

**United States Department of Labor
Employees' Compensation Appeals Board**

S.A., Appellant

and

**DEPARTMENT OF JUSTICE, BUREAU OF
PRISONS, Victorville, CA, Employer**

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**Docket No. 16-1487
Issued: December 13, 2017**

Appearances:
*Max Gest, Esq., for the appellant*¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On August 12, 2016 appellant, through counsel, filed a timely appeal from a May 23, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

³ Together with his appeal request, appellant submitted a timely request for oral argument pursuant to 20 C.F.R. § 501.5(b). By order dated March 1, 2017, the Board exercised its discretion and denied the request as his arguments on appeal could be adequately addressed in a decision based on a review of the case as submitted on the record. *Order Denying Request for Oral Argument*, Docket No. 16-1487 (issued March 1, 2017).

ISSUE

The issue is whether OWCP properly adjusted appellant's compensation, effective July 26, 2015 based on his capacity to earn wages in the constructed position of salesperson -- general merchandise.

FACTUAL HISTORY

On January 18, 2009 appellant, then a 31-year-old correctional officer, sustained injuries to his face and right upper extremity during an altercation with an inmate.⁴ He stopped work on January 20, 2009 and received continuation of pay. OWCP accepted appellant's traumatic injury claim (Form CA-1) alleged for right upper arm/shoulder sprain and left cheek open wound, without complications. The employing establishment was unable to accommodate his right upper extremity restrictions and, therefore, OWCP paid wage-loss compensation for temporary total disability beginning March 15, 2009.⁵

On June 30, 2009, December 27, 2011, and January 29, 2012, appellant underwent OWCP-approved right shoulder surgeries, each performed by Dr. Samuel H. Rice, a Board-certified orthopedic surgeon.⁶ He continued to receive FECA wage-loss compensation for temporary total disability.

In August 2014, OWCP referred appellant to Dr. Gary K. Frykman, a Board-certified orthopedic surgeon, for a second opinion examination and opinion on appellant's ability to work. In a report dated September 23, 2014, Dr. Frykman discussed appellant's factual and medical history and reported the findings of the physical examination he conducted on that date. He noted that appellant had considerable loss of right shoulder motion due to his work injury and diagnosed right shoulder ankyloses and post right shoulder surgeries on June 30, 2009, December 27, 2011, and January 29, 2012. Dr. Frykman determined that appellant was capable of working with restrictions of no work at or above shoulder height, no forceful reaching activities with his right upper extremity, and no repetitive reaching and lifting activities with his right upper extremity involving weight greater than 10 pounds.

In November 2014, OWCP referred appellant, based on Dr. Frykman's work restrictions, for participation in a vocational rehabilitation program designed to return him to work. Its vocational rehabilitation counselor advised that, with adequate training, he could work as a service clerk and administrative clerk. These positions were determined to be suitable vocational goals, but appellant did not start the training program.

⁴ Appellant responded to a body alarm involving a fight between two inmates, one of whom cut him on the left side of his face.

⁵ Effective June 7, 2009, OWCP placed appellant on the periodic compensation rolls.

⁶ The respective operative reports revealed, *inter alia*, that appellant's right rotator cuff remained intact. The first two surgical procedures also revealed that the right biceps tendon was intact. During the January 29, 2012 surgery, Dr. Rice performed tenodesis repair of appellant's right biceps tendon.

In a February 2, 2015 report, Dr. Rice reported the findings of his physical examination on that date, noting that appellant had a negative impingement sign and no tenderness in or around the greater tuberosity, biceps tendon, anterior joint line, or posterior joint line of his right shoulder. In the work status section of the report, he indicated, “[Appellant] remains off work.”⁷

In a March 12, 2015 report of initial contact, Dr. Lawrence J. Coates, Ph.D., an attending licensed clinical psychologist, reported the findings of his evaluation of appellant on that date. He noted that appellant reported significant psychological difficulties stemming from a January 18, 2009 physical assault at work and consequential severe orthopedic injuries stemming from the assault. Dr. Coates ascertained that appellant was having significant symptoms of post-traumatic stress disorder (PTSD) of a chronic nature for which he had never been evaluated nor received treatment. In addition, appellant appeared to have significant depression as a result of his orthopedic injuries. Dr. Coates posited that the depression and PTSD were directly related to and caused by the January 18, 2009 physical assault in the course of appellant’s work. He indicated that, in the course of the evaluation, appellant advised that he had periods of homicidal ideation including road rage. Appellant reported that he had been socially isolated and withdrawn, and that his wife complained that he had been irritable and agitated without provocation. Dr. Coates indicated that it was inappropriate for appellant to participate in a vocational rehabilitation program because he was experiencing significant symptoms which put him at high risk of injuring himself or others in the course of his daily activities. Therefore, he was placing appellant on temporary total disability from a psychiatric point of view with a diagnosis of PTSD and major depressive disorder.

In April 2015, OWCP directed the rehabilitation counselor to identify jobs that appellant could perform without training. The rehabilitation counselor conducted a state labor market survey and determined that appellant was physically and vocationally capable of working in the constructed position of “salesperson, general merchandise” (hereinafter salesperson), a position described in the Department of Labor, *Dictionary of Occupational Titles* (DOT) and given the DOT # 279.357-054.⁸ The labor market survey revealed that the salesperson position was reasonably available in appellant’s commuting area at an average weekly salary of \$360.00.

The position of salesperson involves selling a variety of commodities in a sales establishment and was classified as requiring light exertion of strength under the Department of Labor, *Dictionary of Occupational Titles*. Light exertion of strength under the Department of Labor, *Dictionary of Occupational Titles* requires exertion of up to 20 pounds of force occasionally (performing an activity occasionally means that it is performed up to 1/3 of the time during the workday), and/or exertion of up to 10 pounds of force frequently (meaning that the activity is performed 1/3 to 2/3 of the time during the workday), and/or exertion of a negligible amount of force constantly (meaning that the activity is performed more than 2/3 of the time

⁷ Dr. Rice noted that appellant reported that he needed a work note as he found driving painful and was being asked to drive 50 miles one way. There is no indication in the record that he provided appellant such a note.

⁸ With respect to the determination that the salesperson position was vocationally suitable, the rehabilitation counselor indicated that appellant had transferrable skills from his previous employment experience in asset protection, experience as a stocker, and cashiering experience.

during the workday). The position of salesperson requires frequent reaching (*i.e.*, the action being performed 1/3 to 2/3 of the time during the workday).

In an April 30, 2015 letter, appellant's then-counsel argued that an attached April 21, 2015 report of Dr. Coates showed that appellant was totally disabled due to a work-related psychological condition.

Counsel attached a copy of the April 21, 2015 report from Dr. Coates, who described the January 18, 2009 employment incident during which appellant was injured attempting to stop an altercation between two prisoners. He indicated that appellant reported recurrent intrusive thoughts of the January 18, 2009 assault and significant stress in his relationship with his wife due to the orthopedic limitations stemming from the incident. Dr. Coates reported the findings of his evaluation of appellant, including psychological testing, and diagnosed major depressive disorder (single episode) with periods of homicidal ideation in remission and chronic PTSD. He found that the diagnosed conditions were caused by the January 18, 2009 employment incident, noting that he did not have a psychiatric history prior to January 18, 2009 and that he had experienced psychiatric symptoms since the January 18, 2009 assault. Dr. Coates determined that appellant was unable to engage in the job market due to the nature, extent, and length of time of his psychological injury.

In a June 22, 2015 letter, OWCP advised appellant that it proposed to reduce his wage-loss compensation based on his capacity to earn wages in the constructed position of salesperson. It noted that his vocational ability to work as a salesperson was confirmed by the opinion of his vocational rehabilitation counselor and that his physical ability to perform the position was confirmed by the opinion of Dr. Frykman, OWCP's referral physician. OWCP provided appellant 30 days to submit evidence and argument challenging the proposed action.

In a July 20, 2015 letter, appellant's then-counsel asserted that OWCP's wage-earning capacity determination was improper because the evidence of record did not show that appellant was capable of earning wages as a salesperson, either from a medical or vocational standpoint. He argued that appellant could not drive safely to and from work per limitations imposed by Dr. Rice in a June 25, 2015 report.⁹ Counsel asserted that appellant was totally disabled from PTSD disorder and major depressive disorder which directly stemmed from the January 18, 2009 assault at work. He also argued that appellant's work-related right shoulder condition prevented him from performing the reaching activity required by the salesperson job.¹⁰

In a July 28, 2015 decision, OWCP adjusted appellant's wage-loss compensation, effective July 26, 2015, based on its determination that he was capable of earning wages in the constructed position of salesperson. It found that his vocational ability to work as a salesperson was confirmed by the opinion of his vocational rehabilitation counselor and that his physical ability to perform the position was confirmed by the opinion of Dr. Frykman, OWCP's referral

⁹ The Board notes that the record does not contain a June 25, 2015 report of Dr. Rice.

¹⁰ Appellant submitted a portion of an undated report from Dr. Rice who indicated that, if he were to compete in the open labor market, he would be precluded from occupations requiring lifting over 10 pounds, climbing, crawling, writing, typing, or forward or overhead reaching.

physician. OWCP applied the principles set forth in the *Albert C. Shadrick* decision to calculate the percentage of appellant's loss of wage-earning capacity (LWEC).¹¹ It also noted that it would develop the claimed consequential injuries of PTSD and major depressive disorder and indicated that if a psychiatric condition is subsequently accepted, consideration will be given to modifying the loss of wage-earning decision.¹²

Appellant, through his present counsel, requested a telephone hearing with a representative of OWCP's Branch of Hearings and Review. During the hearing held on April 13, 2016, counsel argued that appellant did not have the vocational skills to work as a salesperson and that his physical condition prevented him from performing the reaching and lifting required by the job. He asserted that appellant's claim should be expanded to include acceptance of right shoulder biceps and rotator cuff tears as related to the January 18, 2009 assault at work. Counsel further argued that consideration should have been given to the disability stemming from appellant's psychological conditions caused by the January 18, 2009 assault. Appellant testified that he did not suffer from any psychological condition prior to the January 18, 2009 work injury.

By decision dated May 23, 2016, OWCP's hearing representative affirmed its July 28, 2015 decision adjusting appellant's compensation effective July 26, 2015 based on his capacity to earn wages in the constructed position of salesperson. She determined that the evidence of record showed that appellant was vocationally and medically capable of earning wages as a salesperson.¹³

LEGAL PRECEDENT

Once OWCP accepts a claim it has the burden of proof to justify termination or modification of compensation benefits.¹⁴ 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 LWEC.¹⁵ An employee's actual earnings generally best reflect his or her wage-earning capacity.¹⁶ Absent evidence that actual earnings do not fairly and reasonably represent the employee's wage-earning capacity, such earnings must be accepted as representative of the individual's wage-earning

¹¹ See *infra* note 24.

¹² In an August 27, 2015 letter, OWCP advised appellant that it had not received sufficient medical evidence supporting that he sustained a work-related psychiatric condition. It provided him 30 days to submit evidence supporting the existence of such a condition. The evidence of record does not contain a final decision regarding whether appellant sustained a work-related psychiatric condition.

¹³ The hearing representative indicated that appellant had not submitted medical evidence supporting counsel's assertion that his claim should be expanded to include acceptance of right shoulder biceps and rotator cuff tears. She also noted that appellant's claimed psychological conditions were subsequently acquired conditions which were immaterial to the wage-earning capacity determination.

¹⁴ *James B. Christenson*, 47 ECAB 775, 778 (1996); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

¹⁵ 5 U.S.C. § 8115(a); 20 C.F.R. §§ 10.402, 10.403; see *Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

¹⁶ *Hayden C. Ross*, 55 ECAB 455, 460 (2004).

capacity.¹⁷ If actual earnings do not fairly and reasonably represent the employee's wage-earning capacity or the employee has no actual earnings, then 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 availability of suitable employment and other factors and circumstances that may affect wage-earning capacity in his disabled condition.¹⁸

OWCP must initially determine the employee's medical condition and work restrictions before selecting an appropriate position that reflects his vocational wage-earning capacity.¹⁹ The medical evidence it relies upon must provide a detailed description of the employee's condition and the evaluation must be reasonably current.²⁰ Where suitability is to be determined based on a position not actually held, the selected position must accommodate the employee's limitations from both injury-related and preexisting conditions, but not limitations attributable to postinjury or subsequently acquired conditions.²¹

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 labor market that fits the employee's capabilities with regard to his physical limitations, education, age, and prior experience.²² 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.²³ Finally, the application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's LWEC.²⁴

ANALYSIS

OWCP accepted that on January 18, 2009 appellant sustained a sprain of his right shoulder and upper arm (unspecified site), and open wound of his left cheek without

¹⁷ *Id.*

¹⁸ 5 U.S.C. § 8115(a); *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

¹⁹ *M.A.*, 59 ECAB 624, 631 (2008).

²⁰ *Id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.4d (June 2013).

²¹ *N.J.*, 59 ECAB 171, 176 (2007); *id.* at Chapter 2.816.4c (June 2013).

²² *Supra* note 20 at Part 2 -- Claims, *Vocational Rehabilitation Services*, Chapter 2.813.7b (February 2011).

²³ The job selected for determining wage-earning capacity must be a position that is reasonably available in the general labor market in the commuting area in which the employee resides. *David L. Scott*, 55 ECAB 330, 335 n.9 (2004); Federal (FECA) Procedure Manual, *id.* at Chapter 2.816.6 (June 2013).

²⁴ 20 C.F.R. § 10.403(d); *see Albert C. Shadrick*, 5 ECAB 376 (1953).

complications.²⁵ Appellant stopped work and received disability compensation. OWCP sent appellant to Dr. Frykman, an OWCP referral physician, who found that appellant was not totally disabled for work and had a partial capacity to perform work for eight hours per day subject to specified work restrictions. Appellant participated in an OWCP-sponsored vocational rehabilitation program and his vocational rehabilitation counselor determined that he was able to perform the position of “salesperson, general merchandise” (salesperson) and that state employment services showed that the position was available in sufficient numbers so as to make it reasonably available within his commuting area.²⁶

In a July 28, 2015 decision, OWCP adjusted appellant’s wage-loss compensation effective July 26, 2015 based on its determination that he was capable of earning wages in the constructed position of salesperson. After a request for hearing, on May 23, 2016 an OWCP hearing representative affirmed OWCP’s July 28, 2015 decision.

The Board finds that OWCP properly adjusted appellant’s compensation effective July 26, 2015 based on his capacity to earn wages in the constructed position of salesperson.

On appeal counsel argues that appellant did not have the vocational ability to work as a salesperson. However, the Board notes that appellant’s vocational rehabilitation counselor is an expert in the field of vocational rehabilitation and finds that OWCP properly relied on her opinion regarding reasonable availability and vocational suitability of the position of salesperson.²⁷

With respect to appellant’s physical ability to work, Dr. Frykman, an attending physician, determined in a September 23, 2014 report that appellant was capable of working with restrictions against performing work at or above shoulder height, performing forceful reaching activities with his right upper extremity, and performing repetitive reaching and lifting activities with his right upper extremity involving weight greater than 10 pounds. He provided an extensive discussion of appellant’s factual and medical history, and outlined the objective findings which supported these work restrictions. The Board finds that the work restrictions of Dr. Frykman contained in his September 23, 2014 report constitute the best assessment of appellant’s ability to perform physical tasks around the time it was determined that he could earn

²⁵ On June 30, 2009, December 27, 2011, and January 29, 2012, appellant underwent OWCP-approved right shoulder surgeries.

²⁶ See *supra* note 24. Appellant’s vocational rehabilitation counselor identified the position of salesperson after being asked by OWCP to select a position that appellant could perform without additional training. The position of salesperson requires exertion of up to 20 pounds of force occasionally (occasionally performing an activity means that the activity is performed up to 1/3 of the time during the workday), and/or exertion of up to 10 pounds of force frequently (the activity is performed 1/3 to 2/3 of the time during the workday), and/or exertion of a negligible amount of force constantly (the activity is performed more than 2/3 of the time during the workday). The position of salesperson requires frequent reaching (*i.e.*, the action being performed 1/3 to 2/3 of the time during the workday). See Department of Labor, *Dictionary of Occupational Titles*.

²⁷ See *G.A.*, Docket No. 13-1351 (issued January 10, 2014). The rehabilitation counselor indicated that appellant had transferrable skills from his previous employment experience in asset protection, experience as a stocker, and cashiering experience.

wages in the constructed position of salesperson. The Board further finds and that this report provides physical restrictions which would allow appellant to work as a salesperson.²⁸

Appellant submitted a February 2, 2015 report in which Dr. Rice, an attending physician, indicated in the work status section of the report, “[Appellant] remains off work.”²⁹ However, this report is of limited probative value regarding appellant’s ability to work because Dr. Rice did not provide any objective findings or medical rationale in support of his opinion on disability.³⁰

On appeal counsel argues that appellant’s claim should be expanded to include acceptance of right shoulder biceps and rotator cuff tears.³¹ However, appellant failed to submit a medical report containing a rationalized opinion supporting such work-related conditions.³² On appeal counsel argues that the fact that OWCP approved several right shoulder surgeries, performed by Dr. Rice on June 30, 2009, December 27, 2011, and January 29, 2012, shows that these conditions should have been accepted as work related. The Board notes that the reports of the first two surgical procedures reveal that appellant’s right biceps tendon was intact. During the January 29, 2012 surgery, Dr. Rice performed tenodesis repair of appellant’s right biceps tendon, but Dr. Rice did not provide any opinion on the cause of the observed right biceps tendon condition and there is no medical report of record showing that appellant had a work-related biceps tendon or rotator cuff condition.³³

²⁸ See *supra* note 26. The Board notes that, although the salesperson position requires frequent reaching, there is no indication in the position description that it would require appellant to engage in repetitive reaching and lifting activities with his right upper extremity involving weight greater than 10 pounds.

²⁹ Appellant also submitted a portion of an undated report from Dr. Rice who indicated that, if he were to compete in the open labor market, he would be precluded from occupations requiring lifting over 10 pounds, climbing, crawling, writing, typing, or forward or overhead reaching. However, this report is not complete and it is of limited probative value because it does not contain a rationalized medical opinion explaining the cause of and need for such work restrictions. See *Y.D.*, Docket No. 16-1896 (issued February 10, 2017) (finding that a report is of limited probative value regarding causal relationship if it does not contain medical rationale explaining how a given condition/disability is related to employment factors).

³⁰ See *D.R.*, Docket No. 16-0528 (issued August 24, 2016). Dr. Rice noted that, upon physical examination, appellant had a negative impingement sign and no tenderness in or around the greater tuberosity, biceps tendon, anterior joint line, or posterior joint line of his right shoulder. Prior to OWCP’s July 28, 2015 LWEC determination, appellant’s then-counsel argued that appellant could not drive safely to and from work per limitations imposed by Dr. Rice in a June 25, 2015 report. However, the record does not contain a June 25, 2015 report of Dr. Rice or any other medical report imposing limitations on driving.

³¹ It is an accepted principle of workers’ compensation law, and the Board has so recognized, that when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause which is attributable to the employee’s own intentional conduct. See *Sandra Dixon-Mills*, 44 ECAB 882 (1993).

³² See *J.D.*, Docket No. 14-2061 (issued February 27, 2015) (regarding the need for a rationalized medical report to establish causal relationship).

³³ The Board has held that medical evidence which does not offer a clear opinion regarding the cause of an employee’s condition is of limited probative value on the issue of causal relationship. See *Charles H. Tomaszewski*, 39 ECAB 461 (1988).

For these reasons, the Board finds that the medical evidence shows that appellant could perform the physical requirements of the constructed position of salesperson.

Appellant has alleged that he was prevented from performing the duties of the constructed position of salesperson due to a psychological condition. In determining wage-earning capacity based on a constructed position, consideration is given to the residuals of the employment injury and the effects of conditions which preexisted the employment injury.³⁴ In determining wage-earning capacity based on a constructed position, consideration is not given to conditions which arise subsequent to the employment injury.³⁵

The Board finds that the evidence of record is insufficient to establish that, around the time of the adjustment of his compensation, appellant had a psychological condition preventing him from performing the duties of the constructed position of salesperson which was related to his January 18, 2009 employment injury or which preexisted his employment injury.³⁶ Appellant did not file a claim for a work-related psychological condition and the evidence of record does not contain a rationalized medical report adequately explaining how a psychological condition related to the January 19, 2009 employment injury prevented him from performing the duties of the constructed position of salesperson beginning in early-2015.

For these reasons, OWCP properly adjusted appellant's compensation effective July 26, 2015 based on his capacity to earn wages in the constructed position of salesperson -- general merchandise.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.³⁷

CONCLUSION

The Board finds that OWCP properly adjusted appellant's compensation effective July 26, 2015 based on his capacity to earn wages in the constructed position of salesperson -- general merchandise.

³⁴ See *Jess D. Todd*, 34 ECAB 798, 804 (1983).

³⁵ *N.J.*, 59 ECAB 397 (2008).

³⁶ See *supra* notes 34 and 35.

³⁷ In its July 28, 2015 decision, OWCP indicated that it would develop the claimed consequential injuries of PTSD and major depressive disorder and indicated that if a psychiatric condition was subsequently accepted, consideration would be given to modifying the loss of wage-earning decision. The Board notes that there is no indication in the record that OWCP has carried out such development.

ORDER

IT IS HEREBY ORDERED THAT the May 23, 2016 decision of the Office of Workers' Compensation Programs is affirmed.³⁸

Issued: December 13, 2017
Washington, DC

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

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

³⁸ Colleen Duffy Kiko, Judge, participated in the original decision, but was no longer a member of the Board effective December 11, 2017.