

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

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**B.G., Appellant**

**and**

**DEPARTMENT OF JUSTICE, BUREAU OF  
PRISONS, Atlanta, GA, Employer**

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**Docket No. 17-0477  
Issued: September 20, 2017**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On January 3, 2017 appellant filed a timely appeal from July 29 and November 7, 2016 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether OWCP met its burden of proof to reduce appellant's compensation benefits on July 29, 2016 based on his capacity to earn wages in the selected position of surveillance system monitor; and (2) whether appellant met his burden of proof to establish that the loss of wage-earning capacity determination should be modified.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On March 7, 2012 appellant, then a 47-year-old correctional officer, filed a traumatic injury claim (Form CA-1) alleging that on March 7, 2012 he experienced pain with numbing and tingling down his right arm to his finger tip when he attempted to secure a grill door at work. The claim form did not indicate whether appellant stopped work. On April 9, 2012 appellant began to work a full-time limited-duty position.

OWCP accepted appellant's claim for degeneration of cervical intervertebral disc and disorder of bursae and tendons in the right shoulder region.

Appellant received treatment from Dr. Daniel R. Orcutt, a Board-certified orthopedic surgeon. Dr. Orcutt indicated, in a November 27, 2012 progress report, that appellant complained of burning sensations in the shoulder and radiating pain in the arm. He reviewed appellant's history and described the March 7, 2012 employment incident. Dr. Orcutt diagnosed right shoulder osteoarthritis, degeneration of the cervical intervertebral disc, disorders of the bursae and tendons in the shoulder region, and brachial neuritis or radiculitis.

On November 28, 2012 appellant began working four hours per day because the employing establishment only had part-time limited-duty work available. He received wage-loss compensation for the remaining four hours a day. On January 17, 2013 appellant returned to full duty.

On April 29, 2013 appellant underwent authorized cervical spine surgery by Dr. Douglas Kasow, a Board-certified orthopedic surgeon. He stopped work. OWCP paid disability compensation on the periodic rolls as of May 5, 2013.

Appellant continued to be treated by Dr. Kasow, who indicated in a November 28, 2013 report, that he had reviewed appellant's history and conducted an examination. Dr. Kasow reported tenderness of the paracervicals from C3 to C7, paracervical trigger point pain, and trapezius trigger point pain. He also noted tenderness to palpation over the left iliac crest. Dr. Kasow diagnosed degeneration of cervical intervertebral disc, myofascial pain, and hip pain.

In a January 14, 2014 cervical spine computerized tomography (CT) scan, Dr. Patricia Davis, a Board-certified neuroradiologist, noted that appellant had surgery on April 20, 2013 following a March 7, 2012 work injury. She reported discectomy fusions at C4-5, C5-6, and C6-7 with osseous ridging toward the right, most evident at C4-5.

Appellant underwent a cervical spine magnetic resonance imaging (MRI) scan by Dr. Michael Smith, a Board-certified neuroradiologist. Dr. Smith related, in a February 3, 2014 report, that appellant had multilevel postoperative changes from C4-7, spinal canal stenosis effaces the cord at C4-5, and foraminal stenosis at multiple levels.

In February 11 and April 18, 2014 reports, Dr. Kasow related appellant's complaints of pain over the neck that radiated into the left shoulder with no relief from trigger point injection. He reviewed appellant's history and provided results on examination. Dr. Kasow reported rhomboid and tenderness of the paracervicals from C3 to C7, paracervical triggerpoint pain around T1-2, and trapezius trigger point pain. He indicated active range of motion with no

crepitus or pain elicited by motion. Dr. Kasow related that cervical spine x-ray scans showed that the plate and screws appeared to be in good position. He also noted that a CT scan and MRI scan showed solid fusion at C4-5, C5-6, and C6-7, mild facet arthropathy at C4-5, and right-sided disc osteophyte complex. Dr. Kasow diagnosed shoulder joint pain. He indicated that appellant could return to work with restrictions.

Dr. Kasow provided February 11 and April 18, 2014 work status and work capacity evaluation reports. He related that appellant could return to full-time work beginning February 11, 2014 with restrictions of sitting only, no lifting, pushing, or pulling over 20 pounds, and no reaching, working above the shoulder level, bending, squatting, kneeling, climbing, or crawling.

In April 2014, OWCP referred appellant to Genia Hachenberg, a rehabilitation counselor, for vocational rehabilitation services. Appellant underwent vocational testing and a work hardening program.

On June 9, 2014 appellant underwent a functional capacity evaluation (FCE) by Jan W. Braunstein, a physical therapist, who related that appellant was capable of performing work of light physical demand and was able to perform the following activities of constant reaching on the left and bi-manual handling, frequent walking and carrying up to 15 pounds, climbing stairs, handling, sitting, and standing, and occasional stooping, crouching, kneeling, reaching on the right, and reaching overhead bilaterally.

On October 14, 2014 OWCP's vocational rehabilitation counselor identified the positions of radio dispatcher and surveillance system monitor as within appellant's work restrictions and vocational skills. She included a job description with physical demands for each position. The vocational rehabilitation counselor completed a labor market survey for each position and indicated that each job was available in the local commuting area. A rehabilitation plan was approved, but appellant refused to sign his individualized placement plan. Appellant's job search placement began on December 17, 2014.

On October 20, 2014 OWCP received an October 14, 2014 cervical spine CT scan wherein Dr. Richard Woodcock, a Board-certified radiologist, observed absence of fusion at C5-6, probable incomplete fusion at C6-7, solid fusion at C4-5, multilevel canal and foraminal narrowing detailed above, including foraminal stenosis on the left side due to uncinete osteophytosis at C6-7, foraminal stenosis bilaterally at C5-6, and mild foraminal narrowing at C4-5.

In a December 12, 2014 letter, appellant was advised by OWCP that the selected positions were within his work restrictions and of his responsibility to cooperate with the 90-day placement assistance plan to help him obtain employment. Rehabilitation services were closed on February 27, 2015.

Appellant continued to receive medical treatment from Dr. Kasow. In progress reports through March 24, 2015, Dr. Kasow indicated that appellant still complained of pain over the T1 spinous process radiating to the left shoulder with no relief from trigger point injections or cervical facet injections. He reviewed appellant's history and provided examination findings

similar to his previous reports. Dr. Kasow diagnosed cervical postlaminectomy syndrome. He continued to provide work status reports which indicated that appellant could work with restrictions of sitting only, no lifting, pushing, or pulling over 20 pounds, and no bending, kneeling, crawling, or reaching above the shoulder.

On October 26, 2015 OWCP again referred appellant for vocational rehabilitation services. On November 25, 2015 the rehabilitation counselor updated the labor market survey information for the surveillance system monitor and radio dispatcher positions with yearly wages of \$37,361.00 for the surveillance system monitor position and \$39,447.00 for the radio dispatcher position. The Specific Vocational Preparation (SVP) for the position of surveillance system monitor required an SVP of 3, which required 30 days to three months of education, training and/or experience. She noted that appellant had over three months of experience in corrections and the military with knowledge of law enforcement terminology, relaying information in an emergency situation, and experience communicating in a calm effective way with counselling and training staff, inmates, and soldiers. The physical demands of the surveillance system monitor position required a sedentary strength level and no climbing, stooping, kneeling, crouching, crawling, and reaching. Each position was identified as being performed in sufficient numbers so as to make it reasonably available within appellant's local commuting area.

Dr. Kasow continued to treat appellant. In a March 29, 2016 report, he related appellant's complaints of musculogenic pain and headaches located to the greater occipital nerve region, localized pain in the anterior cervical strap, and right ulnar nerve complaints. Upon physical examination of appellant's cervical spine, Dr. Kasow observed tenderness of the paracervicals from C3 to C7, tenderness of the occipital protuberance, and tenderness to palpation over the left iliac crest from the autograft for appellant's anterior cervical fusion. Strength examination was normal and range of motion was active. Dr. Kasow indicated that sensation examination of appellant's upper extremities revealed that Tinel's sign at the ulnar nerve was consistent with cubital tunnel. Examination of appellant's shoulders revealed no tenderness to palpation and full range of motion. Dr. Kasow diagnosed cervicgia, cervical post-laminectomy syndrome, and cervico-occipital neuralgia. He provided work status reports, which authorized appellant to work with restrictions of only sitting, no lifting, pushing, or pulling over 20 pounds, and no bending, kneeling, crawling, or reaching above the shoulders.

By letter dated June 21, 2016, OWCP proposed to reduce appellant's compensation, based on his capacity to earn wages as a surveillance system monitor, Department of Labor, *Dictionary of Occupational Titles*, DOT No. 379.367-010.<sup>2</sup> It noted that Dr. Kasow related in a February 11, 2014 report that appellant could work with restrictions. OWCP related that, based on Dr. Kasow's opinion, appellant had been referred for vocational rehabilitation services, and

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<sup>2</sup> The Department of Labor, *Dictionary of Occupational Titles*' job description for surveillance system monitor, DOT No. 379.367-010, is as follows: Monitors premises of public transportation terminals to detect crimes or disturbances, using closed circuit television monitors, and notifies authorities by telephone of need for corrective action. Observes television screens that transmit in sequence views of transportation facility sites. Pushes hold button to maintain surveillance of location where incident is developing, and telephones police or other designated agency to notify authorities of location of disruptive activity. Adjusts monitor controls when required to improve reception, and notifies repair service of equipment malfunctions.

that the surveillance system monitor 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 surveillance system monitor position as sedentary and within the restrictions provided by Dr. Kasow. OWCP indicated that, based on recent wage and position information, the surveillance system monitor position was reasonably available at an entry pay level of \$494.03 per week. Appellant was afforded 30 days to submit additional evidence or argument in opposition to this proposal. No additional evidence was received.

By decision dated July 29, 2016, OWCP reduced appellant's wage-loss compensation based on his capacity to earn wages as a surveillance systems monitor, effective July 28, 2016. By utilizing the *Shadrick* formula,<sup>3</sup> it found that appellant had a 43 percent loss of wage-earning capacity.

On August 11, 2016 appellant requested reconsideration. He provided a completed EN1032 form dated August 7, 2016, Part A, which listed his daughter as a dependent. Appellant also submitted a certification of enrollment from Texas State University for the fall and spring semesters of 2016.

According to a September 22, 2016 telephone memorandum, appellant inquired about adjustment of his periodic payments in regards to his compensation rate, night differential pay, and Sunday premium pay. Several telephone memorandums dated September 22 to November 3, 2016 indicated that OWCP contacted the employing establishment on various occasions in order to obtain information regarding appellant's pay rate. OWCP also sent the employing establishment letters dated September 27 and November 3, 2016 requesting information on appellant's Sunday premium and holiday premium pay for one year prior to March 27 and October 28, 2012.

By decision dated November 7, 2016, OWCP denied modification of the July 29, 2016 decision. It found that appellant had not submitted any evidence indicating that there was a material change in the nature and extent of his injury-related condition, that he had been retrained or otherwise vocational rehabilitated, or that the original determination was, in fact, erroneous. OWCP also noted that it had adjusted appellant's pay rate as he had submitted evidence that his daughter remained a dependent. It further informed appellant that his pay rate reflected Sunday premium and that further information was being obtained from the employing establishment regarding appellant's night shift work at the time of injury.

### **LEGAL PRECEDENT -- ISSUE 1**

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of the compensation benefits.<sup>4</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

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<sup>3</sup> *Albert C. Shadrick*, 5 ECAB 376 (1953). See discussion *infra*.

<sup>4</sup> *James M. Frashner*, 53 ECAB 794 (2002).

totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.<sup>5</sup>

Under section 8115(a) of FECA, 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 if the employee has no actual earnings, wage-earning capacity is determined with due regards to the nature of the injury, degree of physical impairment, usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect the employee's wage-earning capacity in his disabled condition.<sup>6</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 relied upon which OWCP relies must provide a detailed description of the condition.<sup>7</sup> Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.<sup>8</sup>

When OWCP makes a 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, *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, local Chamber of Commerce, employer contacts, and actual job postings.<sup>9</sup> Lastly, OWCP applies the principles set forth in *Albert C. Shadrick*,<sup>10</sup> as codified in section 10.403 of OWCP regulations,<sup>11</sup> to determine the percentage of the employee's loss of wage-earning capacity.<sup>12</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 postinjury or subsequently acquired conditions. Any incapacity to

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<sup>5</sup> 20 C.F.R. §§ 10.402, 10.403; *John D. Jackson*, 55 ECAB 465 (2004).

<sup>6</sup> 5 U.S.C. § 8115(a); 20 C.F.R. § 10.520; *see Pope D. Cox*, 39 ECAB 143 (1988).

<sup>7</sup> *William H. Woods*, 51 ECAB 619 (2000).

<sup>8</sup> *John D. Jackson*, *supra* note 5.

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.6.a (June 2013).

<sup>10</sup> *Albert C. Shadrick*, *supra* note 3.

<sup>11</sup> 20 C.F.R. § 10.403.

<sup>12</sup> *Supra* note 4.

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 the claimant may receive compensation.<sup>13</sup>

### **ANALYSIS -- ISSUE 1**

OWCP issued its July 29, 2016 loss of wage-earning capacity determination based on appellant's capacity to earn wages as a surveillance system monitor. As noted above, it must initially determine appellant's medical condition and work restrictions before selecting an appropriate position that reflects his wage-earning capacity. The medical evidence upon which OWCP relies must provide a detailed description of the condition.<sup>14</sup>

In reports dated February 11, 2014 to March 24, 2015, Dr. Kasow, appellant's treating physician, reviewed appellant's history, including diagnostic testing. Upon physical examination, he observed rhomboid and tenderness of the paracervicals from C3 to C7, paracervical triggerpoint pain around T1-2, and trapezius trigger point pain. Range of motion was active. Dr. Kasow diagnosed shoulder joint pain and cervical post-laminectomy syndrome. He indicated that appellant was able to work with restrictions of sitting only, no lifting, pushing, or pulling over 20 pounds, and no reaching above the shoulder, bending, squatting, kneeling, climbing, or crawling. The Board finds that these limitations are within the physical demands of the surveillance system monitor position, which provided sedentary strength level and restrictions of no climbing, stooping, kneeling, crouching, crawling, and reaching.

Appellant failed to submit any medical evidence which demonstrated that he was unable to work within the work restrictions provided by Dr. Kasow. The Board finds, therefore, that appellant had the physical capacity to perform the duties of the selected position.

The Board also finds that appellant had the necessary vocational and educational preparation for the selected position of surveillance system monitor. Appellant had over three months of experience in corrections and the military with knowledge of law enforcement terminology, relaying information in an emergency situation, and experience communicating in a calm effective way with counselling and training staff, inmates, and soldiers. The rehabilitation counselor advised that the surveillance system monitor position was reasonably available in the local labor market.

The Board concludes that OWCP considered the appropriate factors in determining that the position of surveillance system monitor represented appellant's wage-earning capacity.<sup>15</sup> These factors include availability of suitable employment and appellant's physical limitations, usual employment, age, and employment qualifications.<sup>16</sup> The evidence of record establishes that appellant had the requisite physical ability, skills, and experience to perform the position and

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<sup>13</sup> *James Henderson, Jr.*, 51 ECAB 268 (2000).

<sup>14</sup> *Supra* note 7.

<sup>15</sup> *John D. Jackson*, *supra* note 5.

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

that such a position was reasonably available within the general labor market of his commuting area. OWCP therefore properly determined that the position of surveillance system monitor reflected appellant's wage-earning capacity, and properly reduced his compensation on July 29, 2016.<sup>17</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless it meets the requirements for modification.<sup>18</sup> OWCP procedures at Chapter 2.1501 contain provisions regarding the modification of a formal loss of wage-earning capacity.<sup>19</sup> This relevant part provides that a formal loss of wage-earning capacity will be modified when: (1) the original rating was in error; (2) the claimant's medical condition has materially changed; or (3) the claimant has been vocationally rehabilitated.<sup>20</sup>

### **ANALYSIS -- ISSUE 2**

OWCP issued a loss of wage-earning capacity determination on July 29, 2016. On August 11, 2016 appellant requested reconsideration. As a formal loss of wage-earning capacity determination was in effect at the time appellant requested reconsideration, he must show a basis for modification of that decision to be entitled to wage-loss compensation.

The Board finds that the evidence submitted is insufficient to establish that the original loss of wage-earning capacity determination was erroneous or to establish a material change in appellant's employment-related conditions.<sup>21</sup> Appellant failed to submit any medical evidence to establish a material change in the nature and extent of his accepted cervical and right shoulder conditions.

Based upon appellant's submission of evidence that his daughter remained a dependent OWCP properly adjusted his pay rate to the  $\frac{3}{4}$  augmented rate as he had a qualified dependent. It also advised him that his pay rate included Sunday premium, however, that it was still seeking further information from the employing establishment as to whether he worked the night shift at the time of injury.<sup>22</sup>

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<sup>17</sup> *James Smith*, 53 ECAB 188 (2001).

<sup>18</sup> *Sue A. Sedgwick*, 45 ECAB 211 (1993).

<sup>19</sup> *Supra* note 9 at Chapter 2.1501 (June 2013).

<sup>20</sup> *Id.* at Chapter 2.1501.3(a).

<sup>21</sup> *Supra* note 18.

<sup>22</sup> This aspect of appellant's pay rate determination remains in an interlocutory posture, over which the Board does not have jurisdiction. *See J.J.*, Docket No. 15-1951 (May 16, 2016).

Appellant, therefore, did not meet his burden of proof to show that the July 29, 2016 loss of wage-earning capacity determination should be modified.<sup>23</sup>

Appellant may request modification of the loss of 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 compensation benefits based on his capacity to earn wages in the selected position of surveillance system monitor, and that appellant did not meet his burden of proof to establish that a July 29, 2016 loss of wage-earning capacity determination should be modified.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 7 and July 29, 2016 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: September 20, 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

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<sup>23</sup> See *T.M.*, Docket No. 08-975 (issued February 6, 2009).