

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

C.M., Appellant)	
)	
and)	Docket No. 18-1326
)	Issued: January 4, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Warren, MA, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 25, 2018 appellant, through counsel, filed a timely appeal from an April 30, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP).² 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 this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² The record also contains a June 13, 2018 schedule award decision. Appellant has not appealed from that decision and, thus, it is not before the Board at this time. 20 C.F.R. §§ 501.2(c) and 501.3.

³ 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly reduced appellant's wage-loss compensation, effective September 17, 2017, based on her capacity to earn wages as a data entry clerk.

FACTUAL HISTORY

On May 9, 2013 appellant, then a 37-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that, on May 6, 2013, she injured her shoulder in the performance of duty. She stopped work on May 7, 2013 and did not return. OWCP accepted the claim for right shoulder strain and a partial rotator cuff tear and paid appellant wage-loss compensation for total disability beginning June 21, 2013.

OWCP, on August 5, 2015, referred appellant to Dr. John R. Corsetti, a Board-certified orthopedic surgeon, for a second opinion examination. In an August 31, 2015 report, Dr. Corsetti diagnosed a symptomatic partial thickness right rotator cuff tear and right shoulder acromioclavicular joint (AC) arthropathy causally related to the May 6, 2013 employment injury. He opined that appellant could perform modified employment with no repetitive use of the upper extremity or lifting more than 5 pounds frequently and 10 pounds occasionally. In a work restriction evaluation, Dr. Corsetti found that she could lift 5 to 10 pounds for 4 hours per day with no reaching above the shoulder.

On January 5, 2016 OWCP referred appellant for vocational rehabilitation. In a report dated January 31, 2016, the vocational rehabilitation counselor discussed her prior work experience as a receptionist and in self-employment buying and selling merchandise on eBay. He noted that appellant advised that she might need to "take a quick refresher course to update herself in Word and Excel and she would be very comfortable in any office setting."

In a January 13, 2016 office note, Dr. Andrew M. Chertoff, an attending Board-certified orthopedic surgeon, concurred with Dr. Corsetti's finding that appellant could resume employment.

The vocational rehabilitation counselor, on April 8, 2016, completed a job classification (Form CA-66) for the position of data entry clerk. The position was sedentary requiring occasional lifting of up to 10 pounds and frequent fingering. The rehabilitation counselor found that appellant met the specific vocational preparation of three to six months for the position through her prior work history. He determined that the position was performed in sufficient numbers to be reasonably available within the commuting area based on information from the state Bureau of Labor Statistics and Employment at a weekly wage of \$545.60.

On July 21, 2016 Dr. Chertoff related that he had reviewed Dr. Corsetti's report and concurred with his findings.

On March 2, 2017 OWCP referred appellant to Dr. Balazs B. Somogyi, a Board-certified orthopedic surgeon, for a second opinion examination. On March 23, 2017 Dr. Somogyi found that appellant had continued residuals of her May 6, 2013 employment injury. However, he determined that she could resume work lifting up to 10 pounds with no overhead work or

repetitious use of the right upper extremity. In a March 31, 2017 work capacity evaluation (Form OWCP-5c), Dr. Somogyi opined that appellant could work 8 hours per day with no reaching or reaching above the shoulder and lifting up to 10 pounds for 4 hours per day.

On April 28, 2017 OWCP's rehabilitation specialist requested that the vocational rehabilitation counselor provide updated CA-66 forms for the targeted positions.

In a May 11, 2017 Form CA-66, the vocational rehabilitation counselor found that the sedentary position of data entry clerk, which required occasional lifting up to 10 pounds, frequently fingering, occasional handling, and no reaching, was suitable for appellant based on her prior work experience. He found that the position was performed in sufficient numbers to make it reasonably available based on state employment information at a weekly wage of \$577.60.

On May 19, 2017 an OWCP rehabilitation specialist reviewed the vocational rehabilitation report and noted that the evidence indicated that appellant could work as a data entry clerk earning \$577.60 per week.

In a report dated July 11, 2017, Dr. Chertoff advised that he had evaluated appellant for right shoulder pain on July 6, 2017 and noted that she related the pain "to work back on May 6, 2013." He recommended diagnostic studies and found that she could perform modified employment for two hours per day.

On July 27, 2017 OWCP notified appellant of its proposed reduction of her wage-loss compensation benefits based on her capacity to earn wages of \$577.60 per week as a data entry clerk. It determined that the opinion of Dr. Somogyi constituted the weight of the evidence and established that the position was within her work restrictions.

Dr. Chertoff, on August 17, 2017, requested authorization for a magnetic resonance imaging study due to appellant's complaints of pain in her right shoulder, "which she again related to her work." He opined that she could work with restrictions for two hours per day.

By decision dated August 30, 2017, OWCP reduced appellant's wage-loss compensation benefits, effective September 17, 2017, based on its finding that she had the physical and vocational capacity to earn wages of \$577.60 per week as a data entry clerk. It applied the formula set forth in *Albert C. Shadrick*,⁴ in determining appellant's loss of wage-earning capacity (LWEC). OWCP found that, as she was currently capable of earning more than in her date-of-injury position, she had no LWEC.

On September 6, 2017 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative.

During the hearing, held on February 14, 2018, appellant asserted that she did not receive the appropriate training to work as a data entry clerk, noting that she did not have significant

⁴ 5 ECAB 376 (1953); as codified by regulation in 20 C.F.R. § 10.403.

computer skills. She also maintained that she experienced shoulder pain with performing repetitive work duties.

By decision dated April 30, 2018, OWCP's hearing representative affirmed the August 30, 2017 decision. She found that appellant's buying and selling merchandise on eBay and her acknowledgement that she had some computer skills supported that she could work entering data into a computer.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.⁵ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁶

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.⁷ 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.⁸ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.⁹ 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.¹⁰ 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 or her commuting area.¹¹

OWCP must initially determine a claimant's medical condition and work restrictions before selecting an appropriate position that reflects his or her wage-earning capacity. The medical evidence upon which OWCP relies must provide a detailed description of the condition.¹²

⁵ See *E.D.*, Docket No. 17-1064 (issued March 22, 2018).

⁶ See *S.N.*, Docket No. 17-1589 (issued January 3, 2018).

⁷ 5 U.S.C. § 8115(a).

⁸ *Id.*; see also *J.M.*, Docket No. 17-0397 (issued April 3, 2018).

⁹ 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).

¹⁰ See *M.K.*, Docket No. 17-0208 (issued April 17, 2018).

¹¹ See *O.V.*, Docket No. 16-1702 (issued September 13, 2017).

¹² See *B.G.*, Docket No. 17-0477 (issued September 20, 2017).

Additionally, the Board has held that an LWEC determination must be based on a reasonably current medical evaluation.¹³

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.¹⁴ Lastly, OWCP applies the principles set forth in *Albert C. Shadrick*¹⁵ as codified in section 10.403 of OWCP's regulations,¹⁶ to determine the percentage of the employee's LWEC.¹⁷

ANALYSIS

The Board finds that OWCP properly reduced appellant's wage-loss compensation, effective September 17, 2017, based on her capacity to earn wages as a data entry clerk. On August 31, 2015 Dr. Corsetti, an OWCP referral physician, diagnosed a symptomatic partial thickness right rotator cuff tear and right AC joint arthropathy causally related to the May 6, 2013 employment injury. He found that appellant could work full time with no repetitive use or overhead use of the right upper extremity and with restrictions on lifting more than 5 pounds frequently or 10 pounds occasionally. Dr. Chertoff, her attending physician, reviewed Dr. Corsetti's report and concurred with his findings. The Board thus finds that OWCP properly referred appellant for vocational rehabilitation as the medical evidence established that she was no longer totally disabled due to residuals of her employment injury.¹⁸

OWCP further properly found that appellant had the physical capacity to perform the duties of a data entry clerk. The position is classified as sedentary employment requiring occasional lifting of up to 10 pounds, frequently fingering, occasional handling, and no reaching. Following vocational rehabilitation and reemployment efforts, it referred her to Dr. Somogyi for an updated report regarding her work restrictions. Dr. Somogyi, on March 23, 2017, opined that appellant had continued restrictions from her May 6, 2013 employment injury. He determined that she could work full time lifting up to 10 pounds with no overhead work or repetitive rotation of the right arm. In an OWCP-5c dated March 31, 2017, Dr. Somogyi found that appellant could work eight hours with restrictions on reaching or reaching above the shoulder and lifting up to 10 pounds for

¹³ *Id.*

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.6.a (June 2013).

¹⁵ 5 ECAB 376 (1953).

¹⁶ 20 C.F.R. § 10.403.

¹⁷ *See D.S.*, Docket No. 17-0496 (issued May 25, 2017).

¹⁸ *See D.P.*, Docket No. 16-1198 (issued August 22, 2017); *N.J.*, 59 ECAB 171 (2007).

four hours per day. His opinion is reasoned and based on a complete and accurate history and thus constitutes the weight of the evidence and establishes that she has the requisite physical ability to earn wages as a data entry clerk.¹⁹

On July 11 and August 17, 2017 Dr. Chertoff discussed appellant's complaints of right shoulder pain which she related to her May 6, 2013 work injury. He advised that she could work two hours per day modified employment. Dr. Chertoff, however, did not specifically relate appellant's disability to the accepted employment injury. While he noted that she attributed her pain to the May 6, 2013 injury, a physician's report is of little probative value when it is based on a claimant's belief rather than the doctor's independent judgment.²⁰

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.²¹

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 educational background.²² The rehabilitation counselor determined that appellant had the skills necessary to perform the position of data entry clerk based on her prior work experience, including selling merchandise on eBay. He further found that the position was reasonably available within the appropriate geographical area at a wage of \$577.60 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.²³ 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 appellant had the capacity to perform the position of data entry clerk.²⁴ OWCP further properly determined that she had no LWEC in accordance with the formula developed in *Shadrick* and codified at 20 C.F.R. § 10.403.²⁵ It, therefore, properly found that the position of data entry clerk reflected her wage-earning capacity effective September 17, 2017.

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

¹⁹ See *M.P.*, *supra* note 9.

²⁰ See *M.O.*, Docket No. 18-1056 (issued November 6, 2018).

²¹ See *T.J.*, Docket No. 16-1473 (issued January 26, 2017).

²² *Id.*

²³ 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).

²⁴ *Supra* note 8.

²⁵ *Supra* note 4. OWCP found that the current pay rate for appellant's job at the time of injury was \$558.36, and she was capable of earning \$577.60 and, thus, had no loss of wage-earning capacity.

CONCLUSION

The Board finds that OWCP properly reduced appellant's wage-loss compensation, effective September 17, 2017, based on her capacity to earn wages as a data entry clerk.

ORDER

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

Issued: January 4, 2019
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