

ISSUE

The issue is whether OWCP has met its burden of proof to reduce appellant's wage-loss compensation, effective June 6, 2018, based on her capacity to earn wages as an information clerk.

FACTUAL HISTORY

On March 19, 2010 appellant, then a 54-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that she sustained injuries to her shoulder, hip, and buttocks when she was hit by a vehicle when she was crossing the street to deliver mail while in the performance of duty. She stopped work that day. OWCP accepted strain of lumbosacral joint, left hip contusion, and sprain of the left shoulder and upper arm. It subsequently expanded acceptance of the claim to include complete left rotator cuff tear and displacement of lumbar intervertebral disc without myelopathy. OWCP paid appellant wage-loss compensation on the supplemental rolls until she was placed on the periodic compensation rolls in August 2010.⁴

Dr. Blair Rhode, Board-certified in orthopedic surgery and sports medicine, began treating appellant in August 2010. On May 3, 2011 he performed left shoulder subacromial decompression, acromioclavicular arthroplasty, and rotator cuff repair.

In March 2014, appellant returned to part-time modified-duty work. She thereafter worked sporadically and filed several recurrence of disability claims (Form CA-2a) in 2014 and 2015, which were accepted by OWCP.

Dr. Rhode continued to submit monthly reports describing appellant's treatment and condition. On October 19, 2015 he advised that she could perform sedentary work with a 10-pound lifting/carrying restriction.

On December 8, 2015 OWCP referred appellant for vocational rehabilitation to find a position within the restrictions provided by Dr. Rhode on October 19, 2015. In a January 29, 2016 report, the vocational rehabilitation counselor described appellant's education, training, and work experience. She performed testing and noted that appellant had transferrable clerical and customer service skills. The rehabilitation counselor completed job classifications for the positions of information clerk and receptionist on March 29, 2016. They indicated that both of these positions were sedentary and were available in appellant's commuting area.

Dr. Rhode continued to advise that appellant could perform sedentary work.

Appellant began job placement in April 2016. On July 25, 2016 OWCP noted that she had been in placement for over 90 days and that the medical evidence and her transferrable skills supported that she could work in the position of information clerk. It indicated that the rehabilitation counselor was directed to close the case and it would compute a loss of wage-earning capacity (LWEC). The vocational rehabilitation counselor closed the case on July 29, 2016.

⁴ The record also indicates that OWCP accepted appellant's December 6, 2011 occupational disease claim (Form CA-2) alleging an aggravation of exostosis of the first metatarsal joint of the left foot, under OWCP File No. xxxxx246.

Appellant retired from the employing establishment on September 30, 2016. Dr. Rhode continued to submit reports indicating that she could perform modified duty.

In work status reports dated November 4 and December 7, 2016, and January 4, 2017, Dr. Rhode diagnosed a right knee condition and advised that appellant could work light duty with the restriction of no squatting, kneeling, or crawling. In reports dated February 1 and March 1, 2017 he advised that she could not work due to the right knee condition. In March 17, April 28, May 26, and June 23, 2017 work status reports, Dr. Rhode referenced back, shoulder, and neck conditions. He advised that appellant was at maximum medical improvement and could perform sedentary duties with lifting and carrying restricted to 10 pounds or less.

By letter dated August 15, 2017, OWCP proposed to reduce appellant's wage-loss compensation based on her capacity to earn wages in the constructed position of information clerk, Department of Labor's *Dictionary of Occupational Titles* (DOT) No. 237.367-022 at the rate of \$370.00 per week. It noted that the physical requirements of the information clerk position did not exceed the restrictions provided by Dr. Rhode, and determined the selected position was medically suitable. OWCP further found that the position was vocationally suitable, based on the rehabilitation counselor's report, and found a 68 percent LWEC, with a new gross compensation rate of \$2,084.00. It attached the job classification for the information clerk position completed by the vocational rehabilitation counselor on March 29, 2016.

In treatment notes dated July 21 and August 30, 2017, Dr. Rhode noted appellant's complaint of left shoulder, low back, and neck pain, and a positive left straight leg raise on examination. He diagnosed shoulder pain, low back pain, traumatic tear of rotator cuff, and lumbar radiculopathy. Dr. Rhode advised that appellant's conditions were permanent and stationary. He attached work status reports to each treatment note in which he advised that she could perform sedentary work with lifting and carrying restricted to 10 pounds or less. On the August 30, 2017 work status form Dr. Rhode also indicated that appellant could not squat, kneel, crawl, bend, or stoop, and could not climb ladders.

By decision dated September 25, 2017, OWCP reduced appellant's wage-loss compensation based on her capacity to earn wages as an information clerk earning \$370.00 per week.

On October 10, 2017 appellant, through counsel, requested a hearing before an OWCP hearing representative.

Dr. Rhode submitted additional treatment notes and work status forms in which he reiterated his prior diagnoses and advised that appellant could perform sedentary work with lifting and carrying of less than 10 pounds.

By decision dated February 5, 2018, an OWCP hearing representative reversed the September 25, 2017 LWEC decision. He found that the medical evidence supported that appellant was capable of working as an information clerk, but that the labor market survey on which the LWEC determination was based was not current, OWCP should have obtained more recent labor market information.

Appellant received retroactive additional compensation from OWCP and it returned her to the periodic compensation rolls. Dr. Rhode submitted reports dated January 29 and February 26, 2018 in which he reiterated his findings and recommendations.

OWCP referred the record to the vocational rehabilitation counselor to provide an updated labor market survey. The counselor forwarded a March 30, 2018 report and attached job classifications for the information clerk and receptionist positions dated March 31, 2018. The rehabilitation counselor indicated that the source of wage data was a Bureau of Labor Statistics survey dated March 31, 2017. For the information clerk position, 20,150 jobs were available in appellant's commuting area with a weekly wage of \$388.00. For the receptionist position, 24,150 jobs were available with a weekly wage of \$380.00.

By letter dated May 3, 2018, OWCP proposed to reduce appellant's wage-loss compensation based on her capacity to earn wages in the constructed position of information clerk, DOT No. 237.367-022 at the rate of \$388.00 per week. It noted that the physical requirements of the information clerk position did not exceed the restrictions provided by her physician Dr. Rhode, and determined the selected position was medically suitable.⁵ OWCP further found that the position was vocationally suitable, based on the rehabilitation counselor's report, and found a 68 percent loss of wage-earning capacity, with a new gross compensation rate of \$2,130.00. It attached the job classification for the information clerk position completed by the vocational rehabilitation counselor on March 31, 2018. 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. OWCP 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.⁶

By decision dated June 5, 2018, OWCP reduced appellant's wage-loss compensation, effective June 6, 2018. It found the position of information clerk with weekly earnings of \$388.00 per week represented her LWEC.

On June 11, 2018 counsel requested a hearing before an OWCP hearing representative. During the hearing, held telephonically on November 7, 2018, appellant testified that her computer skills were stale, that OWCP offered no training through vocational rehabilitation, and that driving made her condition worse. Counsel asserted that she had insufficient experience and training for the selected position.

⁵ The Board notes that OWCP indicated that the strength requirements for the information clerk position were light whereas the job classification indicates that strength level was sedentary.

⁶ The job description for the information clerk position, 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.

Dr. Rhode had submitted reports dated April 20 to December 28, 2018 in which he reiterated his findings and conclusions. He continued to advise that appellant could perform sedentary duties with a 10-pound lifting and carrying restriction.

By decision dated January 18, 2019, an OWCP hearing representative affirmed the June 5, 2018 LWEC determination. She found that, based on Dr. Rhode's opinion, the position of information clerk was medically suitable. The hearing representative further found that the vocational rehabilitation counselor had properly considered all appropriate factors and provided evidence that appellant had satisfied specific vocational requirements for the job. She concluded that the position of information clerk represented appellant's LWEC.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of the compensation benefits.⁷ 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.⁸

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.⁹ 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.¹⁰ 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 the selected position does not establish that the work is not reasonably available in his or her commuting area.¹¹

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

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

⁸ *Id.*

⁹ 5 U.S.C. § 8115(a).

¹⁰ *C.M.*, Docket No. 18-1326 (issued January 4, 2019).

¹¹ *Id.*

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 LWEC that can be attributed to the accepted employment injury and for which the claimant may receive compensation.¹⁵

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.¹⁶ Lastly, OWCP applies the principles set forth in *Albert C. Shadrick*,¹⁷ as codified in section 10.403 of OWCP regulations,¹⁸ to determine the percentage of the employee's LWEC.¹⁹

ANALYSIS

The Board finds that OWCP has met its burden of proof to reduce appellant's wage-loss compensation, effective June 6, 2018, based on her capacity to earn wages as an information clerk.

Dr. Rhode, who began treating appellant in August 2010 has consistently advised since October 19, 2015 that she could perform sedentary duties with a 10-pound lifting and carrying restriction. OWCP, therefore, properly referred her for vocational rehabilitation in December 2015 as the medical evidence established that she was no longer totally disabled due to residuals of her employment injury.²⁰

¹² *J.H.*, Docket No. 18-1319 (issued June 26, 2019).

¹³ *Id.*

¹⁴ *G.E.*, Docket No. 18-0663 (issued December 21, 2018).

¹⁵ *Id.*

¹⁶ *Supra* note 10; Federal (FECA) Procedure Manual, Part 2-- Claims, *Vocational Rehabilitation Services*, Chapter 2.813.19d (November 2011).

¹⁷ 5 ECAB 376 (1953).

¹⁸ 20 C.F.R. § 10.403.

¹⁹ *Supra* note 9.

²⁰ *Supra* note 7.

OWCP further properly determined that appellant had the physical capacity to perform the duties of an information clerk. The position is classified as sedentary employment requiring occasional lifting up to 10 pounds. Dr. Rhode's restrictions fall within this requirement. He reiterated his opinion that appellant could perform sedentary duty with lifting and carrying limited to 10 pounds in a report dated December 28, 2018. The vocational rehabilitation counselor noted that the position of information clerk allowed for a variety of duties, none of which exceeded Dr. Rhode's restrictions.²¹ The Board finds that his opinion constitutes the weight of the medical evidence and establishes that appellant had the requisite physical ability to earn wages as an information clerk.²² There is no contradictory medical evidence of record. 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.²³

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.²⁴ In her March 30, 2018 report, the rehabilitation counselor attached a job classification for the information clerk position dated March 31, 2018. She indicated that the source of wage data was a Bureau of Labor Statistics labor market survey dated March 31, 2017. For the information clerk position, 20,150 jobs were available in appellant's commuting area with a weekly wage of \$388.00. 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.²⁵ 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.²⁶ It applied the *Shadrick* formula, as codified in section 10.403 of its regulations,²⁷ in determining appellant's LWEC. Contrary to counsel's assertion on appeal that LWEC determination was contrary to law and fact, OWCP properly found that the position of information clerk reflected her wage-earning capacity.²⁸

CONCLUSION

The Board finds that OWCP has met its burden of proof to reduce appellant's wage-loss compensation, effective June 6, 2018, based on her capacity to earn wages as an information clerk.

²¹ *Id.*

²² *Supra* note 10.

²³ *Supra* note 7

²⁴ *Supra* note 10.

²⁵ *Supra* note 7; *supra* note 16 at Chapter 2.816.6(b) (June 2013).

²⁶ *T.B.*, Docket No. 17-1777 (issued January 16, 2019).

²⁷ *Supra* notes 17, 18.

²⁸ *Supra* note 10.

ORDER

IT IS HEREBY ORDERED THAT the January 18, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 25, 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