

FACTUAL HISTORY

On April 15, 1999 appellant, then a 28-year-old letter carrier, filed an occupational disease claim alleging that as a result of walking 10 miles a day during his federal employment, he developed pain in his left heel. He had a past history of asthma, back strain, right knee sprain, bilateral knee surgeries and spinal meningitis. OWCP accepted appellant's claim for left Achilles tendinitis. It later accepted his claim for worsening of a Haglund deformity, retroacalcanal bursitis and left lower leg deep vein thrombosis. On July 18, 1999 appellant underwent a partial excision of left calcaneus retroacalcanal bursa. On February 29, 2000 he returned to work for the employing establishment as a modified general clerk. On February 15, 2006 appellant underwent a left Achilles partial excision and Achilles tendon tenolysis with excision of calcanal bursa. He returned to work as a modified general clerk on April 28, 2006. The employing establishment withdrew appellant's light-duty assignment under the National Reassessment Process (NRP) effective February 11, 2011.

In a March 28, 2011 report, Dr. Peter E. Krumins, appellant's treating Board-certified orthopedic surgeon, listed appellant's impression as status post left Achilles tendon tenolysis; left Achilles tendinopathy/partial tear; left leg chronic thrombophlebitis with history of deep venous thrombosis and pulmonary embolism; and Coumadin anticoagulation. In a duty status report of the same date, he noted that appellant had restrictions and could only sit, kneel, bend/stoop, twist, push/pull, reach above the shoulder and drive intermittently. Dr. Krumins indicated that appellant was limited to standing/walking to less than 3.75 minutes every 30 minutes.

OWCP referred appellant to Dr. Joseph Carney, a Board-certified orthopedic surgeon, for a second opinion. In an opinion dated April 9, 2011, Dr. Carney diagnosed appellant with the following conditions related to his employment injury: (1) left Achilles tendinitis, status post left Achilles partial excision of calcaneal bursa on February 15, 2006; (2) left calcaneal spur; and (3) left lower deep vein thrombosis. He noted that appellant had the following medical conditions that were not related to the employment injury: (1) asthma; (2) back strain; (3) right knee sprain (different claim); (4) bilateral knee surgeries including right partial meniscectomy in 1990 and left partial meniscectomy in 1996; and (5) spinal meningitis. Dr. Carney opined that appellant could not perform the duties of his date-of-injury position. He noted that appellant had a chronic postthrombophlebitic condition that will be chronic, that he had objective edema despite wearing compression stockings in the left lower extremity and has chronic tendinosis of his Achilles tendon. Dr. Carney concluded that these conditions would be aggravated with the duties required of a mail carrier. He noted that appellant could work as a modified clerk with restrictions and that these restrictions should be permanent. In the attached duty status report, Dr. Carney listed appellant's restrictions as sitting six hours a day, walking five hours a day, standing two hours a day, reaching four hours a day, twisting four hours a day and bending/stooping, pushing/pulling, lifting, squatting and kneeling up to one-half hour a day. He prohibited appellant from operating a motor vehicle at work or climbing.

On August 24, 2011 OWCP referred appellant for the development of a vocational rehabilitation program.

In an October 28, 2011 report, Dr. Krumins stated that Dr. Carney's restrictions were not consistent with appellant's limitations. He noted that appellant had an excision of the left

calcaneal bursa back in 1999, and that he has had persistent pain and dysfunction since that time, with his course complicated by developing deep venous thrombosis of the same leg. Dr. Krumins stated that appellant continues to have pain complaints that are ongoing with limitation of his function. He limited appellant to standing and walking 15 minutes every 2 hours, limiting his lifting to 70 pounds, standing less than 1 hour, walking less than 20 minutes per day, kneeling 15 minutes with bending and stooping 15 minutes, twisting 1 hour, pulling 15 minutes, grasping 2 hours at a time with fine manipulation limited to 3 hours a time and reaching above shoulder to 15 minutes.

In a memorandum received by OWCP on November 1, 2011, appellant noted his objections to Dr. Carney's report. He noted that he had bone spurs on his feet that have shaved off twice, had plantar fasciitis, Achilles tendonitis and since his last surgery, he has deep vein thrombosis (DVTs) and swelling in his leg due to poor blood flow. Appellant noted that on the day he saw Dr. Carney, he had not been on his feet.

In a November 15, 2011 update to his report, Dr. Carney stated that he agreed with the attending provider that appellant warranted permanent modifications, but that it was his opinion that very strict walking limitations for appellant were not medically necessary. He noted that subsequent to his report, there was a difference in his recommended limitations, specifically, that more frequent walking would be beneficial in preventing thrombus for appellant, as long as the walking is of a light-duty capacity, as outlined in his limitations.

In a January 10, 2012 report, Dr. Krumins recommended continuing job modifications previously specified. He believed appellant would benefit from retraining for a sedentary position and stated that he did not feel that appellant was capable of doing any job requiring him to stay on his feet or walk more than 15 minutes every 2 hours.

The vocational rehabilitation specialist recommended in a January 20, 2012 report that appellant was vocationally qualified as a dispatcher as represented in the Department of Labor's *Dictionary of Occupational Titles* (DOT No. 249.167-014). The tasks performed by a dispatcher, as listed by DOT, include: compiles list of available vehicles; assigns vehicles; issues keys; records time of departure, destination, cargo and expected time of return; investigates overdue vehicles; and directs drivers using a two-way radio. The position never requires climbing, balance, stooping, kneeling, crouching or crawling. The position requires frequent reaching, talking and hearing and occasional handling and fingering. Strength was listed as sedentary, which is defined as occasional lifting of less than 10 pounds. With regard to specific vocational preparation, the vocational rehabilitation counselor report indicated that between five months and 1 year training was required but that appellant had 13 years of customer service experience as a clerk for the employing establishment and has demonstrated experience in maintaining records, preparing reports, providing retail service to customers, communicating by telephone and maintaining attention to detail. The vocational rehabilitation specialist approved the plan on February 1, 2012.

By letter dated February 13, 2012, OWCP informed appellant that a plan for 90 days of vocational assistance for placement as a dispatcher or general office clerk had been approved. On May 21, 2012 the vocational rehabilitation specialist closed placement services without job placement. Despite appellant's inability to secure employment, the vocational rehabilitation

specialist found him capable of earning \$22.09 per hour (\$883.60 per week) as a dispatcher. The vocational rehabilitation specialist indicated that the wages were based on the Occupational Employment Statistics from the United States Department of Labor, Bureau of Labor and Statistics for Washington dated May 2011. The vocational rehabilitation specialist attached the occupational employment statistics from the May 11, 2011 report, which indicated that for police, fire and ambulance dispatchers, the hourly median wage was \$22.09 and the hourly median wages for all other dispatchers was \$18.64.

In a letter to OWCP dated August 17, 2012, counsel argued that the opinion of the vocational rehabilitation specialist that appellant could work as a 911 dispatcher at \$23.00 an hour was ludicrous.² He noted that appellant never did this type of work before and could not possibly be hired at this type of salary for this type of job. Counsel requested a position description of the emergency dispatcher.

On September 6, 2012 OWCP proposed reducing appellant's compensation to reflect his ability to earn wages as a dispatcher at the rate of \$22.09 per hour or \$883.60 per week. It indicated that the evidence of record revealed that he was vocationally and physically capable of working as a dispatcher, that the position was reasonably available in his commuting area and that it represented his wage-earning capacity. Appellant was advised that if he disagreed with this proposal, he had 30 days to respond to the proposal. He did not submit a timely response.

By decision dated October 10, 2012, OWCP reduced appellant's compensation effective October 10, 2012 based on his ability to earn wages as an emergency dispatcher. It indicated that the position was sedentary and that the physical requirements did not exceed his accepted work tolerance limitations. OWCP noted that the position was reasonably available in appellant's commuting area and that the entry pay level for the position was \$883.60 per week. Under the *Shadrick* decision,³ it calculated the percentage of his LWEC based on this position.

On October 16, 2012 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative.

In a January 10, 2012 progress report, Dr. Krumins listed his impression as left Achilles moderate tendinosis mild intrasubstance tear and history of DVT/pulmonary embolism or anti-coagulation. He noted that it might be worthwhile for appellant to see a vascular surgeon. Dr. Krumins recommended continued job modification and stated that appellant would benefit from retraining for a sedentary position. He did not believe that appellant was capable of doing any type of job requiring him to stay on his feet or walk more than 15 minutes every 2 hours.

At the hearing held on February 11, 2013, appellant stated that he was physically capable of working as a dispatcher and noted that he was working in a job that was more physically strenuous when he worked as a modified clerk, but that the employing establishment took that

² The vocational rehabilitation counselor actually noted the hourly wage for police, fire and ambulance dispatchers was \$22.09.

³ See *Dennis D. Owen*, 44 ECAB 475, 479-80 (1993); *Wilson L. Clow, Jr.*, 44 ECAB 157, 171-75 (1992); *Albert C. Shadrick*, 5 ECAB 376 (1953).

job from him. He testified that he told the vocational rehabilitation specialist that he was interested in computers, but that no money was provided for computer training. Appellant noted that he had worked 15 years ago as a patrol officer but he never had performed the duties of a dispatcher on a regular basis and that he did not have any computer skills associated with dispatch. He noted that he tried to apply for dispatcher jobs, but that they paid from minimum wage all the way up to \$24.00 an hour for a 911 dispatcher. Appellant stated that to become a 911 dispatcher there were specific training and testing required. He testified that taxicab companies and trucking companies told him that they were not hiring. Appellant noted that he tried to find work in customer service but had been unsuccessful. Counsel argued that appellant had no transferable skills from prior employment for work as a dispatcher, so he would need to be considered an entry level employee. He contended that a 911 dispatcher position could not be considered to develop his wage-earning capacity because it required passing tests and it was unclear whether appellant would pass. Appellant also argued that 911 jobs require computer skills. He contended that the DOT is outdated and 20 years old. Appellant finally argued that the dispatcher position was basically a minimum wage job.

By decision dated April 26, 2013, OWCP's hearing representative affirmed OWCP's October 10, 2012 decision.⁴

LEGAL PRECEDENT

Once OWCP has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.⁵ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on proper factual and medical background.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 wage-earning capacity or if the employee has no actual earnings, his or her wage-earning capacity is determined with due regards to the nature of the injury, his or her degree of physical impairment, his or her usual employment, his or her age, his or her 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

⁴ On January 31, 2013 OWCP issued a decision denying appellant's claim for a schedule award. This decision is not currently under appeal. See 20 C.F.R. § 501.3. The Board notes that an OWCP hearing representative issued a July 29, 2013 decision with regard to appellant's claim for a schedule award subsequent to the date appellant filed this appeal.

⁵ *Bettye F. Wade*, 37 ECAB 556 (1986); *Ella M. Gardner*, 36 ECAB 238 (1984).

⁶ See *Del K. Rykert*, 40 ECAB 284 (1988).

⁷ 5 U.S.C. § 8115(a); 20 C.F.R. § 10.520; see *Pope D. Cox*, 39 ECAB 143 (1988).

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 relied upon must provide a detailed description of the condition.⁸ Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.⁹

OWCP procedure instructs that, in cases where a claimant has undergone vocational rehabilitation, the vocational rehabilitation counselor will submit a final report summarizing why vocational rehabilitation was unsuccessful and listing two or three jobs which are medically and vocationally suitable for the claimant. Where no vocational rehabilitation services were provided, the vocational rehabilitation counselor will have provided the report. Included will be the corresponding job numbers from DOT (or OWCP specified equivalent) and pay ranges in the relevant geographical area.¹⁰ 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 employee service or other applicable service. Finally, application of the principles set forth in the *Shadrick*¹¹ decision will result in the percentage of the employee's loss of wage-earning capacity.

In determining an employee's wage-earning capacity based on a position defined 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.¹² 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.¹³

ANALYSIS

OWCP accepted that appellant sustained left Achilles tendinitis, left calcaneal spur and left lower deep vein thrombosis. It reduced his compensation benefits effective October 10, 2012 based on his ability to earn wages as dispatcher, a decision that was affirmed by the hearing representative on April 26, 2013.

⁸ *William H. Woods*, 51 ECAB 619 (2000).

⁹ *John D. Jackson*, 55 ECAB 465 (2004).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.816.5 (June 2013).

¹¹ *Albert C. Shadrick*, *supra* note 3.

¹² *James Henderson, Jr.*, 51 ECAB 619 (2000).

¹³ *Albert L. Poe*, 37 ECAB 684 (1986); *David Smith*, 34 ECAB 409 (1982).

OWCP properly determined that appellant was physically capable of performing the position of a dispatcher. The dispatcher position was listed as sedentary and the duties did not exceed the restrictions as set forth by appellant's treating physician, Dr. Krumins' or the second opinion physician, Dr. Carney. Although there was a difference of opinion between Dr. Krumins and Dr. Carney with regard to appellant's walking abilities, both physicians agree that appellant could work in a sedentary position. In fact, appellant did not dispute this fact; at the hearing he noted that the position he held at the employing establishment as a modified clerk was more strenuous than the proposed dispatcher position. The Board also notes that the vocational rehabilitation specialist found that the position of dispatcher was reasonably available in sufficient numbers in appellant's commuting area.

However, the Board finds that OWCP erred in determining that appellant had a wage-earning capacity of \$22.09 per hour or \$883.60 per week as a dispatcher. The statistics utilized by the vocational rehabilitation specialist, the May 2011 report from Bureau of Labor Statistics, listed two different categories for dispatchers: wages for police, fire and ambulance dispatchers and wages for all other dispatchers. The difference between wages paid for these two different categories of dispatchers is substantial, with the median wage paid for emergency dispatchers being \$22.09 per hour and the median wage for other dispatchers being \$18.64 per hour. The vocational rehabilitation specialist utilized the wages for emergency dispatchers but never explained how appellant had the requisite skills for the higher level position of emergency dispatcher. She indicated that appellant had 13 years of customer service experience as a clerk for the employing establishment and demonstrated experience in maintaining records, preparing reports, providing retail service to customers, communicating by telephone and maintain attention to detail. This assessment of appellant's skills may indicate that he can work as a nonemergency dispatcher, but the vocational rehabilitation specialist never discussed whether there were any special education and/or testing requirements for working as an emergency dispatcher. OWCP procedure manual states that "unless documentation is of record supporting that the claimant is capable of earning more, the entry level wage of the selected position should be used."¹⁴

The vocational rehabilitation specialist did not explain the different requirements between the dispatcher and the emergency dispatcher and how appellant was vocationally qualified for the elevated wages. The vocational rehabilitation specialist report recommended placement in an emergency dispatcher position with a yearly salary of \$36,940.80 (\$17.76 per hour). The wages selected by the vocational rehabilitation specialist were based on the median wages of an emergency dispatcher operator, (\$22.09) not the entry level wages. This is inconsistent with OWCP procedures, without sufficient documentation.

Thus, the Board finds that OWCP improperly set appellant's LWEC based on the median wages for the constructed position of police, fire and ambulance dispatcher. Accordingly, the case will be reversed.

¹⁴ *Supra* note 10 at Chapter 2.816.5 (June 2013).

CONCLUSION

The Board finds that OWCP did not meet its burden of proof in reducing appellant's wage-loss compensation based on the constructed LWEC position of dispatcher.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 26, 2013 is reversed.¹⁵

Issued: May 23, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁵ Richard J. Daschbach, Chief Judge, who participated in the preparation of the decision, was no longer a member of the Board after May 16, 2014.