

ISSUE

The issue is whether OWCP met its burden of proof to reduce appellant's wage-loss compensation, effective September 20, 2017, based on her capacity to earn wages in the constructed position of nurse consultant.

FACTUAL HISTORY

On October 15, 2007 appellant, then a 61-year-old nurse, filed a traumatic injury claim (Form CA-1) alleging that on October 10, 2007 she strained her lower back when repositioning a patient while in the performance of duty. She stopped work.

In a medical report dated October 18, 2007, Dr. Narinder S. Aujla, a Board-certified orthopedic surgeon, related appellant's history of the alleged October 10, 2007 injury and also noted that appellant had a medical history of hypertension, cardiac arrhythmia, and neuromuscular bladder implant.

OWCP accepted the claim for a lumbar sprain. Appellant returned to work for four hours a day. On October 8, 2008 she underwent a right L4-5 hemilaminectomy/foraminotomy. OWCP subsequently expanded the acceptance of the claim to include lumbar herniated disc at L4-5, displacement of lumbar intervertebral disc without myelopathy and lumbar region intervertebral disc disorder with myelopathy. It paid appellant wage-loss compensation on the periodic rolls for total disability as of August 2, 2009.

From 2004 through 2013, appellant periodically worked from home as an online instructor for three different private employing establishments. On April 22, 2010 she underwent a L1 laminectomy with placement of a spinal cord stimulator to the T11-12 level. In 2012, appellant suffered a nonwork-related cerebral vascular accident (CVA)/stroke.

OWCP referred appellant for a second opinion evaluation to determine her disability status.⁴ In a September 29, 2015 report, Dr. Jonathan Black, a Board-certified orthopedic surgeon and OWCP referral physician, opined that she had the residual condition of postlaminectomy syndrome related to the employment-related injury. He also opined that appellant could work full duty in a sedentary and light-duty capacity with permanent lifting restrictions of no greater than 10 pounds for three hours of work. Dr. Black completed a work capacity evaluation (Form OWCP-5).

On October 14, 2015 OWCP referred appellant to vocational rehabilitation services based on Dr. Black's work restrictions. In a November 17, 2015 initial report, the vocational rehabilitation counselor reported on her education, training, and work experience, and found that

⁴ In a March 27, 2014 report, Dr. Richard C. Smith, an orthopedic surgeon and OWCP referral physician, indicated that appellant had postlaminectomy syndrome, a residual of her work-related injury, and that she could not function as a nurse. While he opined that she could work in a sedentary capacity with permanent restrictions, he also noted that her spinal cord stimulator was not functioning.

she had transferrable skills and that additional training or development was not necessary.⁵ The vocational rehabilitation counselor completed a transferable skill analysis and identified the positions of nurse consultant, medical secretary, and customer service clerk representative as being within appellant's medical restrictions and vocational capabilities.

In monthly reports dated beginning November 6, 2015, Dr. Terry W. Kuhlwein, a Board-certified family practitioner, opined that appellant was temporarily totally disabled from work. He noted that she required multiple medications and periodic therapeutic injections for her chronic low back and right hip pain. Dr. Kuhlwein advised that appellant's symptoms significantly impacted her activities of daily living, as she was unable to safely operate a motor vehicle and had limited ability to walk, sit, or stand for a prolonged period of time.

Once OWCP determined that the employing establishment could not accommodate appellant's full-time sedentary restrictions, OWCP resumed its return-to-work plan.⁶ Following a new vocational assessment, the rehabilitation counselor again identified the positions of nurse consultant, medical secretary, and customer service clerk representative as being within appellant's physical limitations, and vocational skills. Appellant was unsuccessful in finding employment within her restrictions.

On October 27, 2016 the rehabilitation counselor related that the constructed nurse consultant position, Department of Labor, *Dictionary of Occupational Titles* (DOT) No. 075.127-014, was sedentary in nature, and met appellant's physical restrictions.⁷ The physical requirements of the position were noted as occasional lifting limited to 10 pounds; with no climbing, stooping, kneeling, or crouching required. The counselor noted that appellant's nursing knowledge and postgraduate education was directly transferable to meet the specific vocational preparation requirements of two to four years. Appellant had also received on-the-job training opportunities, had effective communication skills, computer knowledge, and keyboarding ability with basic math skills. The counselor confirmed that there were sufficient openings for the position in her commuting area and that the weekly wage for the position was \$928.80.

Dr. Kuhlwein, in his December 28, 2016 report, opined that appellant was temporarily totally disabled due to chronic, progressive low back pain, chronic right hip/groin pain, and lumbar disc disorder with myelopathy. He indicated that she required ongoing maintenance medications

⁵ The rehabilitation counselor reported that appellant had a doctorate in nursing, that she was currently licensed, that she belonged to several professional organizations, and had submitted publications in the nursing field and received various awards. Appellant had over 25 years of semiskilled, skilled and professional nursing-related work experience. She also had computer training, had passed a course in Microsoft Excel, and had taught online courses.

⁶ The employing establishment had offered appellant a full-time sedentary position as a medical support assistant, but later disqualified her for the position due to her postinjury cardiac/stroke conditions which were unrelated to her October 10, 2007 work injury.

⁷ The Department of Labor, *Dictionary of Occupational Titles* described the physical requirements of the nurse consultant position as follows: reviews and suggests changes in nursing organization and administrative procedures; analyzes nursing techniques and recommends modifications; aids schools in planning nursing curriculums and hospital and public health nursing services in developing and carrying out staff education programs; provides assistance in developing guides and manuals for specific aspects of nursing services; prepares educational materials and assists in planning and developing health and educational programs for industrial and community groups; advises in services available through community resources; consults with nursing groups concerning professional and educational programs; prepares or furnishes data for articles and lectures; and participates in surveys and research studies.

and other adjuvant pain medications. Dr. Kuhlwein noted that appellant recently required right-sided sacroiliac joint injection for pain relief. He reported that she was prone to falling due to right leg weakness. Dr. Kuhlwein also noted that appellant had a neurogenic bladder and must self-catheterize multiple times a day.

OWCP determined that a conflict in medical evidence existed between Dr. Kuhlwein and Dr. Black as to whether appellant could return to work and referred her to Dr. Robert McShane, a Board-certified orthopedic surgeon, for an impartial medical evaluation. It provided Dr. McShane with a March 4, 2014 statement of accepted facts (SOAF) which outlined her preexisting and concurrent conditions, including cardiac arrhythmia and atonic bladder and a series of questions.

In a June 12, 2017 report, Dr. McShane reviewed the SOAF, reported physical examination findings, and opined that appellant's lumbar sprain had resolved, but that she continued to have residuals from status post L4-5 right-sided hemilaminotomy and discectomy and status post spinal cord stimulator placement, which included right-sided sciatica. He opined that she could not work as a nurse, but was capable of working full time in a sedentary capacity with permanent restrictions of no lifting, pushing, or pulling over 20 pounds, no prolonged or repetitive forward bending, and frequent change of positions from sitting to standing and intermittent walking. Dr. McShane opined that, while appellant's husband did the driving, appellant could drive as long as she did not take long acting narcotic pain medications. He further opined that any restrictions she had with regard to her CVA, cardiac arrhythmia, or bladder issues were outside the scope of her workers' compensation injury. Dr. McShane opined that appellant had reached maximum medical improvement on April 22, 2011 one-year status post the spinal cord stimulator placement.

By letter dated July 10, 2017, OWCP proposed to reduce appellant's wage-loss compensation based on her capacity to earn wages in the constructed position of nurse consultant, DOT No. 075.127-014, at the rate of \$928.80 per week. It accorded the special weight of the medical evidence to Dr. McShane, as the impartial medical examiner, and determined that the selected position was medically and vocationally suitable for her and represented her wage-earning capacity. As appellant's wage-earning capacity was less than the current pay of the job she held when injured, 47 percent, OWCP proposed to reduce her wage-loss compensation benefits to \$3,173.00 every four weeks. OWCP afforded her 30 days in which to submit contrary evidence.

In response, appellant submitted additional medical evidence. Medical reports dated December 1, 2016 and February 9, May 8, July 19, and August 14, 2017 from the Mayo Clinic indicated that she had undergone right-sided sacroiliac injections. OWCP also continued to receive diagnostic test reports.

OWCP also received appellant's August 2, 2017 letter which requested that acceptance of the claim be expanded to include sacrococcygeal disorder.

By decision dated September 20, 2017, OWCP reduced appellant's wage-loss compensation based on her capacity to earn wages as a nurse consultant earning \$928.80 per week. It also denied her request to expand acceptance of her claim to include sacrococcygeal disorder.

On September 28, 2017 counsel requested a telephonic hearing before an OWCP hearing representative. The telephonic hearing was held on March 13, 2018.

In an August 29, 2017 report, Dr. Kuhlwein reported that appellant was managed with low-dose opioid analgesics for her chronic low back pain. He indicated that she had no evidence of

development of tolerance or significant side effects, but recommended that she not drive because of the nature of those medications. Dr. Kuhlwein also noted that appellant had difficulty with ambulation and infrequently would utilize a cane, a walker, and sometimes even a wheelchair for prolonged outings. He advised against a sedentary position for eight hours as she experienced increased low back pain with prolonged sitting.

In an April 24, 2018 report, Dr. Kuhlwein diagnosed chronic, progressive low back pain, chronic right hip/groin pain, lumbar disc disorder with myelopathy, and bilateral lumbar facet disease. He indicated that appellant spent more time in bed, partly due to the back and leg pain and her cardiac condition. Dr. Kuhlwein also discussed her bladder and heart issues, relating that she had to self-catherize every four to five hours, and that she had recently had her single chamber pacemaker replaced with a dual chamber pacemaker. He continued to opine that appellant was temporarily totally disabled.

By decision dated May 18, 2018, OWCP's hearing representative affirmed OWCP's September 20, 2017 decision.⁸

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of the compensation benefits.⁹ 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 totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity (LWEC).¹⁰

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 or her disabled condition.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 appellant's medical

⁸ The hearing representative did not rule on the issue of whether the acceptance of appellant's claim should be expanded to include sacrococcygeal disorder. Therefore, this issue is not before the Board in this appeal.

⁹ See *S.H.*, Docket No. 17-0990 (issued June 12, 2018); *M.K.*, Docket No. 17-0208 (issued April 17, 2018); *James M. Frashner*, 53 ECAB 794 (2002).

¹⁰ 20 C.F.R. §§ 10.402 and 10.403; see *S.H.*, *id.*; *John D. Jackson*, 55 ECAB 465 (2004).

¹¹ 5 U.S.C. § 8115(a); 20 C.F.R. § 10.520; *T.B.*, Docket No. 17-1777 (issued January 16, 2019); *Pope D. Cox*, 39 ECAB 143 (1988).

condition.¹² Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.¹³

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.¹⁴ Any incapacity to perform the duties of the selected position resulting from subsequently-acquired conditions is immaterial to the LWEC that can be attributed to the accepted employment injury and for which the claimant may receive compensation.¹⁵

It is well established that when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.¹⁶

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 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. 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, employing establishment contacts, and actual job postings.¹⁷ Lastly, OWCP applies the principles set forth in *Albert C. Shadrick*,¹⁸ as codified in section 10.403 of OWCP regulations,¹⁹ to determine the percentage of the employee's LWEC.²⁰

ANALYSIS

The Board finds that OWCP did not meet its burden of proof to reduce appellant's wage-loss compensation, effective September 20, 2017, based on her capacity to earn wages in the constructed position of nurse consultant.

In his June 12, 2017 report, Dr. McShane discussed appellant's history, medical records, and examination findings and provided physical restrictions based upon her accepted lumbar

¹² See *B.G.*, Docket No. 17-0477 (issued September 20, 2017); *William H. Woods*, 51 ECAB 619 (2000).

¹³ *C.M.*, Docket No. 18-1326 (issued January 4, 2019).

¹⁴ *G.E.*, Docket No. 18-0663 (issued December 21, 2018); *James Henderson, Jr.*, 51 ECAB 268 (2000).

¹⁵ *Id.*

¹⁶ 5 U.S.C. § 8123(a); see *M.C.*, Docket No. 18-1374 (issued April 23, 2019); see also *F.W.*, Docket No. 15-0441 (issued October 4, 2016).

¹⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.6.a (June 2013).

¹⁸ *Albert C. Shadrick*, 5 ECAB 376 (1953).

¹⁹ 20 C.F.R. § 10.403.

²⁰ See *T.B.*, *supra* note 11.

conditions. He further opined, however, that any restrictions she had with regard to her CVA, cardiac arrhythmia, and bladder issues were outside the scope of her employment injury. The medical evidence of record establishes that appellant's cardiac arrhythmia, as well as her bladder condition were preexisting, while her CVA occurred following the employment injury. As previously noted, however, determining wage-earning capacity based upon a selected position, both injury-related and preexisting conditions, but not postinjury or subsequently-acquired conditions must be considered.²¹ OWCP should have requested that Dr. McShane provide a supplemental opinion as to whether appellant's preexisting conditions precluded her employment as a nurse consultant. As it did not develop the medical evidence both relative to her preexisting and employment-related conditions, it did not meet its burden of proof to reduce her compensation benefits.²²

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to reduce appellant's compensation effective September 20, 2017 based on her capacity to earn wages in the constructed position of nurse consultant.

ORDER

IT IS HEREBY ORDERED THAT the May 18, 2018 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 26, 2019
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

²¹ *Supra* note 14.

²² *James Henderson Jr., supra* note 14.