsel argues that Dr. Basil Ingemi, a Board-certified orthopedic surgeon, was selected from the PDS and was bypassed without a proper reason. He further contends that the vocational rehabilitation counselor changed her opinion regarding the number of available information clerk positions and failed to confirm that the positions were reasonably available to appellant.

### **FACTUAL HISTORY**

On January 26, 2002 appellant, then a 35-year-old letter carrier, sustained a lower back injury while loading mail onto a mail truck. He stopped work and did not return. OWCP accepted the claim for bulging disc at L5-S1 and authorized physical therapy for 120 days from February 15 to June 15, 2002. Appellant was placed on the periodic rolls and received appropriate compensation benefits.

In an April 11, 2008 report, Dr. Robert Taffet, an orthopedic surgeon, opined that appellant was unable to work as a letter carrier and was able to work full time with the following permanent restrictions: half an hour of walking, standing and operating a motor vehicle; no twisting, bending, stooping; no pushing or pulling more than 50 pounds; and no lifting more than 20 pounds.

On October 16, 2008 the Office of Inspector General submitted a report of investigation of appellant covering the period July 12, 2006 to October 15, 2008.

On January 28, 2009 a vocational rehabilitation counselor identified three potential positions for appellant: a security officer (hotel and restaurant), Department of Labor's *Dictionary of Occupational Titles* (DOT) No. 376.367-018; a surveillance system monitor, DOT No. 379.367-010; and an information clerk, DOT No. 237.367-022. The information clerk position was identified as sedentary and the duties included answering inquiries, providing information regarding activities conducted at the employing establishment and the location of departments, offices and employees within the organization, providing information concerning services, such as laundry and valet services, in hotel and receiving and answering requests for information. The vocational counselor confirmed online that the positions were available in appellant's commuting area on a full- or part-time basis.

On May 6, 2009 the vocational rehabilitation counselor reported that there had been a slight decline in the number of available administrative and support positions within a reasonable commuting distance for the period March 2008 to March 2009.

In an August 14, 2009 report, Dr. Taffet indicated that appellant was unable to walk, stand or sit for prolonged periods. He opined that appellant was capable of light/sedentary work with frequent breaks, changing positions and the following permanent restrictions: three hours of sitting; one hour of walking and standing; no twisting, bending, stooping or climbing; two hours of operating a motor vehicle at work; one hour of pushing and pulling no more than 40 pounds and one hour of lifting no more than 10 pounds.

By letter dated August 31, 2009, OWCP referred appellant to Dr. Robert A. Smith, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated September 14, 2009, Dr. Smith reviewed appellant's history of injury and treatment and determined that his conditions had resolved. He advised that appellant could not go back to work in a regular-duty capacity given the finding of nonindustrial degenerative disease in the spine. Dr. Smith found that appellant could return to permanent light-duty work with lifting limited to 10 pounds and with the chance to sit or stand at will. He concluded that appellant reached maximum medical improvement in August 2008 when a magnetic resonance imaging (MRI) scan showed his right paracentral disc protrusion at L5-S1 had resolved.

On October 15, 2009 OWCP found a conflict in medical opinion between Dr. Taffet and Dr. Smith and referred appellant to Dr. Levitsky for an impartial medical examination. The record contains an October 15, 2009 MEO23 IFECs report, which states that appellant's referee appointment was scheduled with Dr. Levitsky. The record also contains bypass forms for two other Board-certified orthopedic surgeons, noting that they were bypassed because OWCP was unable to contact them or because they did not accept Department of Labor patients. Dr. Ingemi was bypassed because he did not accept Department of Labor patients and Dr. Seth Silver was bypassed because OWCP was unable to locate a telephone number to contact him.

OWCP further included a screen shot that included a list of physician's, including Dr. Levitsky.

In his November 17, 2009 report, Dr. Levitsky reviewed appellant's medical history and conducted a physical examination. He found forward flexion of the lumbar spine was about 60 degrees, extension was 20 degrees and side bending was 20 degrees bilaterally. Straight leg raising on the right side at 60 degrees caused pain in appellant's right buttock and he had global hypesthesias in his entire right leg. Dr. Levitsky diagnosed lumbar spine sprain/strain, post-traumatic low back pain, herniated L5-S1 lumbar disc, radiculopathy, right lower extremity and severe degenerative disc disease, L5-S1. He opined that appellant was unable to perform his regular work duties and would never be able to return to gainful employment performing heavy lifting. Dr. Levitsky concluded that appellant had reached maximum medical improvement. He agreed with Dr. Taffet's opinion that appellant could perform either sedentary or light-duty type work and further opined that he would never be able to perform medium or heavy-duty work.

In a March 11, 2010 report, Dr. Levitsky indicated that he had been provided with a surveillance video of appellant dated February 27, 2007. He stated that the video clearly demonstrated appellant's ability to get down on his hands and knees and look under his car. Appellant was shown kneeling, squatting and bending over cleaning his car, especially the tires. According to Dr. Levitsky, the video did not demonstrate any obvious pain on appellant's face when he was bending over. He opined that appellant was capable of doing work at a higher level from sedentary to light and could probably perform medium-duty work.

In a May 4, 2010 report, Dr. Michael Barrett, an osteopath and orthopedic surgeon, opined that appellant was unable to work as a letter carrier. He found that appellant had reached maximum medical improvement and could perform sedentary work with the following permanent restrictions: eight hours of sitting; half an hour of walking, standing and operating a motor vehicle at work; and no twisting, bending or stooping.

On June 21, 2010 the vocational rehabilitation counselor reported that there had been a slight increase in the number of available service-providing positions within a reasonable commuting area as of January 2010 and identified an information clerk position with an average weekly salary of \$402.00 per week.

On June 25, 2010 OWCP received a rehabilitation plan and award, including the information clerk position, signed by appellant on June 21, 2010.

On June 25, 2010 OWCP requested that the employing establishment confirm appellant's grade and step level as of January 26, 2002 and the current salary for a letter carrier. On June 28, 2010 the employing establishment confirmed that on January 26, 2002 he was a Grade 1, Step B earning \$36,013.00 per year and that the current salary would be \$46,301.00 per year.

In an August 25, 2010 report, the vocational rehabilitation counselor identified available positions for appellant. On September 30, 2010 she reported that there had been a slight decrease in the number of available service-providing positions for the period June to August 2010, however, jobs were available within a reasonable commuting distance from appellant's home.

On October 6, 2010 OWCP issued a notice of proposed reduction of benefits finding that appellant was capable of earning wages as an information clerk at the rate of \$402.00 per week. It afforded him 30 days in which to submit evidence or argument regarding his capacity to earn wages in the position described.

Subsequently, appellant's attorney submitted an October 18, 2010 statement and an October 26, 2010 report by Dr. Barrett opining that appellant could return to a sedentary-type job.

By decision dated January 14, 2011, OWCP finalized the proposed reduction of compensation benefits finding that appellant had the capacity to earn wages as an information clerk.

By letter dated January 21, 2011, appellant's attorney requested a hearing, which was held before an OWCP hearing representative on May 19, 2011. Prior to the hearing, OWCP received an April 13, 2011 report by Dr. Kenneth H. Rogers, an osteopath Board-certified in pain medicine and anesthesiology, who reported that he performed right L5 and S1 transforaminal injection in the past and reviewed an MRI scan dated September 10, 2009, which showed degenerative disc disease at L5-S1 with left foraminal disc protrusion at L4-5 and annular tear. Upon physical examination, Dr. Rogers found that appellant's motor strength was limited by pain and suggested a new MRI scan be performed as an initial step towards further treatment. In a May 4, 2011 progress report, he reviewed an MRI scan of the lumbar spine dated April 20, 2011, which showed L4-5 intervertebral foraminal stenosis and lateral annular tear. There was severe loss of the L5-S1 disc with herniation and intervertebral foraminal stenosis bilaterally. There were Schmorl's nodes at L2-3 and L3-4 and the inferior end plate of T12, representing an end plate failure. Dr. Rogers recommended that transforaminal injections be performed bilaterally.

By decision dated July 28, 2011, an OWCP hearing representative affirmed the January 14, 2011 wage-earning capacity 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.<sup>3</sup>

Section 8115(a) of FECA,<sup>4</sup> 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.<sup>5</sup> Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup>

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 DOT or otherwise available in the open market, that fits that employee's capabilities with regard to his 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*<sup>9</sup> 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.<sup>10</sup>

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<sup>3</sup> See *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

<sup>4</sup> 5 U.S.C. § 8115.

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

<sup>6</sup> See *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

<sup>7</sup> *Id.*

<sup>8</sup> See *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

<sup>9</sup> 5 ECAB 376 (1953).

<sup>10</sup> See *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

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. 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.<sup>11</sup>

### ANALYSIS

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 information clerk.

On October 15, 2009 OWCP found a conflict in medical opinion between Dr. Taffet, who opined that appellant was capable of sedentary work and Dr. Smith, who also opined that appellant could return to light-duty work but who found that appellant's conditions had resolved. It referred appellant to Dr. Levitsky, a Board-certified orthopedic surgeon, for an impartial medical examination. In his November 17, 2009 report, Dr. Levitsky diagnosed lumbar spine sprain/strain, post-traumatic low back pain, herniated L5-S1 lumbar disc, right lower extremity radiculopathy and severe degenerative disc disease at L5-S1. He opined that appellant could perform either sedentary or light-duty type work and further opined that he would never be able to perform medium or heavy-duty work. However, on March 11, 2010, Dr. Levitsky viewed a surveillance video of appellant dated February 27, 2007, which clearly demonstrated his ability to get down on his hands and knees, kneel, squat and bend over. According to him, the video did not demonstrate any obvious pain on appellant's face when he was bending over and Dr. Levitsky opined that appellant was capable of doing work at a higher level from sedentary to light and could probably perform medium-duty work.

On January 28, 2009 the vocational rehabilitation counselor stated that she had identified three jobs that appellant would be capable of performing and which were available in the area. One of them was as information clerk, DOT No. 237.367-022, with an average weekly salary of \$402.00 per week. This position was identified as sedentary and was reasonably available in appellant's commuting area on a full or part-time basis.

In support of his claim, appellant provided reports from Dr. Barrett and Dr. Rogers. However, neither physician noted that they had reviewed the duties required of an information clerk. These reports merely provided findings and did not offer any opinion as to whether appellant was capable of performing the duties required for the selected position of an information clerk. These reports do not establish that he was unable to perform the duties of an information clerk on a full- or part-time basis.

The evidence establishes that appellant was capable of performing the duties required for the selected position of an information clerk. As noted, Dr. Levitsky advised that appellant was capable of doing work at a higher level from sedentary to light and could probably perform medium-duty work. The vocational rehabilitation counselor determined that appellant was able

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<sup>11</sup> See *John D. Jackson*, 55 ECAB 465 (2004).

to perform the position of an information clerk. She provided a job description which was comprised of sedentary requirements related to the receiving and answering requests for information and determined that the position fell within appellant's medical restrictions. The counselor noted that the position was available on a full- or part-time basis within his commuting area and that the wage of the position was \$402.00 per week.

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 information clerk represented his wage-earning capacity.<sup>12</sup> 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 his commuting area. The wage information as set forth by the vocational counselor indicated that the wages for the position of information clerk was \$402.00 per week. Applying the *Shadrick*<sup>13</sup> principles, the current pay rate for the date-of-injury position is compared with the wage-earning capacity of \$402.00 per week and a percentage of loss of wage-earning capacity is determined. OWCP determined that appellant had a 45 percent loss of wage-earning capacity and his compensation was reduced to a net compensation of \$1,366.68 every four weeks. The Board finds that OWCP met its burden of proof to reduce his compensation in this case.

On appeal, appellant's attorney contends that the vocational rehabilitation counselor changed her opinion regarding the number of available information clerk positions and failed to confirm that the positions were reasonably available to appellant. The record contains several reports from the vocational rehabilitation counselor identifying available positions for appellant. On September 30, 2010 the vocational rehabilitation counselor reported that there had been a slight decrease in the number of available service-providing positions for the period June to August 2010, but noted that jobs were available within a reasonable commuting distance from appellant's home. Although she reported on the periodic increase and decrease of available jobs, she did not fail to confirm that there were positions reasonably available to appellant within the commuting area.<sup>14</sup> Therefore, the Board finds that the attorney's argument is not substantiated.

Appellant's attorney further contends that OWCP improperly terminated appellant's compensation based on the reports of Dr. Levitsky who was not properly selected from the PDS. Specifically, counsel argues that Dr. Ingemi was selected from the PDS but no reason was provided on the bypass as to why he could not conduct the referee medical examination. OWCP has an obligation to verify that it selected Dr. Levitsky in a fair and unbiased manner. It maintains records for this very purpose.<sup>15</sup> The current record contains an October 15, 2009

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<sup>12</sup> See *James M. Frasher*, 53 ECAB 794 (2002).

<sup>13</sup> See *supra* note 9.

<sup>14</sup> In determining what constitutes suitable work for a particular disabled employee, OWCP considers the employee's current physical limitations, whether the work is available within the employee's demonstrated commuting area, the employee's qualifications to perform such work and other relevant factors. 20 C.F.R. § 10.500(b); see *Ozine J. Hagan*, 55 ECAB 681 (2004).

<sup>15</sup> See *M.A.*, Docket No. 07-1344 (issued February 19, 2008).

MEO23 IFECs report, which states that appellant's referee appointment was scheduled with Dr. Levitsky. OWCP further included a screen shot that included a list of physicians, including Dr. Ingemi and Dr. Levitsky. The record supports that Dr. Ingemi was also selected from the PDS. Contrary to counsel's contention, the bypass note specifically excluded him on the basis that he did not accept Department of Labor patients. OWCP provided a reasonable explanation for bypassing Dr. Ingemi. There is no evidence that Dr. Ingemi was improperly bypassed.<sup>16</sup> The Board finds that OWCP provided documentation regarding Dr. Levitsky's selection. The Board has placed great importance on the appearance as well as the fact of impartiality and only if the selection procedures which were designed to achieve this result are scrupulously followed may the selected physician carry the special weight accorded to an impartial specialist. As OWCP has met its affirmative obligation to establish that it properly followed its selection procedures, the Board finds that the attorney's argument is not substantiated.<sup>17</sup>

Appellant may request modification of the wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

### **CONCLUSION**

The Board finds that OWCP met its burden of proof to reduce appellant's compensation benefits based on his capacity to earn wages in the constructed position of information clerk.

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<sup>16</sup> See *E.M.*, Docket No. 11-1373 (issued February 3, 2012).

<sup>17</sup> *Cf. H.W.*, Docket No. 10-404 (issued September 28, 2011) (where the MEO23 IFECs report was the only documentation of the scheduled impartial medical specialist examination. There were no screen shots substantiating the selection of the impartial medical specialist. The Board remanded the case by an order for selection of another impartial medical specialist and the issuance of an appropriate decision following any further development).

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 28, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 11, 2012  
Washington, DC

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

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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