

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

C.M., Appellant

and

U.S. POSTAL SERVICE, NETWORK
DISTRIBUTION CENTER, Sharonville, OH,
Employer

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**Docket No. 18-0742
Issued: March 12, 2020**

Appearances:

Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Deputy Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 23, 2018 appellant, through counsel, filed a timely appeal from a January 26, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

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 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the January 26, 2018 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.*

ISSUE

The issue is whether OWCP properly reduced appellant's wage-loss compensation benefits, effective May 17, 2017, based on her ability to earn wages in the constructed position of receptionist.

FACTUAL HISTORY

On September 14, 2012 appellant, then a 60-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on August 23, 2012 she pulled a muscle in her lower back when removing sacks of mail from a belt and loading them into over-the-road (OTR) containers while in the performance of duty. OWCP accepted the claim for lumbar strain.⁴ Appellant stopped work on August 29, 2012 and returned to light-duty work on September 14, 2012. She again stopped work on March 13, 2013 when she was sent home as no work was available within her restrictions. OWCP paid appellant wage-loss compensation on the periodic rolls effective May 1, 2015.

On April 30, 2015 OWCP referred appellant to Dr. Edward G. Fisher, a Board-certified orthopedic surgeon, for a second opinion examination in order to determine whether appellant continued to suffer residuals of her accepted lumbar sprain condition, whether she was capable of returning to her regular mail handler position, whether she had any nonwork-related medical conditions precluding her returning to work, and what work restrictions she had based on the accepted work injury.

In a report dated May 19, 2015, based on an examination performed May 14, 2015, Dr. Fisher noted his review of appellant's history of injury and the medical reports of record. On examination he found a negative straight leg test bilaterally and intact lower extremity sensation and motor power. Dr. Fisher opined that appellant had no residuals from the sprain sustained on August 23, 2012, but that she had suffered muscle deconditioning of the lower back, and mild arthritis and mild disc bulge/protrusion, which were the result of the normal aging process and were directly aggravated by the August 23, 2012 employment injury. He found that appellant had no work restrictions or treatment recommendations in regard to the August 23, 2012 lumbar sprain, as it was no longer clinically present, but that she "should perform daily aggressive home exercises to strengthen her back and increase her mobility."

On November 3, 2015 OWCP requested clarification of Dr. Fisher's report. It requested that Dr. Fisher provide medical rationale for his opinion that appellant's mild arthritis and mild disc bulge/protrusion were a result of the normal aging process, but also directly aggravated by the August 23, 2012 work-related injury; whether there were residuals of this aggravation; and if there were residuals, whether she was capable of returning to her position of mail handler and what, if any, work restrictions were applicable.

In an addendum report dated December 3, 2015, Dr. Fisher clarified his May 19, 2015 report. He indicated that subsequent to August 23, 2012, appellant was unable to work with or without restrictions due to her markedly decreased range of back motion and persistent back pain, which supported an aggravation of her preexisting arthritic back condition due to her accepted

⁴ OWCP had previously accepted appellant's claims for thoracic sprain and lumbar sprain under File No. xxxxxx952 and for lumbar strain under File No. xxxxxx899. Appellant's claims have been administratively combined with the present claim, File No. xxxxxx952, with File No. xxxxxx952 designated as the master file.

work injury. He opined that she was not capable of performing the duties of a mail handler. In a December 2, 2015 work capacity evaluation (OWCP-5c), Dr. Fisher opined that: appellant could work full time with permanent work restrictions of no standing or walking over two hours per day, with breaks every half hour; no twisting, bending, or stooping; and no lifting, pushing, or pulling over 10 pounds frequently and 20 pounds occasionally.

On January 8, 2016 OWCP requested that appellant's treating physician, Dr. James Lutz, an occupational medicine specialist, review Dr. Fisher's May 19, 2015 report and December 3, 2015 addendum and provide comments on areas of agreement and disagreement. OWCP afforded Dr. Lutz 30 days to respond. No response was received.

Appellant was subsequently referred to an OWCP-sponsored vocational rehabilitation program. On April 7, 2016 appellant's vocational rehabilitation counselor determined that she was capable of working as a receptionist or registration clerk and that state labor market surveys on that date showed that these positions were reasonably available in her commuting area. The receptionist position, under the Department of Labor, *Dictionary of Occupational Titles* #237.367-038, was characterized as sedentary in nature and involved such duties as receiving callers at establishments, determining the nature of their business, operating telephones, and recording the information of callers.⁵ Physical demands of the position were listed as frequent reaching, handling, talking, and hearing, as well as occasional fingering. The vocational rehabilitation counselor indicated that appellant would meet the specific vocational preparation (SVP) for the position by completing a short training course in computer skills.

Appellant underwent nine weeks of computer skills training from April 25 through June 24, 2016. On June 28, 2016 90 days of job seeking skills training and job searching commenced and was subsequently extended through December 24, 2016. OWCP again extended the job search through January 27, 2017. Appellant had not obtained a position by January 27, 2017 and her vocational rehabilitation file was closed.

On January 12, 2017 the vocational rehabilitation counselor completed an updated job classification (Form CA-66) for the position of receptionist. She advised that appellant met the SVP for the position by her completion of a computer skills training course. The vocational rehabilitation counselor advised that the state job market outlook established that the position was reasonably available in her commuting area with entry level wages of \$324.40 per week.

In a March 6, 2017 letter, OWCP advised appellant that it proposed to reduce her compensation based on her capacity to earn wages in the constructed position of receptionist. It indicated that the duties of the receptionist position, based on the Department of Labor, *Dictionary of Occupational Titles*, were within her work capacity based on the work restrictions provided by Dr. Fisher, and that the position was reasonably available within her commuting area. Appellant's loss of wage-earning capacity (LWEC) was calculated based on her ability to earn wages of \$324.40 per week in the receptionist position. According to the *Shadrick* formula, codified at 20

⁵ Sedentary work, according to the Department of Labor, *Dictionary of Occupational Titles*, involves occasionally exerting up to 10 pounds of force and sitting most of the time, but may involve walking or standing for brief periods of time. See *G.E.*, Docket No. 18-0663 (issued December 21, 2018); *P.J.*, Docket No. 15-0295 (issued May 20, 2015).

C.F.R. § 10.403, this resulted in an LWEC of \$828.40 per week.⁶ OWCP afforded appellant 30 days to provide evidence or argument against the proposed decision to reduce compensation.

Subsequently OWCP received a March 2, 2017 report from Dr. Hal S. Blatman, Board-certified in occupational medicine. Dr. Blatman examined appellant and noted tenderness in the muscles of the lower back. He advised that appellant should continue her home program physical massage therapy. In his report of April 3, 2017, Dr. Blatman noted that he had examined appellant and found continued tenderness and spasm in her lower back and buttocks. He reiterated his recommendation to continue home program physical massage therapy and to return in four weeks.

OWCP subsequently expanded acceptance of the claim to include an aggravation of degenerative disc disease at L2-3 and L3-4 and an aggravation of facet arthropathy at L4-5 and L5-S1.

By decision dated May 16, 2017, OWCP reduced appellant's compensation, effective May 17, 2017, based on her ability to earn wages in the constructed position of receptionist. It found that the evidence of record established that she was physically and vocationally capable of earning wages of \$324.40 per week in the constructed position of receptionist and that the position was reasonably available in her commuting area.

In a report dated May 8, 2017, Dr. Blatman again examined appellant finding tenderness and spasm in the muscles of the lower back and buttocks. He again noted that appellant should continue her home physical massage therapy program and return in four weeks. Dr. Blatman submitted similar reports from June through August 2017.

On May 24, 2017 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative.

The hearing was held on November 14, 2017. During the hearing, counsel argued that appellant was vocationally unable to earn wages as a receptionist because of her age and lack of experience working in an office setting. Appellant testified that she was physically unable to perform as a receptionist as it required extensive sitting, and she was unable to sit for more than 20 or 30 minutes. Counsel further argued that the acceptance of her claim should be expanded to include the additional conditions identified in Dr. Fisher's reports.

By decision dated January 26, 2018, OWCP's hearing representative affirmed the May 16, 2017 LWEC determination finding that the selected position of receptionist was medically and vocationally suitable. The hearing representative noted that progress notes from Dr. Blatman documented that appellant was being treated for low back pain, but did not address appellant's physical restrictions or opine that she was unable to perform in the selected position. She found that the position of receptionist was within the physical restrictions provided by Dr. Fisher and that the vocational expert had found that the position was vocationally suitable.

⁶ 5 ECAB 376 (1953).

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.⁷ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.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. 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.⁹ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.¹⁰ 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.¹¹ 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.¹²

When OWCP makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by OWCP or to an OWCP wage-earning capacity specialist for selection of a position, listed in the Department of Labor, *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits that employee's capabilities with regard to 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, employer contacts, and actual job postings.¹³ Lastly, OWCP

⁷ *C.F.*, Docket No. 19-0595 (issued September 9, 2019); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

⁸ *S.N.*, Docket No. 17-1589 (issued January 3, 2018); *Del K. Rykert*, 40 ECAB 284 (1988).

⁹ 5 U.S.C. § 8115(a); *K.S.*, Docket No. 19-0678 (issued October 25, 2019); *E.W.*, Docket No. 14-584 (issued July 29, 2014); 5 U.S.C. § 8115(a).

¹⁰ *See M.P.*, Docket No. 18-0094 (issued June 26, 2018); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.3 (June 2013).

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

¹² *Id.*; *see also Leo A. Chartier*, 32 ECAB 652 (1981).

¹³ *Supra* note 10 at Chapter 2.816.6.a (June 2013).

applies the principles set forth in *Albert C. Shadrick*¹⁴ as codified in section 10.403 of OWCP's regulations,¹⁵ to determine the percentage of the employee's LWEC.¹⁶

ANALYSIS

The Board finds that OWCP properly reduced appellant's wage-loss compensation benefits, effective May 17, 2017, based on her capacity to earn wages in the constructed position of receptionist.

In a report dated May 19, 2015, Dr. Fisher, an OWCP referral physician, found that appellant had no further residuals of her accepted lumbar sprain, but had sustained an aggravation of mild arthritis of the back and disc bulges causally related to her August 23, 2012 employment injury. In a December 3, 2015 addendum, he opined that she could work with restrictions of no standing or walking over two hours per day, with breaks every half hour; no twisting, bending, or stooping; and no lifting, pushing, or pulling of over 10 pounds frequently and 20 pounds occasionally. The Board thus finds that OWCP properly referred appellant for vocational rehabilitation as the medical evidence established that she was no longer totally disabled due to residuals of her employment injury based upon the report of Dr. Fisher.¹⁷

The Board further finds that the selected position of receptionist is within appellant's physical work tolerances as detailed by Dr. Fisher. There are no other medical reports of record containing contemporaneous work restrictions or addressing her ability to perform the duties of a receptionist. The receptionist position was defined as sedentary in nature, meaning that appellant would occasionally exert up to 10 pounds of force and sit most of the time, as well as possibly walk or stand for brief periods of time. The Board finds that Dr. Fisher's opinion is reasoned and based on a complete and accurate history and thus constitutes the weight of the evidence and establishes that appellant has the requisite physical ability to earn wages as a receptionist.¹⁸

In reports dated March through May 2017, Dr. Blatman treated appellant for lower back tenderness and spasm and recommended massage therapy. He did not, however, address the relevant issue of whether she could perform the position of receptionist and thus his opinion is of little probative value.¹⁹

The Board, therefore, finds that the weight of the evidence establishes that appellant had the physical capacity to perform the duties of the selected position.²⁰

¹⁴ *Supra* note 6.

¹⁵ 20 C.F.R. § 10.403.

¹⁶ *See K.S.*, *supra* note 9; *J.M.*, Docket No. 17-0397 (issued April 3, 2018).

¹⁷ *C.M.*, *supra* note 11.

¹⁸ *Id.*

¹⁹ *See M.K.*, Docket No. 18-0907 (issued February 7, 2019).

²⁰ *See T.J.*, Docket No. 16-1473 (issued January 26, 2017).

In assessing the claimant's ability to perform the selected position, OWCP must consider not only physical limitations, but also take into account work experience, age, mental capacity and educational background.²¹ Appellant's vocational rehabilitation counselor determined that she was able to perform the position of receptionist and demonstrated that the position was available in sufficient numbers so as to make it reasonably available within her commuting area. The vocational rehabilitation counselor is an expert in the field of vocational rehabilitation and OWCP may rely on the counselor's opinion regarding reasonable availability and vocational suitability.²² OWCP considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment, age, and employment qualifications, in determining that the position of receptionist represented her wage-earning capacity effective May 17, 2017.²³ Appellant attended nine weeks of computer skills training from April 25 through June 24, 2016. The evidence of record establishes that she had the requisite physical ability, skill, and experience to perform the position of receptionist and that such a position was reasonably available within the general labor market of her commuting area at a weekly entry-level wage of \$342.40. OWCP also properly determined her LWEC in accordance with the formula developed in *Shadrick* and codified at 20 C.F.R. § 10.403.²⁴ Therefore, OWCP properly reduced appellant's compensation effective May 17, 2017 based on her capacity to earn wages as a receptionist.

On appeal counsel contends that appellant does not have the vocational capacity to work as a receptionist as she only had a graduate equivalent degree, nor had she worked in an office or similar work environment. As discussed, however, the vocational rehabilitation counselor found that she met the SVP for the position as she had completed a computer training program.

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 properly reduced appellant's wage-loss compensation benefits, effective May 17, 2017, based on her ability to earn wages in the constructed position of receptionist.

²¹ *R.D.*, Docket No. 19-0752 (issued August 20, 2019).

²² See *J.B.*, Docket No. 17-0817 (issued April 26, 2018); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.6(b) (June 2013).

²³ See *T.B.*, Docket No. 17-1777 (issued January 16, 2019); *Clayton Varner*, 37 ECAB 248 (1985).

²⁴ *Supra* note 7; OWCP divided appellant's employment capacity to earn wages of \$324.40 a week by the current pay rate of the position held when injured of \$1,204.44 per week to find 27 percent wage-earning capacity. It multiplied the pay rate at the time of disability of \$1,134.80 by the 27 percent wage-earning capacity percentage. OWCP subtracted the resulting amount of \$306.40 from appellant's date-of-injury pay rate of \$1,134.80 which provided a loss of wage-earning capacity of \$828.40 per week. It then multiplied this amount by the appropriate compensation rate of three-fourths and applied adjustments, which yielded net compensation of \$1,716.13 every four weeks.

ORDER

IT IS HEREBY ORDERED THAT the January 26, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 12, 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