

ISSUE

The issue is whether OWCP properly reduced appellant's wage-loss compensation, effective April 30, 2017, based upon his wage-earning capacity in the constructed position of office clerk.

FACTUAL HISTORY

On October 15, 2002 appellant, then a 46-year-old waiter, filed an occupational disease claim (Form CA-2) alleging that factors of his federal employment, including daily bending/stooping while cleaning and resetting tables and pulling hot carts, caused or contributed to the development of a back condition. OWCP initially accepted the claim for lumbar sprain. It subsequently expanded acceptance of the claim to include the conditions of displacement of lumbar intervertebral disc without myelopathy and degeneration lumbar intervertebral disc.

The employing establishment was initially able to accommodate appellant's restrictions and he returned to work as a waiter in October 2002. Appellant stopped work in May 2007 as the employing establishment was unable to continue to accommodate his restrictions. OWCP again paid wage-loss compensation on the supplemental rolls and placed him on the periodic compensation rolls commencing June 10, 2007. Appellant continued to work part time for an independent contractor performing furniture repair, upholstery work, and sign making for an average of approximately 25 hours per week, a job he held prior to his 2002 employment injury.

On May 18, 2016 appellant underwent a second opinion evaluation with Dr. Wallace K. Larson, a Board-certified orthopedic surgeon. In his report, Dr. Larson noted appellant's history of injury and medical treatment. He reviewed the statement of accepted facts (SOAF) and presented examination findings. Dr. Larson diagnosed degenerative disc disease of the lumbar spine without radicular symptoms and opined that appellant did not require further medical treatment. He opined that appellant was able to work 8 hours per day with restrictions, and since he was working 32 hours weekly he could continue that work. In an accompanying work capacity evaluation (Form OWCP-5c), Dr. Larson opined that appellant could work 8 hours per workday with restrictions of 4 hours per day of twisting, bending/stooping, squatting, kneeling, and climbing and 3 hours per day of no more than 20 pounds lifting and 40 pounds pushing and pulling.

As the employing establishment could no longer accommodate appellant's restrictions, OWCP referred him to vocational rehabilitation services based on Dr. Larson's May 18, 2016 opinion. In letters dated December 13, 2016 and January 9, 2017, OWCP advised appellant that his part-time private sector employment, which he held prior to the employment injury, was dissimilar from his date-of-injury employment. It informed appellant of his requirement to seek part-time private sector employment.

On December 27, 2016 appellant signed a vocational rehabilitation plan development form. On January 8, 2017 the vocational rehabilitation counselor completed a transferable skills analysis which showed that appellant had a reasonable probability to obtain re-employment in the entry level clerical field of office clerk and file clerk. The vocational rehabilitation counselor indicated that appellant's skills that were transferable to the entry level clerical/administrative position were skills in computer operation and administrative tasks based upon current volunteer union steward tasks and his work history prior to 2002.

In a January 19, 2017 report and Form OWCP-5c, appellant's physician, Dr. Mark Fraley, an osteopath specializing in family medicine, opined that appellant was able to work six to eight hours per day with restrictions in his current carpenter job, which appellant held preinjury. He provided bending/stooping restrictions, and indicated that appellant required 5- to 10-minute breaks "as needed every hour." Dr. Fraley further indicated that his opinion only applied to appellant's current carpenter position and did not apply to any other job possibility as all jobs were different.

Appellant subsequently advised his vocational rehabilitation counselor that he disagreed with Dr. Larson's work restrictions and that he would only follow Dr. Fraley's work restrictions.

On January 24, 2017 the vocational rehabilitation counselor noted in a rehabilitation action report (Form OWCP-44) that appellant confirmed that he would not seek re-employment under the currently accepted physical restrictions of Dr. Larson. She indicated that a transferable skills analysis, completed on January 8, 2017, showed that appellant had a reasonable probability to obtain re-employment in the entry level clerical field of office clerk and file clerk. The vocational rehabilitation counselor noted that earning capacity for entry level clerical jobs in those job titles ranged from \$9.37 to \$10.14 per hour.

OWCP, in a letter dated January 30, 2017, notified appellant of the penalties under 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519 for failure to cooperate with vocational rehabilitation without good cause. It noted that the vocational rehabilitation counselor had advised that he would only follow work restrictions assigned by his own physician and that he declined to participate in his vocational rehabilitation return to work program by failing to complete his December 27, 2016 rehabilitation plan development assignments. It also noted that appellant had not provided a return to work rehabilitation plan, which was due by March 6, 2017. OWCP advised that appellant was obligated to use Dr. Larson's May 18, 2016 work restrictions in his return to work activity. It further noted that the vocational rehabilitation counselor indicated that he had the ability to obtain entry level employment working 32 hours per week as an office clerk earning wages of \$299.84 per 32-hour week in his labor market. OWCP afforded appellant 30 days to contact OWCP and his rehabilitation counselor to make a good faith effort to participate in the rehabilitation effort designed to return him to gainful employment. It informed him that, if he believed he had a good reason for not participating in the rehabilitation effort, he should respond within 30 days, with reasons for noncompliance, and submit evidence in support of his position. OWCP noted that, if appellant did not comply with the instructions contained in the letter within 30 days, the rehabilitation effort would be terminated and action would be taken to reduce his compensation under 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519.

In a vocational rehabilitation progress report dated February 1, 2017, the vocational rehabilitation counselor noted that the wage data for the selected position of office clerk was a preliminary earnings capacity projection based upon the most recent available statistical data of 2015. She added that additional research would be needed to verify the suitability per duties, the required physical requirements of the position, and significant availability in the local private sector job market.

On February 21, 2017 appellant, through his representative, contested his ability to participate in vocational rehabilitation.

On May 2, 2017 the employing establishment indicated that appellant's pay plan was wage-grade (WG) 03, Step 00 with base pay rate \$16.26 per hour. It advised that he was in retained pay status and was only entitled to 50 percent of annual pay adjustments under the applicable pay retention rules of the employing establishment. An attached spreadsheet indicated that appellant's pay rate was \$16.26 and his current pay rate would be \$17.95.

By decision dated May 4, 2017, OWCP reduced appellant's wage-loss compensation, effective April 30, 2017, based on his ability to earn \$299.84 in a 32-hour week in wages in the constructed position of office clerk, *Dictionary of Occupational Titles* (DOT) No. 209.562-010.⁴ It found that the physical and vocational requirements of the position conformed to his medical restrictions and prior work experience. OWCP noted that appellant had refused to develop a rehabilitation plan for private sector return to work based on the accepted May 18, 2016 work restrictions of Dr. Larson. It further noted that he had been notified on several occasions that the carpentry position he currently holds was not a fair and reasonable representation of his earning capacity. Commencing April 30, 2017, OWCP applied the *Shadrick*⁵ formula and thereafter paid appellant wage-loss compensation benefits at the new rate of \$948.88.⁶

On May 5, 2017 the rehabilitation vocational counselor closed appellant's case due to the vocational rehabilitation sanction in place.

On May 24, 2017 appellant requested an oral hearing before an OWCP hearing representative, which was held telephonically on October 26, 2017. He asserted that the wage-earning capacity was incorrectly calculated as the correct pay rate was WG-8 instead of WG-3. A Notice of Personnel Action (Standard Form SF-50) with an effective date of March 31, 2002 indicated that appellant's job changed from wood crafter to waiter and that he was entitled to retain a WG-8 pay rate until March 30, 2004.

By decision dated January 8, 2018, an OWCP hearing representative vacated OWCP's May 4, 2007 decision based on the pay rates used to calculate the loss of wage-earning capacity (LWEC) payments. The hearing representative found that OWCP properly determined that since appellant had not fully participated in vocational rehabilitation efforts, he would have been capable of earning the wages of an office clerk. However, based on the SF-50 provided, additional development was needed as to appellant's correct pay rate.

In a November 15, 2017 letter, Dr. Fraley indicated that appellant could work light duty and that stretch breaks must be taken to reduce symptoms caused by work activity. He indicated that his previous restrictions and narratives stand, but clarified that those restrictions would apply to any position, not just to appellant's current carpenter position. Dr. Fraley opined that "any position would undoubtedly require numerous accommodations as appellant's current employer allows and provides however." He continued to disagree with the work restrictions of Dr. Larson. A copy of his previously submitted Form OWCP-5c was submitted.

⁴ The physical requirements of the office clerk position involved light exertion level, with a negligible amount of force constantly, up to 10 pounds of force frequently, and no more than 20 pounds of force occasionally.

⁵ 5 ECAB 376 (1953).

⁶ This was based on appellant's date of recurrence pay rate.

In a March 28, 2018 letter, the employing establishment provided pay rate information which demonstrated that appellant's recurrence pay rate was correct, but that the current wage of WG 03, Step 00, had he not been injured, would be \$18.91 per hour. It confirmed that he was under pay retention at the time of his injury and was only entitled to 50 percent of annual pay adjustments under the employing establishment's pay retention rules. A spread sheet demonstrated the required pay adjustments.

On August 1, 2018 OWCP issued a *Shadrick* documentation memo for pay rate validation for LWEC decision. It found that appellant's previously established recurrence pay rate from May 11, 2007 had an updated hourly rate of \$18.91 or \$758.95 per week for the date-of-injury job.⁷

By decision dated August 3, 2018, OWCP reduced appellant's wage-loss compensation, effective April 30, 2017, based on his ability to earn \$299.84 in a 32-hour week in wages in the constructed position of office clerk. It found that he had failed, without good cause, to undergo vocational rehabilitation as directed. Based on the updated pay rate information from the employing establishment from appellant's date-of-recurrence pay rate, OWCP found that appellant's net compensation at the updated pay rate was \$1,021.92.

On August 21, 2018 appellant requested an oral hearing before an OWCP hearing representative. The hearing was held telephonically on January 18, 2018.

By decision dated April 4, 2019, an OWCP hearing representative affirmed OWCP's August 3, 2018 decision.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proof to establish that the disability has ceased or lessened before it may terminate or modify compensation benefits.⁸ 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 his or her LWEC.⁹

When OWCP makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an OWCP wage-earning capacity counselor or specialist for selection of a position, listed in the Department of Labor, DOT or otherwise available in the open market, that fit 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 labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in *Albert C.*

⁷ OWCP determined, on August 2, 2018, that appellant was underpaid \$708.81 during the period April 30 through July 21, 2017. On August 3, 2018 OWCP issued a check to him in the amount of \$708.81 for the pay rate adjustment.

⁸ S.C., Docket No. 19-1680 (issued May 27, 2020); *Betty F. Wade*, 37 ECAB 556, 565 (1986).

⁹ 20 C.F.R. §§ 10.402, 10.403.

*Shadrick*¹⁰ and codified by regulations at 20 C.F.R. § 10.403 should be applied.¹¹ Subsection (d) of the regulations 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.¹²

The determination of whether an employee is physically capable of performing a modified assignment is a medical question that must be resolved by medical evidence.¹³ OWCP procedures provide that acceptable reasons for refusing an offered position include withdrawal of the offer or medical evidence of inability to do the work or travel to the job.¹⁴

Section 8123(a) of FECA provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."¹⁵ In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹⁶

OWCP's procedures provide that if the attending physician opines that the claimant cannot perform the duties of the offered position and a second opinion specialist opines that the claimant can perform those duties, and both opinions are of equal weight, then a conflict in the medical evidence exists and a referral to an impartial medical specialist for a referee examination is necessary.¹⁷ If the claims examiner seeks an impartial medical examination and ultimately finds that the offered position is suitable, a new 30-day notice is required.¹⁸

ANALYSIS

The Board finds that OWCP improperly reduced appellant's wage-loss compensation, effective April 30, 2017.

OWCP initially referred appellant to Dr. Larson for a second opinion evaluation to determine appellant's work restrictions. In a May 18, 2016 report, Dr. Larson, noted his review

¹⁰ *Supra* note 5.

¹¹ *Supra* note 9 at § 10.403.

¹² *See S.W.*, Docket No. 15-0598 (issued June 22, 2015); *Id.* at § 10.403(d).

¹³ *M.A.*, Docket No. 18-1671 (issued June 13, 2019); *Gayle Harris*, 52 ECAB 319 (2001).

¹⁴ *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.5a (June 2013); *see E.B.*, Docket No. 13-0319 (issued May 14, 2013).

¹⁵ 5 U.S.C. § 8123(a).

¹⁶ *D.M.*, Docket No. 18-0746 (issued November 26, 2018); *R.H.*, 59 ECAB 382 (2008); *James P. Roberts*, 31 ECAB 1010 (1980).

¹⁷ *Supra* note 14, Part 2 -- Claims, *Job Offers and Return to Work*, at Chapter 2.814.5.a.4(d) (June 2013).

¹⁸ *Id.*

of a SOAF and the medical record. In a May 18, 2016 Form OWCP-5c, Dr. Larson opined that appellant could work 8 hours per work day with restrictions of 4 hours per day twisting, bending/stooping, squatting, kneeling, and climbing; no more than 40 pounds 3 hours per day pushing and pulling; and no more than 20 pounds 3 hours per day of lifting.

In a January 19, 2017 report and Form OWCP-5c, appellant's physician Dr. Fraley opined that appellant was able to work 6 to 8 hours per day with restrictions in his existing carpenter job, which appellant held preinjury. Dr. Fraley also provided bending/stooping restrictions and indicated that appellant required 5- to 10-minute breaks "as needed every hour." In a November 15, 2017 letter, Dr. Fraley clarified that appellant could work light duty, but that stretch breaks were necessary to reduce symptoms caused by work activity. He reiterated his prior restrictions and narratives, but clarified that those restrictions would apply to any position, not just to appellant's carpenter position. Dr. Fraley concluded that "any position would undoubtedly require numerous accommodations as appellant's current employer allows and provides however." He noted his specific disagreement with the work restrictions assigned by Dr. Larson.

The Board finds that an unresolved conflict remains as to the work restrictions that impact appellant's ability to perform the constructed position of an office clerk, as Dr. Fraley and Dr. Larson disagreed as to the level of possible capacity to work. Dr. Fraley considered the restrictions assigned by Dr. Larson, for the government, and directly refuted his restrictions upon which OWCP determined that appellant can return to work in an office clerk position. For a conflict to arise, the opposing physician's viewpoints must be of virtually equal weight and rationale.¹⁹ The Board finds that the medical opinions of Drs. Fraley and Larson are of equal weight and are in conflict and thus preclude a determination as to whether OWCP properly found appellant capable of work in the constructed position of office clerk. As there exists an unresolved conflict in medical opinion, pursuant to 5 U.S.C. § 8123(a), the case should have been referred to physician in the appropriate field of medicine to resolve the conflict.²⁰ Thus, the Board finds that OWCP improperly reduced appellant's wage-loss compensation benefits based upon the restrictions assigned by Dr. Larson.

¹⁹ See *J.B.*, Docket No. 18-1021 (issued December 4, 2018); *M.R.*, Docket No. 17-0634 (issued July 24, 2018); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

²⁰ *Supra* note 18; see also *B.C.*, Docket No. 18-0407 (issued September 17, 2018).

CONCLUSION

OWCP improperly reduced appellant's wage-loss compensation, effective April 30, 2017.

ORDER

IT IS HEREBY ORDERED THAT the April 4, 2019 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 27, 2020
Washington, DC

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

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board