

ISSUE

The issue is whether OWCP met its burden of proof to reduce appellant's wage-loss compensation benefits based on her capacity to earn wages in the constructed position of customer service representative.

On appeal counsel contends that OWCP improperly shifted the burden of proof to appellant and that the statement of accepted facts (SOAF) provided to the impartial medical examiner was inaccurate. She further contends that OWCP provided a second opinion physician, a psychiatrist, with leading questions and that the second opinion psychiatrist's report was stale. Finally, counsel contends that the impartial medical examiner determined that appellant could work only four hours a day.

FACTUAL HISTORY

On September 9, 1978 appellant, then a 26-year-old air traffic controller, filed a traumatic injury claim⁴ (Form CA-1) alleging that she slipped on water in front of an ice machine in the employee cafeteria. OWCP accepted this claim for right hand, bilateral knee, and bilateral ankle injuries. Appellant had a recurrence of disability due to her September 9, 1978 injury on June 22, 1979 and returned to work on July 6, 1979.

Appellant filed a traumatic injury claim (Form CA-1) alleging that on December 20, 1979⁵ she again slipped on a wet floor at work and developed back pain. OWCP accepted this claim for chronic lumbosacral strain and bulging disc. Appellant stopped work on July 7, 1980 and returned to work on July 29, 1980. OWCP thereafter accepted a recurrence of disability due to her December 20, 1979 injury on March 11, 1980, but appellant returned to work on April 1, 1980. A March 12, 1980 lumbar myelogram showed an L4-5 disc bulge not significantly changed since a July 1979 study. Appellant sustained a second recurrence of disability due to her December 20, 1979 injury beginning August 3, 1981.

Appellant filed a traumatic injury claim (Form CA-1) on May 21, 1981 alleging that she slipped and fell reinjuring her back. Her physician released her to return to work on August 28, 1981. OWCP accepted left ankle strain and lumbosacral strain. Appellant was off the employing establishment rolls from September 1981 until January 1984. She was terminated on September 14, 1983; however, her termination was subsequently overturned on March 30, 1984.

In an August 15, 1984 decision, OWCP's hearing representative found that appellant had no disability for work after May 21, 1981 due to any employment injury.

⁴ OWCP File No. xxxxxx483.

⁵ File No. xxxxxx558.

Appellant subsequently filed additional traumatic injury claims, occupational disease claims, and claims for wage-loss compensation and medical benefits.⁶

In an August 11, 1987 letter, counsel informed OWCP that on June 2, 1983 the Fourth Circuit Court of Appeals had found that appellant “was the object of sustained and nontrivial harassment....” She further noted that the employing establishment knew or should have known of the harassment, but made no significant effort to the end the harassment.⁷ Counsel contended that appellant developed an emotional injury as a result of this harassment. She further contended that the employing establishment had treated appellant as a “striker” even though the Merit Systems Protection Board (MSPB) found that she was not a strike participant. Finally, in the letter counsel detailed appellant’s sexual harassment at the employing establishment.

Appellant filed an occupational disease claim (Form CA-2) on August 28, 1987 alleging intermittent respiratory and cardiac problems, anxiety, chronic fatigue, depression, intermittent muscular problems, and temporomandibular joint (TMJ) dysfunction. She provided a detailed statement describing the events that contributed to her emotional condition. OWCP developed a SOAF noting appellant’s established sexual harassment and the decision by MSPB. In an August 13, 1987 decision, however, it denied her claim. Subsequently, on April 23, 1992, OWCP accepted the claim for anxiety disorder, fatigue, aggravation of asthma, and fibromyositis. Appellant filed claims for wage-loss compensation benefits (Form CA-7) due to her accepted conditions. OWCP authorized total disability compensation beginning April 6, 1994. It placed appellant on the periodic rolls on December 10, 1998. The employing establishment terminated her employment effective January 15, 1999.

Dr. Mayo F. Friedlis, a Board-certified psychiatrist, examined appellant on October 27, 2009, and April 20 and November 30, 2010, diagnosing right L5 radiculopathy, L4-5 neural foraminal stenosis, L4-5 disc bulge, lumbar spondylosis, lumbar facet arthropathy, fibromyalgia, chronic fatigue syndrome, and chronic lymphedema. He recommended therapeutic Rolwing, massage, and neuromuscular massage for pain.

Dr. Stephen J. Rojcewicz, Jr., a Board-certified psychiatrist, diagnosed anxiety disorder on January 24, 2011. At that time he opined that appellant’s anxiety condition was still present and disabled her from all work.

⁶ On October 26, 1982 appellant filed an occupational disease claim (Form CA-2) alleging that she developed a herniated disc at L4-5, back pain, ear problems, and severe anxiety due to harassment at the employing establishment; a November 20, 1984 traumatic injury claim (Form CA-1) alleging that on May 27, 1981 she developed severe anxiety from persistent harassment by her supervisor; a March 18, 1985 traumatic injury claim (Form CA-1) for an emotional condition due to a March 15, 1985 incident; and a September 18, 1985 traumatic injury claim (Form CA-1) for an emotional condition that she related to a September 13, 1985 letter about leave use. She filed a second occupational disease claim (Form CA-2) on March 20, 1985 alleging that she developed anxiety, fatigue, stress, and lower back conditions due to factors of her federal employment. OWCP requested additional information from appellant on July 9, 1987 and afforded her 30 days to respond. It denied this case by decision dated August 13, 1987.

⁷ *Katz v. Dole*, 709 F.2d 251 (1983).

On April 26, 2011 OWCP referred appellant, along with a SOAF and a list of questions, for a second opinion evaluation with Dr. Lance Atkinson, Board-certified in occupational medicine. The accepted conditions listed in the SOAF were anxiety disorder, fatigue, aggravation of asthma, and nonspecific fibromyositis. It further noted that appellant had filed 17 claims for injuries, but the onset date of the conditions at issue was the claim first reported on January 1, 1980. In a May 9, 2011 report, Dr. Atkinson noted that on physical examination he did not find any evidence of asthma, musculoskeletal abnormalities, or fibromyalgia. He opined that appellant's physical therapy, massage, or Rolfing had not cured her conditions, but could be palliative for her chronic lumbar back pain, her fibromyalgia, and her lymphedema.⁸

OWCP found a conflict of medical opinion between Drs. Atkinson and Friedlis on the issue of whether massage therapy should continue and determined that the conflict required referral to an impartial medical examiner. It referred her to Dr. Bao T. Pham, a Board-certified psychiatrist. In a November 6, 2011, report, Dr. Pham opined that physical therapy and Rolfing had not provided any significant relief or lessened her degree of disability. He found that appellant was disabled from her date-of-injury position, but that she could participate in vocational rehabilitation.⁹

In a May 30, 2012 note, Dr. Rojcewicz opined that appellant had a medical necessity for massage therapy as there was a direct correlation between muscle tension, pain, and spasms and appellant's anxiety level. He noted that appellant had adverse reactions to anti-anxiety and muscle relaxant medications and that he could not prescribe such medications.

Dr. Brian C. Turrisi, a Board-certified pulmonologist diagnosed chronic asthma, residual sarcoidosis, and lymphedema. He opined that appellant's asthma was chronic, present, and disabling. Dr. Turrisi noted that anxiety, fatigue, and lymphedema aggravated her asthma. On June 25, 2012 he opined that the ongoing massage therapy would provide continued relief of symptoms directly associated to appellant's asthma, myalgia, and fatigue. Dr. Turrisi noted that appellant could not take medications which would normally be prescribed for her symptoms and used massage therapy modalities to control pain and offer relief.

On August 14, 2012 an OWCP hearing representative found that Drs. Rojcewicz and Turrisi created a conflict with Dr. Pham's report regarding the ongoing need for massage therapy. He remanded the case and ordered OWCP to update the SOAF and refer appellant for an impartial medical examination.

OWCP referred appellant, a list of questions, and an updated SOAF for a second opinion evaluation with Dr. Anjali Pathak, a Board-certified psychiatrist on December 17, 2012. The December 13, 2012 SOAF noted that appellant's accepted conditions were anxiety disorder, fatigue, aggravation of asthma, and nonspecific fibromyositis and also provided an excerpt from appellant's website which listed her campaigns for political office since 2000 and her travel. The excerpt from the website noted that she had worked with Congressional Members and staff, testified before Congress when requested, and made proposals to Congress for restricting the

⁸ Dr. Atkinson did not specifically address appellant's disability for work.

⁹ By decision dated March 16, 2012, OWCP denied authorization for further massage therapy. Counsel requested an oral hearing on March 27, 2012.

Federal Aviation Administration under the Department of Defense. The excerpt also noted organizing activities including her organization of “Walking for Safety” and organizing a petition of “Signatures for Solidarity” collecting nearly 100,000 signatures nationwide.

OWCP also referred appellant, the December 13, 2012 SOAF, and a list of specific questions to Dr. Stuart M. Brooks, Board-certified in occupational medicine, for an impartial medical examination to resolve the conflict of medical opinion evidence regarding the ongoing need for massage therapy due to her psychiatric conditions.

Dr. Pathak completed her second opinion report on January 28, 2013. She reviewed the SOAF and evaluated appellant’s test results. Dr. Pathak diagnosed anxiety disorder, conversion disorder/somatization disorder, and dependent personality disorder. She opined that appellant’s anxiety disorder was related to her employment injury. Dr. Pathak found that appellant did not require psychiatric interventions and that massage therapy had not improved her psychiatric symptoms. She determined that there was no justification to continue massage therapy for her anxiety disorder. Dr. Pathak found that appellant’s symptoms of anxiety were chronic, pervasive, and likely to interfere with her ability to work at the employing establishment. She opined that appellant’s prognosis for return to work was poor. Dr. Pathak concluded that appellant was not currently a candidate for vocational rehabilitation.

In a report dated March 18, 2013, Dr. Brooks, the impartial medical examiner, on the issue of the need for massage therapy due to appellant’s orthopedic and pulmonary conditions, reviewed the updated SOAF and obtained a history from appellant. He discussed each of appellant’s physical conditions. Dr. Brooks determined that massage therapy was not curative. He contended “that it borders on biological implausibility to presume that unremitting massage therapies provided for more than 18 years, are necessary to treat her proclaimed work-related injury/condition(s).” In response to OWCP’s questions, Dr. Brooks opined that there were no objective medical diagnoses causally related to appellant’s injuries at work as described in the SOAF and there were no remaining work-related medical conditions. He concluded, “Most of her findings relate to subjective complaints and there are few objective medical findings to support her contentions.” In a March 19, 2013 work capacity evaluation worksheet (Form OWCP-5c), Dr. Brooks found that appellant could return to work with restrictions. He indicated by checking a box marked “yes” that she could work eight hours a day with her motivation and desire to work as reasons for difficulty in her return. Dr. Brooks then noted that, if appellant was unable to work an eight-hour day, she could work four hours a day. He provided restrictions indicating that she was allowed to sit for six hours, walk for three hours, stand for four hours, and reach for three hours. Dr. Brooks found that appellant was capable of twisting for two hours, and bending or stooping for one hour. He indicated that she could operate a motor vehicle for four hours at work. Appellant’s lifting was limited to five pounds for three hours a day. She could push and pull up to five pounds for four hours a day. Appellant could squat for one hour a day, but could not kneel or climb. Dr. Brooks indicated that she required 15-minute breaks every two hours. He also noted that she was at maximum medical improvement (MMI) for any listed work-related condition.

On March 27, 2013 OWCP requested clarification from Dr. Pathak. It requested that she review the entire SOAF, including appellant’s activities following her 1994 federal work stoppage. OWCP noted, “Please discuss the SOAF in its entirety, including the candidacies,

activities, and national as well as international travel. [Appellant] has presented herself to voters as an able-bodied retired federal employee and ran for United States Congress several times. Given her activities please explain your finding that she is totally disabled.”

In an April 9, 2013 decision, OWCP denied authorization for massage therapy. Counsel requested an oral hearing on April 18, 2013.

Dr. Pathak provided a supplemental report on April 23, 2013. She opined that appellant’s symptoms of anxiety, including feelings of apprehension, irritability, and lability of affect, as well as nightmares and flashbacks, were directly related to her work for the employing establishment. Dr. Pathak reviewed appellant’s postemployment activities including running for office and traveling abroad. She opined, “After reviewing the additional information provided about her activities, such as running for political office, campaigning for the office, and her national and international activities, it is clear that [appellant] is not totally disabled. Appellant may be able to work for an agency not related to the [employing establishment].” Dr. Pathak opined that appellant could participate in vocational rehabilitation and that there were no psychiatric work restrictions other than not working for the employing establishment.

OWCP proposed to terminate appellant’s wage-loss compensation and medical benefits in a letter dated May 21, 2013. By decision dated June 19, 2013, it found that appellant had forfeited her compensation benefits for the period January 9, 1998 through April 9, 2000 and October 21, 2009 through February 1, 2013. OWCP found that appellant had improperly failed to report her candidacy for political offices and her work in a travel agency.¹⁰

In a decision dated July 11, 2013 and corrected July 22, 2013, OWCP terminated appellant’s entitlement to medical and wage-loss compensation benefits for the physical conditions of fatigue, aggravation of asthma, and fibromyositis.

Counsel requested an oral hearing on July 15, 2013 and requested that the oral hearings on both the April 9, 2013 and July 22, 2013 decisions be consolidated and heard at the same time.

Dr. Brooks, in a July 30, 2013 supplemental report, opined that appellant was capable of performing work at the sedentary level including exerting up to 10 pounds of force occasionally, or a negligible amount of force frequently to lift, carry, push, pull, or otherwise move objects, including the human body. He noted that appellant could sit most of the time, as well as walk or stand for brief periods of time. Dr. Brooks opined that appellant could walk and stand occasionally.

OWCP referred appellant for vocational rehabilitation on August 27, 2013 based on the work restrictions provided by Drs. Pathak and Brooks. Appellant met with the vocational rehabilitation counselor on September 23, 2013.

¹⁰ On August 6, 2013 OWCP made a preliminary finding that appellant had received a \$457,842.76 overpayment because the compensation paid for the period January 9, 1998 through April 9, 2000 and from October 21, 2009 through February 1, 2013 was forfeited. Appellant requested a prereducement hearing on September 4, 2013. The forfeiture issue was addressed in a November 13, 2013 decision.

In a November 13, 2013 decision, an OWCP hearing representative found that the issue of massage therapy authorization required additional medical development. He also found that OWCP had not met its burden of proof to terminate appellant's wage-loss compensation.¹¹ The hearing representative determined that Dr. Brooks' reports were not entitled to special weight as he had not been provided a complete and accurate history of all of the pertinent claims for accepted conditions. He directed OWCP to combine appellant's claims for physical injury,¹² and to obtain supplemental reports from Dr. Brooks and Dr. Pathak based on a revised SOAF and to issue a *de novo* decision on authorization for continuing massage therapy. The hearing representative also reversed the decisions dated July 11 and 22, 2013 which terminated appellant's wage-loss compensation benefits. Appellant appealed to the Board, but it dismissed the appeal.¹³ She again challenged the forfeiture decision with OWCP.

OWCP formulated an additional SOAF on January 8, 2014 which included the statement that appellant had operated her own travel agency and run for political office several times while receiving temporary total disability compensation.¹⁴ This SOAF also noted that appellant had traveled extensively including Canada, Europe, Africa, South America, Australia, New Zealand, Israel, and Japan. Counsel objected to the updated SOAF on January 13, 2014.

OWCP thereafter composed a new SOAF on January 30, 2014. This SOAF listed appellant's accepted conditions due to her sexual harassment claim including anxiety disorder, fatigue, aggravation of asthma, and nonspecific fibromyositis. OWCP also specifically noted five of appellant's accepted claims for physical injury including lumbosacral strain, bulging disc at L4-5, left ankle sprain, contusion to the face, neck sprain, right shoulder sprain, and left knee sprain occurring from 1978 through 1994. It noted that appellant was last treated for these conditions in 2002. OWCP further indicated that appellant had stopped her federal employment in 1994 and had operated her own travel agency business and ran several times for political office while receiving temporary total disability for the conditions set forth in the SOAF. OWCP also noted that she had traveled extensively throughout the United States, Canada, Europe, Africa, South America, Australia, New Zealand, Israel, and Japan. It concluded that in the fall of 2013 she traveled to Europe for several weeks while receiving total wage-loss compensation

¹¹ On February 20, 2014 counsel contended that OWCP had not established forfeiture or overpayment. Appellant provided a February 19, 2014 affidavit noting that she was an investor in Herndon Sterling Travel Service based on stocks issued in January 1998. The owner of the travel service substantiated this statement in an affidavit dated February 19, 2014.

¹² OWCP's hearing representative found that appellant had a total of 12 claims including a September 9, 1978 claim, File No. xxxxxx483 accepted for strain of the lumbosacral joint; a March 3, 1990 claim, File No. xxxxxx625 accepted for contusions to the face, scalp, and neck; and a January 4, 1994 claim, File No. xxxxxx448 accepted for sprain of the neck, lumbar region, right shoulder and upper arm as well as left collateral knee sprain and left calf and thigh contusions. He noted that it was not clear whether claims dated February 10 and April 7, 1987 were formally accepted.

¹³ The Board issued an *Order Dismissing Appeal* on September 28, 2015 finding that the November 13, 2013 decision appealed by counsel was not a final adverse decision. Docket No. 14-0487 (issued September 28, 2015).

¹⁴ OWCP listed five additional claims including September 9, 1978, December 20, 1979, March 3, 1990, and January 4, 1994 described by an OWCP hearing representative. It also detailed the accepted conditions in the April 7, 1987 claim of left ankle sprain and lumbar strain.

benefits. OWCP requested a supplemental report from Dr. Brooks on January 30, 2014 using the updated January 30, 2014 SOAF.

On January 17, 2014 the vocational rehabilitation counselor provided appellant with a job placement plan in the positions of a motor vehicle dispatcher, customer service representative, or reservation clerk. OWCP authorized 90 days of placement in the selected positions on February 4, 2014. Appellant signed the rehabilitation plan from the vocational rehabilitation counselor on February 21, 2014. On February 24, 2014 the vocational rehabilitation counselor noted that she had conducted a labor market survey of the positions of motor vehicle dispatcher, customer service representative, and reservations clerk.

Counsel objected to the most recent SOAF on February 5, 2014 noting that appellant had not operated her own travel agency.

In his March 10, 2014 supplemental report, Dr. Brooks noted reviewing the January 30, 2014 SOAF. He reviewed appellant's accepted injuries including lumbosacral strains in 1978, 1979, and 1987. Dr. Brooks again opined that appellant's accepted conditions of anxiety disorder, fatigue, aggravation of asthma, fibromyositis, as well as all other accepted conditions listed in the updated SOAF had resolved. He determined that it was not appropriate for appellant to receive continued massage therapy and that appellant was capable of performing sedentary work as he previously reported.

Dr. Leonard J. Hertzberg, a Board-certified psychiatrist, completed a report on March 10, 2014 and diagnosed anxiety disorder. He opined that appellant continued to be disabled from working at the employing establishment. Dr. Hertzberg noted, "It is not envisioned that [appellant] will be fit to work in any capacity and her status is regarded as permanent." He noted that efforts of the vocational rehabilitation counselor to return her to work as a dispatcher "would not be feasible as it would be too humiliating and impact negatively upon her self-esteem."

By decision dated March 13, 2014, OWCP terminated appellant's wage-loss compensation and medical benefits effective that date. On April 18, 2014 it determined that the March 13, 2014 decision was issued in error and vacated that decision.

OWCP issued a notice of proposed termination of appellant's wage-loss compensation and medical benefits on May 6, 2014.

The vocational rehabilitation counselor completed a report on May 19, 2014 and found that the positions of motor vehicle dispatcher, customer service representative, and reservation clerk were reasonably available. She submitted a closure report on May 29, 2014 and provided the median wages for the selected positions. The vocational rehabilitation counselor determined that the median wages were appropriate based on appellant's extensive experience and background as an air traffic controller and dispatcher.

By decision dated June 19, 2014, OWCP's Branch of Hearings and Review reversed the June 19, 2013 forfeiture decision and set aside the preliminary overpayment finding. The hearing representative found that appellant had not worked for or run a travel agency, but instead was a passive investor in a travel agency. She further found that there was no tangible

documentation that appellant was actively running any of the campaigns for public office identified by OWCP.

On July 21, 2014 counsel noted that the hearing representative found that appellant was only a passive investor in a travel agency and asked that OWCP alter the SOAF to reflect this finding. She also requested that appellant's bids for political office be excluded from the SOAF.

OWCP again updated its SOAF on August 18, 2014. This SOAF listed appellant's accepted conditions including anxiety disorder, fatigue, aggravation of asthma, and fibromyositis due to her accepted emotional conditions. It also noted appellant's accepted physical conditions, from five specific claims, of lumbosacral strains, bulging disc at L4-5, left ankle sprain, contusion to the face, and sprains of the neck, right shoulder and left knee. OWCP noted that appellant had run for political office and traveled extensively throughout the United States, Canada, Europe, Africa, South America, Australia, New Zealand, Israel, and Japan while receiving compensation for total disability. It reported appellant's attempts at public office, but removed the reference to the travel agency.

On August 27, 2014 the vocational rehabilitation counselor closed appellant's vocational services noting that she had not obtained employment within 90 days of placement. She found that appellant was capable of performing sedentary work and that the positions of customer service representative, reservation clerk, and motor vehicle dispatcher were vocationally and medically appropriate. The counselor noted that appellant had several years of coursework beyond high school at two different colleges and that she worked in many different clerical/administrative positions prior to her work as an air traffic controller. The labor market survey dated January 16, 2014 found that the three selected positions existed in sufficient numbers within a reasonable commuting area based on actual employer contacts and the most recent data from the state. The vocational rehabilitation counselor concluded that based on appellant's education, work experience, and transferable skills, she should be capable of earning the median wages in the identified positions which ranged from \$431.60 to \$740.40 per week.

Counsel continued to protest the SOAF, on September 17, 2014 alleging that reference to appellant's political activities were prejudicial.

OWCP terminated appellant's wage-loss compensation and medical benefits effective January 8, 2015 for her physical conditions of aggravation of asthma, fatigue, and fibromyositis. It noted that medical benefits and wage-loss compensation for anxiety disorder continued.

On January 27, 2015 OWCP proposed to reduce appellant's compensation benefits as she was no longer totally disabled and had the capacity to earn wages as a customer service representative at the rate of \$431.60 per week. It noted that her wage-earning capacity was less than the current pay of the job she held when injured. It relied on Dr. Pathak's January 28 and April 23, 2013 reports for the finding as to her ability to return to gainful employment. OWCP afforded appellant 30 days to respond.

In a March 2, 2015 decision, OWCP reduced appellant's wage-loss benefits based on her capacity to earn wages as a customer service representative. It based her work restrictions on those set forth in the April 23, 2013 report of Dr. Pathak. OWCP found that the position of

customer service representative was medically suitable, vocationally suitable based on the findings of the vocational rehabilitation counselor, and reasonably available in her commuting area.

On March 30, 2015 counsel requested an oral hearing regarding the March 2, 2015 wage-earning capacity decision. She later changed this to a request for a review of the written record. Counsel contended that OWCP had the burden of proof to establish that the constructed positions fairly and reasonably represented appellant's wage-earning capacity. She further contended that the medical evidence from Dr. Pathak was stale, that the medical reports were based on an incorrect SOAF, and that the selected position was not medically suitable.

By decision dated December 14, 2015, OWCP's hearing representative found that the March 2, 2015 wage-earning capacity determination should be affirmed.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.¹⁵ 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.¹⁶

Section 8115 of FECA¹⁷ provides 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 reasonably represent wage-earning capacity, or the employee has no actual earnings, her wage-earning capacity is determined with due regard to the nature of her injury, the degree of physical impairment, her usual employment, her age, her qualifications for other employment, the availability of suitable employment, and other factors or circumstances which may affect her wage-earning capacity in his disabled condition.¹⁸

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.¹⁹ Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.²⁰ In determining an employee's wage-earning capacity based on a position deemed suitable, but not actually held, OWCP must

¹⁵ *James M. Frasher*, 53 ECAB 794 (2002); *J.E.*, Docket No. 16-0006 (issued November 16, 2016).

¹⁶ 20 C.F.R. §§ 10.402 and 10.403; *John D. Jackson*, 55 ECAB 465 (2004).

¹⁷ 5 U.S.C. § 8115.

¹⁸ *Id.*

¹⁹ *William H. Woods*, 51 ECAB 619 (2000).

²⁰ *John D. Jackson*, 55 ECAB 465 (2004).

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.²¹

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 that employee's capabilities with regard to her 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*²² will result in the percentage of the employee's loss of wage-earning capacity. The basis rate of compensation paid under FECA is 66 2/3 percent of the injured employee's monthly pay.²³

ANALYSIS

The Board finds that OWCP met its burden of proof to reduce appellant's monetary benefits based on her ability to earn wages in the selected position of customer service representative.

OWCP accepted appellant's claims for the conditions of right hand, bilateral knee, and bilateral ankle injuries, chronic lumbosacral strain and bulging disc, left ankle strain and lumbosacral strain, anxiety disorder, fatigue, aggravation of asthma, and fibromyositis. It terminated benefits for all but the psychiatric condition on January 8, 2015. In a March 2, 2015 decision, OWCP found that the selected position of customer service representative fairly and reasonably represented appellant's wage-earning capacity, basing its determination on the restrictions set forth by Dr. Pathak for her psychiatric condition claim. The March 2, 2015 decision was affirmed on December 14, 2015 by a hearing representative who found that OWCP had properly determined appellant's wage-earning capacity.

Dr. Brooks, in a July 30, 2013 report, opined that appellant was capable of performing work at the sedentary level, including exerting up to 10 pounds of force occasionally, or a negligible amount of force frequently to lift, carry, push, pull, or otherwise move objects, including the human body. He noted that appellant could sit most of the time, as well as walk or stand for brief periods of time. Dr. Brooks opined that appellant could walk and stand occasionally. In his March 10, 2014 report, Dr. Brooks reviewed the January 30, 2014 SOAF

²¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Vocational Rehabilitation Services*, Chapter 2.813.1 (February 2011); *John D. Jackson, supra* note 16.

²² 5 ECAB 376 (1953).

²³ *Karen L. Lonon-Jones*, 50 ECAB 293 (issued March 18, 1999).

and found that appellant could perform sedentary work. The Board finds that Dr. Brooks' reports are based on a proper factual background and contain sufficient medical reasoning to establish that appellant was capable of performing a sedentary position for eight hours a day.

In her August 23, 2013 report, Dr. Pathak, OWCP's second opinion physician, opined that appellant could participate in vocational rehabilitation and that she had no work restrictions for her psychiatric condition, except that she could not return to work at the employing establishment. The Board finds that this report was based on a proper factual background and is sufficiently well-reasoned to represent the weight of the medical evidence and establish that appellant was capable of working in the constructed position of customer service representative.

Appellant submitted a March 10, 2014 report from Dr. Hertzberg finding that she was totally disabled as returning to work as a dispatcher would be "humiliating" and "negatively impact her self-esteem." The Board finds, however, that this report does not establish appellant's disability for work in the selected position of customer service representative. Dr. Hertzberg's reasoning for finding appellant could not perform the selected position is not related to her employment injury, but instead it is considered self-generated and not compensable as it amounts to frustration over not being able to hold a particular position or to work in a particular environment.²⁴

In development of the claim OWCP properly referred appellant for vocational rehabilitation as both Dr. Pathak's and Dr. Brooks' reports established that she was no longer totally disabled due to residuals of her employment injury.²⁵ In addition, OWCP properly found that appellant had the capacity to perform the duties of a customer service representative. The position is classified as sedentary work requiring occasional lifting of up to 10 pounds, which is within the restrictions set forth by Dr. Brooks. While Dr. Brooks' work status report listed an ability to work eight hours in a sedentary position, and subsequently noted an ability to work four hours, the Board finds that his opinion was fully premised upon the determination that appellant's work injuries had fully resolved. He primarily noted that she was capable of a full eight-hour day, but with several activities during that day restricted to four or fewer hours each. Therefore Dr. Brooks' opinion is a proper basis for the finding that appellant had the capacity to perform the duties of a customer service representative. Following its proposed reduction of her compensation, appellant did not submit any rationalized medical evidence to establish that she was unable to perform the sedentary position. The medical evidence, consequently, establishes that she has the requisite physical ability to earn wages as a customer service representative.²⁶

In assessing the claimant's ability to perform the selected position, OWCP must consider not only physical limitations, but also take into account appellant's work experience, age, mental

²⁴ *Martha L. Watson*, 46 ECAB 407, 418 (1995); *J.M.*, Docket No. 16-0312 (issued June 22, 2016). *See also Merle J. Marceau*, 53 ECAB 197, 203 (2001) (while appellant contended that the selected position would not fully utilize his skills, the Board found that determining an employee's wage-earning capacity was not contingent upon such factors).

²⁵ *See N.J.*, 59 ECAB 171 (2007).

²⁶ *See S.J.*, Docket No. 14-1455 (issued October 23, 2014); *S.S.*, Docket No. 13-0011 (issued March 21, 2013).

capacity, and educational background.²⁷ The rehabilitation counselor determined that appellant had the skills necessary to perform the position of customer service representative based on her several years of coursework beyond high school at two different colleges and her work in many different clerical/administrative positions prior to her work as an air traffic controller. The rehabilitation counselor found that the position existed in sufficient numbers within a reasonable commuting area based on actual employer contacts and the most recent data from the state. The rehabilitation counselor concluded that based on appellant's education, work experience, and transferable skills that she was capable of earning the median wages in the identified positions which ranged from \$431.60 to \$740.40 per week. As the rehabilitation counselor is an expert in the field of vocational rehabilitation, OWCP may rely on her opinion in determining whether the job is vocationally suitable and reasonably available.²⁸ The Board finds that OWCP considered the proper factors, including the availability of suitable employment, appellant's physical limitations, and employment qualifications in determining that she had the capacity to perform the position of customer service representative.²⁹ OWCP also properly determined her loss of wage-earning capacity in accordance with the formula developed in *Shadrick* and codified at 20 C.F.R. § 10.403. It, therefore, correctly found that the position of customer service representative reflected appellant's wage-earning capacity effective March 2, 2015.

On appeal counsel asserts that OWCP improperly shifted the burden of proof for modification of wage-loss compensation benefits to appellant. The Board finds this assertion is without merit. The burden of terminating or modifying compensation benefits, once a claim has been accepted, falls onto OWCP.³⁰ The record of evidence establishes that OWCP obtained the necessary medical opinions from Drs. Brooks and Pathak prior to proposing modification of benefits. At all times the burden remained upon OWCP to develop the medical evidence in the process of determining appellant's wage-earning capacity.

Counsel further asserts on appeal that OWCP was in error to rely upon the medical opinions of Dr. Brooks as to the status of appellant's physical conditions, claiming that he relied upon an improper SOAF and was prejudiced by leading questions and materials included in the SOAF, including notation of appellant's travels, organizing activities, and political campaigns. The Board finds counsel's challenges to the medical opinions of Dr. Brooks to be without merit. The January 30, 2014 SOAF, upon which Dr. Brooks relied in providing his medical opinion, is found to be a proper SOAF for purposes of obtaining an accurate assessment of appellant's current ability to return to an employment position. The January 30, 2014 SOAF was sufficient to provide a framework for the physician to conduct his own physical examination of appellant and formulate his own independent medical opinion as to her ability to return to work.³¹ As the Board has previously held, a physician's report should be excluded when there is evidence that OWCP may have influenced the opinion of the physician, such as through leading questions or

²⁷ *Id.*

²⁸ *C.S.*, Docket No. 17-0496 (issued May 25, 2017).

²⁹ *Id.*

³⁰ *Supra* note 15.

³¹ *See Abe E. Scott*, 45 ECAB 164, 174 (1993).

telephone contact.³² The Board finds the information contained in the SOAF at issue to be an accurate, factual presentation of appellant's activities while on total disability compensation and provided a proper background for an opinion in this case, and thus was not a prejudicial disclosure of information.

Finally, counsel asserts on appeal that the medical opinion of Dr. Pathak was stale and therefore an improper foundation for the finding that appellant was capable of the selected position of customer service representative. The Board finds that Dr. Pathak's opinion was limited to a determination that, due to her knowledge of appellant's postinjury activities coupled with her psychiatric evaluation, appellant was not totally disabled and was able to participate in vocational rehabilitation activities. The Board finds that as Dr. Pathak's April 23, 2013 report was less than two years old when considered, it is not considered stale under the facts of this case.³³ Counsel did not provide any evidence or argument to contest Dr. Pathak's opinion that appellant was capable of participation in vocational rehabilitation, especially in light of the fact that she did successfully participate in such activity.

For the reasons set forth herein, the Board finds that OWCP properly reduced appellant's compensation benefits based on the reports of Drs. Brooks and Pathak.

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 monetary benefits based on her capacity to earn wages in the constructed position of customer service representative.

³² See *R.A.*, Docket No. 10-844 (issued December 22, 2010).

³³ *G.M.*, Docket No. 16-1032 (issued January 4, 2017).

ORDER

IT IS HEREBY ORDERED THAT the December 14, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 22, 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