

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

C.H., Appellant)	
)	
and)	Docket No. 19-0136
)	Issued: May 23, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Los Angeles, CA, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On October 24, 2018 appellant, through counsel, filed a timely appeal from an August 29, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP).² Pursuant to the

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 Board notes that following the August 29, 2018 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.*

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.

ISSUE

The issue is whether OWCP properly reduced appellant's wage-loss compensation, effective February 4, 2018, based on her capacity to earn wages as a customer complaint clerk.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances as presented in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On January 17, 2002 appellant, then a 46-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on October 13, 2001 she sustained low back pain radiating into her left leg while in the performance of duty. She stopped work on October 25, 2001 and did not return. OWCP accepted the claim for lumbosacral sprain with radiculopathy. It authorized an L3-4 and L5-S1 anterior discectomy and fusion, which was performed on September 13, 2005. Subsequently, OWCP expanded acceptance of appellant's claim to include an aggravation of degeneration of a lumbar/lumbosacral intervertebral disc and postlaminectomy syndrome. It assigned OWCP File No. xxxxxx928.

OWCP previously accepted under OWCP File No. xxxxxx754 that appellant sustained lumbar strain, an aggravation of a disc bulge at L4-5, and status post laminectomy due to a June 17, 1995 employment injury. It administratively combined OWCP File Nos. xxxxxx928 and xxxxxx754, with OWCP File No. xxxxxx928 designated as the master file.

By decision dated May 18, 2006, the Board reversed the September 10 and November 5, 2004 and January 6 and April 19, 2005 OWCP decisions terminating appellant's wage-loss compensation and entitlement to schedule award compensation due to her refusal of suitable work under 5 U.S.C. § 8106(c)(2).

Subsequently, OWCP reinstated appellant's wage-loss compensation.

Appellant received treatment from Dr. A. Michael Moheimani, an attending Board-certified orthopedic surgeon. In a January 21, 2011 report, Dr. Moheimani diagnosed status post fusion at L3-4 and L5-S1 and opined that she was permanently partially disabled. He continued to submit periodic progress reports finding that appellant's work status was permanent and stationary.

³ 5 U.S.C. § 8101 *et seq.*

⁴ Docket No. 05-1535 (issued May 18, 2006).

On December 8, 2016 OWCP referred appellant to Dr. Michael J. Einbund, a Board-certified orthopedic surgeon, for a second opinion examination regarding the status of appellant's accepted conditions.

In a report dated December 21, 2016, Dr. Einbund reviewed appellant's history of injury and the medical evidence of record, including the results of diagnostic testing. On examination he found a positive straight leg raise bilaterally, decreased sensation of the proximal lower leg, and normal strength of the lower extremities. Dr. Einbund opined that appellant had continued objective residuals of her October 13, 2001 employment injury and resulting September 13, 2005 surgery. He found retrolisthesis at L2 in relation to L3 and hypertrophic changes at L4-5 causing stenosis of the central canal "directly related to the accepted industrial conditions and subsequent surgery of September 13, 2005." Dr. Einbund further found that appellant had sustained an employment-related permanent aggravation of lumbar disc degeneration and postlaminectomy syndrome. He opined that she could perform sedentary employment lifting, pushing, and pulling no more than 10 pounds for 2.66 hours per day, standing and walking combined for three hours per day, and bending and stooping for one hour per day. Dr. Einbund further found that appellant was "limited to sitting in excess of five hours a day" with the ability to sit or stand as desired. In a December 29, 2016 work capacity evaluation (OWCP-5c), he provided limitations on lifting, pushing, and pulling up to 10 pounds for 2.66 hours per day and bending and stooping for one hour per day.

On January 5, 2017 OWCP referred appellant for vocational rehabilitation.

The vocational rehabilitation counselor, on March 3, 2017, completed a job classification (Form CA-66) for the position of customer complaint clerk. The duties included investigating customer complaints about bills or service, examining documents, notifying customers of findings, examining merchandise, and keying information into computers. The position was sedentary and required occasional lifting up to 10 pounds. The vocational rehabilitation counselor found that the physical requirements "fell within the limitations by Dr. Einbund as the duties could be varied not to exceed the restrictions. Furthermore, this type of work involves mostly independent work that allows for alternating the duties and physical demands as needed." The vocational rehabilitation counselor advised that appellant could meet the specific vocational preparation of six months to a year required for the position through her participation in a 20-week training program and through her prior work experience as a letter carrier, mail supervisor, and fast food manager. She opined that the position was reasonably available within her commuting area at a weekly wage of \$611.20.

In a March 15, 2017 rehabilitation action report (OWCP-44), OWCP approved a training program for appellant from March 13 to July 31, 2017 at HealthStaff Training Institute with the objective for her to obtain a position as a customer complaint clerk or receptionist. It also approved vocational placement services from August 1 to November 1, 2017.

In progress reports dated April 19 and May 31, 2017, Dr. Moheimani discussed appellant's complaints of back pain radiating into the right upper extremity from extended sitting taking computer classes. He diagnosed disc herniations and ruptures at C5-6, L2-3, and L4-5 with neural foraminal stenosis, right sacroiliac joint dysfunction, and status post lumbar fusion at L3-4 and L5-S1. Dr. Moheimani found that appellant's work status was permanent and stationary.

On June 28, 2017 Dr. Moheimani reviewed the results of a June 13, 2017 magnetic resonance imaging (MRI) study and noted that it demonstrated L2-3 retrolisthesis and L4-5 spondylolisthesis. He requested authorization to perform a right sacroiliac joint injection.

In a vocational rehabilitation report dated August 14, 2017, the vocational rehabilitation counselor advised that appellant was behind in her courses due to vision problems, noting that she had recently been diagnosed with glaucoma and cataracts. She requested a training extension and noted that her curriculum would be modified.

On August 31, 2017 HealthStaff Training Institute issued appellant a certificate of completion in Computerized Office Specialist work.

The vocational rehabilitation counselor, in a September 15, 2017 vocational rehabilitation report, noted that she had met with appellant as part of her transition to the job placement phase of vocational rehabilitation. She indicated that she was considering retirement. On October 16, 2017 the vocational rehabilitation counselor asserted that appellant had the skills necessary to work as a customer complaint clerk.

In a November 27, 2017 rehabilitation action report (Form OWCP-44), the vocational rehabilitation counselor notified OWCP that she had provided appellant with 90 days of placement services.⁵ She indicated that she had not fully participated with the services, providing as a reason back pain.

On November 30, 2017 an OWCP vocational rehabilitation specialist noted that appellant minimally participated in job placement services. She found that the position of customer complaint clerk was reasonably available within her commuting area at entry-level wages of \$611.20 per week.

OWCP, on December 5, 2017, advised appellant of its proposed reduction of her wage-loss compensation as the evidence established that she was able to earn wages in the selected position of customer complaint clerk. It afforded her 30 days to submit evidence or argument regarding the proposed reduction of her compensation.

Thereafter, appellant resubmitted December 30, 2015 and May 31 and June 28, 2017 progress reports from Dr. Moheimani finding that her work status was permanent and stationary.

By decision dated January 30, 2018, OWCP reduced appellant's wage-loss compensation, effective February 4, 2018, finding that she had the capacity to earn wages of \$611.20 per week as a customer complaint clerk. It determined that the opinion of Dr. Einbund represented the weight of the evidence and established that she could perform the duties of the selected position.

In progress reports dated January 31, February 28, and April 26, 2018, Dr. Moheimani diagnosed disc herniations and ruptures at C5-6, L2-3, and L4-5 with neural foraminal stenosis,

⁵ In a progress reports dated November 8 and 22, 2017, Dr. Moheimani diagnosed disc herniations and ruptures at C5-6, L2-3, and L4-5 with neural foraminal stenosis, right sacroiliac joint dysfunction, and status post lumbar fusion at L3-4 and L5-S1 and requested authorization for a bilateral sacroiliac joint injection. He advised that appellant's work status was permanent and stationary.

right sacroiliac joint dysfunction, and status post lumbar fusion at L3-4 and L5-S1. He found that appellant's work status was permanent and stationary.

On February 6, 2018 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative. During the telephonic hearing, held on July 6, 2018, appellant asserted that her physical condition prevented her from performing the duties of a customer complaint clerk. She advised that she had high blood pressure, anxiety, panic attacks, and limitations due to her postlaminectomy syndrome. Counsel questioned whether the position of customer complaint clerk was reasonably available within appellant's geographical area.

By decision dated August 29, 2018, OWCP's hearing representative affirmed the January 30, 2018 decision. She found that OWCP properly reduced appellant's wage-loss compensation as the position of customer complaint clerk was medically and vocationally suitable.

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.⁶ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁷

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.⁸ 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.⁹ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.¹⁰ 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.¹¹ The fact that an employee has been unsuccessful in obtaining work

⁶ See *E.D.*, Docket No. 17-1064 (issued March 22, 2018).

⁷ See *S.N.*, Docket No. 17-1589 (issued January 3, 2018).

⁸ 5 U.S.C. § 8115(a).

⁹ *Id.*; see also *J.M.*, Docket No. 17-0397 (issued April 3, 2018).

¹⁰ 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).

¹¹ See *M.K.*, Docket No. 17-0208 (issued April 17, 2018).

in the selected position does not establish that the work is not reasonably available in his commuting area.¹²

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.¹³ Lastly, OWCP applies the principles set forth in *Albert C. Shadrick*¹⁴ as codified in section 10.403 of OWCP's regulations,¹⁵ to determine the percentage of the employee's loss of wage-earning capacity (LWEC).¹⁶

ANALYSIS

The Board finds that OWCP properly reduced appellant's wage-loss compensation, effective February 4, 2018, based on her capacity to earn wages as a customer complaint clerk. On December 8, 2016 Dr. Einbund, an OWCP referral physician, diagnosed retrolisthesis at L2 in relation to L3, hypertrophic changes at L4-5 causing central canal stenosis, a permanent aggravation of lumbar disc degeneration, and postlaminectomy syndrome causally related to her accepted employment injury and resultant surgery. He opined that appellant could perform sedentary employment lifting, pushing, and pulling not more than 10 pounds for 2.66 hours per day, standing and walking combined no more than 3 hours per day, and bending and stooping not more than 1 hour per day. The Board 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.¹⁷

OWCP further properly determined that appellant had the physical capacity to perform the duties of a customer complaint clerk. The position is classified as sedentary employment requiring occasional lifting up to 10 pounds. Dr. Einbund opined that appellant could sit five hours per day with the ability to switch positions and stand and walk and combined three hours per day. The vocational rehabilitation counselor noted that position of customer complaint clerk allowed for independent work with a variety of duties that did not exceed Dr. Einbund's restrictions. The Board finds that Dr. Einbund's opinion is well reasoned and based on a complete and accurate

¹² *C.M.*, Docket No. 18-0688 (issued November 15, 2018).

¹³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.6.a (June 2013).

¹⁴ 5 ECAB 376 (1953).

¹⁵ 20 C.F.R. § 10.403.

¹⁶ *See J.M.*, Docket No. 17-0397 (issued April 3, 2018).

¹⁷ *C.M.*, Docket No. 18-1326 (issued January 4, 2019).

history and thus constitutes the weight of the evidence and establishes that appellant has the requisite physical ability to earn wages as a customer complaint clerk.¹⁸

In progress reports dated 2017 through 2018, Dr. Moheimani diagnosed disc herniations and ruptures at C5-6, L2-3, and L4-5, right sacroiliac joint dysfunction, and status post lumbar fusion at L3-4 and L5-S1. He opined that appellant's work status was permanent and stationary. Dr. Moheimani did not address the relevant issue of whether she could perform the position of customer complaint clerk and thus his opinion is of no probative value.¹⁹

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.²⁰

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.²¹ The rehabilitation counselor determined that appellant had the skills necessary to perform the position of customer complaint clerk based on her prior work experience and her 20-week training program at HealthStaff Training Institute. She further found that the position was reasonably available within her commuting area at a weekly wage of \$611.20. 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.²² 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 customer complaint clerk.²³ OWCP further properly determined that she had no LWEC in accordance with the formula developed in *Shadrick* and codified at 20 C.F.R. § 10.403.²⁴ OWCP, therefore, properly found that the position of customer complaint clerk reflected her wage-earning capacity effective February 4, 2018.

¹⁸ *Id.*

¹⁹ See *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

²⁰ See *T.J.*, Docket No. 16-1473 (issued January 26, 2017).

²¹ *Id.*

²² 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).

²³ *T.B.*, Docket No. 17-1777 (issued January 16, 2019).

²⁴ *Supra* notes 15, 16. OWCP divided appellant's employment capacity to earn wages of \$611.20 a week by the current pay rate of the position held when injured of \$1,174.94 per week to find 52 percent wage-earning capacity. It multiplied the pay rate at the time of injury of \$839.62 by the 52 percent wage-earning capacity percentage. The resulting amount of \$436.60 was subtracted from appellant's date-of-injury pay rate of 839.62 which provided a loss of wage-earning capacity of \$403.02 per week. OWCP then multiplied this amount by the appropriate compensation rate of three-fourths and applied adjustments, which yielded \$1,456.20 every four weeks.

Appellant may request modification of the LWEC 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 February 4, 2018, based on her capacity to earn wages as a customer complaint clerk.

ORDER

IT IS HEREBY ORDERED THAT the August 29, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 23, 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