

Pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.⁴

ISSUE

The issue is whether OWCP met its burden of proof to reduce appellant's compensation based on its determination that the constructed position of dispatcher, security services represented his wage-earning capacity.

FACTUAL HISTORY

This case has previously been before the Board.⁵ The facts of the case as presented in the Board's prior order are incorporated herein by reference. The relevant facts are as follows.

On August 3, 2005 appellant, then a 56-year-old transportation security screener, filed a traumatic injury claim (Form CA-1) alleging that, on August 1, 2005, he experienced low back pain while lifting bags in performance of his federal employment duties. OWCP accepted the claim for lumbosacral sprain/strain. It subsequently expanded acceptance of the claim to include lumbosacral intervertebral disc degeneration and derangement of the posterior horn of the right medial meniscus. OWCP paid appellant wage-loss compensation and medical benefits on the supplemental rolls commencing October 15, 2005 and on the periodic rolls as of January 22, 2006.⁶

In 2012, appellant was referred for vocational rehabilitation services. Based on his experience, education, medical restrictions, and a labor market survey, the rehabilitation counselor determined that appellant was capable of earning wages as a dispatcher, radio (emergency) a position listed in the Department of Labor's *Dictionary of Occupational Titles* (DOT) and bearing the DOT #379.362.010. Although appellant participated in a job search, the efforts did not result in job placement. By decision dated May 2, 2012, OWCP reduced his compensation based on the constructed position of dispatcher, radio (emergency). However, by decision dated July 18, 2012, an OWCP hearing representative set aside the May 2, 2012 decision and remanded the case for

³ 5 U.S.C. § 8101 *et seq.*

⁴ The record provided to the Board includes evidence received after OWCP issued its November 16, 2016 decision. The Board's jurisdiction is limited to the evidence that was before OWCP at the time of its final decision. 20 C.F.R. § 501.2(c)(1). Therefore, the Board is precluded from considering this evidence for the first time on appeal. *Id.*

⁵ *Order Granting Motion for Remand and Cancelling Oral Argument*, Docket No. 14-1024 (issued August 26, 2014).

⁶ Appellant also has an accepted claim for bilateral carpal tunnel syndrome under OWCP File No. xxxxxx025 which is not part of the combined case record. He underwent OWCP-approved right carpal tunnel release on October 27, 2008 and left carpal tunnel release February 23, 2009. Appellant subsequently underwent carpal tunnel releases on December 16, 2013 for the right side and January 29, 2014 for the left side. In an August 12, 2014 report, Dr. Marc Suffis, Board-certified in emergency medicine and a specialist in occupational medicine, opined that appellant had reached maximum medical improvement (MMI) for his bilateral carpal tunnel syndrome and performed an impairment examination. OWCP administratively combined the present current claim, File No. xxxxxx299, with File Nos. xxxxxx106, xxxxxx183, and xxxxxx243, which had been accepted for cervical and/or lumbar strains, and subsequent aggravation. OWCP File No. xxxxxx243 was designated as the master file.

further development. Compensation for total disability was reinstated and further development with vocational rehabilitation services was obtained.

By decision dated December 19, 2012, OWCP reduced appellant's compensation based on the constructed position of ambulance dispatcher, Standard Occupational Classification (SOC) 43-5031,⁷ which was the equivalent to DOT #379.362-010. However, on March 5, 2013, an OWCP hearing representative set aside the December 19, 2012 decision and remanded the case for further development. Compensation for total disability was reinstated and further development with vocational rehabilitation services was obtained.

By decision dated July 11, 2013, OWCP reduced appellant's compensation based on the constructed position of customer service representative, DOT # 239.362-014. By decision dated January 10, 2014, an OWCP hearing representative affirmed OWCP's July 11, 2013 decision.

On March 31, 2014 appellant appealed to the Board. The Board issued an *Order Granting Motion for Remand and Cancelling Oral Argument* on August 26, 2014.⁸ In an August 6, 2014 motion, the Director of OWCP had requested that the Board remand the case, acknowledging that OWCP had not properly supported its finding that the selected position was medically suitable. The Director also noted that there was an issue with regard to the wage rate used for the selected position. The Board granted the Director's motion, set aside OWCP's January 10, 2014 decision, and remanded the case for additional development to be followed by a *de novo* decision.

On remand, OWCP referred appellant for a second opinion examination with Dr. Louis F. Kretschmer, a Board-certified orthopedic surgeon, to determine appellant's disability status. The updated statement of accepted facts (SOAF) noted appellant's accepted work-related conditions including the accepted bilateral carpal tunnel syndrome under OWCP File No. xxxxxx025.

In a December 22, 2014 report, Dr. Kretschmer opined that appellant was partially disabled as a result of the multiple level degenerative disc disease of the lumbar spine and was able to work with a lifting restriction of no greater than 40 pounds on a repetitive basis. In his December 22, 2014 work capacity evaluation, Form OWCP-5c, he indicated that appellant's accepted conditions were at maximum medical improvement (MMI) and that appellant could perform his date-of-injury position. In a January 8, 2015⁹ corrected Form OWCP-5c, Dr. Kretschmer indicated that appellant was not capable of performing his usual job, but could work with permanent restrictions of no repetitive lifting over 40 pounds.

Following Dr. Kretschmer's examination, OWCP referred appellant's file to vocational rehabilitation services for updated Labor Market Surveys (Form CA-66) and wage information for

⁷ The SOC is derived from the Occupational Information Network (O*NET), which was developed under the sponsorship of the U.S. Department of Labor, Employment and Training Administration. The DOT is replaced by the O*NOET Database as a new system of occupational information that reflects current occupations in both government and non-government positions.

⁸ *Supra* note 5.

⁹ The form notes a date of January 8, 2014. However, this appears to be a typographical error as Dr. Kretschmer's second opinion examination was in December 2014

the positions of receptionist, customer service representative and dispatcher, security services, which were previously identified as vocationally appropriate for appellant.

On February 6, 2015 the vocational rehabilitation counselor provided updated CA-66 forms for the identified positions which were identified in the sedentary to light-duty categories. For the position of dispatcher, security services (DOT # 372.167-010), the physical demand was listed as light duty, which required frequent lifting of 10 pounds and occasional lifting of no greater than 20 pounds, and involved frequent reaching, handling, fingering activities from 1/3 to 2/3 of the time. The position involved dispatching security personnel to the client's site for private, protective-service. The duties of the position required reading posted orders to ascertain personnel requirements and notifying guards of work assignments and changes in instructions by telephone. The position also required posting assignment information on a dispatch board, compiling and recording data, issuing regular and special equipment to guards, and may include interviewing applicants and recommending hiring of guards.

The vocational rehabilitation counselor noted that appellant met the specific vocational preparation requirement of one to two years as he had extensive prior experience and skill in related security positions and would be entering the position as a skilled employee.¹⁰ The vocational rehabilitation counselor indicated that King County was used to determine the average annual wage of \$46,906.00 annually (\$22.07 per hour) and job availability, which demonstrated that the job was being performed in sufficient numbers so as to make it reasonably available to appellant within his commuting area. The rehabilitation specialist further opined that, given appellant's extensive prior experience and skill in related security positions, he would be capable of reemployment as a skilled employee capable of earning above entry level wages. The specialist further opined that the dispatcher, security services position was within his physical limitation of lifting no more than 40 pounds and that contact with employing establishments revealed that the physical requirements of the position more appropriately matched that of a sedentary limitation.

In a February 23, 2015 report, Dr. Suffis indicated that appellant's chronic low back pain with degenerative disc disease had been at MMI for a while and that there had been no change in his condition. He noted that appellant had previous permanent restrictions.

On April 15, 2015 OWCP requested clarification from Dr. Kretschmer. It specifically asked him to confirm that the conditions of bilateral carpal tunnel syndrome and right knee derangement of posterior horn of medial meniscus, as outlined as accepted work-related conditions in the SOAF, were also considered in determining appellant's work-related disability.

On June 10, 2015 Dr. Kretschmer reexamined appellant. In a report of the same date, he opined that all of appellant's work-related accepted conditions in OWCP File Nos. xxxxxx243, xxxxxx813, xxxxxx106, and xxxxxx0245 had resolved and were no longer disabling. Dr. Kretschmer noted that, under OWCP File No. xxxxxx025, Dr. Suffis found that appellant had reached MMI for the accepted bilateral carpal tunnel condition on December 20, 2006. He

¹⁰ The vocational rehabilitation counselor had found that, through his work as an airline security representative and supervisor, appellant had met the necessary skills. He had demonstrated the ability to use a computer for his regular job tasks and thus met the computer skill requirement. The counselor additionally had worked in highly stressful environments, which was a required temperament for radio (emergency) dispatcher.

reviewed the positions of dispatcher, security services and customer service representative and opined that, taking into account all claims and conditions accepted, appellant was capable of performing those positions without specific restrictions. In a June 24, 2015 work capacity evaluation form (Form OWCP-5c), Dr. Kretschmer opined that appellant had reached MMI and was capable of returning to his usual job. He noted that this included all claims and conditions accepted.

In a July 9, 2015 report, Dr. Kretschmer noted that the accepted medial meniscal tear, degenerative in nature, had reached a steady state and no further treatment was indicated as of June 10, 2015, the date of his examination. He reiterated that he had reviewed the positions of dispatcher, security services, and customer service representative and opined that, taking into account all claims and conditions accepted, appellant was capable of performing those positions without restrictions.

On July 30, 2015 the vocational rehabilitation counselor provided updated labor market data for the positions of dispatcher, security services and customer service representative. She indicated that the wage information for the dispatcher position did not include police, fire, and emergency. In an August 18, 2015 report and on the July 30, 2015 Form CA-66, the vocational rehabilitation counselor opined that based on appellant's extensive prior experience and skill in related security positions, appellant was qualified to enter the dispatcher, security services position as a skilled employee capable of earning average wage of \$17.36 per hour or \$694.40 per week.¹¹

On September 10, 2015 OWCP issued a notice of proposed reduction of appellant's compensation, finding that he was partially disabled from work and that the position of dispatcher, security services (DOT # 372.167-010) was medically and vocationally consistent with his medical limitations and work experience. It found that he was capable of earning wages at the rate of \$694.40 per week as a dispatcher, security services and that the position was reasonably available within his commuting area. OWCP provided an attachment detailing the application of the *Shadrick* formula.¹² Appellant was provided 30 days to submit evidence and argument challenging the proposed action.

In a September 17, 2015 report, Dr. Suffis noted that, while appellant was at MMI for his back conditions, appellant could not lift 40 pounds on a regular basis or return to full duty in his date-of-injury position. In a September 17, 2015 Form OWCP-5c, he opined that appellant could return to work with restrictions of sitting no more than 4 hours, walking and standing no more than 2 hours, lifting no more than 2 hours, repetitive movements of the wrists for no more than 2 hours, and pushing and pulling no more than 30 minutes, a 10-pound weight restriction was also noted.

An August 13, 2015 x-ray report of the bilateral knees was submitted. This indicated that the right knee had no changes from the prior study of July 15, 2010, but the degree of degenerative joint disease in the left knee was worse than when compared to a prior study of July 15, 2010.

¹¹ On August 21, 2015 the vocational rehabilitation specialist indicated that the dispatch wage was the average wage of all the employing establishment contacts and was the only wage that could be supported for security dispatchers.

¹² *Albert C. Shadrick*, 5 ECAB 376 (1953).

On November 2, 2015 OWCP requested that Dr. Suffis review the job classifications for the dispatcher, security service and customer service representative positions and determine whether, considering the whole person, appellant was able to perform the identified positions. On November 9, 2015¹³ Dr. Suffis opined that the positions of both dispatcher, security service and customer service representative would be within appellant's physical capabilities so long as appellant was allowed to have regular position changes and the sitting, standing and walking requirements listed on his OWCP-5c form were maintained. A copy of his September 17, 2015 Form OWCP-5c was provided.

In a November 16, 2015 report, Dr. Suffis indicated that there was no neurological basis for surgical intervention at the present time for appellant's degenerative disc disease, lumbar spine, with probable spinal stenosis.

By decision dated December 16, 2015, OWCP finalized the notice of proposed reduction and reduced appellant's compensation, effective that date, for the reason that the position of dispatcher, security services was medically and vocationally suitable, was reasonably available within his commuting area, and represented his wage-earning capacity.

On January 13, 2016 OWCP set aside the December 16, 2015 decision due to a typographical error when computing the actual entitlement following the reduction. Accordingly, it reissued a notice of proposed reduction based on the position of dispatcher, security services.¹⁴ Appellant was provided 30 days to submit evidence and argument challenging the proposed action. No response was received within the time allotted.

By decision dated February 22, 2016, OWCP reduced appellant's compensation, effective January 9, 2016, based on his capacity to earn wages as a dispatcher, security services. It found that the evidence of record showed that he was vocationally and physically capable of working as a dispatcher, security services. OWCP applied the *Shadrick* formula to adjust appellant's compensation.

On March 14, 2016 OWCP received appellant's March 10, 2016 request for a hearing before an OWCP hearing representative. In a March 12, 2016 letter, counsel argued that the selected position of dispatcher, security services required appellant to finger objects frequently which contradicted Dr. Suffis' September 17, 2015 restrictions of no repetitive wrists movements for more than two hours in an eight-hour day. In support of his argument, counsel cited to OWCP's Federal (FECA) Procedural Manual Chapter 2.813, Exhibit 1: Physical Demand Definitions, for the definition of "repetitive movements of the wrists (fingering)" and "frequently."¹⁵ He indicated

¹³ The letter is dated November 9, 2014. However, this appears to be a typographical error as Dr. Suffis electronically signed the letter on November 10, 2015.

¹⁴ On January 20, 2016 OWCP received appellant's request for an oral hearing of its December 16, 2015 decision before an OWCP hearing representative. On February 1, 2016 OWCP's Branch of Hearings and Review found that the case not in posture for a hearing as no final decision had been made on the issue upon which the appeal was requested.

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Vocational Rehabilitation Services*, Chapter 2.813 (February 2011).

that repetitive movements involved fingering and since the selected position involved frequent fingering for 1/3 to 2/3 of the time, by definition, that amounted to a maximum of 5 hours and 20 minutes in an 8-hour day.

In a July 21, 2016 report, Dr. Suffis continued to relate that appellant was at MMI for his lumbar spine degenerative disc disease and that he would continue to see him on an as-needed basis for administrative needs.

Chiropractic reports from May 13 through July 12, 2016 were also provided.

An oral hearing was held on October 6, 2016. Counsel reiterated his arguments that the selected position was not suitable as it did not meet Dr. Suffis' work restriction against repetitive wrist movements more than two hours a day.

By decision dated November 16, 2016, an OWCP hearing representative affirmed OWCP's February 22, 2016 reduction of appellant's compensation based on his capacity to earn wages as a dispatcher, security services. The hearing representative found that Dr. Suffis' restriction against repetitive wrist movements more than two hours per day did not restrict appellant from using his fingers more than two hours per day. The hearing representative concluded that fingering movements were distinguishable from wrist movements.

LEGAL PRECEDENT

Once OWCP has made a determination that a claimant is totally disabled from work as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of benefits.¹⁶ Under section 8115(a), 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 his or her wage-earning capacity, or if the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his or her usual employment, age, qualifications for other employment, the availability of suitable employment, and other factors or circumstances which may affect wage-earning capacity in his or her disabled condition.¹⁷

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 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.¹⁸

¹⁶ *T.O.*, 58 ECAB 377 (2007).

¹⁷ *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

¹⁸ *See D.P.*, Docket No. 11-1796 (issued March 23, 2012).

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 DOT or otherwise available in the open market, that fits the employee's capabilities with regard to his or her physical limitations, education, age, and prior experience.¹⁹ 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*²⁰ will result in the percentage of the employee's loss of wage-earning capacity.

ANALYSIS

The Board finds that OWCP met its burden of proof to establish that the constructed position of dispatcher, security services represented appellant's wage-earning capacity.

The constructed position of dispatcher, security services entailed work for private security firms, not police, fire, or emergency services. The duties of the position included reading posted orders to ascertain personnel requirements and notifying guards of work assignments and changes in instructions by telephone. The position also required posting assignment information on a dispatch board, compiling and recording data, issuing regular and special equipment to guards, and may include interviewing applicants and recommending hiring of guards.

OWCP relied on the opinion of Dr. Kretschmer, an OWCP second-opinion physician, in finding that the constructed position was within appellant's physical limitations. It later sought clarification from Dr. Kretschmer to confirm that the accepted conditions of bilateral carpal tunnel syndrome²¹ and right knee derangement of posterior horn of medial meniscus were considered. Dr. Kretschmer subsequently opined that all of appellant's work-related, accepted conditions had resolved or reached a stable state as of June 10, 2015, the date of his examination, and that he had no permanent restrictions. He opined that, taking into account all claims and conditions accepted, appellant was capable of performing the selected position. Thus, Dr. Kretschmer's opinion supports that appellant could perform the position of dispatcher, security services.

On November 2, 2015 OWCP requested that appellant's treating physician, Dr. Suffis, review the position description for dispatcher, security services and determine whether appellant could perform the identified position. Dr. Suffis responded on November 9, 2014 that appellant could perform the position of dispatcher, security services, so long as he was allowed regular position changes and the sitting, standing, and walking requirements listed on his OWCP-5c form were maintained. He did not relate that appellant would be unable to perform this position due to wrist or fingering limitations.

In a September 17, 2015 Form OWCP-5c, Dr. Suffis opined that appellant could return to work, but that he had permanent restrictions of sitting no more than 4 hours, walking and standing

¹⁹ *Mary E. Marshall*, 56 ECAB 420 (2005); *James A. Birt*, 51 ECAB 291 (2000).

²⁰ 5 ECAB 376 (1953); codified by regulations at 20 C.F.R. § 10.403.

²¹ Impairments that preexisted the employment injury, in addition to injury-related impairments, must be taken into consideration in selecting a job within a claimant's work tolerance. *Gary L. Moreland*, 54 ECAB 638 (2003).

no more than 2 hours, lifting no more than 2 hours, repetitive movements of the wrists no more than 2 hours, pushing and pulling no more than 30 minutes, and a 10-pound weight restriction. In so far as the restrictions provided by Dr. Suffis on the form are inconsistent with his narrative report, the probative value of his opinion is reduced.²²

As both Dr. Kretschmer and Dr. Suffis reviewed the position description for a dispatcher, security services, and both physicians opined following review of the actual description that appellant could perform the duties of this position, the Board finds that OWCP met its burden of proof to establish that the constructed position was medically suitable.

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 capacity, and educational background.²³ The rehabilitation counselor determined that appellant had the skills necessary to perform the position of dispatcher, security services for private security firms based on his prior work experience and skills learned in prior related security positions. The rehabilitation counselor found that the position existed in sufficient numbers within appellant's commuting area. The rehabilitation counselor concluded that based on appellant's education, work experience, and transferable skills that he was capable of earning the median wages in the identified position as a skilled worker. 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.²⁴ 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 he had the capacity to perform the selected position.²⁵ OWCP also properly determined his 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 dispatcher, security services reflected appellant's wage-earning capacity effective December 16, 2015.

On appeal counsel contends that the position of dispatcher violates restrictions against fingering as Dr. Suffis had precluded repetitive wrist movements for no more than two hours per day. As noted herein, the Board finds that the restrictions provided by Dr. Suffis on the form report are inconsistent with his narrative report, thus his opinion lacked probative value.

Appellant may request modification of the loss of wage-earning capacity determination, supported by new evidence of argument, at any time before OWCP.

²² See *I.B.*, Docket No. 11-1796 (issued March 23, 2012).

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

²⁴ *C.S.*, Docket No. 17-0496 (issued May 25, 2017).

²⁵ *Id.*

CONCLUSION

The Board finds that OWCP properly reduced appellant's compensation based on its determination that the constructed position of dispatcher, security services represented his wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the November 16, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 26, 2018
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board