



## ISSUE

The issue is whether OWCP properly reduced appellant's compensation, effective August 12, 2014, based on its finding that he had the capacity to earn wages as an eligibility worker.

## FACTUAL HISTORY

On August 4, 2010 appellant, then a 49-year-old border patrol agent, filed a traumatic injury claim (Form CA-1) alleging that, on that date, he injured his knees, neck, back, groin, and elbow when he was thrown from an all-terrain vehicle. He stopped work on August 5, 2010 and did not return. OWCP accepted the claim for multiple contusions, degenerative or lumbar disc disease of the lumbar intervertebral discs, a sprain of the right foot, sprain on the right at an unspecified site, sprain of the right lateral collateral ligament of the knee, right chondromalacia patellae, and a tear of the right lateral meniscus. It paid appellant compensation for total disability beginning November 21, 2010.

Under subsidiary file number xxxxxx260, OWCP had previously accepted in December 2009 a partial rupture of the left quadriceps, left knee, and leg sprain, and thoracic or lumbosacral neuritis/radiculitis.

Appellant underwent a partial right medial meniscectomy and lateral retinacular release on May 18, 2011.

In order to determine whether appellant continued to be disabled due to the accepted conditions, on September 12, 2012, OWCP referred appellant to Dr. Lowell M. Anderson, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated October 10, 2012, Dr. Anderson reviewed the history of injury and the medical reports of record, including the results of diagnostic studies. On examination, he found full range of motion of the elbows, full motor and strength testing of the upper extremities, some tenderness of the right sacroiliac joint, slight right foot discomfort, and mild crepitus of the right knee. Dr. Anderson diagnosed lumbar disc degeneration, an aggravation of preexisting disc pathology, lumbar facet arthropathy, and a permanent aggravation of preexisting patellofemoral joint chondromalacia due to the August 4, 2010 employment injury. He found that appellant was unable to return to his usual employment. In an October 12, 2012 work restriction evaluation, Dr. Anderson determined that appellant could work eight hours per day sitting for six hours, walking and standing for two hours, pushing, pulling, and lifting up to 25 pounds. He found that appellant could not squat, kneel, climb, bend/stoop, or twist. Dr. Anderson further advised that appellant should take a 10-minute break each hour and alternate sitting, standing, and walking as needed. He opined that appellant could perform "sedentary office work."

By letter dated January 29, 2013, OWCP requested that Dr. Anderson clarify his work restrictions. In his February 5, 2013 supplemental report, Dr. Anderson indicated that appellant could bend while performing sedentary work. He also updated the October 2012 work restriction evaluation and advised that he could perform limited squatting, kneeling, and climbing and that he should alternate sitting, standing, and walking as necessary. Dr. Anderson marked through the requirement that appellant take a 10-minute break each hour.

In a duty status report (Form CA-17) dated April 16, 2013, Dr. Michael D. Nolan, Board-certified in family medicine, diagnosed lumbar disc disease and found that appellant could lift up to 10 pounds, sit for three hours per day, and stand and walk for two hours per day. In a progress report dated April 16, 2013, he diagnosed thoracic and lumbosacral neuritis/radiculitis and limb pain. Dr. Nolan noted that a second opinion physician had determined that appellant “could do things that [he] does [not] think he can do. For instance, he does [not] think he can sit for six hours, and he knows he can[not] stand for more than 10 or 15 minutes without getting severe back pain.”

OWCP referred appellant to vocational rehabilitation on April 19, 2013.

Dr. Nolan evaluated appellant for back pain on April 23, 2013 and indicated that “he will continue to be disabled related to his back problem indefinitely.” He noted that he had “some type of evaluation which suggested he could sit for as long as six hours at a time, or stand for four hours a day. This is inconsistent with my understanding of his condition.”

In a report dated May 18, 2013, the rehabilitation counselor reviewed appellant’s prior work history as a border patrol agent, a machinist, a fishing boat captain, and professional quarterback. He noted that appellant had received a Bachelor of Arts in psychology.

Dr. Nolan submitted an August 16, 2013 duty status report providing the same work restrictions as those of April 16, 2013.

The rehabilitation counselor informed OWCP on August 18, 2013 that appellant had used “verbally demeaning and condescending language to bully and intimidate” and “alarming body language.” He advised that he had asked to meet with appellant only in a public location or with one of his family members present.

By letter dated November 5, 2013, the rehabilitation counselor asked that appellant sign a vocational rehabilitation plan for 90 days of job placement services.<sup>3</sup> He advised appellant that he should contact a minimum of eight employers a week.

Appellant informed OWCP on November 19, 2013 that he did not believe that he could drive to apply for jobs when he took narcotic pain medication. He contended that the rehabilitation counselor was not providing him with any assistance.

On December 20, 2013 the rehabilitation counselor requested that OWCP issue appellant a sanction letter as he was not cooperating with vocational rehabilitation.

In a February 14, 2014 letter to OWCP’s rehabilitation specialist, the rehabilitation counselor advised that appellant had made threatening statements, indicated that he carried a concealed weapon, and had used intimidating body language. He also had refused to meet with

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<sup>3</sup> On October 17, 2013 Dr. Gregg D. Pike, a Board-certified orthopedic surgeon, reviewed appellant’s history of a work injury and diagnosed developing right knee arthritis and left patellofemoral chondromalacia and patellar tendinitis. On October 22, 2013 Dr. John G. VanGilder, a Board-certified neurosurgeon, discussed appellant’s history of work injuries in 2005 and 2010. He recommended an S1 joint injection and referred him to a neurologist for memory and cognitive complaints.

the counselor in a public location or to complete the offered rehabilitation plan. Additionally, appellant had not completed a resume or identified reasonable job goals, but instead wanted to pursue the occupations of football coach or firearms instructor, which the counselor found were not available in sufficient numbers in the local area. He had also referred in vulgar terms to the second opinion physician and had made it clear that he did not want the rehabilitation counselor to work with others to assist him in returning to work without preapproval.

By letter dated February 14, 2014, OWCP informed appellant that he was obstructing vocational rehabilitation efforts by failing to complete the rehabilitation plan, telling the rehabilitation counselor not to work without his approval, verbally abusing the rehabilitation counselor, and acting in a threatening way. It notified him of the penalty for refusing to cooperate with vocational rehabilitation and provided him 30 days to contact both OWCP and the rehabilitation counselor and agree to participate with good effort. OWCP advised appellant that if he believed that he had good cause for not participating he should provide such reasons in writing with supporting documentation. If he did not cooperate with vocational rehabilitation or show good cause, it would reduce his compensation as if he had participated with vocational rehabilitation.

The rehabilitation counselor advised appellant on February 21, 2014 that OWCP had extended the time for plan development and provided a list of job openings. He recommended positions as an eligibility worker, community services worker, and motel desk clerk.

By letter dated March 6, 2014, appellant challenged OWCP's finding that he obstructed the return to work effort and maintained that he had acted respectfully toward the rehabilitation counselor. He accused OWCP of making Dr. Anderson alter his work restrictions and contended that the rehabilitation counselor falsely accused him of threatening actions, failing to complete a resume, and not wanting assistance with the job search. Appellant indicated that he asked the counselor if he could carry a firearm if he worked in child protective services. He maintained that he was unable to work full time or drive while under the influence of his narcotic pain medication.

An OWCP rehabilitation specialist, in a response dated March 28, 2014, advised appellant that he had not agreed to put forth good effort in cooperating with vocational rehabilitation but instead provided reasons for his actions. It notified him that vocational rehabilitation was being terminated and it decided that his reasons for failing to cooperate with vocational rehabilitation were not valid.

On April 18, 2014 the vocational rehabilitation counselor completed a job classification form (OWCP-66) for the position of eligibility worker from the Department of Labor's *Dictionary of Occupational Titles*. The position was described as sedentary requiring occasional lifting of up to 10 pounds. The rehabilitation counselor determined that appellant had the vocational capacity to perform the position, which required specific vocational preparation of one to two years, based on his work history and college degree in psychology. He further found that the position existed in sufficient numbers in his commuting area at entry level wages of \$486.40 per week, as confirmed by the state employment offices and direct contact with employers.

By letter dated May 15, 2014, appellant advised that he had filed a grievance against the rehabilitation counselor with his company. He explained that he had provided reasons for not cooperating with vocational rehabilitation within 30 days, noting that the primary reason was that he was unable to work full time. Appellant asserted that his treating physician found that he was unable to work eight hours a day.

The OWCP rehabilitation specialist recommended that OWCP reduce appellant's compensation based on the identified position of eligibility worker earning wages of \$486.40 per week. The rehabilitation specialist noted that appellant had failed to cooperate in vocational rehabilitation with good effort. He found that the position of eligibility worker was suitable and a good fit for appellant's degrees in psychology.

On July 9, 2014 OWCP advised appellant of its proposed reduction of his compensation based on its findings that he had the capacity to earn wages as an eligibility workers. It provided him 30 days to respond to the proposed reduction of compensation.

Appellant's counsel, by letter dated July 25, 2014, requested an extension of time to respond to the proposed reduction of compensation.

In a decision dated August 12, 2014, OWCP reduced appellant's compensation effective August 12, 2014 as he had the capacity to earn wages of \$486.40 per week as an eligibility worker. It utilized the formula set forth in *Albert C. Shadrick*,<sup>4</sup> to calculate his wage-earning capacity.

In a report dated August 14, 2014, Dr. Nolan evaluated appellant for back pain. He discussed his belief that he could not work as an intake person at a welfare facility because he was unable to go for eight hours without lying down. Dr. Nolan advised that he would review information but did not know if he could assist appellant with his vocational rehabilitation issues.

Dr. Wilbert Pino, a Board-certified orthopedic surgeon, evaluated appellant on September 4, 2014. He noted a "very convoluted history of a work-related injury dating back to 2000." Dr. Pino diagnosed degenerative disc disease of the lumbar spine at multiple levels and moderate to advanced joint disease of the hips bilaterally. He related,

"It is my opinion that [appellant] has significant degenerative disease of his lumbar spine and his hip that would preclude him from being active and being able to be gainfully employed.... I would concur with prior evaluations and the given restrictions of work activities includ[ing] lifting, pushing, pulling, kneeling, squatting or stooping. Lifting, pulling and pushing restrictions of 20 pounds on [an] occasional basis will also be appropriate. These restrictions would be permanent restrictions and limitations on any type of employment that he would choose to pursue."

In a December 9, 2014 medical status form, Dr. Pino found that appellant could occasionally lift up to 20 pounds but could not bend, kneel, squat, or climb. He also determined

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<sup>4</sup> 5 ECAB 376 (1953); codified by regulation at 20 C.F.R. § 10.403.

that appellant needed to take numerous breaks. In a report dated December 9, 2014, Dr. Pino diagnosed employment-related degenerative joint disease and degenerative disc disease of the lumbar spine, moderate to advanced joint disease of the left hip, and post-traumatic degenerative joint disease of the right knee after reconstruction. He noted that he had provided restrictions and recommended “frequent breaks if [appellant] finds a suitable job. Matching his job to his current restrictions may require the intervention of a vocational rehabilitation consultant. I do feel that he will have ... significant difficulty performing full-time employment given his multiple complaints and limitations.”

The employing establishment offered appellant a position as a law enforcement communications assistant on February 12, 2015. The position required sitting for six hours, walking for two hours, and standing for two hours, alternating as needed.

On March 9, 2015 appellant’s counsel requested reconsideration.<sup>5</sup> He contended that the reports from Dr. Pino established that appellant was unable to perform the duties of an eligibility worker.

Dr. Pino, in a March 21, 2015 duty status report, diagnosed lumbar degenerative disc disease and found that appellant could lift up to 10 pounds, sit and walk for two hours, and stand for one hour.

Appellant, in a statement dated April 10, 2015, related that OWCP should have informed him that his reasons for not cooperating were unacceptable and provided another 15 days before ceasing vocational rehabilitation. He listed his complaints against the rehabilitation counselor and questioned why OWCP relied upon its referral physician when his attending physicians provided their own limitations.

On March 31, 2015 Dr. Pino diagnosed low back pain with radiculopathy on the right and weakness on ambulation. He advised that appellant should continue with the same work restrictions. Dr. Pino also provided a progress report dated April 20, 2015. He diagnosed employment-related multilevel degenerative disc and joint disease of the lumbar spine. Dr. Pino reviewed the work offer from the employing establishment and indicated that it was “not consistent with the work restrictions I have provided.” He recommended a functional capacity evaluation.

By decision dated June 10, 2015, OWCP denied modification of its August 12, 2014 loss of wage-earning capacity determination. It found that the physical requirements for the position of eligibility worker did not exceed the limitations set forth by Dr. Pino.

### **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 justifying a subsequent reduction of benefits.<sup>6</sup> Under section 8115(a), wage-earning capacity is determined by the actual

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<sup>5</sup> On March 17, 2015 appellant requested that OWCP expand acceptance of his claim to include a hip condition.

<sup>6</sup> *T.O.*, 58 ECAB 377 (2007).

wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent his wage-earning capacity, or if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his usual employment, age, qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect wage-earning capacity in his disabled condition.<sup>7</sup>

When OWCP makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an OWCP wage-earning capacity specialist for selection of a position listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open market, that fits the employee's capabilities with regard to his physical limitations, education, age and prior experience.<sup>8</sup> 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.

### ANALYSIS

Appellant received compensation for total disability beginning November 21, 2010 due to his August 4, 2010 employment injury, accepted for multiple contusions, degenerative of the lumbar intervertebral discs, a sprain of the right foot, a sprain on the right at an unspecified site, a sprain of the right lateral collateral ligament of the knee, right chondromalacia patellae, and a tear of the right lateral meniscus. He also had a prior claim accepted for a partial rupture of the left quadriceps, left knee and leg sprain, and thoracic or lumbosacral neuritis/radiculitis.

In a report dated October 10, 2010, Dr. Anderson, an OWCP referral physician, diagnosed employment-related lumbar disc degeneration, an aggravation of preexisting disc pathology, lumbar facet arthropathy, and a permanent aggravation of patellofemoral joint chondromalacia. He found that appellant could work full time sitting for six hours per day, standing and walking for two hours per day, and pushing, pulling, and lifting up to 25 pounds. On February 5, 2013 Dr. Anderson clarified that appellant should alternate sitting, standing, and walking as necessary and could perform limited squatting, kneeling, and climbing.<sup>10</sup>

The Board finds that Dr. Anderson's opinion establishes that appellant has the requisite physical ability to earn wages as an eligibility worker. The position is classified as sedentary work requiring occasional lifting of up to 10 pounds, which is within the restrictions set forth by Dr. Anderson.

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<sup>7</sup> *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

<sup>8</sup> *Mary E. Marshall*, 56 ECAB 420 (2005); *James A. Birt*, 51 ECAB 291 (2000).

<sup>9</sup> *See supra* note 4.

<sup>10</sup> *See N.J.*, 59 ECAB 171 (2007).

In a progress report dated April 16, 2013, Dr. Nolan diagnosed thoracic and lumbosacral neuritis/radiculitis and limb pain. While he also discussed appellant's belief that he could not sit for 6 hours or stand and walk more than 10 to 15 minutes, he did not provide an independent assessment of his work abilities. A physician's report is of little probative value when it is based on a claimant's belief rather than the doctor's independent judgment.<sup>11</sup>

In duty status reports dated April 16 and August 16, 2013, Dr. Nolan diagnosed lumbar disease and found that appellant could lift up to 10 pounds, sit for three hours per day, and stand and walk for two hours per day. He did not, however, provide any rationale for his opinion and thus it is of diminished probative value.<sup>12</sup>

In assessing the claimant's ability to perform the selected position, OWCP must consider not only physical limitations but also take into account work experience, age, mental capacity and educational background.<sup>13</sup> The rehabilitation counselor determined that appellant had the skills necessary to perform the position of eligibility worker due to his prior employment as a border patrol agent and his college degree in psychology. He further found that the position was reasonably available within the appropriate geographical area at an entry-level wage of \$486.40 per week. On June 9, 2014 the OWCP rehabilitation specialist concurred with the opinion of the rehabilitation counselor. As the rehabilitation specialist is an expert in the field of vocational rehabilitation, OWCP may rely on his opinion in determining whether the job is vocationally suitable and reasonably available.<sup>14</sup> The Board finds that OWCP considered the proper factors, including the availability of suitable employment, appellant's physical limitations, and his employment qualifications in determining that he had the capacity to perform the position of eligibility worker.<sup>15</sup> OWCP further properly determined his loss of wage-earning capacity in accordance with the formula developed in *Shadrick* and codified at 20 C.F.R. § 10.403.<sup>16</sup> OWCP, therefore, properly found that the position of eligibility worker reflected appellant's wage-earning capacity, effective August 12, 2014.

Subsequent to the issuance of OWCP's loss of wage-earning capacity decision, appellant submitted an August 14, 2014 report from Dr. Nolan who discussed his belief that he was unable to perform as an eligibility worker. Dr. Nolan related that he did not know if he could help

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<sup>11</sup> *Earl David Seale*, 49 ECAB 152 (1997).

<sup>12</sup> *Jacquelyn L. Oliver*, 48 ECAB 232 (1996).

<sup>13</sup> *See supra* note 8.

<sup>14</sup> *Dorothy Jett*, 52 ECAB 246 (2001); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.816.6(c) (June 2013).

<sup>15</sup> *See supra* note 10.

<sup>16</sup> *See supra* note 4. OWCP divided appellant's employment capacity to earn wages of \$486.40 a week by his current pay rate of the position held when injured of \$1,653.97 per week to find a 29 percent wage-earning capacity. OWCP multiplied the pay rate at the time of injury of \$1,653.97 by the 29 percent wage-earning capacity percentage. The resulting amount of \$479.65 was subtracted from appellant's date-of-injury pay rate of \$1,668.38 which provided a loss of wage-earning capacity of \$1,174.32 per week. OWCP then multiplied this amount by the appropriate compensation rate of three-fourths which yielded \$880.74.

appellant with issues regarding rehabilitation. As he did not address appellant's work capacity, his opinion is of little probative value.

In a report dated September 4, 2014, Dr. Pino noted that appellant had a complicated history of work injuries. He diagnosed degenerative disease of the spine and hips preventing significant activity or employment. Dr. Pino advised that appellant could lift, push, and pull up to 20 pounds occasionally and agreed with restrictions on kneeling, squatting, or stooping. On December 9, 2014 he found that appellant could lift up to 20 pounds occasionally but not bend, knee, climb, or squat, and required frequent breaks. As Dr. Pino's restrictions are within those required for the position of eligibility worker, his opinion does not establish that appellant is unable to perform the duties of the position.

Dr. Pino, in a duty status report dated March 21, 2015, diagnosed lumbar degenerative disc disease and found that appellant could lift up to 10 pounds, sit and walk for two hours, and stand for one hour. He checked a box marked "yes" that the history of injury provided by appellant corresponded to an injury to his low back, knees, and right foot in an all-terrain vehicle accident. The Board has held, however, that an opinion on causal relationship which consists only of a physician checking a box marked "yes" to a medical form question on whether the claimant's condition was related to the history given is of little probative value. Without any explanation or rationale for the conclusion reached, such report is insufficient to establish causal relationship.<sup>17</sup>

On March 31, 2015 Dr. Pino diagnosed low back pain with radiculopathy and determined that appellant had the same work restrictions. He did not, however, explain the reason for the limitations or address whether he had the capacity to perform the duties of an eligibility worker. Medical opinions which contain no rationale or explanation are of little probative value.<sup>18</sup> On April 20, 2015 Dr. Pino found that appellant was unable to accept a position with the employing establishment as a law enforcement communications assistant; however, this is not relevant to the current issue of whether he has shown that he is unable to perform the duties of an eligibility worker.

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 properly reduced appellant's compensation, effective August 12, 2014, based on its finding that he had the capacity to earn wages as an eligibility worker.

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<sup>17</sup> *Deborah L. Beatty*, 54 ECAB 334 (2003) (the checking of a box "yes" in a form report, without additional explanation or rationale, is insufficient to establish causal relationship).

<sup>18</sup> *See D.G.*, Docket No. 15-0948 (issued February 10, 2016); *L.G.*, Docket No. 15-1334 (issued January 28, 2016).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 10, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 10, 2016  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board