

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

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**E.F., Appellant**

**and**

**SMITHSONIAN INSTITUTION, OFFICE OF  
PUBLIC AFFAIRS, Washington, DC, Employer**

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**Docket No. 19-1019  
Issued: November 6, 2019**

*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 April 9, 2019 appellant filed a timely appeal from a November 16, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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 has met its burden of proof to reduce appellant's compensation benefits to zero based on her actual earnings as a full-time reference librarian.

**FACTUAL HISTORY**

Appellant, a 59-year-old former public affairs specialist, has an accepted traumatic injury claim (Form CA-1) for multiple injuries that she sustained from a November 21, 1994 motor vehicle accident that occurred while in the performance of duty. The claim was accepted for

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

adjustment disorder with depressed mood, calcifying tendinitis of the right shoulder, contusion of back, shoulder, and upper arm, herpes zoster with other nervous system complications, and other injury to liver. Appellant stopped work for intermittent periods. OWCP then paid her wage-loss compensation on the periodic rolls beginning June 16, 2002.

On January 15, 2004 OWCP proposed to reduce appellant's wage-loss compensation, finding that the evidence of record established that she was no longer totally disabled from work. It determined that she had the capacity to earn wages as a secondary school teacher at the rate of \$579.26 per week.

On March 12, 2004 OWCP finalized the proposed reduction of appellant's wage-loss compensation, effective March 21, 2004, based on her capacity to earn wages as a secondary school teacher. It found that the position was medically and vocationally suitable for her and fairly and reasonably represented her wage-earning capacity.

In a letter dated January 21, 2008, appellant informed OWCP that she had returned to work full time and was earning a salary commensurate with the salary that she had earned at the time of her November 21, 1994 employment injury.

In a July 17, 2008 Form CA-1032, appellant indicated that in December 2007 she began employment as a reference librarian for the Library of Congress.

Appellant continued to receive medical treatment. On an August 23, 2016 Family and Medical Leave Act health care provider certification form, Dr. William F. Postma, a Board-certified orthopedic surgeon specializing in sports medicine, noted her medical condition of left knee meniscal tear and arthrosis and status post arthroscopic surgery. He indicated that appellant was unable to perform her employment duties of prolonged standing and walking. Dr. Postma reported that she was disabled from work for the period July 1 to August 1, 2016. The form listed appellant's essential job functions as pushing book trucks, shelving and sorting materials, computer work, movement between three buildings *via* tunnels (or outdoors), lifting and transporting materials often oversized. There is no medical evidence in the record from 2017 to 2018.

In a September 10, 2018 letter, a workers' compensation specialist for the employing establishment informed OWCP that appellant was a Grade 9, Step 1 when she worked for the employing establishment. She noted that, according to the 2018 GS pay schedule, the annual rate of pay was \$56,233.00. The workers' compensation specialist indicated that, according to appellant's CA-1032 form, she was currently making \$50,400.00 annually in her current position. Thus, she concluded that appellant was at 89 percent wage-earning capacity.

By decision dated November 16, 2018, OWCP found that appellant had no loss of wage-earning capacity (LWEC). It indicated that she had been employed as a reference librarian full time commencing December 1, 2007 for a period of more than 60 days, with weekly wages of \$1,084.62. Effective September 10, 2018, the current pay rate for appellant's date-of-injury job and step when injured was \$1,081.40 a week. When rounded to the nearest percentage point as required by the formula used to determine wage-earning capacity, OWCP found that she had no LWEC as her current actual earnings were essentially equal to the current pay rate of her date-of-

injury position. It further determined that appellant's reference librarian position met all the requirements of 20 C.F.R. § 10.510 for a light-duty position.

### **LEGAL PRECEDENT**

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of the compensation benefits.<sup>2</sup> 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 from all gainful employment, is considered partially disabled and is entitled to compensation computed on loss of wage-earning capacity.<sup>3</sup>

Section 8115(a) of FECA provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his or her actual earnings if his or her actual earnings fairly and reasonably represent his or her wage-earning capacity.<sup>4</sup> Generally, wages actually earned are the best measure of a 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>5</sup> Once OWCP determined that the actual wages of a given position represent an employee's wage-earning capacity, OWCP applies the principles developed in the *Albert C. Shadrick*<sup>6</sup> decision, now codified at 20 C.F.R. § 10.403, in order to calculate the adjustment in the employee's compensation. Compensation payments are based on the wage-earning capacity determination, and OWCP's finding remains undisturbed until properly modified.<sup>7</sup>

A light-duty position that fairly and reasonably represents an employee's ability to earn wages may form the basis of an LWEC determination if that light-duty position is a classified position to which the injured employee has been formally reassigned.<sup>8</sup> The position must conform to the established physical limitations of the injured employee; the employing establishment must have a written position description outlining the duties and physical requirements; and the position must correlate to the type of appointment held by the injured employee at the time of injury.<sup>9</sup> If

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<sup>2</sup> *M.K.*, Docket No. 17-0208 (issued April 17, 2018); *H.N.*, Docket No. 09-1628 (issued August 19, 2010); *T.F.*, 58 ECAB 128 (2006).

<sup>3</sup> 20 C.F.R. § 10.402 and 10.403; *J.H.*, Docket No. 18-1319 (issued June 26, 2019); *John D. Jackson*, 55 ECAB 465 (2004).

<sup>4</sup> 5 U.S.C. § 8115(a); *B.W.*, Docket No. 19-0207 (issued August 23, 2019); *N.J.*, 59 ECAB 171 (2007).

<sup>5</sup> *B.G.*, Docket No. 17-1763 (issued April 9, 2018); *Lottie M. Williams*, 56 ECAB 302 (2005).

<sup>6</sup> *Albert C. Shadrick*, 5 ECAB 376 (1953). The formula developed in the *Shadrick* decision has been codified at 20 C.F.R. § 10.403(d), which provides that the employee's wage-earning capacity in terms of percentage is obtained by dividing the employee's actual earnings or the pay rate of the position selected by OWCP, by the current pay rate for the job held at the time of the injury.

<sup>7</sup> *D.M.*, Docket No. 16-1527 (issued July 25, 2017); *Katherine T. Kreger*, 55 ECAB 633 (2004).

<sup>8</sup> 20 C.F.R. § 10.510.

<sup>9</sup> *Id.*

these circumstances are present, a determination may be made that the position constitutes regular federal employment.<sup>10</sup> In the absence of a light-duty position as described above, OWCP will assume that the employee was engaged in noncompetitive, makeshift, or odd-lot employment.<sup>11</sup>

### **ANALYSIS**

The Board finds that OWCP has not met its burden of proof to reduce appellant's compensation benefits to zero based on her actual earnings as a full-time reference librarian.

In December 2007, appellant began employment as a full-time reference librarian for the Library of Congress. On November 16, 2018 OWCP issued a decision finding that the position fairly and reasonably represented her wage-earning capacity as she had been performing the position since December 1, 2007 and had demonstrated the ability to perform the duties of the modified job for 60 days or more. It noted that the reference librarian position to which appellant had returned met the criteria of 20 C.F.R. § 10.510 for a light-duty position.

The Board finds, however, that the current record does not establish that the reference librarian position complied with OWCP's regulations regarding light-duty job offers as established in 20 C.F.R. § 10.510. Although the November 16, 2017 decision referenced an August 23, 2016 position description, the evidence of record does not contain such a written position description outlining the duties and physical requirements of the offered position. Accordingly, the Board is unable to determine from the evidence of record whether the physical requirements of the position were within appellant's medical restrictions.<sup>12</sup> As the record is incomplete, the Board finds that OWCP has not met its burden of proof to reduce her compensation benefits to zero.

### **CONCLUSION**

The Board finds that OWCP has not met its burden of proof to reduce appellant's compensation benefits to zero based on her actual earnings as a full-time reference librarian.

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *See W.R.*, Docket No. 18-1782 (issued May 29, 2019).

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 16, 2018 decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 6, 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