

ISSUE

The issue is whether OWCP met its burden of proof to reduce appellant's compensation benefits based on his capacity to earn wages in the selected position of dispatcher, radio, Department of Labor's *Dictionary of Occupational Titles* (DOT) No. 379.362-010.

On appeal counsel asserts that OWCP procedures prohibit using a state or government position as a basis for a constructed wage-earning capacity decision.

FACTUAL HISTORY

On July 17, 2014 appellant, then a 44-year-old supervisory federal air marshal, filed an occupational disease claim (Form CA-2) alleging that, due to a prior accepted knee injury, he had continued knee pain caused by employment duties.³ On October 15, 2014 OWCP accepted traumatic arthropathy of the left lower leg, old disruption of the left anterior cruciate ligament, and derangement of the left medial meniscus. Dr. Marko F. Krpan, an attending Board-certified osteopath specializing in orthopedic surgery, recommended a total left knee arthroplasty, which he performed on December 29, 2014.⁴ Appellant accepted modified duty on March 2, 2015.

The employing establishment determined that appellant was unable to perform the essential duties of the federal air marshal jobs, and/or that he no longer met its medical standards. Appellant stopped work on May 11, 2015 and filed a recurrence claim (Form CA-2a). He began receiving FECA wage-loss compensation, effective that day. A May 19, 2015 functional capacity evaluation, signed by Dr. Krpan on May 20, 2015, demonstrated that appellant could function at the medium physical demand level.

In July 2015 OWCP referred appellant to a vocational rehabilitation specialist, for vocational rehabilitation services. On July 30, 2015 Dr. Krpan advised that appellant could stand or walk a maximum of two to three hours in an eight-hour workday. Appellant had vocational testing and the rehabilitation specialist completed a transferable skills analysis. In an August 18, 2015 rehabilitation report, the specialist indicated that a labor market survey had been completed on August 11, 2015 and the positions of surveillance systems monitor, check cashier, radio dispatcher, maintenance service dispatcher, and security guard were identified. She documented several job opportunities and completed job classification forms for each position on September 3, 2015. These included a job description with physical demands for each position, indicating that each had a sedentary strength level. The vocational rehabilitation specialist indicated that each position was available in the local commuting area. She submitted a vocational placement plan.

³ Appellant noted that he had initially filed a recurrence claim (Form CA-2a) for a September 6, 2006 traumatic injury, accepted for traumatic bilateral sprain of the lateral collateral ligament. OWCP adjudicated the 2006 claim under File No. xxxxxx107 and the instant claim under File No. xxxxxx771.

⁴ The procedure was authorized by OWCP on March 25, 2015. The record does not indicate that appellant received wage-loss compensation before, during, or immediately after this procedure.

On November 13, 2015 OWCP informed appellant that it had approved the employment plan prepared by the vocational rehabilitation specialist.

In January 2016 appellant relocated from the Chicago, Illinois, area to Cartersville, Georgia. Rehabilitation services were closed on February 22, 2016. In her closure memorandum, the vocational rehabilitation specialist indicated that the first targeted position was surveillance system monitor, and the second targeted position was radio dispatcher, noting that both positions were sedentary, both were vocationally and medically appropriate and, based on the September 3, 2015 labor market surveys, both existed in sufficient numbers within the local (Chicago) commuting area.

On April 1, 2016 OWCP obtained employment and wage estimates from May 2014 in the Chicago metropolitan area for the positions of dispatcher, radio DOT No. 379.362-010, with a median hourly wage of \$23.63; system surveillance monitor, DOT No. 379.367-010, with a median hourly wage of \$9.18; and dispatcher, maintenance service, DOT No. 239.367-014, with a median hourly wage of \$20.65.

In an amended notice of proposed reduction dated May 27, 2016,⁵ OWCP proposed to reduce appellant's compensation, based on his capacity to earn wages as a radio dispatcher, DOT No. 379.362-010. It noted that Dr. Krpan confirmed on July 8, 2015 that appellant had reached maximum medical improvement with permanent restrictions at a light demand level, based on a May 19, 2015 functional capacity evaluation, and that the physician had provided permanent restrictions of sitting for eight hours, walking and standing for one hour, twisting for 15 minutes with no bending, stooping, squatting, kneeling, or climbing. OWCP noted that appellant had been referred for vocational rehabilitation services, and the radio dispatcher position was selected as being the most appropriate, based upon the rehabilitation counselor's review of appellant's work history and transferrable skills analysis. It described the physical requirements of the radio dispatcher position as sedentary and within the restrictions provided by Dr. Krpan.⁶ OWCP indicated that, based on recent wage and position information, the radio dispatcher position was reasonably available at an entry pay level of \$945.20 per week.

On July 18, 2016 counsel maintained that the constructed position was improper. He noted that OWCP procedures prohibit use of this type of job in which the claimant was not

⁵ An original notice was prepared on April 1, 2016.

⁶ The complete title for the position is (government ser.) alternate titles: dispatcher; police radio dispatcher; station operator the Department of Labor's *Dictionary of Occupational Titles* job description for dispatcher, radio, DOT No. 379.362-010, is as follows: Receives complaints from public concerning crimes and police emergencies, broadcasts orders to police radio patrol units in vicinity to investigate complaint, and relays instructions or questions from remote units. Records calls broadcast and complaints received. In some municipalities coordinates all police, fire, ambulance, and other emergency requests, relaying instructions to radio unit concerned. May make operating adjustments to transmitting equipment where station is not automatic and be required to hold federal license. May transmit and receive messages between divisions of own agency and other law enforcement agencies. May monitor silent alarm system to detect illegal entry into business establishments. May contact police officers (government ser.) I-375.263-014 and guards, school-crossing (government ser.) 371.567-010 to verify assignment locations. The strength level is sedentary.

actually employed and also asserted that the pay rate for the constructed position was not sufficiently explained.⁷

By decision dated July 27, 2016, OWCP reduced appellant's wage-loss compensation based on his capacity to earn wages as a radio dispatcher, effective July 24, 2016. By utilizing the *Shadrick* formula,⁸ it found that appellant had a 60 percent loss of wage-earning capacity.⁹

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.¹⁰ 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.¹¹

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 reasonably represent wage-earning capacity or the employee has no actual earnings, 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 availability of suitable employment, and other factors or circumstances which may affect his or her wage-earning capacity in the disabled condition.¹²

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.¹³ Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.¹⁴

⁷ On July 27, 2016 OWCP granted appellant a schedule award for 59 percent permanent impairment of the left lower extremity, for 169.92 weeks, to run from July 24, 2016 to October 26, 2019. Appellant elected federal retirement benefits, effective July 24, 2016, and did not file an appeal with the Board from the schedule award decision.

⁸ *Albert C. Shadrick*, 5 ECAB 376 (1953). See discussion *infra*.

⁹ The Board notes that the July 27, 2016 decision includes typographic errors indicating that the weekly pay rate for the dispatcher, radio position is \$4,296.48. This, however, is the four-week compensation rate before deductions. The correct weekly pay rate of \$945.20 was used in the *Shadrick* calculation.

¹⁰ *James M. Frasher*, 53 ECAB 794 (2002).

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

¹² 5 U.S.C. § 8115; 20 C.F.R. § 10.520; *John D. Jackson*, *id.*

¹³ *William H. Woods*, 51 ECAB 619 (2000).

¹⁴ *John D. Jackson*, *supra* note 11.

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 his or 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, local Chamber of Commerce, employer contacts, and actual job postings.¹⁵ Finally, application of the principles set forth in *Albert C. Shadrick*,¹⁶ as codified in section 10.403 of OWCP regulations,¹⁷ will result in the percentage of the employee's loss of wage-earning capacity.¹⁸

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 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.¹⁹

OWCP procedures also provide that the job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the claimant lives.²⁰ The availability of the employment is usually evaluated with respect to the area where the claimant resides at the time the determination is made, rather than the area of residence at the time of injury.²¹ The procedures also indicate that, if a labor market survey is more than one year old, the case should be returned to the rehabilitation specialist so that a current survey can be obtained.²² The procedures further provide that a Federal or other civil service position in which the claimant is not actually employed may not be considered reasonable and may not be used to make a wage-earning capacity decision.²³

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.6 (June 2013).

¹⁶ *Supra* note 9.

¹⁷ 20 C.F.R. § 10.403.

¹⁸ *James M. Frasher*, *supra* note 10.

¹⁹ *John D. Jackson*, *supra* note 11.

²⁰ Federal (FECA) Procedure Manual, *supra* note 15 at Chapter 2.816.6.a.; see *Joyce W. Thurman*, Docket No. 05-1537 (issued December 7, 2005).

²¹ *Id.* at Chapter 2.816.7.b.

²² *Id.* at Chapter 2.816.6.a.

²³ *Id.* at Chapter 2.816.7.a.

ANALYSIS

The Board finds the July 27, 2016 wage-earning capacity decision must be reversed. While the medical evidence establishes that appellant can perform the duties of the selected position, the record indicates that in January 2016, the Department of Labor's *Dictionary of Occupational Titles* description of the selected position of radio dispatcher describes a position that is a government civil service position. An alternate title is police radio dispatcher, and the Department of Labor's *Dictionary of Occupational Titles* description includes job duties of receiving complaints from the public concerning crimes and police emergencies and relaying instructions to police, fire, ambulance, etc.²⁴ OWCP procedures are clear that federal or other civil service positions in which a claimant had not actually been employed could not be used for a loss of wage-earning capacity determination.²⁵ There is no evidence of record as to whether the radio dispatcher position was available in the general labor market. It was, therefore, inappropriate for OWCP to base appellant's wage-earning capacity on the constructed position of radio dispatcher.²⁶

The Boards finds that for these reasons the record does not establish that the selected position of radio dispatcher, was reasonably available or otherwise an appropriate position. Thus, OWCP failed to meet its burden of proof to justify reducing his wage-loss compensation.

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to reduce appellant's compensation benefits based on his capacity to earn wages in the selected position of radio dispatcher, DOT No. 379.362-010.

²⁴ *Supra* note 7.

²⁵ *Supra* note 24.

²⁶ *See J.E.*, Docket No. 08-1582 (issued March 3, 2009).

ORDER

IT IS HEREBY ORDERED THAT the July 27, 2016 decision of the Office of Workers' Compensation Programs is reversed.

Issued: May 12, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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