



Federal Employees' Compensation Act<sup>4</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>5</sup>

### **ISSUE**

The issue is whether OWCP has met its burden of proof to reduce appellant's wage-loss compensation, effective January 6, 2019, based on her capacity to earn wages in the constructed position of receptionist.

### **FACTUAL HISTORY**

On September 20, 2013 appellant, then a 61-year-old transportation security officer, filed a traumatic injury claim (Form CA-1) alleging that on that date she fractured her wrist when she fell to the floor after she attempted to fix her shoe lace, while in the performance of duty. She indicated that her pay grade as of the date of injury was Level 5 Step E. On October 8, 2013 appellant underwent open reduction and internal fixation of right distal radius intraarticular fracture. OWCP accepted the claim for closed fracture of right distal radius. Appellant received wage-loss compensation on the supplemental rolls as of November 19, 2013 on the periodic rolls as of December 15, 2013.

On the employing establishment's portion of a Form CA-7 dated December 3, 2013 it indicated that appellant was Grade E, Step O and that her base pay was \$698.25 per week with night differential of \$17.46 per week on the date of injury.

On December 11, 2013 OWCP called the employing establishment to discuss the inconsistency in the grades on the CA-1 and CA-7 forms. The employing establishment indicated that appellant was paid using pay band "E" and that there were no steps in the pay band.

On June 19, 2014 Dr. Jose Jackson, an orthopedic surgery specialist, indicated that appellant was able to work "with restrictions on lifting in the forearms." He released her from his care on August 19, 2014, noting that she was at maximum medical improvement (MMI), with no pain and normal function, but with stiffness of the right hand. Despite several requests from OWCP, Dr. Jackson did not provide further specific details regarding appellant's lifting restrictions.

In a November 21, 2014 report, Dr. Gilbert D. Beauperthuy-Rojas, an osteopath Board-certified in orthopedic surgery serving as an OWCP second opinion physician, reviewed the medical record and noted appellant's physical examination findings. He opined that appellant had reached MMI. In a November 21, 2014 work capacity evaluation (Form OWCP-5c),

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<sup>4</sup> 5 U.S.C. § 8101 *et seq.*

<sup>5</sup> The Board notes that following the July 9, 2019 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

Dr. Beauperthuy-Rojas opined that appellant was capable of full-time limited duty with pulling/pushing/lifting restrictions of no more than 10 pounds.

On January 23, 2015 OWCP referred appellant for vocational rehabilitation services. After performing a transferable skills analysis and vocational and other testing, the vocational rehabilitation specialist indicated that appellant had the minimal specialized vocational preparation to qualify for receptionist, appointment clerk, or other similar clerical jobs. Appellant underwent a 15-week training program computer/office proficiency from September 8, 2015 to February 2, 2016. Thereafter, she was provided with 90 days of placement assistance from February 8 through May 3, 2016, with an extension of placement assistance through July 8, 2016. As appellant did not secure employment, vocational rehabilitation services were closed on August 30, 2016.

In a March 28, 2017 report, Dr. Brian Fingado, an attending Board-certified orthopedic and hand surgeon, opined that appellant was at MMI and advised that she could work on a full time basis with restrictions. On a corresponding duty status report (Form CA-17), Dr. Fingado indicated that appellant could lift/carry no more than 10 pounds on a continuous basis, no more than 15 pounds on an intermittent basis, and could drive intermittently for two hours per day.

On October 13, 2017 appellant's case was referred back to a vocational rehabilitation counselor for a current labor market survey. In a December 16, 2017 Form OWCP-66, labor market survey, the vocational rehabilitation counselor identified the receptionist position as Department of Labor, *Dictionary of Occupational Titles* (DOT), No. 237.367-038 as within appellant's medical and vocational abilities.<sup>6</sup> The position was listed at the sedentary level with occasional lifting of no more than 10 pounds, frequent reaching and handling, and occasional fingering. The vocational rehabilitation counselor indicated that appellant met the specific vocational preparation as she had a certificate of completion for Microsoft Office training. She also indicated that the position was reasonably available in appellant's commuting area and had a weekly wage of at least \$360.00.

In an April 11, 2018 letter, the employing establishment indicated that appellant's date-of-injury pay rate for pay band E had base salary \$30,133.00 with locality pay \$6,298.00. It noted that one year prior to the date of injury, appellant earned night differential of \$917.58 and holiday compensation of \$1,396.80, that her salary ranged from \$29,302.00 (minimum) to \$44,007.00 (maximum) with a 20.79 percent locality pay. The employing establishment advised that the current pay band had salary range of \$30,919.00 to \$46,434.00 with 22.64 percent locality pay.

In a May 15, 2018 report, Dr. Fingado indicated that appellant had a stable examination. In a Form CA-17 report of even date, he reported restrictions of lifting/carrying/pulling/pushing no more than 10 pounds continuously and no more than 15 pounds intermittently; no climbing,

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<sup>6</sup> The job description indicated that a receptionist received callers at establishment, determined nature of business and directed callers to destination. The receptionist obtains caller's name and arranges for appointment with person called upon. Directs caller to destination and records name, time of call, nature of business, and person called upon. Depending upon the type of office, may operate PBX telephone console to receive incoming messages; may type memos, correspondence, reports and other documents; may make future appointments and answer inquiries; may perform variety of clerical duties and other duties pertinent to type of establishment; and may collect and distribute mail and messages.

kneeling, bending/stooping, or twisting; reaching above the shoulder for 30 minutes on a continuous basis and 8 hours on an intermittent basis; and intermittent driving for 2 hours.

A September 13, 2018 worksheet for determining wage-loss capacity (LWEC) under performance based alternative pay systems pay band noted maximum and minimum salaries for the date of injury, determined the percentage of the salary range, and then added the base pay rate to the night differential, Sunday premium pay, and holiday pay to determine appellant's total current date of injury pay rate of \$798.27. In a September 13, 2018 wage-earning capacity (CA Form 816), OWCP applied the formula set forth in *Albert C. Shadrick*<sup>7</sup> to find that appellant's weekly compensation amount based on the constructed position was \$273.21.

On September 13, 2018 OWCP proposed to reduce appellant's wage-loss compensation to \$1,147.00 every four weeks based on her capacity to earn wages in the constructed receptionist position at the rate of \$360.00 per week. It found that the position was medically and vocationally suitable and represented her wage-earning capacity. OWCP indicated, and provided its calculations, that the weekly pay rate on the date of injury was \$745.11 effective September 30, 2013 and that the current pay rate for job and step when injured was \$798.27 effective April 11, 2018. Appellant was afforded 30 days to respond to the proposed reduction in her compensation. She did not respond.

By decision dated January 3, 2019, OWCP reduced appellant's wage-loss compensation, effective January 6, 2019, based on her capacity to earn wages as a receptionist.

On January 15, 2019 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative. A telephonic hearing was held on May 14, 2019. In a January 10, 2019 letter, appellant, through counsel, alleged that her shift differential was not included in her benefits calculation.

In a May 14, 2019 letter, appellant contended that she could not perform the receptionist job due to her age, restrictions, and lack of experience. She also alleged that her step and level pay were not properly utilized in her wage-earning capacity determination.

In a June 4, 2019 report, Dr. Fingado noted appellant's complaints that, because of her right hand injury, she found it extremely difficult to drive a car, "type on a piano" or do other fine manipulation activities. He noted examination findings and opined that she had reached MMI with regards to the injury to the right upper extremity. Dr. Fingado indicated that appellant had permanent lifting restrictions of 10 pounds frequently and 15 pounds occasionally for the right upper extremity and that she could sit, stand, or walk for eight hours a day. He limited driving to no more than 30 minute trips due to fatigue. In a June 4, 2019 Form CA-17 report, Dr. Fingado indicated that appellant's work restrictions included lifting/carrying/pulling/pushing no more than 10 pounds on a continuous basis and no more than 15 pounds on an intermittent basis; reaching above the shoulder for 30 minutes on a continuous basis and 8 hours on an intermittent basis; and intermittent driving for 2 hours.

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<sup>7</sup> 5 ECAB 376 (1953); codified by regulation at 20 C.F.R. § 10.403(c)-(e).

By decision dated July 9, 2019, an OWCP hearing representative affirmed the January 3, 2019 LWEC determination. The hearing representative found that OWCP properly applied the pay banding formula, as set forth in its procedures, in calculating the current pay rate for the date-of-injury position and that it had considered all the proper factors in determining 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.<sup>8</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>9</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>10</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>11</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 the selected position does not establish that the work is not reasonably available in his or her commuting area.<sup>12</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>13</sup> Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.<sup>14</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

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<sup>8</sup> *C.H.*, Docket No. 19-0136 (issued May 23, 2019).

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

<sup>10</sup> 5 U.S.C. § 8115(a).

<sup>11</sup> *C.M.*, Docket No. 18-1326 (issued January 4, 2019).

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

<sup>13</sup> *J.H.*, Docket No. 18-1319 (issued June 26, 2019).

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

impairments resulting from both injury-related and preexisting conditions, but not impairments resulting from post-injury or subsequently-acquired conditions.<sup>15</sup> 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.<sup>16</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>17</sup> Lastly, OWCP applies the principles set forth in *Albert C. Shadrick*,<sup>18</sup> as codified in section 10.403 of OWCP regulations,<sup>19</sup> to determine the percentage of the employee's LWEC.

OWCP's procedures note that some agencies have performance-based pay systems, and provide specific procedures for an LWEC determination under such a system.<sup>20</sup> The regulations provide:

“If the employing agency pay scale was banded on the DOI, and remains banded ‘currently’ the CE [claims examiner] will first need to determine the injured employee's DOI pay rate as a percentage of the appropriate band. Once that percentage has been established, the current pay rate for the DOI job (as entered in Item (2) of the *Shadrick* formula) will be the same percentage of the current pay range for the band in which the employee was being paid on the DOI.

“Once the current pay rate for the job held when injured is calculated according to the above instructions, it can be entered into Item (2) of the *Shadrick* formula so that compensation for [loss of wage-earning capacity] can be paid to the injured employee. The CE must document the case record with the Form CA-816 or equivalent.”<sup>21</sup>

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<sup>15</sup> *G.E.*, Docket No. 18-0663 (issued December 21, 2018).

<sup>16</sup> *Id.*

<sup>17</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Vocational Rehabilitation Services*, Chapter 2.813.19d (November 2011).

<sup>18</sup> 5 ECAB 376 (1953).

<sup>19</sup> 20 C.F.R. § 10.403.

<sup>20</sup> *Supra* note 17 at *Determining Wage-Earning Capacity Based on Actual Earnings*, Chapter 2.815.4(e) (June 2013).

<sup>21</sup> *Id.*

## ANALYSIS

The Board finds that OWCP has met its burden of proof to reduce appellant's wage-loss compensation, effective January 6, 2019, based on her capacity to earn wages in the constructed position of receptionist.

Dr. Beauperthuy-Rojas advised on November 21, 2014 that appellant had reached MMI and that she was capable of full-time limited duty with pulling/pushing/lifting restrictions of no more than 10 pounds and no more than 15 pounds on an intermittent basis; reaching above the shoulder for 30 minutes on a continuous basis and 8 hours on an intermittent basis; and intermittent driving for 2 hours. OWCP referred her for vocational rehabilitation in January 2015 as the medical evidence established that she was no longer totally disabled due to residuals of her employment injury.<sup>22</sup>

OWCP further properly determined that appellant had the physical capacity to perform the duties of a receptionist. The position is classified as sedentary employment requiring occasional lifting up to 10 pounds. Dr. Beauperthuy-Rojas's restrictions fall within this requirement. The Board finds that Dr. Beauperthuy-Rojas's his opinion constitutes the weight of the medical evidence and establishes that appellant had the requisite physical ability to earn wages as a receptionist.<sup>23</sup>

Appellant's physician, Dr. Fingado, indicated in his March 28, 2017 report and in subsequent reports thereafter, that appellant could lift/carry no more than 10 pounds on a continuous basis and no more than 15 pounds on an intermittent basis. While he subsequently added additional restrictions for driving and reaching above the shoulder, there is no indication that such restrictions would prevent appellant from performing the receptionist position. Although the restrictions assigned by Dr. Fingado precluded reaching above shoulder for more than 30 minutes, the position description for a receptionist does not conflict with this reaching restriction. 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>24</sup>

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>25</sup> In her December 16, 2017 updated labor market survey (Form CA-66), the rehabilitation counselor indicated that appellant met the specific vocational preparation requirement as she obtained a certificate of completion in Microsoft Office training; the availability and weekly wage in appellant's commuting area was confirmed by various sources, including local employers, school staff and Labor Market Statistics Center, through telephone contact, review of websites, staff and statistics. 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

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<sup>22</sup> See *C.H.*, *supra* note 8.

<sup>23</sup> See *C.M.*, *supra* note 11.

<sup>24</sup> See *C.H.*, *supra* note 8.

<sup>25</sup> See *C.M.*, *supra* note 11.

job is vocationally suitable and reasonably available.<sup>26</sup> The Board thus finds that, contrary to appellant's assertions on appeal, 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 receptionist.<sup>27</sup>

Lastly, contrary to appellant's assertions on appeal, OWCP properly applied the *Shadrick* formula in determining appellant's LWEC. The evidence reflects that the employing establishment had a performance based alternate pay system, known as pay banding. OWCP explained in detail and provided its calculations, consistent with OWPC's procedures, as to how appellant's DOI and current pay rate were calculated.<sup>28</sup>

Accordingly OWCP properly found that the position of receptionist reflected her wage-earning capacity.<sup>29</sup>

On appeal appellant argued that her restriction of 30 minutes driving renders the selected position not reasonably available in the labor market commuting area. The Board found, however, that OWCP properly considered Dr. Fingado's restriction which limited driving to no more than 30 minutes on a continuous basis and 2 hours per day in finding that such restrictions did not affect her ability to commute to the location of available employment positions, within her local labor market.<sup>30</sup>

### **CONCLUSION**

The Board finds that OWCP has met its burden of proof to reduce appellant's wage-loss compensation, effective January 6, 2019, based on her capacity to earn wages in the constructed position of receptionist.

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<sup>26</sup> *J.F.*, Docket No. 19-0864 (issued October 25, 2019); *C.H.*, *supra* note 8; *supra* note 17 at Chapter 2.816.6(b) (June 2013).

<sup>27</sup> *T.B.*, Docket No. 17-1777 (issued January 16, 2019).

<sup>28</sup> *See supra* note 20.

<sup>29</sup> *J.F.*, *supra* note 26.

<sup>30</sup> *See B.R.*, Docket No. 19-0088 (issued August 13, 2019).

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 9, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 17, 2020  
Washington, DC

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

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board