

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

R.D., Appellant)	
)	
and)	Docket No. 19-0752
)	Issued: August 20, 2019
DEPARTMENT OF THE ARMY, UNITED)	
STATES MILITARY ACADEMY,)	
West Point, NY, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On February 22, 2019 appellant filed a timely appeal from a January 31, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ 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.

¹ The Board notes that following the January 31, 2019 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly reduced appellant's wage-loss compensation effective August 30, 2018 based on his capacity to earn wages as a service order clerk.

FACTUAL HISTORY

On January 22, 2004 appellant, then a 41-year-old motor vehicle operator, filed a traumatic injury claim (Form CA-1) alleging that on January 13, 2004 he experienced back pain and numbness of the left leg and right foot when he slipped and fell getting out of a truck while in the performance of duty. He stopped work on January 14, 2004 and did not return. OWCP accepted the claim for lumbar sprain. It subsequently expanded acceptance of the claim to include postlaminectomy syndrome and displacement of a lumbar intervertebral disc without myelopathy at L5-S1. OWCP paid appellant wage-loss compensation for total disability on the supplemental rolls effective March 7, 2004, and on the periodic rolls effective June 13, 2004.³

On July 13, 2015 OWCP referred appellant to Dr. Richard C. Smith, a Board-certified orthopedic surgeon, for a second opinion examination.

In a report dated July 30, 2015, Dr. Smith diagnosed low back pain, displacement of a lumbar intervertebral disc without myelopathy, and lumbar postlaminectomy syndrome. In a July 31, 2015 work capacity evaluation (OWCP-5c), he found that appellant could perform sedentary and light work for eight hours per day with restrictions.

In a March 30, 2016 work capacity evaluation (OWCP-5c), Dr. Michael Baskin, a Board-certified physiatrist, found that appellant could work up to two hours per day performing sedentary work.

OWCP determined that a conflict existed between Dr. Smith and Dr. Baskin regarding appellant's work restrictions and referred him to Dr. Markus Kornberg, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated October 5, 2016, Dr. Kornberg diagnosed failed back syndrome, chronic back pain, and left radicular symptoms. He advised that appellant had sustained a disc herniation at L5-S1 due to his January 13, 2004 employment injury. Dr. Kornberg opined that appellant could work eight hours per day with restrictions. In a work capacity evaluation (OWCP-5c) of even date, he found that appellant could perform medium work with restrictions, including sitting for four hours per day, walking for three hours per day, standing for two hours per day, and lifting up to 20 pounds for three hours per day.

On May 30, 2017 OWCP referred appellant to a vocational rehabilitation counselor for vocational rehabilitation.

³ On April 1, 2004 appellant underwent a discectomy and removal of a large extruded disc fragment compression the left L5-S1 nerve root. On July 15, 2004 he underwent a discectomy and removal of a huge focal disc herniation compression the right L5-S1 nerve root.

In a vocational rehabilitation report dated July 13, 2017, the vocational rehabilitation counselor reviewed appellant's work history as a maintenance mechanic and as a counter attendant and cashier. She related that testing showed that appellant had average aptitude for clerical tasks. The vocational rehabilitation counselor recommended that he complete a short online computer training course with a goal of job placement as a service dispatcher, service order clerk, or information clerk.

On August 28, 2017 the vocational rehabilitation counselor recommended a change in status to a "short online prevocational computer/keyboarding enhancement" followed by placement services. An OWCP rehabilitation specialist recommended approval of the plan on September 21, 2017.

On October 9, 2017 the vocational rehabilitation counselor completed a job classification (Form CA-66) for the position of service order clerk. The duties included distributing work orders, scheduling service calls, and recording information. The position was sedentary and required occasional lifting up to 10 pounds. The vocational rehabilitation counselor advised that appellant met the specific vocational preparation of three to six months for the position through his work experience in customer service, basic computer skills, basic math skills, high school education, and good communication skills. She opined that state employment data confirmed that the position was reasonably available within his commuting area at a weekly wage of \$349.74 per week.

On November 29, 2017 the vocational rehabilitation counsel advised that appellant had completed 88 percent of his online computer training in "touch typing" but had failed to update her on his progress.

On December 15, 2017 OWCP's rehabilitation specialist changed appellant's case status to placement with a new employer effective December 7, 2017.

By vocational rehabilitation closure report dated February 27, 2018, the vocational rehabilitation counselor advised that appellant had not communicated with her and did not appear to be searching for employment. As such, she recommended case closure.

In a March 6, 2018 closure memorandum, an OWCP vocational rehabilitation specialist noted that appellant completed 88 percent of his online training in basic computer skills and typing. She found that the targeted position of service order clerk remained available and was vocationally appropriate and was reasonably available within his commuting area at entry level wages ranging from \$349.60 to \$640.00 per week. The vocational rehabilitation specialist noted, however, that the medical evidence from Dr. Kornberg was stale.

In a report dated March 6, 2018, Dr. Robert R. Reppy, an osteopath, disagreed with Dr. Kornberg's work restrictions, noting that he had failed to perform a physical capacity evaluation. He asserted that appellant was unable to work as a mechanic.

On March 12, 2018 OWCP again referred appellant to Dr. Smith for a second opinion examination.

In a report dated March 29, 2018, Dr. Smith reviewed appellant's history of injury and the medical evidence of record, including the results of diagnostic testing. He diagnosed low back

pain, displacement of the L5-S1 lumbar intervertebral disc without myelopathy, and lumbar postlaminectomy syndrome. Dr. Smith indicated that appellant had “significant pain behavior, which may have some psychological component.” He found that he had continued restrictions from his employment injury but could perform sedentary employment with accommodation. In a work capacity evaluation (OWCP-5c) of even date, Dr. Smith advised that appellant could perform sedentary employment.

In a progress report dated May 2, 2018, Dr. Reppy diagnosed failed back syndrome, lumbar sprain, and displacement of a lumbar intervertebral disc with myelopathy. He noted that OWCP continued to identify lumbar sprain as an accepted condition even though 14 years had passed since the injury. Dr. Reppy advised that appellant could not lift more than 10 pounds, perform repetitive activities, stand more than 30 minutes, walk more than 45 minutes, and was unable to climb or stoop due to residuals of his January 13, 2004 employment injury.

In a state workers’ compensation form dated May 11, 2018, Dr. Lourdes Vareis-Batista, a Board-certified physiatrist, made a notation on the form that appellant was unable to perform functional activities.⁴ In a report of even date, she diagnosed low back pain and lumbar postlaminectomy syndrome.

On June 1, 2018 OWCP advised appellant of its proposed reduction of his wage-loss compensation as the evidence established that he could earn wages in the selected position of service order clerk. It afforded him 30 days to submit evidence or argument regarding the proposed reduction of his compensation.

In reports dated June 6 and 18, 2018, Dr. Reppy diagnosed failed back syndrome, lumbar sprain, and displacement of a lumbar intervertebral disc with myelopathy.⁵ He provided work restrictions, including no lifting over 10 pounds, standing no more than 30 minutes, or walking over 45 minutes.

On June 20, 2018 Dr. Reppy advised that the diagnosis of sprain was in error as it did not apply to a condition lasting over six months. He recommended that OWCP expand acceptance of the claim to include lumbar radiculopathy and a left herniated nucleus pulposus at L5-S1.

Appellant, in an undated statement received by OWCP on June 29, 2018, asserted that Dr. Reppy had found that he was unable to work.

By decision dated August 29, 2018, OWCP reduced appellant’s wage-loss compensation effective August 30, 2018 as he had the capacity to earn wages of \$349.60 per week as a service order clerk. It found that the opinion of Dr. Smith represented the weight of the evidence and established that he could perform the selected position. OWCP applied the formula set forth in

⁴ Dr. Vareis-Batista continued to submit similar reports dated June 2018 through March 2019.

⁵ Dr. Reppy submitted similar progress reports on July 16 and August 20, 2018.

*Albert C. Shadrick*⁶ as codified in section 10.403 of OWCP's regulations, to determine appellant's loss of wage-earning capacity (LWEC).

In a progress report dated September 5, 2018, Dr. Reppy diagnosed failed back syndrome, lumbar sprain, and displacement of a lumbar intervertebral disc with myelopathy due to appellant's accepted employment injury. In a September 26, 2018 report, he found that appellant should not stand over 30 minutes, walk over 45 minutes, climb, or stoop.⁷

On September 10, 2018 appellant requested a review of the written record before an OWCP hearing representative.

In a January 21, 2019 progress report, Dr. Reppy advised that appellant was unable to lift over 10 pounds. He asserted that residuals of his lumbar intervertebral disc disorder with myelopathy "prevent[ed] him from returning to his job."

On January 22, 2019 Dr. Reppy related that appellant could perform modified duties lifting under 25 pounds, performing no carrying, and walking not more than five minutes. He attributed his disability to his accepted employment injury.

By decision dated January 31, 2019, OWCP's hearing representative affirmed the August 29, 2018 LWEC determination.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proof to establish that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.⁸ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁹

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.¹⁰ If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if 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 usual employment, age, qualifications for other employment, the availability of suitable employment, and other factors and circumstances which may affect the wage-earning capacity in his or her disabled condition.¹¹ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor

⁶ 5 ECAB 376 (1953).

⁷ The record contains similar progress reports from Dr. Reppy dated December 5, 2018 and January 7, 2019.

⁸ See *C.H.*, Docket No. 19-0136 (issued May 23, 2019).

⁹ See *C.M.*, Docket No. 18-1326 (issued January 4, 2019).

¹⁰ 5 U.S.C. § 8115(a).

¹¹ *Id.*; see also *Z.W.*, Docket No. 18-1000 (issued June 24, 2019).

market under normal employment conditions.¹² 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 employee lives.¹³ The fact that an employee has been unsuccessful in obtaining work in the selected position does not establish that the work is not reasonably available in his commuting area.¹⁴

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.¹⁵ Lastly, OWCP applies the principles set forth in *Albert C. Shadrick*¹⁶ as codified in section 10.403 of OWCP's regulations,¹⁷ to determine the percentage of the employee's LWEC.¹⁸

ANALYSIS

The Board finds that OWCP properly reduced appellant's wage-loss compensation effective August 30, 2018 based on his capacity to earn wages as a service order clerk.

OWCP properly determined that a conflict arose between Dr. Smith, an OWCP referral physician, and Dr. Baskin, appellant's physician, regarding his physical work restrictions. It referred him to Dr. Kornberg for an impartial medical examination. In a report dated October 5, 2016, Dr. Kornberg diagnosed failed back syndrome, chronic back pain, left radicular symptoms, and a herniated disc at L5-S1 due to appellant's January 13, 2004 employment injury. He determined that he could work with restrictions, including sitting four hours per day, walking three hours per day, standing two hours per day, and lifting up to 20 pounds for three hours per day. The Board finds that OWCP properly referred appellant for vocational rehabilitation based on his

¹² See *M.P.*, Docket No. 18-0094 (issued June 26, 2018); see also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.3 (June 2013).

¹³ See *M.K.*, Docket No. 17-0208 (issued April 17, 2018).

¹⁴ *C.M.*, Docket No. 18-0688 (issued November 15, 2018).

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

¹⁶ 5 ECAB 376 (1953).

¹⁷ 20 C.F.R. § 10.403.

¹⁸ See *J.H.*, Docket No. 18-1319 (issued June 26, 2019).

report, which established that he was no longer totally disabled due to residuals of his employment injury.¹⁹

OWCP further properly found that appellant had the physical capacity to perform the duties of a service order clerk. Following vocational rehabilitation, it referred him to Dr. Smith for an updated report regarding his work restrictions. In a report dated March 29, 2018, he found that appellant could perform sedentary employment. The position of service order clerk is classified as sedentary employment requiring occasional lifting up to 10 pounds. Additionally, Dr. Reppy, appellant's attending physician, opined in 2018 progress reports that he could perform modified duty with restrictions of lifting no more than 10 pounds, standing no more than 30 minutes, walking no more than 45 minutes, and performing no repetitive activities, climbing, or stooping. The medical evidence, consequently, establishes that he has the requisite physical ability to earn wages as a service order clerk.²⁰

In state workers' compensation form reports dated 2018 and 2019, Dr. Lourdes Vareis-Batista, indicated by notation that appellant could not preform functional activities and diagnosed low back pain and lumbar postlaminectomy syndrome. She did not, however, directly address whether he could work as a service order clerk or provide any rationale for her findings, and thus her opinion is of little probative value.²¹

On January 21, 2019 Dr. Reppy found that appellant could not lift over 10 pounds and that he was unable to perform his employment due to residuals of his lumbar intervertebral disc disorder. He did not, however, address the issue of whether he could work in the selected position of service order clerk, and thus his report is of no probative value.²²

In a progress report dated January 22, 2019, Dr. Reppy found that appellant could perform modified duties lifting under 25 pounds and walking under five minutes as a result of his accepted employment injury. He did not provide any rationale for his change in work restrictions; consequently, his report is of diminished probative value.²³

The Board, therefore, finds that the weight of the evidence establishes that appellant had the physical capacity to perform the duties of the selected position of service order clerk.²⁴

In assessing the claimant's ability to perform the selected position, OWCP must consider not only physical limitations but also take into account work experience, age, mental capacity and

¹⁹ *C.M.*, *supra* note 9.

²⁰ *See C.H.*, *supra* note 8.

²¹ *See C.S.*, Docket No. 16-1448 (issued October 4, 2017).

²² *See C.H.*, *supra* note 8; *L.B.*, Docket No.18-0533 (issued August 27, 2018).

²³ *See J.S.*, Docket No. 16-1285 (issued January 5, 2017).

²⁴ *See T.J.*, Docket No. 16-1473 (issued January 26, 2017).

educational background.²⁵ The rehabilitation counselor determined that appellant had the skills necessary to perform the position of service order based on his prior work experience, education, basic computer and math skills, communication skills, and his completion of 88 percent of an online computer training course. She further found that the position was reasonably available within his commuting area at a weekly wage of \$349.74 per week. As the rehabilitation counselor is an expert in the field of vocational rehabilitation, OWCP may rely on his or her opinion in determining whether the job is vocationally suitable and reasonably available.²⁶ 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 position of service order clerk.²⁷ OWCP further properly determined his LWEC in accordance with the formula developed in *Shadrick* and codified at 20 C.F.R. § 10.403.²⁸ OWCP, therefore, properly found that the position of service order clerk reflected his wage-earning capacity effective August 30, 2018.

On appeal appellant disagreed that he had only sustained a lumbar sprain and requested that OWCP expand acceptance of his claim to include postlaminectomy syndrome, lumbar disc displacement, lumbar radiculopathy, a herniated L5-S1 disc, and disc bulges and tears. The Board notes, however, that OWCP had accepted a lumbar sprain and expanded acceptance to include postlaminectomy syndrome and disc displacement of an intervertebral disc without myelopathy at L5-S1. Appellant has the burden of proof to submit evidence showing any additional conditions not accepted or approved by OWCP resulted from the employment injury through the submission of reasoned medical evidence.²⁹

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

CONCLUSION

The Board finds that OWCP properly reduced appellant's wage-loss compensation effective August 30, 2018 based on his capacity to earn wages as a service order clerk.

²⁵ See *supra* note 15; see also *M.P.*, Docket No. 18-0094 (issued June 26, 2018).

²⁶ See *J.B.*, Docket No. 17-0817 (issued April 26, 2018); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.6(b) (June 2013).

²⁷ *T.B.*, Docket No. 17-1777 (issued January 16, 2019).

²⁸ *Supra* note 16. OWCP divided appellant's employment capacity to earn wages of \$349.60 a week by the current pay rate of the position held when injured of \$1,102.90 per week to find a 32 percent wage-earning capacity. It multiplied the pay rate at the time of injury of \$814.33 by the 32 percent wage-earning capacity percentage. The resulting amount of \$260.59 was subtracted from appellant's date-of-injury pay rate of \$814.33 which provided a loss of wage-earning capacity of \$553.74 per week. OWCP then multiplied this amount by the appropriate compensation rate of three-fourths and applied adjustments, which yielded net compensation of \$1,999.26 every four weeks.

²⁹ See *V.B.*, Docket No. 12-599 (issued October 2, 2012); *Jaja K. Asaramo*, 55 ECAB 200 (2004).

ORDER

IT IS HEREBY ORDERED THAT the January 31, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 20, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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