

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

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**K.S., Appellant** )

**and** )

**DEPARTMENT OF COMMERCE, U.S.** )  
**CENSUS BUREAU, Eureka, CA, Employer** )  
\_\_\_\_\_ )

**Docket No. 19-0678**  
**Issued: October 25, 2019**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On February 4, 2019 appellant filed a timely appeal from a December 20, 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 wage-loss compensation benefits, effective May 9, 2018, based on her capacity to earn wages in the constructed position of information clerk for 20 hours per week.

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

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>2</sup> The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On July 13, 2000 appellant, then a 53-year-old temporary recruiting assistant, filed an occupational disease claim (Form CA-2) alleging that she sustained neck and shoulder injuries due to factors of her federal employment. She stopped work on June 30, 2000.<sup>3</sup> OWCP initially accepted the claim for left shoulder and neck strains, and subsequently expanded acceptance of the claim to include degeneration of cervical intervertebral disc, and unspecified inflammatory spondylopathy of the cervical region. It paid appellant wage-loss compensation beginning July 1, 2000 on the supplemental rolls and on the periodic compensation rolls commencing February 23, 2003. Appellant returned to work in April 2010, but OWCP resumed payment of temporary total disability wage-loss compensation on the periodic rolls as of July 3, 2011.

In October 2016, OWCP referred appellant to Dr. Charles Xeller, Board-certified in orthopedic surgery, for a second-opinion evaluation regarding her disability status. In a November 8, 2016 report, Dr. Xeller noted the accepted conditions, and her complaints of neck pain and limited neck motion. He reviewed the medical record including a September 20, 2011 magnetic resonance imaging (MRI) scan of appellant's cervical spine that demonstrated multilevel cervical degenerative disc disease. Dr. Xeller described his physical examination findings and diagnosed cervical spondyloarthropathy with an element of spinal stenosis and no myelopathy, and mild bilateral carpal tunnel syndrome. He advised that appellant's cervical arthritis condition was permanently aggravated by extensive driving required by her employment duties, and that minor activity caused increased symptoms. Dr. Xeller advised that she could perform sedentary desk work with light filing and answering telephones for four hours per day. He advised that appellant could sit for three hours and stand for one hour with altering sitting and standing every 30 minutes, and no overhead lifting, squatting, kneeling, or climbing. Appellant was restricted from driving while at work and her driving to and from work was limited to 30 minutes or less. Pushing, pulling, and lifting were limited to 10 pounds.

OWCP referred appellant for vocational rehabilitation services in December 2016. The vocational rehabilitation counselor performed a transferable skills assessment, noting that appellant had a B.A. degree in business management. The employing establishment indicated that a return to work offer would not be made. The rehabilitation counselor completed labor market surveys for the position of information clerk and receptionist, and appellant signed an individual rehabilitation placement plan and job search plan and agreement on May 3, 2017. This noted a job goal of receptionist or information clerk within appellant's commuting area. Copies of the job classification forms for the two positions, signed by the rehabilitation counselor on May 3, 2017, were based on a Tri-County Vocational Services labor market survey dated May 2, 2017. The

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<sup>2</sup> Docket No. 11-2085 (issued May 10, 2012). The Board's prior decision concerned an issue regarding an overpayment of compensation.

<sup>3</sup> The employing establishment indicated that this was the last day of appellant's temporary assignment. Appellant was terminated by the employing establishment effective July 9, 2000.

forms indicated that both proposed positions were sedentary in nature and were available for full-time and/or part-time positions in appellant's commuting area.

On a prescription slip, Dr. Larry Pyle, a family medicine practitioner, noted on May 3, 2017 that appellant was unable to work due to medical "reasons."

By letter dated May 11, 2017, OWCP informed appellant that the positions of information clerk and receptionist were within the physical limitations as outlined by Dr. Xeller and advised her that she was expected to cooperate fully with the vocational rehabilitation process.

Appellant began an online computer training course on June 14, 2017.

In a prescription note dated June 20, 2017, Dr. Pyle indicated that appellant was unable to work due to pulmonary hypertension and extreme shortness of breath on minimal activity, and that she also experienced sleep deprivation.

Appellant completed computer training on December 16, 2017. In a December 28, 2017 report, the rehabilitation counselor noted that on December 27, 2017 appellant had contacted the rehabilitation counselor and indicated that she was unwilling to participate in the placement process. Vocational rehabilitation services were closed.

On March 28, 2018 OWCP proposed to reduce appellant's wage-loss compensation benefits because she was no longer totally disabled, and that the position of information clerk was medically and vocationally suitable for her and represented her wage-earning capacity. It noted that the diagnosed condition of pulmonary hypertension manifested after the employment injury. OWCP allotted appellant 30 days to respond to the proposed reduction. It attached the job classification for the information clerk position completed by the vocational rehabilitation counselor on May 3, 2017. The physical demands indicated that the strength level was sedentary with no climbing, balancing, stooping, kneeling, crouching, crawling, fingering, and no requirement for feeling, smelling, far acuity, depth perception, accommodation, color vision, or field of vision. It required occasional reaching and handling, and frequent talking and hearing, and required near acuity. A sedentary position limited lifting to no more than 10 pounds occasionally.<sup>4</sup>

By letter dated April 16, 2018, appellant disagreed with the proposed reduction. She asserted that Dr. Xeller relied on an old MRI scan and had not physically examined her to her satisfaction. Appellant also noted that he indicated that she could only work 20 hours per week.

Appellant submitted a January 31, 2018 report in which Dr. Kimberly A. Page, a Board-certified neurosurgeon, noted appellant's complaint of cervical pain that had persisted for 17 years,

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<sup>4</sup> The job description for the information clerk position, *Dictionary of Occupational Titles* (DOT) 237.067.022, is as follows: Answers inquiries from persons entering establishment; provides information regarding activities conducted at establishment, and location of departments, offices, and employees within the organization; informs customer of location of store merchandise in retail establishment; provides information concerning services, such as laundry and valet services in hotel; receives and answers requests for information from company officials and employees; may call employees or officials to information desk to answer inquiries; may keep record of questions asked.

dating back to the employment injury. She reported that a cervical spine MRI scan dated November 30, 2017 demonstrated a progression from the 2011 study with severe bilateral foraminal narrowing. Dr. Page described full range of motion and no tenderness on examination of the neck. She diagnosed cervical spondylosis with myelopathy, bilateral carpal tunnel syndrome, and noted that cervical surgery was a treatment option.

By decision dated May 9, 2018, OWCP reduced appellant's wage-loss compensation in accordance with section 8113(b) of FECA to reflect her loss of wage-earning capacity (LWEC) had she continued to participate in vocational rehabilitation efforts. It determined that she had failed, without good cause, to undergo vocational rehabilitation as directed. OWCP further found that, if appellant had participated in good faith in vocational rehabilitation, she would have been able to perform the constructed position of information clerk for 20 hours a week and reduced her compensation accordingly.

In correspondence postmarked June 5, 2018, appellant requested a hearing before an OWCP hearing representative. She maintained that Dr. Xeller had not physically examined her, that Dr. Pyle opined that her neck injury contributed to her total disability, and that the November 30, 2017 MRI scan, together with Dr. Page's report, indicated that her cervical condition prohibited work. Appellant submitted a copy of the November 30, 2017 cervical spine MRI scan report. This demonstrated multilevel cervical canal stenosis and foraminal narrowing which was slightly worse when compared to the September 20, 2011 scan. The study was negative for disc extrusion.

On October 4, 2018 appellant submitted questions to Dr. Pyle. Dr. Pyle answered "yes" to her questions as to whether the 2011 cervical MRI scan was outdated, and whether he had referred her to Dr. Page based on the findings of the November 2017 MRI scan. As to whether appellant could perform the physical requirements of the information clerk position for four hours daily, five days a week, Dr. Pyle wrote that he recommended a physical assessment.

At the telephonic hearing held on October 22, 2018 appellant testified that, based on Dr. Xeller's report, she could not perform the information clerk position. She explained that Dr. Xeller advised that she could not drive more than 30 minutes and that the two nearest towns, Red Bluff and Redding, were more than 30 minutes away. Appellant also noted that she had serious limitations on endurance and that the November 2017 MRI scan and Dr. Page's report indicated that her accepted cervical condition had progressed.

In a November 15, 2018 letter, an employing establishment workers' compensation specialist advised that the driving time to Red Bluff and Redding was less than 30 minutes. The specialist attached documents from Google Maps verifying travel from appellant's home to these locations and also indicated that other types of transportation could be available.

By decision dated December 20, 2018, an OWCP hearing representative affirmed the May 9, 2018 decision. He found that OWCP properly accorded weight to Dr. Xeller's opinion, finding that the information clerk position complied with his restrictions regarding appellant's ability to work for 20 hours a week. The hearing representative indicated that the subsequently-acquired conditions were not to be considered, and noted that the rehabilitation counselor determined that appellant had relevant work experience and that appellant had

completed computer training. He found that the information clerk position complied with the restrictions prescribed by Dr. Xeller, that it was suitable and available in appellant's commuting area within prescribed driving restrictions. The hearing representative concluded that OWCP properly determined appellant's LWEC by applying "the *Shadrick* formula."

### LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proving that the disability has ceased or lessened before it may terminate or modify compensation benefits.<sup>5</sup>

OWCP's procedures provide that noncooperation with vocational rehabilitation during the placement stage does not generally result in a sanction decision under section 8113(b) of FECA. Rather, if noncooperation occurs during placement, OWCP should request that the rehabilitation counselor submit a final report and list the jobs for which placement was being attempted (*i.e.*, provide updated labor market surveys, if necessary, including current pay information). Continuing placement services for the full 90-day period is not required if the claimant has not cooperated. Upon receipt of this information, the claims examiner should prepare a prereduction notice determining the injured workers' LWEC prospectively pursuant to section 8115 of FECA, not section 8113(b), based on one of the selected positions. After considering any response to the prereduction notice, the claims examiner should issue a final decision, if appropriate.<sup>6</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 for all gainful employment, is entitled to compensation computed on LWEC.<sup>7</sup>

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

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<sup>5</sup> *Z.W.*, Docket No. 18-1000 (issued June 24, 2019).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Vocational Rehabilitation Services*, Chapter 2.813.17(d) (February 2011).

<sup>7</sup> *C.H.*, Docket No. 19-0136 (issued May 23, 2019).

<sup>8</sup> 5 U.S.C. § 8115(a).

<sup>9</sup> *C.M.*, Docket No. 18-1326 (issued January 4, 2019).

the selected position does not establish that the work is not reasonably available in his or her commuting area.<sup>10</sup>

OWCP must initially determine an employee'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 employee's medical condition.<sup>11</sup> Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.<sup>12</sup>

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.<sup>13</sup> 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.<sup>14</sup>

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

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

<sup>11</sup> *J.H.*, Docket No. 18-1319 (issued June 26, 2019).

<sup>12</sup> *Id.*

<sup>13</sup> *G.E.*, Docket No. 18-0663 (issued December 21, 2018).

<sup>14</sup> *Id.*

<sup>15</sup> *Supra* note 9; *supra* note 6 at Chapter 2.813.19d (November 2011).

<sup>16</sup> 5 ECAB 376 (1953).

<sup>17</sup> 20 C.F.R. § 10.403.

<sup>18</sup> *Supra* note 9.

## ANALYSIS

The Board finds that OWCP has met its burden of proof to reduce appellant's wage-loss compensation benefits, effective May 9, 2018, based on her capacity to earn wages in the constructed position of information clerk for 20 hours per week.

As noted, OWCP procedures provide that, when an employee fails to cooperate during placement, it should follow specific procedures, including preparing a prereduction notice in which it determines the injured workers' LWEC prospectively pursuant to section 8115 of FECA based on one of the positions selected by the rehabilitation counselor, to be followed by an appropriate final LWEC decision.<sup>19</sup>

Dr. Xeller, an OWCP referral physician, opined in a comprehensive report dated November 8, 2016 that appellant could return to part-time modified duty. He noted the accepted conditions, and her complaints of neck pain and limited neck motion, reviewed the medical record, and described his physical examination findings. Dr. Xeller diagnosed cervical spondyloarthropathy with elements of spinal stenosis with no myelopathy noted, and mild bilateral carpal tunnel syndrome. He advised that appellant could perform sedentary desk work with light filing and answering telephones for four hours a day. Dr. Xeller limited sitting to three hours and standing to one hour with altering sitting and standing every 30 minutes, and no overhead lifting, squatting, kneeling or climbing, and no driving at work. Driving to and from work limited was limited to 30 minutes or less. Pushing, pulling, and lifting were limited to 10 pounds. OWCP thereafter properly referred appellant for vocational rehabilitation in December 2016 as the medical evidence established that she was no longer totally disabled due to residuals of her employment injury.

OWCP determined that appellant had the physical capacity to perform the duties of an information clerk for 20 hours a week. The position is classified as sedentary employment requiring occasional lifting up to 10 pounds. Dr. Xeller's restrictions fall within this requirement. The vocational rehabilitation counselor noted that position of information clerk allowed for a variety of duties, none of which exceeded Dr. Xeller's restrictions.<sup>20</sup> The Board finds that weight of the medical evidence rests with the opinion of Dr. Xeller who provided a well-rationalized report. Dr. Page did not comment on appellant's work capacity. Dr. Pyle merely advised that appellant could not work due to a subsequently-acquired condition and later recommended that she have a physical assessment. Any incapacity to perform the duties of the selected position resulting from subsequently-acquired conditions is immaterial to an LWEC,<sup>21</sup> and he did not indicate that she could not work due to the accepted conditions. The Board, therefore, finds that the weight the medical evidence establishes that appellant had the physical capacity to perform the duties of the selected position.<sup>22</sup>

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<sup>19</sup> *Supra* note 6.

<sup>20</sup> *Supra* note 4.

<sup>21</sup> *Supra* note 13.

<sup>22</sup> *Supra* note 7.

In assessing the employee's ability to perform the selected position, OWCP must consider not only physical limitations, but also consider work experience, age, mental capacity, and educational background.<sup>23</sup> In her May 3, 2017 report, the rehabilitation counselor described appellant's transferable skills and completed labor market surveys for the positions of information clerk and receptionist, and appellant signed an individual rehabilitation placement plan and job search plan and agreement on May 3, 2017. This noted a job goal of receptionist and information clerk within appellant's commuting area. Copies of the job classification forms for the two positions were signed by the rehabilitation counselor on May 3, 2017, and were based on Tri-County Vocational Services labor market survey dated May 2, 2017. The forms indicated that the positions were sedentary in nature, and were available for full-time and/or part-time positions in appellant's commuting area. As the rehabilitation counselor is an expert in the field of vocational rehabilitation, OWCP may rely on his or her opinion in determining whether a job is vocationally suitable and reasonably available.<sup>24</sup>

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 she had the capacity to perform the position of information clerk.<sup>25</sup> OWCP properly applied the *Shadrick* formula, as codified in section 10.403 of its regulations,<sup>26</sup> in determining her LWEC.

On appeal appellant asserts that her work capacity should be based upon the opinion of Dr. Page, that Dr. Xeller's opinion was based upon a limited examination, and that she was unable to drive to and from work with the restrictions assigned by Dr. Xeller. The Board has found, however, that Dr. Page has not provided an opinion on her work capacity, that Dr. Xeller has provided a rationalized medical opinion, and that the restrictions of Dr. Xeller as to driving are consistent with her ability to commute to the location of available employment positions.

### CONCLUSION

The Board finds that OWCP has met its burden of proof to reduce appellant's wage-loss compensation benefits, effective May 9, 2018, based on her capacity to earn wages in the constructed position of information clerk for 20 hours a week.

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<sup>23</sup> *Supra* note 9.

<sup>24</sup> *Supra* note 7; *supra* note 6 at Chapter 2.816.6(b) (June 2013).

<sup>25</sup> *T.B.*, Docket No. 17-1777 (issued January 16, 2019).

<sup>26</sup> *Supra* note 16.

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 20, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 25, 2019  
Washington, DC

Christopher J. Godfrey, 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