

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

C.P., Appellant)	
)	
and)	Docket No. 19-0595
)	Issued: September 9, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Atwood, TN, Employer)	
)	

Appearances:
Stephanie N. Leet, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On January 24, 2019 appellant, through counsel, filed a timely appeal from an August 2, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP).² Pursuant to the 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.

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 appellant, through counsel, specifically appealed OWCP's August 2, 2018 merit decision. Although OWCP's October 24, 2018 merit decision which suspended appellant's compensation benefits, effective October 14, 2018, is within the Board's jurisdiction, appellant has not appealed that decision. Therefore, the Board will not address the October 24, 2018 suspension decision in this appeal. *See* 20 C.F.R. § 501.3(a)(c).

³ 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP has met its burden of proof to reduce appellant's wage-loss compensation benefits, effective July 22, 2018, based on her capacity to earn wages in the constructed position of general office clerk.

FACTUAL HISTORY

On May 21, 2014 appellant, then a 40-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on May 14, 2014 she injured her lower back and right leg when lifting a tub of flats from the floor to a case while in the performance of duty. She noted that she felt a pop in her lower back and experienced mild pain in her back and right leg, which gradually worsened by the end of the day. Appellant stopped work on May 15, 2014. OWCP accepted the claim for L4 herniated disc including inferiority extruded disc fragment. It paid appellant wage-loss compensation for temporary total disability on the supplemental rolls beginning August 2, 2014.

In a duty status report (Form CA-17) and work capacity evaluation (Form OWCP-5c) dated June 10, 2016, Dr. Laverne R. Lovell, an attending Board-certified neurologist, diagnosed other intervertebral disc displacement, lumbar region due to the accepted May 14, 2014 employment injury. He advised that, while appellant could not perform her usual job, she could work four hours a day with restrictions. Dr. Lovell's restrictions included no operation of a motor vehicle at work and no bending, stooping, twisting, pushing, or pulling. Appellant was also restricted to continuous sitting and standing, intermittent simple grasping, and casing mail four hours a day, and intermittent walking. Dr. Lovell indicated that these restrictions applied until her next monthly appointment when a magnetic resonance imaging (MRI) scan would be completed.

OWCP, on July 1, 2016, referred appellant for vocational rehabilitation based on Dr. Lovell's June 10, 2016 report. In a letter dated August 4, 2016, a vocational rehabilitation counselor requested that the employing establishment determine whether it had a position available for appellant within the restrictions set forth by Dr. Lovell.

On September 8, 2016 the employing establishment offered appellant a part-time, modified rural carrier position for seven and one-half hours a week, over a five-day workweek, which was available effective September 17, 2016. Appellant accepted the position and returned to work on September 9, 2016. She worked one hour a day in the position through September 16, 2016. Effective September 17, 2016, appellant accepted the modified position working one and one-half hour a day, five days a week.

OWCP thereafter received an October 17, 2016 functional capacity evaluation (FCE) report which revealed that appellant was capable of performing light to medium physical demand work with occasional lifting of 22 pounds from floor to waist, 20 pounds from waist to shoulder, and 20 pounds from shoulder to overhead; carrying 30 pounds; pushing 49 pounds; and pulling 42 pounds. Appellant could also occasionally stand up to 1 hour, walk up to .23 miles, crawl up to 10 feet, kneel, squat, bend, climb up and down stairs, and sit frequently. She could never crouch due to increased low back pain.

OWCP also received an additional Form CA-17 report dated November 10, 2016 by Dr. Lovell who reiterated his diagnosis of other intervertebral disc displacement, lumbar region due to the accepted May 14, 2014 employment injury. Dr. Lovell advised that appellant could perform light to medium physical demand work.

On March 31, 2017 appellant stopped work after being notified by the employing establishment that it could no longer provide work compatible with her restrictions.

OWCP received a Form CA-17 report dated April 21, 2017 by Dr. Toby Hampton, a Board-certified family practitioner. Dr. Hampton diagnosed other intervertebral disc displacement, lumbar region due to the accepted May 14, 2014 employment injury. He advised that appellant could perform light-duty work, four hours a day with restrictions. The restrictions included no pulling, pushing, or lifting more than 20 pounds continuously for three to four hours and intermittently for 20 to 30 minutes; standing more than 60 minutes; and climbing, kneeling, bending/stooping, twisting, driving a vehicle, and operating machinery. Appellant was allowed to sit continuously for three to four hours and intermittently for 20 to 30 minutes; stand and reach above shoulder level continuously for one hour; walk intermittently for .2 hours; and perform simple grasping and fine manipulation continuously for four hours.

On May 9, 2017 OWCP again referred appellant for vocational rehabilitation based on Dr. Hampton's⁴ April 21, 2017 report. A vocational rehabilitation counselor, on July 21, 2017, completed a job classification (Form CA-66) for the position of general office clerk, listed in the Department of Labor, *Dictionary of Occupational Titles* and bearing the DOT #219.362-010.⁵ The physical demand was listed as light duty, which required occasional lifting of 20 pounds; frequent lifting of 10 pounds; reaching, handling, fingering, talking, and hearing; and no climbing, balancing, stooping, kneeling, crouching, or crawling. The position involved tasks including, but not limited to maintaining records of business transactions and office activities and other general clerical duties.

The rehabilitation counselor noted that appellant would meet the specific vocational preparation for the position in three to six months by obtaining basic computer skills training at Tennessee Career Center in Jackson, Tennessee for a period of approximately two months followed by on-the-job training. He determined that the position was performed in sufficient numbers to be reasonably available within the commuting area based on information from the state Department of Labor and Workforce Development at a weekly wage of \$340.00.

OWCP thereafter received an additional Form CA-17 report, dated October 26, 2017, from Dr. Hampton who again advised that appellant could perform light-duty work, four hours a day with restrictions. The restrictions were the same restrictions, with the exceptions of no walking and driving a vehicle intermittently for one hour, set forth in his April 21, 2017 CA-17 form report.

⁴ The Board notes that it appears OWCP inadvertently misidentified the April 21, 2017 Form CA-17 report as being authored by Dr. Lovell rather than Dr. Hampton. The report indicates that the author's specialty is family medicine. As noted, Dr. Lovell is a Board-certified neurologist, while Dr. Hampton is a Board-certified family practitioner.

⁵ The vocational rehabilitation counselor also completed CA-66 forms for the positions of hospital admitting clerk (DOT #205.362-018) and receptionist (DOT #237.367-038).

On December 13, 2017 a rehabilitation specialist indicated that appellant had completed computer training and that placement assistance would begin on December 28, 2017.

OWCP, in a letter dated January 11, 2018, requested that Dr. Lovell review the position description for among other things, general office clerk and a labor market survey for this position. It specifically requested that he provide whether the restrictions set forth in his October 26, 2017 Form CA-17 report⁶ represented appellant's current restrictions and whether she was capable of performing the duties of the general office clerk position.

In a Form OWCP-5c report dated February 5, 2018, Dr. Lovell noted that appellant could not perform her usual job due to continued pain in the lower back and legs. He noted, however, that she could perform sedentary or light work for eight hours a day with permanent restrictions. These included: sitting, standing, and lifting 20 pounds for four hours; and walking, pushing 20 pounds, and pulling 20 pounds for two hours; and no squatting, kneeling, or climbing. Dr. Lovell recommended 10-minute breaks every two hours and 30-minute breaks every four hours.

OWCP, in a letter dated March 8, 2018, requested that Dr. Lovell clarify how appellant could work eight hours a day when she could only sit four hours a day.

Dr. Lovell responded in a letter dated March 21, 2018 that the four-hour sitting and standing restrictions were meant to indicate continuous sitting or standing. He advised that appellant could sit for longer periods during the day if she had frequent breaks where she could get up, stand, and move around. Dr. Lovell concluded that she was able to sit, stand, and move around while working such that she could maintain a reasonable comfort level.

In a letter dated June 21, 2018, OWCP notified appellant that it proposed to reduce her wage-loss compensation pursuant to 5 U.S.C. §§ 8106 and 8115. It advised her that she was only partially disabled and that the position of general office clerk (DOT #219.362-010) was medically and vocationally consistent with her medical limitations, work experience, and education. OWCP explained that the physical requirements of the general office clerk did not exceed the restrictions imposed by Dr. Lovell in his June 10, 2016 report. It found that appellant was capable of earning wages at the rate of \$340.00 per week as a general office clerk and that the position was reasonably available within her commuting area. OWCP provided an attachment detailing the application of the formula set forth in *Albert Shadrick*.⁷ Appellant was afforded 30 days to submit evidence and argument challenging the proposed action.

In a letter dated July 19, 2018, appellant, through counsel, disagreed with the proposed reduction of compensation. Counsel contended that Dr. Lovell's June 10, 2016 work restrictions were stale and should not be used as appellant's valid work restrictions. Alternatively, she asserted that the general office clerk position was not within the restrictions set forth by Dr. Lovell. Counsel maintained that his June 10, 2016 Form OWCP-5c report indicated that appellant could only work four hours a day and that her restrictions were not permanent as they only applied until

⁶ The record does contain a Form CA-17 report from Dr. Lovell. As previously noted by the Board, however, the author of the October 26, 2017 Form CA-17 report is Dr. Hampton.

⁷ 5 ECAB 376 (1953); as codified by regulation in 20 C.F.R. § 10.403.

her next monthly appointment when a lumbar spine MRI scan was completed. She referenced the findings of the October 17, 2016 FCE⁸ and asserted that these findings, as well as subsequent Form CA-17 reports from Dr. Lovell, provided additional work restrictions that were not within the requirements of the general office clerk position.

Counsel submitted an October 20, 2017 report from Dr. Hampton who noted appellant's complaints of low back pain radiating down her right leg. Dr. Hampton indicated that appellant reported that pain medication allowed her to work part time.

Dr. Hampton discussed examination findings and diagnosed low back pain and degenerative disc disease of the lumbar spine with failed back surgery.

OWCP subsequently received an additional Form CA-17 report dated July 7, 2018 by Dr. Hampton who reiterated that appellant could work four hours a day with restrictions. Appellant was allowed to lift eight pounds continuously for three to four hours and 17 pounds intermittently for 20 to 30 minutes; sit and stand continuously for four hours; and walk, kneel, bend, stoop, twist, reach above shoulder with a maximum of 14 pounds, drive a vehicle, and operate machinery intermittently for 20 to 30 minutes.

By decision dated August 2, 2018, OWCP reduced appellant's wage-loss compensation benefits, effective July 22, 2018, based on her ability to earn wages of \$340.00 per week as a general office clerk. It noted that the physical duties of the position were in accordance with the restrictions provided by Dr. Lovell in his March 21, 2018 report, and that her rehabilitation counselor had determined that she was vocationally capable of performing the constructed position. OWCP applied the *Shadrick*⁹ formula to adjust appellant's compensation.

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.¹⁰ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.¹¹

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.¹² 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

⁸ The Board notes that it appears counsel inadvertently related that the FCE was performed on November 10, 2016 rather than October 17, 2016 as she referenced the exact findings contained in the October 17, 2016 FCE.

⁹ *Supra* note 7.

¹⁰ *See E.D.*, Docket No. 17-1064 (issued March 22, 2018).

¹¹ *See S.N.*, Docket No. 17-1589 (issued January 3, 2018).

¹² 5 U.S.C. § 8115(a).

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.¹³ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.¹⁴ 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.¹⁵ 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.¹⁶

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 the condition.¹⁷ Additionally, the Board has held that a loss of wage-earning capacity (LWEC) determination must be based on a reasonably current medical evaluation.¹⁸

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.¹⁹ Lastly, OWCP applies the principles set forth in *Albert C. Shadrick*²⁰ as codified in section 10.403 of OWCP's regulations,²¹ to determine the percentage of the employee's LWEC.²²

¹³ *Id.*; see also *J.M.*, Docket No. 17-0397 (issued April 3, 2018).

¹⁴ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.3 (June 2013); see also *M.P.*, Docket No. 18-0094 (issued June 26, 2018).

¹⁵ See *M.K.*, Docket No. 17-0208 (issued April 17, 2018).

¹⁶ See *O.V.*, Docket No. 16-1702 (issued September 13, 2017).

¹⁷ See *B.G.*, Docket No. 17-0477 (issued September 20, 2017).

¹⁸ *Id.*

¹⁹ Federal (FECA) Procedure Manual, *supra* note 14 at Chapter 2.816.6.a (June 2013).

²⁰ *Supra* note 7.

²¹ 20 C.F.R. § 10.403.

²² See *D.S.*, Docket No. 17-0496 (issued May 25, 2017).

ANALYSIS

The Board finds that OWCP has met its burden of proof to reduce appellant's wage-loss compensation benefits, effective July 22, 2018, based on her capacity to earn wages in the constructed position of general office clerk.

The duties of the constructed position of general office clerk involved tasks including, but not limited to, maintaining records of business transactions and office activities and other general clerical duties. The physical demands of the position required occasional lifting of 20 pounds; frequent lifting of 10 pounds; reaching, handling, fingering, talking, and hearing; and involved no climbing, balancing, stooping, kneeling, crouching, or crawling.

OWCP relied on the opinion of appellant's physician, Dr. Lovell, in finding that the constructed position was within appellant's physical limitations. On January 11, 2018 it requested that Dr. Lovell review the position description for general office clerk and determine whether appellant could perform the identified position. In response, Dr. Lovell submitted a Form OWCP-5c report dated February 5, 2018 in which he advised that while appellant could not perform her usual job she could perform sedentary light work eight hours a day with permanent restrictions. These included sitting, standing, and lifting 20 pounds for four hours; and walking, pushing 20 pounds, and pulling 20 pounds for two hours; and no squatting, kneeling, or climbing. Dr. Lovell recommended 10-minute breaks every two hours and 30-minute breaks every four hours. OWCP later sought clarification from Dr. Lovell regarding his finding that appellant could work eight hours a day, but only sit for four hours a day. Dr. Lovell subsequently explained that his sitting restriction referred to continuous sitting. He related that appellant could sit for longer periods during the workday as long as she took frequent breaks to get up, stand, and move around.

As the physical requirements of the general office clerk position are within the restrictions recommended by Dr. Lovell, the Board finds that the weight of the evidence establishes that appellant had the physical capacity to perform the duties of the constructed position.²³

Dr. Hampton, appellant's physician, has submitted multiple reports detailing his treatment of appellant. He opined that appellant could only work four hours a day with restrictions. The Board finds, however, that these reports do not establish appellant's disability from performing work in the constructed position of general office clerk. Dr. Hampton did not indicate that he had reviewed the duties required of a general office clerk. These reports merely provided findings and did not offer an opinion as to whether appellant was capable of performing the duties required for the constructed position of a general office clerk.²⁴ Furthermore, Dr. Hampton provided work restrictions more stringent than those in the constructed position of general office clerk, but did not explain why appellant's work restrictions were further limited.²⁵ As such, the Board finds that

²³ See *C.H.*, Docket No. 19-0136 (issued May 23, 2019); *C.M.*, Docket No. 18-1326 (issued January 4, 2019); *J.B.*, Docket No. 17-0817 (issued April 26, 2018); *T.J.*, Docket No. 16-1473 (issued January 26, 2017).

²⁴ See *J.S.*, Docket No. 12-1343 (issued April 22, 2013).

²⁵ *G.A.*, Docket No. 15-161 (issued May 6, 2015).

these reports fail to establish that appellant was unable to perform the duties of a general office clerk.²⁶

In assessing the claimant's ability to perform the selected position, OWCP must consider not only physical limitations, but also take into account appellant's work experience, age, mental capacity, and educational background.²⁷ The Board finds that appellant had received the necessary vocational and educational preparation for the constructed position of general office clerk. The rehabilitation counselor determined that appellant would acquire the skills necessary to perform the position of general office clerk by attending computer skills training at Tennessee Career Center, which she completed as of December 13, 2017. The counselor found that the position existed in sufficient numbers within appellant's commuting area. The rehabilitation counselor concluded that, based on appellant's education, work experience, and transferable skills that she was capable of earning the median wages in the identified position as a skilled worker. As he is an expert in the field of vocational rehabilitation, OWCP may rely on his opinion in determining whether the job is vocationally suitable and reasonably available.²⁸

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 selected position.²⁹ OWCP also properly determined her loss of wage-earning capacity in accordance with the formula developed in *Shadrick* and codified at 20 C.F.R. § 10.403. It, therefore, properly determined that the position of general office clerk reflected appellant's wage-earning capacity, and properly reduced her compensation effective July 22, 2018.

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 has met its burden of proof to reduce appellant's wage-loss compensation benefits, effective July 22, 2018, based on her capacity to earn wages in the constructed position of general office clerk.

²⁶ *J.S.*, *supra* note 24.

²⁷ *See C.H.*, *supra* note 23; *C.M.*, *supra* note 23; *T.J.*, *supra* note 23.

²⁸ *See C.H.*, *supra* note 23; *J.B.*, *supra* note 23; Federal (FECA) Procedure Manual, *supra* note 14 at Chapter 2.814.6(b) (June 2013).

²⁹ *See supra* note 23.

ORDER

IT IS HEREBY ORDERED THAT the August 2, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 9, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board