



excessive workload casing and carrying mail had caused a left elbow injury. Appellant also noted that his employment duties, which required both climbing on uneven grade and standing in place, caused bilateral knee injury. On March 31, 2009 OWCP accepted his claim for left elbow lateral and medial epicondylitis and bilateral knee degenerative joint disease.<sup>2</sup>

Appellant stopped work on February 22, 2011 and OWCP commenced payment of wage-loss benefits. On June 7, 2011 he underwent an accepted total left knee replacement.

On April 2, 2012 appellant was referred for vocational rehabilitation services. Pursuant to a vocational rehabilitation report dated January 24, 2013, a plan was approved for appellant to attend community college for 28 months to obtain a degree in accounting.

Appellant completed classes at Hiram Community College. However, as explained in a memorandum by the rehabilitation counselor dated May 6, 2015, the college canceled several courses due to lack of enrollment. The school required certain classes to be taken in a specific order. OWCP was therefore notified that appellant could not graduate until fall of 2016. The rehabilitation counselor asked if appellant could take a class at another school at the same time he was completing classes at Hiram Community College, but Hiram Community College would not honor credits taken elsewhere. She therefore informed OWCP that a revised plan for job search would be submitted and that appellant would no longer take further classes.

By letter to OWCP dated May 12, 2015, appellant asked that his rehabilitation plan be reconsidered. He noted that he only had two math classes to take at Lorain Community College to obtain an associate degree in applied business, and that he had 13 classes left to obtain his bachelor's degree from Hiram Community College. Appellant noted that if he obtained his bachelor's degree his employment prospects would improve and he would be able to replace the salary he made at the employing establishment. He argued that OWCP had spent considerable money to date, and thus it made financial sense if he were allowed to finish his classes and be rehabilitated.

In a June 1, 2015 report, Dr. Louis Keppler, appellant's treating Board-certified orthopedic surgeon, noted that appellant had been under his care for several years for various medical conditions. He noted that appellant had paroxysmal atrial fibrillation, left total knee replacement, coronary artery disease with stenting, hypertension, hyperlipidemia, diabetes mellitus, and obesity. Dr. Keppler opined that appellant was still disabled and was not capable of remunerative employment due to his medical conditions. He opined that appellant's orthopedic conditions affected his ability to walk, stand, drive, squat, crawl, or perform any labor activity, and would continue in the future. Dr. Keppler expected that surgery would eventually be necessary.

On June 18, 2015 OWCP approved job goals of payroll clerk and accounting clerk. The duties of the position of payroll clerk were described as compiling payroll data, entering data,

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<sup>2</sup> Appellant had filed a prior claim in 1999 (OWCP File No. xxxxxx792) that was accepted for bilateral carpal tunnel syndrome and bilateral epicondylitis. The claimant had a left carpal tunnel release on January 20, 2000 and a right endoscopic carpal tunnel release on March 7, 2000. The claimant also underwent a right lateral epicondylectomy performed on August 21, 2003.

and maintaining payroll records. The rehabilitation counselor proceeded to assist appellant in conducting a job search. On November 9, 2015 he completed a job classification form and indicated that appellant was capable of performing the position of payroll clerk. The rehabilitation counselor noted that the position was sedentary and that appellant had the necessary vocational training based on his education and past work history. He noted that there were over 1,500 payroll clerk positions in appellant's geographical area. On January 14, 2016 the rehabilitation counselor closed appellant's file. He noted that the initial job search consisted of a period in excess of 90 days and appellant was provided a 90-day extension, but was unable to obtain a position. The rehabilitation counselor noted that the original plan was for appellant to complete a 28-month training plan, but that the college indicated that it would take another 1.5 years to complete the training which would amount to almost 4 years of training, so the decision was made to stop training and seek appropriate employment within appellant's current skills, abilities, and training. He determined that the position of payroll clerk was performed in sufficient numbers near his home in Elyria, Ohio and that it was reasonably available with an average weekly wage of \$681.00.

On April 20, 2016 OWCP referred appellant to Dr. Edward Gregory Fisher, a Board-certified orthopedic surgeon, for a second opinion. In a May 27, 2016 report, Dr. Fisher indicated that appellant continued to have a positive Tinel's sign and decreased sensation to light touch involving the index, long, and ring fingers of each hand. He noted no residuals over the left medial and lateral epicondylitis and no residuals over the right lateral epicondyle areas. Dr. Fisher did note residuals from appellant's right knee, including pain, discomfort, and tenderness over the medial side of the knee on palpitation, positive painful crepitation over the medial side of the knee on flexing and extending the knee, limited range of motion, and varus deformity. He reviewed the positions of payroll and accounting clerk, and determined that appellant could perform either of these sedentary jobs without restrictions. Dr. Fisher noted that appellant required no additional treatment for his bilateral carpal tunnel syndrome or his bilateral elbow conditions, and noted that his left knee was treated successfully with a replacement and no further treatment was necessary. With regard to the degenerative joint disease of the right knee, he noted that continued conservative treatment was recommended until appellant could have a right knee total knee replacement.

On May 23, 2016 appellant submitted a change of address form indicating that he moved from Elyria, Ohio to Folkston, Georgia.

On June 14, 2016 OWCP issued a notice of proposed reduction wherein it determined that appellant had the capacity to earn wages as a payroll clerk at the rate of \$681.00 per week, the position was medically and vocationally suitable, and that the position of payroll clerk represented appellant's wage-earning capacity.

Thereafter, on June 30, 2015 OWCP received June 2, 2016 reports wherein Dr. Keppler diagnosed bilateral knee osteoarthritis and noted numbness and tingling in both hands and limited standing endurance. Dr. Keppler reviewed appellant's medical treatment and indicated that appellant had work-related conditions which had not resolved. He opined that appellant was not medically able to return to work without restrictions. Dr. Keppler asked for a vocational assessment by a rehabilitation counselor. His current treatment plan was to continue supporting

appellant with injections, rehabilitative prescriptions, and additional surgery if necessary. Dr. Keppler noted that appellant continued to experience pain and discomfort.

By decision dated July 15, 2016, OWCP reduced appellant's compensation effective July 15, 2016 as it determined that the position of payroll clerk was medically and vocationally suitable for him.

On July 18, 2016 OWCP received a June 28, 2016 report from Dr. Keppler in which he noted reviewing Dr. Fisher's report but noted his disagreement with Dr. Fisher's statement that appellant had no pain, discomfort, or tenderness over either medial or lateral epicondyle on the left. Dr. Keppler opined that appellant could not perform repetitive activities without residual pain and could not perform the job of payroll clerk or accounting clerk. He explained that appellant's rehabilitative capacity was limited because of the accepted conditions and furthermore that his diabetes affected his ability to rehabilitate. Dr. Keppler opined that the period of disability was not due to his diabetes, but that it did impair his recovery.

By letter dated August 1, 2016, appellant requested reconsideration. In his reconsideration request, he contended that while the selected position was readily available based on a search in the metropolitan area of Elyria, Ohio, on May 23, 2016 he had moved to Folkston, Georgia in May 2016. Appellant also contended that he could not work at any job for eight hours a day because of his diabetes and employment-related conditions. He contended that OWCP based its ability to work on medical reports from Dr. Ghanma dated April 2, 2012 and Dr. Keppler dated April 17, 2012, and that both of these reports are over four years old and did not represent his current abilities.

By decision dated August 12, 2016, OWCP reviewed appellant's claim on the merits, but denied modification of its July 15, 2016 decision.

### **LEGAL PRECEDENT**

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.<sup>3</sup> An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.<sup>4</sup>

Section 8115 of FECA and section 10.520 of OWCP regulations provide that 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 reasonable represent wage-earning capacity or the employee has no actual wages, the wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the employee's usual employment, age, qualifications for other employment, the

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<sup>3</sup> *James M. Frasher*, 53 ECAB 794 (2002).

<sup>4</sup> 20 C.F.R. §§ 10.402 and 10.403; *John D. Jackson*, 55 ECAB 465 (2004).

availability of suitable employment, and the other factors or circumstances which may affect his wage-earning capacity in the disabled condition.<sup>5</sup>

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 condition.<sup>6</sup> Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.<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 a vocational rehabilitation counselor authorized by OWCP 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. 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.<sup>8</sup> Finally, application of the principles set forth in *Albert C. Shadrick*<sup>9</sup> as codified in section 10.403 of OWCP regulations, will result in the percentage of the employee's loss of wage-earning capacity.<sup>10</sup>

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 a subsequently acquired condition 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

OWCP based its July 15, 2016 wage-earning capacity decision on appellant's capacity to earn wages as a payroll clerk. On August 12, 2016 it reviewed this determination on the merits, but denied modification of its prior decision.

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<sup>5</sup> 5 U.S.C. § 8115; *id.* at § 10.520, *John D. Jackson, id.*

<sup>6</sup> *William H. Woods*, 51 ECAB 619 (2000).

<sup>7</sup> *John D. Jackson, supra* note 4.

<sup>8</sup> *Id.*

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

<sup>10</sup> 20 C.F.R. § 10.403.

<sup>11</sup> *John D. Jackson, supra* note 4.

The Board finds that the position of payroll clerk, which is sedentary in nature, is medically suitable to appellant's physical restrictions. Appellant's allegation that the position was based on stale medical evidence is without merit. On June 14, 2016 OWCP proposed to reduce appellant's compensation based on the opinion of Dr. Fisher, who conducted an examination on May 27, 2016, and determined that appellant was able to perform the sedentary position of payroll clerk. The reduction of benefits was finalized on July 15, 2016. At that time, OWCP also reviewed Dr. Keppler's reports of June 2, 2016, but found his opinion that appellant appeared to have work-related residuals to be equivocal, and also correctly noted that Dr. Keppler failed to recognize that appellant had seen a vocational rehabilitation counselor.

Appellant alleged that OWCP erred when it reduced his compensation as he was not provided 30 days to respond to the proposed reduction of benefits and that, due to the abbreviated response period, OWCP had not considered Dr. Keppler's report of June 28, 2016. Initially, the Board notes that OWCP provided appellant 30 days from the June 14, 2016 proposed reduction of benefits to submit new evidence. The final decision reducing appellant's compensation benefits was issued on July 15, 2016 and Dr. Keppler's June 28, 2016 report was received by OWCP on July 18, 2016. Furthermore, the Board notes that OWCP fully considered Dr. Keppler's June 28, 2016 report when it addressed appellant's reconsideration request on August 12, 2016. OWCP found Dr. Keppler's opinion vague, and noted that he failed to explain how appellant's diabetes affected his ability to rehabilitate. The Board also finds that Dr. Keppler did not provide a rationalized explanation as to why appellant was unable to perform the sedentary duties of the position of payroll clerk. The Board has long held that medical opinions not containing rationale are of diminished probative value.<sup>12</sup>

The Board finds that appellant had the necessary vocational and educational preparation for the selected position of payroll clerk. The rehabilitation counselor indicated that this position was chosen for appellant based on his education and past work history. Although appellant had not completed the degree program at the community college, he did complete extensive coursework. His allegation that the position was not suitable due to the fact that he had not obtained a degree is irrelevant as he had sufficient educational qualifications for the selected position. Accordingly, the Board finds that OWCP properly relied upon the opinion of the rehabilitation counselor that appellant was vocationally capable of performing the position of payroll clerk.<sup>13</sup>

However, the Board finds that OWCP erred because it did not properly determine that the position was available within appellant's current commuting area. The rehabilitation counselor researched job availability near Elyria, Ohio. However, appellant submitted a change of address form on May 23, 2016 indicating that he had moved to Folkston, Georgia prior to the proposed reduction of benefits on June 14, 2016. There is no evidence in the case record that OWCP considered whether the position of payroll clerk, or a similar position, was reasonably available in the area of Folkston, Georgia, the area where he moved prior to the determination of his wage-earning capacity and the area where he presently resides. Generally, where an employee has moved away from the area where appellant was employed at the time of his employment injury,

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<sup>12</sup> See *N.J.*, 59 ECAB 171 (2007).

<sup>13</sup> See *R.M.*, Docket No. 12-326 (issued July 17, 2012).

his employment-related loss of wage-earning capacity shall be determined upon the basis of employment opportunities in the area where he resided at the time the determination was made.<sup>14</sup> However, when the employee voluntarily moves to an isolated locality with few job opportunities, the question of availability should be applied to the area of residence at the time of injury.<sup>15</sup>

The Board finds that this case is not in posture for decision. Although the record reflects that appellant voluntarily moved to Folkston, Georgia, OWCP failed to consider whether he moved into an isolated area or whether Folkston, Georgia was sufficiently close to a major city as to base the wage-earning capacity on his new residential area. OWCP based its reasonable availability finding on appellant's prior residence without any consideration or regard of appellant's move from Ohio to Georgia.<sup>16</sup>

### CONCLUSION

The Board finds that OWCP did not meet its burden to reduce appellant's monetary benefits based upon the constructed position of payroll clerk.

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<sup>14</sup> *Joyce L. Perry*, 33 ECAB 51 (1981); *see also A.P.*, Docket No. 14-0095 (issued July 9, 2015).

<sup>15</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Vocational Rehabilitation Services*, Chapter 2.816.7(b) (June 2013); *Joyce W. Thurman*, Docket No. 05-1537 (issued December 7, 2005). *Richard L. Semple*, Docket No. 82-270 (issued March 19, 1982).

<sup>16</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated August 12 and July 15, 2016 are set aside and the case remanded for further consideration consistent with this decision.

Issued: April 25, 2017  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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