

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

S.C., Appellant)	
)	
and)	Docket No. 19-1381
)	Issued: November 24, 2020
U.S. POSTAL SERVICE, MAIN POST OFFICE,)	
Grand Rapids, MI, Employer)	
)	

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

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

JURISDICTION

On June 11, 2019 appellant, through counsel, filed a timely appeal from a March 29, 2019 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 March 29, 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.*

ISSUE

The issue is whether OWCP has met its burden of proof to reduce appellant's wage-loss compensation, effective October 1, 2018, based on his capacity to earn wages in the constructed position of check cashier.

FACTUAL HISTORY

On December 5, 2015 appellant, then a 57-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that he sustained a left metatarsal fracture at work on December 3, 2013 when picking up a package while in the performance of duty. By decision dated February 28, 2014, OWCP accepted the claim for left foot fracture, fifth metatarsal (closed). It initially paid appellant wage-loss compensation on the supplemental rolls, and then placed him on the periodic rolls as of June 2015. Appellant returned to full-time, restricted work on November 30, 2015.

On March 24, 2015 appellant underwent a left midfoot fusion of the first, second, and third tarsometatarsal joints for left midfoot post-traumatic arthritis, which was performed by Dr. John Maskill, a Board-certified orthopedic surgeon. Appellant did not return to work after his March 15, 2016 surgical procedure.⁴

By decision dated August 2, 2016, OWCP expanded the acceptance of appellant's claim to include the additional condition of post-traumatic osteoarthritis of the left ankle and foot.

On January 9, 2017 OWCP referred appellant to Dr. Emmanuel Obianwu, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the nature and extent of his employment-related conditions. In his February 6, 2017 report, Dr. Obianwu noted his review of the statement of accepted facts and appellant's medical history. He reported that appellant's March 24, 2015 fusion surgery was unsuccessful, so appellant underwent additional surgery on March 15, 2016 for a revision of the left fusion of the first, second, and third tarsometatarsal joints. Dr. Obianwu found that the March 15, 2016 surgery achieved a fusion and appellant had no residuals of his left fifth metatarsal fracture, which had completely healed. He released appellant to return to work with restrictions for prolonged walking and standing limited to five hours per day and pushing, pulling, and lifting up to 20 pounds for eight hours per day.

By decision dated April 25, 2017, OWCP expanded the acceptance of appellant's claim to include the additional condition of other enthesopathy of the left foot.

On September 21, 2017, Dr. John D. Maskill, a Board certified orthopedic surgeon, diagnosed post-traumatic osteoarthritis of the left foot and provided work restrictions including limited bending and twisting; no squatting; sitting and standing optional; sedentary work only; elevation of the affected extremity as needed; no climbing; and lifting limits of floor to waist up to 32 pounds, waist to shoulder up to 24 pounds, overhead up to 16 pounds, and carrying up to 40 pounds.

On November 17, 2017 OWCP referred appellant for vocational rehabilitation to identify an employment position within the restrictions assigned by Dr. Maskill on September 21, 2017.

⁴ Appellant retired from the employing establishment on March 15, 2016.

In a January 31, 2018 report, Dr. Justin Roberts, an orthopedic surgeon, advised that appellant was not capable of working more than four hours per day and provided work restrictions, effective September 21, 2017, which included limited bending and twisting; no squatting; sit/stand optional; sedentary work only; elevation of the affected extremity, as needed; no climbing; lifting floor to waist up to 32 pounds; lifting waist to shoulder up to 24 pounds; lifting overhead up to 16 pounds; and carrying up to 40 pounds.

In a January 30 2018 report, the vocational rehabilitation counselor described appellant's education, training, and work experience. She performed testing and noted that the occupation of check cashier could generally be learned on the job in one to three months. The rehabilitation counselor further indicated that a compatible position would be sedentary and reasonably available in appellant's commuting area. She identified the positions of check cashier and order clerk and found that they were feasible occupational goals for appellant in a sedentary capacity. For both positions the rehabilitation counselor identified the applicable duties, provided job classification information, weekly pay rate information, and noted reasonable availability in appellant's local commuting or geographical areas for both full-time and part-time openings.

In a rehabilitation action report dated February 5, 2018, the rehabilitation counselor noted changes in appellant's medical status. The vocational rehabilitation counselor closed the case on July 24, 2018.

On August 16, 2018 OWCP notified appellant that it proposed to reduce his entitlement to wage-loss compensation based on his capacity to earn wages in the constructed position of check cashier, at the weekly pay rate of \$185.00. It noted that the physical requirements of the check cashier position did not exceed the restrictions and again noted that the selected position was medically suitable. OWCP further found that the position was vocationally suitable, based on the rehabilitation counselor's report, and found 16 percent LWEC, with a new gross compensation rate of \$2,952.00.⁵ It attached the job classification for the check cashier position completed by the vocational rehabilitation counselor on January 30, 2018 and Dr. Roberts' January 31, 2018 work restrictions. The physical demands indicated that the strength level was sedentary, but also involved lifting up to 10 pounds, frequent reaching, handling, and fingering.

In a September 19, 2018 report, Dr. Gregory L. Scallon, a Board-certified orthopedic surgeon, concurred that appellant was capable of working consistent with Dr. Roberts' work restrictions.

By decision dated October 1, 2018, OWCP reduced appellant's wage-loss compensation, effective October 1, 2018, consistent with its finding that the constructed position of check cashier with weekly earnings of \$185.00 represented his wage-earning capacity.

Appellant subsequently submitted an October 4, 2018 report from Dr. Scallon who opined that he had reached maximum medical improvement (MMI) and had ongoing restrictions of sit to stand for four hours per day.

⁵ The rehabilitation counselor noted that the source of wage data was a Bureau of Labor Statistics (BLS) labor market survey dated May 2016. For the check cashier position, 14,120 jobs were found to be available in appellant's commuting area with a weekly wage of \$185.00 for part-time entry level positions.

On October 9, 2018 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. During the hearing, held telephonically on January 25, 2019, appellant testified that he was not a very good speller and did not have good computer skills, but did work in a bar managing money approximately 28 years ago. Counsel asserted that he had insufficient experience and training for the selected position.

By decision dated March 29, 2019, OWCP's hearing representative affirmed the October 1, 2018 LWEC determination. She found that, based on the medical evidence of record, the position of check cashier 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.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of the compensation benefits.⁶ 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.⁷

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.⁸ 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. 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.¹⁰

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

⁶ *C.H.*, Docket No. 19-0136 (issued May 23, 2019).

⁷ *J.F.*, Docket No. 19-0864 (issued October 25, 2019).

⁸ 5 U.S.C. § 8115(a).

⁹ *C.M.*, Docket No. 18-1326 (issued January 4, 2019).

¹⁰ *Id.*

condition.¹¹ Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.¹²

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 post-injury or subsequently-acquired conditions.¹³ 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.¹⁴

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, a local "Chamber of Commerce," employing establishment contacts, and actual job postings.¹⁵ Lastly, OWCP applies the principles set forth in *Albert C. Shadrick*,¹⁶ as codified in section 10.403 of OWCP's regulations,¹⁷ to determine the percentage of the employee's LWEC.

ANALYSIS

The Board finds that OWCP has met its burden of proof to reduce appellant's wage-loss compensation, effective October 1, 2018, based on his capacity to earn wages in the constructed position of check cashier.

Appellant's attending physicians, including Drs. Maskill, Roberts, and Scallon, opined that he could perform sedentary duties with lifting restrictions up to 32 pounds from floor to waist, 24 pounds waist to shoulder, 16 pounds overhead, and a carrying restriction of up to 40 pounds. OWCP therefore properly referred him for vocational rehabilitation in November 2017 as the medical evidence established that he was no longer totally disabled from work due to residuals of his employment injury.¹⁸

¹¹ *J.H.*, Docket No. 18-1319 (issued June 26, 2019).

¹² *Id.*

¹³ *G.E.*, Docket No. 18-0663 (issued December 21, 2018).

¹⁴ *Id.*

¹⁵ *C.M.*, *supra* note 9; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Vocational Rehabilitation Services*, Chapter 2.813.7(a)(3) (February 2011).

¹⁶ 5 ECAB 376 (1953).

¹⁷ 20 C.F.R. § 10.403.

¹⁸ *C.H.*, *supra* note 6.

The Board finds that OWCP properly determined that appellant had the physical capacity to perform the duties of a check cashier. The position is classified as sedentary employment requiring lifting up to 10 pounds, frequent reaching, handling, and fingering all of which are consistent with the assigned restrictions. The vocational rehabilitation counselor noted that the position of check cashier allowed for a variety of duties, none of which exceeded the doctors' medical restrictions. The Board, therefore, finds that the weight of the medical evidence establishes that appellant had the physical capacity to perform the duties of the selected position.¹⁹

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.²⁰ In her January 30, 2018 report, the rehabilitation counselor attached a job classification for the check cashier position. She indicated that the source of wage data was a BLS labor market survey dated May 2016. For the check cashier position, 14,120 jobs were available in appellant's commuting area with a weekly wage of \$185.00 for part-time entry level positions. As the rehabilitation counselor is an expert in the field of vocational rehabilitation, OWCP may rely on her opinion in determining whether a job is vocationally suitable and reasonably available.²¹

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 he had the capacity to perform the position of check cashier.²² It properly applied the *Shadrick* formula, as codified in section 10.403 of its regulations,²³ in determining appellant's LWEC. The Board thus finds that OWCP properly determined that the position of check cashier reflected appellant's wage-earning capacity.²⁴

CONCLUSION

The Board finds that OWCP has met its burden of proof to reduce appellant's wage-loss compensation, effective October 1, 2018, based on his capacity to earn wages in the constructed position of check cashier.

¹⁹ *Id.*

²⁰ *C.M., supra* note 9.

²¹ *C.H., supra* note 6; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Vocational Rehabilitation Services*, Chapter 2.816.6(b) (June 2013).

²² *T.B.*, Docket No. 17-1777 (issued January 16, 2019).

²³ *Supra* notes 16 and 17, respectively.

²⁴ *C.M., supra* note 9.

ORDER

IT IS HEREBY ORDERED THAT the March 29, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 24, 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