



when she tripped on uneven grass while in the performance of duty. She stopped work on the date of injury.

On September 21, 2015 OWCP initially accepted the claim for an open left ankle fracture of the medial malleolus. It subsequently expanded the acceptance of the claim to include left ankle sprain, not otherwise specified, and loose body in the left ankle. OWCP authorized a left ankle arthroscopy with debridement and synovectomy, which was performed on February 25, 2016 by Dr. Holman Chan, an attending Board-certified orthopedic surgeon. It paid appellant wage-loss compensation on the supplemental rolls commencing October 17, 2015.

On a June 8, 2016 work capacity evaluation form (Form OWCP-5c), Dr. Chan noted appellant's accepted condition of left ankle sprain. He advised that she was not capable of performing her usual job without restriction as her left ankle was weak and unstable. Dr. Chan indicated, however, that appellant could perform sedentary, light, or medium work, eight hours a day, walking and standing limited to two hours a day with breaks, pushing, pulling, and lifting limited to one hour a day and 10 pounds, and no squatting, kneeling, or climbing. He further indicated that she could operate a motor vehicle at work and to and from work. Dr. Chan determined that appellant had not reached maximum medical improvement (MMI).

On June 21, 2016 the employing establishment, in response to OWCP's June 16, 2016 letter requesting a copy of appellant's limited-duty job offer, related that appellant had not returned to work and, consequently, no limited-duty job offer had been provided to her.

OWCP referred appellant for vocational rehabilitation services beginning on June 21, 2016. Appellant underwent a regimen of vocational testing.

In reports dated July 6 and August 3, 19, and 31, 2016, Dr. Chan noted appellant's history, findings on physical examination, and assessed sprain of the anterior talofibular ligament of left ankle, subsequent encounter. He recommended that she undergo a functional capacity evaluation (FCE). In the report dated July 6, 2016 and OWCP-5c forms dated August 3 and 31, 2016, Dr. Chan reiterated his opinions that appellant could work with restrictions and that she had not reached MMI. He indicated that she could push, pull, and lift limited to one hour a day and 20 pounds, and squat, kneel, or climb limited to one hour a day. Appellant could also sit, reach, reach above the shoulder, twist, bend, or stoop eight hours a day. Dr. Chan indicated that he was awaiting an FCE to identify a position for appellant.

A rehabilitation counselor prepared a training plan to prepare appellant for entry level employment as a receptionist, U.S. Department of Labor, *Dictionary of Occupational Titles* (DOT) #237.367.038, or billing clerk, DOT #214.382.014. The positions were classified as sedentary, with three-to-six months of specific vocational preparation. The rehabilitation counselor conducted a labor market survey to verify that receptionist and billing clerk positions were reasonably available in appellant's commuting area with entry-level wages of \$10.00 to \$12.00 an hour. She prepared a rehabilitation plan on September 5, 2016 to train appellant for the positions of receptionist or billing clerk, to be followed by 90 days of job placement assistance. The rehabilitation counselor advised that appellant required approximately 32 weeks of computer

training at Asher College beginning October 3, 2016 through May 17, 2017.<sup>2</sup> She estimated that, after vocational training and participation in a job placement program, appellant would have estimated yearly earnings between \$27,300.00 and \$33,820.00.

By letter dated September 28, 2016, OWCP notified appellant that the selected positions of receptionist and billing clerk were within her medical limitations and that she would receive 90 days of placement after any necessary training. It also informed her that she was expected to cooperate fully with the rehabilitation program, so that she might return to work.

OWCP received appellant's September 28, 2016 FCE performed by Robert Wolinsky, a physical therapist, which indicated light-to-medium work capacity as her demonstrated capabilities did not meet her city carrier job requirements as she could not lift up to 70 pounds, carry up to 35 pounds even occasionally, or stand and walk frequently. Regardless of the work environment, Mr. Wolinsky found that appellant should avoid kneeling, crawling, and negotiation of ladders and uneven surfaces. Inclines should be limited to no greater than 20 degrees. Mr. Wolinsky recommended that appellant continue to use a cane as prescribed by her physician and to participate in her home exercise program with specific focus on left foot mobility, strength, endurance, and proprioception.

On October 17, 2016 appellant attended the authorized computer training program to prepare her for employment in the selected positions. She subsequently completed the computer training program and earned a certificate of completion for the office administrator program on May 22, 2017.

An additional report dated October 5, 2016 from Dr. Chan was received. Dr. Chan noted appellant's history, findings on physical examination, and assessed sprain of the anterior talofibular ligament of left ankle, subsequent encounter. He reviewed FCE results and again advised that she was unable to perform her regular duties as a postal carrier. Dr. Chan restated his prior standing, walking, squatting, and kneeling work restrictions. He also indicated that appellant may push and pull up to 60 pounds and 40 pounds actively for less than 33 percent of the time, lift up to 20 pounds for less than 33 percent of the time, and climb ladders. Dr. Chan maintained that her work restrictions were permanent based on the FCE results. He determined that appellant had reached MMI.

OWCP, on January 10, 2017, referred appellant, together with a statement of accepted facts (SOAF), the medical record, and a list of questions, to Dr. Gary J. La Tourette, a Board-certified orthopedic surgeon, for a second opinion to determine whether she had any additional employment-related conditions, residuals of her employment-related conditions, and employment-related work restrictions, and required further medical treatment.

In a January 31, 2017 report, Dr. LaTourette examined appellant and diagnosed left ankle sprain/strain and left ankle osteochondral defect medial talar dome, and loose body. He advised that the diagnosed condition was directly caused by appellant's September 1, 2015 work injury. Dr. La Tourette noted her prior left ankle arthroscopy with debridement of osteochondral defect

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<sup>2</sup> Subsequently, the time period for appellant's computer training was changed to begin on October 17, 2016 and end on May 26, 2017 due to a cost adjustment for the training.

of the talar dome and maintained that the only other surgery that could possibly be performed would be an osteotomy with osteochondral microfracture drilling which may or may not substantially improve her ankle pain and function. Therefore, he advised that he could not strongly recommend such surgery at that time. Dr. La Tourette indicated that appellant had already maximized physical therapy and was on a home exercise program and, thus, the only other treatment he could recommend for her neurologic pain symptoms were the pharmaceuticals of Neurotin and Lyrica.

On a Form OWCP-5c dated January 31, 2017, Dr. La Tourette indicated that appellant could not perform her usual job, but she could work eight hours a day standing limited to one hour a day, lifting limited to one hour a day and 20 pounds, and climbing limited to one hour a day and 10 pounds. He noted that her limitations were permanent.

On August 8, 2017 the rehabilitation counselor informed OWCP that appellant had returned to work for a private employer, Associated Supply Company, Inc. as a full-time file clerk, effective, August 7, 2017, with a salary of \$11.00 an hour. A copy of appellant's file clerk position was illegible. However, on a facsimile cover sheet dated August 8, 2017 the rehabilitation counselor listed the job requirements, which included accurately filing alphabetically, maintaining supplies and coffee, creating labels in Microsoft Word, creating and adding materials to hard copy files as needed for record keeping, conducting routine verifications to ensure integrity of the filing system, and answering telephones for lunch break.

A September 27, 2017 letter from a human resources employee at Associated Supply Company, Inc. was received. She verified that appellant was a full-time employee with a salary of \$11.00 an hour.

By letter dated October 13, 2017, OWCP advised appellant that her monetary compensation would be reduced effective August 7, 2017 based upon her actual earnings.<sup>3</sup>

A November 17, 2017 telephone memorandum (Form CA-110) reflects that appellant notified OWCP that she had been laid off work, effective at 3:00 p.m. that date. Appellant noted that her private employer expected to rehire her following the holidays. A second telephone memorandum dated November 28, 2017 reflects that appellant was informed by OWCP that she would not be entitled to total disability compensation if she was no longer employed for any reason other than her injury.

By decision dated January 30, 2018, OWCP reduced appellant's wage-loss compensation, effective August 7, 2017, based upon her loss of wage-earning capacity. It found that her actual wages as a file clerk with Associated Supply Company, Inc. fairly and reasonably represented her wage-earning capacity. OWCP noted that appellant had worked in this position for more than 60 days and that the position was in compliance with her work restrictions set forth by Dr. La Tourette. It obtained pay rate information from the employing establishment which indicated that her weekly pay rate at the time of injury was \$701.20. The current weekly pay rate for the job and step when injured, effective September 2, 2017, was found to be \$788.58.

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<sup>3</sup> This letter did not make findings that appellant's actual earnings fairly and reasonably represented her wage-earning capacity and was not accompanied by appeal rights.

Appellant's actual weekly earnings were reported as \$440.00. Her wage-earning capacity percentage was therefore 56 percent and her weekly loss was \$392.67. This weekly earnings loss multiplied by the 75 percent compensation rate yielded a weekly compensation pay rate of \$308.53 or a four-week loss of wage-earning capacity of \$994.00.<sup>4</sup>

### **LEGAL PRECEDENT**

Once OWCP accepts a claim and pays compensation, it has the burden of proving that disability has ceased or lessened in order to justify termination or modification or termination of compensation benefits.<sup>5</sup>

Under 5 U.S.C. § 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. Generally, wages actually earned are the best measure of wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.<sup>6</sup>

As long as there is no work stoppage due to the accepted condition(s), a formal loss of wage-earning capacity determination should be issued following 60 calendar days from the date of return to work.<sup>7</sup> If the injured employee is no longer working in the alternative position upon which a rating is being considered, OWCP may consider a retroactive loss of wage-earning capacity determination.<sup>8</sup> However, this is rare and should only be made where the employee worked in the position for at least 60 days, the employment fairly and reasonably represented his or her wage-earning capacity as outlined under Federal (FECA) Procedure Manual Chapter 2.815.5, and the subsequent work stoppage or change in the alternative positions(s) did not occur because of any change in the employee's injury-related condition affecting his or her ability to work.<sup>9</sup>

OWCP procedures state that, after a claimant has been working for 60 days, it will make a determination as to whether actual earnings fairly and reasonably represent wage-earning capacity.<sup>10</sup> The formula for determining loss of wage-earning capacity based on actual earnings,

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<sup>4</sup> These calculations were recorded in an October 17, 2017 wage-earning capacity form (Form CA-816).

<sup>5</sup> *P.C.*, Docket No. 16-1714 (issued October 18, 2017); *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

<sup>6</sup> *C.M.*, Docket No. 16-1638 (issued October 6, 2017); *E.W.*, Docket No. 14-0584 (issued July 29, 2014); *Dennis E. Maddy*, 47 ECAB 259, 262 (1995).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on Actual Earnings*, Chapter 2.815.6(a) (June 2013); *see also D.M.*, Docket No. 16-1527 (issued July 25, 2017).

<sup>8</sup> *Id.* at Chapter 2.815.7.

<sup>9</sup> *Id.* at Chapter 2.815.5.

<sup>10</sup> *Id.*; *see also L.J.*, Docket No. 14-0970 (issued August 21, 2014).

developed in the *Albert C. Shadrick* decision,<sup>11</sup> has been codified at section 10.403 of OWCP regulations.<sup>12</sup> Under the *Shadrick* formula, OWCP calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's actual earnings by the current or updated pay rate for the position held at the time of injury.<sup>13</sup> The employee's wage-earning capacity in dollars is computed by first multiplying the pay rate for compensation purposes, defined in 20 C.F.R. § 10.5(a) as the pay rate at the time of injury, the time disability begins, or the time disability recurs, whichever is greater, by the percentage of wage-earning capacity. The resulting dollar amount is then subtracted from the pay rate for compensation purposes to obtain loss of wage-earning capacity.<sup>14</sup> The regulations further provide that the employee's wage-earning capacity in terms of percentage is computed by dividing the employee's earnings by the current pay rate.<sup>15</sup>

### ANALYSIS

The Board finds that OWCP met its burden of proof to reduce appellant's wage-loss compensation benefits based on her actual earnings in a full-time, private-sector position.

OWCP accepted that appellant, a full-time mail carrier, sustained left knee and left ankle injuries in the performance of duty on September 1, 2015 and authorized left ankle arthroscopy with debridement and synovectomy which was performed on February 25, 2016. Appellant was treated by Dr. Chan, who found that she would be unable to return to her date-of-injury position with the employing establishment. However, Dr. Chan advised that she was not totally disabled and could return to full-time employment with specified permanent restrictions. OWCP referred appellant to vocational rehabilitation, who underwent vocational testing, and later successfully completed a computer training program. Appellant was evaluated by Dr. La Tourette, an OWCP referral physician, who opined that appellant could not perform her date-of-injury job, but she could work eight hours a day with certain restrictions. Subsequently, with vocational rehabilitation assistance, appellant found employment in the private sector commencing August 7, 2017 as a file clerk with Associated Supply Company, Inc. A human resources employee from Associated Supply Company, Inc. verified that appellant was a full-time employee with a salary of \$11.00 an hour. On November 17, 2017 appellant informed OWCP that she was laid off. On January 30, 2018 OWCP issued a formal wage-earning capacity decision finding that appellant's actual earnings in private employment as a file clerk, effective August 7, 2017, fairly and reasonably represented her wage-earning capacity and reduced her wage-loss compensation benefits.

The Board finds that appellant's actual earnings fairly and reasonably reflect that she has 56 percent wage-earning capacity. There is no medical evidence of record which establishes that appellant remains totally disabled due to the residuals of her accepted left knee injuries and

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<sup>11</sup> 5 ECAB 376 (1953).

<sup>12</sup> 20 C.F.R. § 10.403(c)-(e).

<sup>13</sup> *Id.* at § 10.403(c)-(d).

<sup>14</sup> *Id.* at § 10.403(e).

<sup>15</sup> *Id.* at § 10.403(d).

surgery. While OWCP issued a retroactive loss of wage-earning capacity determination, appellant had worked as a file clerk over 60 days. The record indicates that by the time OWCP issued its January 30, 2018 decision appellant had been laid off from work. However, the evidence of record does not reflect that appellant was laid-off from work due to her injury-related condition.<sup>16</sup> Therefore, the evidence of record is sufficient to establish that appellant's actual earnings as a file clerk fairly and reasonably represented her wage-earning capacity.<sup>17</sup>

The Board also finds that OWCP properly applied the *Shadrick* formula in determining appellant's loss of wage-earning capacity.<sup>18</sup> The calculations provided by OWCP in its January 30, 2018 decision comport with the *Shadrick* formula, as provided in section 10.403(d) of OWCP regulations.<sup>19</sup> Under the *Shadrick* formula, it first calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's actual earnings by the current or updated pay rate for the position held at the time of injury. OWCP properly used appellant's weekly pay rate of \$701.20 at the time of injury. It also properly used her current weekly pay rate for the date-of-injury position of \$788.58. OWCP used appellant's actual weekly earnings as a file clerk effective August 7, 2017 of \$440.00 per week. It then divided her actual weekly earnings during the relevant time period (\$440.00) by the current pay rate for the job she held when injured (\$788.58) for a total wage-earning capacity percentage of 56 percent. OWCP multiplied the weekly pay at the time of injury (\$701.20) by 56 percent for an adjusted wage-earning capacity of \$392.67. It then subtracted \$392.67 from \$701.20, yielding a loss of wage-earning capacity of \$308.53 per week. OWCP determined that compensation at the 75 percent augmented rate totaled \$231.40 per week or \$994.00 each four weeks.

On appeal appellant contends that she is having difficulty finding new employment within her work restrictions since being let go from Associated Supply Company, Inc. The Board notes that the fact that appellant has been unsuccessful in obtaining work in the positions selected by the vocational rehabilitation counselor does not establish that the work is not reasonably available in her commuting area.<sup>20</sup>

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

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<sup>16</sup> *Supra* note 9.

<sup>17</sup> *S.B.*, Docket No. 07-346 (issued April 23, 2008).

<sup>18</sup> *Albert C. Shadrick*, *supra* note 11.

<sup>19</sup> 20 C.F.R. § 10.403.

<sup>20</sup> *See O.V.*, Docket No. 16-1702 (issued September 13, 2017); *D.M.*, Docket No. 10-751 (issued November 26, 2010); *Leo A. Chartier*, 32 ECAB 652, 657 (1981).

**CONCLUSION**

The Board finds that OWCP properly reduced appellant's wage-loss compensation, effective August 7, 2017, to reflect her actual earnings in her private employment as a file clerk.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 30, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 15, 2018  
Washington, DC

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

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

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