



## **ISSUE**

The issue is whether OWCP has met its burden of proof to reduce appellant's wage-loss compensation, effective September 30, 2018, based on his capacity to earn wages as an internal security manager.

## **FACTUAL HISTORY**

On October 1, 2013 appellant, then a 46-year-old federal air marshal, filed a traumatic injury claim (Form CA-1) alleging that on September 25, 2013 he injured his cervical spine during a mandatory high intensity interval training while in the performance of duty. OWCP accepted the claim for a cervical strain. On August 6, 2014 it expanded the acceptance of the claim to include cervical disc herniation at C6-7. Appellant stopped work on August 6, 2014 and OWCP paid him wage-loss compensation on the supplemental rolls. He sought treatment for his conditions with Dr. Jason Thompson, a Board-certified spinal surgeon and, on August 26, 2014 underwent OWCP-authorized surgery for a C6-7 cervical disc arthroplasty. Commencing October 11, 2014 OWCP paid appellant wage-loss compensation on the periodic rolls.

In an October 20, 2014 work capacity evaluation (Form OWCP-5c), Dr. Thompson reported that appellant was physically fit and had made an excellent recovery. However, he was permanently restricted from full-contact duty including physical take downs and restraining people.

In a letter dated November 4, 2014, the employing establishment advised OWCP that its medical officer had determined that appellant could no longer perform the essential duties of a federal air marshal and requested that he be referred to vocational rehabilitation services for placement with a new employer.

In a January 29, 2015 medical report, Dr. Thompson discussed appellant's status post C6-7 disc arthroplasty. He opined that appellant could return to work in the public sector as he had no restrictions on lifting, bending, twisting, or exercising. However, Dr. Thompson found that appellant could not return to a law enforcement position where the potential for unexpected physical violence to the head and neck could be anticipated.

On February 17, 2015 OWCP referred appellant to Dr. Louis Kretschmer, a Board-certified orthopedic surgeon, for a second opinion evaluation. Dr. Kretschmer indicated that, although, appellant did not have any specific restrictions, he would not be able to return to work as a federal air marshal as it would be unsafe for him to participate in vigorous physical confrontations with fellow employees or aggressive passengers on an airplane. The physician recommended vocational rehabilitation. In an accompanying Form OWCP-5c, Dr. Kretschmer determined that appellant's restrictions were permanent and he was capable of performing sedentary, light- and medium-duty work.

On March 19, 2015 OWCP referred appellant for vocational rehabilitation to find a suitable position within the restrictions provided by Dr. Kretschmer on February 17, 2015.

On April 15, 2015 vocational rehabilitation services conducted a labor market survey for employment in the commuting area of Maple Valley, Washington where appellant resided.

Vocational rehabilitation services also updated a prior labor market survey on April 23, 2015, for employment as a security guard in Pierce and South King Counties, Washington.

On June 15, 2015 appellant submitted a change of address and notified OWCP that he was relocating from Maple Valley, Washington to Chandler, Arizona.

In August 14 and 17, 2015 reports, the vocational rehabilitation counselor provided updated labor market surveys based on appellant's relocation to Chandler, Arizona. She described appellant's education, training, and work experience. The counselor completed job classifications and determined that he was capable of working as an internal security manager or plant protection superintendent, which provided for sedentary and light-duty work in Phoenix, Arizona and the surrounding area. She indicated that both positions were within the restrictions provided by Dr. Kretschmer and state labor market surveys on that date showed that the positions were reasonably available in appellant's commuting area.

On September 8, 2015 OWCP advised appellant that, based on the medical evidence and his transferrable skills, he was capable of working in the position of plant protection superintendent, with an average hourly wage of \$20.00 per hour, and internal security manager, with an average hourly wage of \$19.52 per hour. The vocational rehabilitation counselor noted that the duties of these jobs were within appellant's restrictions and were available in sufficient numbers within his commuting area.

From September 8, 2015 through February 11, 2016, appellant underwent training to become a Certified Protection Professional (CPP). After obtaining his CPP credential, he worked with his vocational rehabilitation counselor for job placement. Beginning August 9, 2016 appellant sought treatment with Dr. Steven Berman, a treating physician.

In a September 29, 2016 memorandum, the vocational rehabilitation counselor noted that it was unclear why appellant had not obtained employment despite extensive placement services. She noted that both the internal security manager and plant protection superintendent positions were vocationally suitable for appellant. Appellant possessed a bachelor's degree, had obtained an industry CPP credential through training, and had a long history of relevant work experience as a federal air marshal for 14 years, a border patrol agent for 4 years, and a security manager for 4 through 5 years. The vocational rehabilitation counselor found that both positions remained medically suitable as the duties were within appellant's work limitations and were available in sufficient numbers within appellant's commuting area based on an August 29, 2016 labor market survey. She recommended working as an internal security manager due to his previous experience in this position. The vocational rehabilitation counselor reported that appellant would expect to earn the average wage of \$19.45 per hour due to his prior experience and his recently acquired CPP industry credential.

On December 7, 2016 appellant submitted another change of address and notified OWCP that he was relocating from Chandler, Arizona to Sparks, Nevada.

On December 7, 2017 OWCP requested that appellant's treating physician evaluate his functional capabilities by completing a Form OWCP-5c. On a December 12, 2017 Form OWCP-5c, Dr. Berman reported that appellant had reached maximum medical improvement (MMI) and his restrictions remained unchanged. He reported that appellant could perform sedentary, light- and medium-duty work.

OWCP, on February 2, 2018, asked the vocational rehabilitation counselor to perform a labor market survey for the purposes of determining if the plant protection superintendent and internal security manager positions were available in appellant's new job market of Sparks, Nevada.

On March 28, 2018 the vocational rehabilitation counselor confirmed that the two positions of plant protection superintendent and internal security manager jobs still met appellant's criteria based on the March 23, 2018 labor market survey. The counselor reported that appellant was capable of working as an internal security manager and plant protection superintendent and that labor market surveys showed that these positions were reasonably available in his commuting area of Sparks, Nevada. The Department of Labor, *Dictionary of Occupational Titles* (DOT) describes the internal security manager position (DOT #378.137-0102) as follows:

“Supervises and coordinates activities of store detectives (retail trade), conducts private investigations, and sells internal protective service to wholesale and retail businesses. Assigns store detectives (retail trade) to shifts at various locations according to job requirements and worker's abilities, skills, and experience. Observes workers in performance of duties to evaluate efficiency and to detect and correct inefficient work practices. Interviews and hires workers to fill vacant positions. Demonstrates and explains methods of detecting and apprehending shoplifters. Explains state laws concerning arrest and detention to employees. Conducts private investigation to obtain information concerning such matters as divorce evidence, juvenile runaways, and background data on persons applying for employment, insurance, or bonding. Acts as undercover agent in retail stores to detect employee incompetency and dishonesty. Prepares detailed reports concerning matters investigated. Contacts business establishments to promote sales of security services. Analyzes security needs, estimates costs, and presents proposal to prospective customer.”

The DOT, on a job classification (Form OWCP-66), described the physical requirements of the position as light work to include exerting up to 20 pounds of force occasionally. The vocational counselor reported that the salary for this position ranged from \$18.00 to \$23.00 per hour based on the labor market survey. She recommend the average wage of \$20.50 per hour based on appellant's previous experience performing this position and his recently acquired CPP industry credential.

In a letter dated July 9, 2018, Dr. Berman verified that appellant had reached MMI and was capable of working full time with the restrictions that had been in place since 2014. He reported that appellant was in a permanent stationary status and there were no significant changes to his condition since the last visit. Dr. Berman found that there were no changes in his work status or the recommended work restrictions.

On August 23, 2018 OWCP notified appellant that it proposed to reduce his wage-loss compensation pursuant to 5 U.S.C. §§ 8106 and 8115. It advised him that he was only partially disabled from work and that the position of internal security manager (DOT #378.137-0102) was medically and vocationally suitable with regard to his medical limitations, work experience, and education. OWCP explained that the physical requirements of the internal security manager did not exceed the restrictions imposed by Dr. Berman's December 12, 2017 and July 9, 2018 reports. It found that appellant was capable of earning wages at the rate of \$820.00 per week as an internal

security manager and that the position was reasonably available within his commuting area. OWCP provided an attachment detailing the application of the formula set forth in *Albert C. Shadrick*.<sup>4</sup> It afforded appellant 30 days to submit evidence and argument challenging the proposed action.

On September 9, 2018 counsel for appellant disagreed with the proposed reduction of compensation. Counsel argued that the job analysis was improper because it was based on appellant's prior residence in Seattle, Washington. He asserted that the job availability and wage rate should have been conducted for Sparks, Nevada, where appellant currently resided. Counsel further argued that the job availability and hourly wage was likely far less in Sparks, Nevada and requested a new labor market survey.

By decision dated September 28, 2018, OWCP reduced appellant's wage-loss compensation benefits, effective September 30, 2018, based on his ability to earn wages of \$820.00 per week as an internal security manager. It verified that the March 23, 2018 labor market study, was conducted for his commuting area in and around Reno, Nevada and not Seattle, Washington as asserted by counsel for appellant. OWCP explained that the physical duties of the position were in accordance with the restrictions provided by Dr. Berman's July 9, 2018 report, and that appellant's rehabilitation counselor had determined that he was vocationally capable of performing the constructed position. It further found that appellant was no longer totally disabled from work and that the position of internal security manager was medically and vocationally suitable, and represented his wage-earning capacity. OWCP applied the *Shadrick*<sup>5</sup> formula to adjust his compensation.

On October 9, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

A hearing was held on January 25, 2019. During the hearing, appellant testified that he was unable to accept most of the jobs in the labor market study. He asserted that he had severe asthma and that almost all of the jobs were in casinos, where smoking was permitted. Appellant further stated that his work restrictions limited his ability to actively restrain a resisting subject. He testified that the job rate of \$20.00 per hour was inflated because most of the jobs in the area only paid in the \$12.00 to \$15.00 per hour range. The hearing representative held open the record for 30 days. No additional evidence was submitted.

By decision dated March 29, 2019, OWCP's hearing representative affirmed the September 28, 2018 decision. She found that OWCP properly reduced appellant's wage-loss compensation as the position of internal security manager was medically and vocationally suitable. The hearing representative noted that work restrictions provided by Drs. Thompson, Kretschmer, and Berman complied with the vocational rehabilitation job duties of an internal security manager as the weight of the medical evidence established that appellant was capable of performing full-time work in this position. She further noted review of the updated March 23, 2018 labor market survey, which listed numerous noncasino positions for an internal security manager. The hearing representative reported that the salary range was identified between \$18.00 and \$23.00 per hour and that the recommended average wage of \$20.50 per hour was appropriate because of appellant's

---

<sup>4</sup> 5 ECAB 376 (1953); as codified by regulation in 20 C.F.R. § 10.403.

<sup>5</sup> *Id.*

bachelor's degree in criminal justice, his CPP credential, and approximately 22 years of relevant work experience. She concluded that the position of internal security manager reasonably and accurately reflected his wage-earning capacity and his compensation was properly reduced effective September 30, 2018.

### **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.<sup>6</sup> OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>7</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. 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>8</sup> Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.<sup>9</sup> 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.<sup>10</sup> 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>11</sup>

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.<sup>12</sup> Additionally, the Board has held that a loss of wage-earning capacity (LWEC) determination must be based on a reasonably current medical evaluation.<sup>13</sup>

---

<sup>6</sup> *C.F.*, Docket No. 19-0595 (issued September 9, 2019); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

<sup>7</sup> *S.N.*, Docket No. 17-1589 (issued January 3, 2018); *Del K. Rykert*, 40 ECAB 284 (1988).

<sup>8</sup> 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).

<sup>9</sup> *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).

<sup>10</sup> *C.M.*, Docket No. 18-1326 (issued January 4, 2019).

<sup>11</sup> *See B.G.*, Docket No. 17-0477 (issued September 20, 2017).

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

<sup>13</sup> *Id.*

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 DOT or otherwise available in the open labor market, that fits that 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, employer contacts, and actual job postings.<sup>14</sup> Lastly, OWCP applies the principles set forth in *Albert C. Shadrick*<sup>15</sup> as codified in section 10.403 of OWCP's regulations,<sup>16</sup> to determine the percentage of the employee's LWEC.<sup>17</sup>

### ANALYSIS

The Board finds that OWCP has met its burden of proof to reduce appellant's wage-loss compensation, effective September 30, 2018, based on his capacity to earn wages as an internal security manager.<sup>18</sup>

The record reflects that Drs. Thompson, Kretschmer, and Berman have provided permanent work restrictions, which prohibited appellant from participating in full physical restraint and contact of other persons, rendering him unable to perform the essential duties of a federal air marshal. The physicians have consistently advised that, while appellant cannot perform physical restraint activities, he could still perform sedentary, light- and medium-duty work full time. OWCP, therefore, properly referred him for vocational rehabilitation on March 19, 2015 as the medical evidence established that he was no longer totally disabled due to residuals of his employment injury.<sup>19</sup>

OWCP properly determined that appellant had the physical capacity to perform the duties of an internal security manager. The position is classified as light work exerting up to 20 pounds occasionally. Dr. Berman's restrictions fall within this requirement. In his July 9, 2018 report, he reiterated his opinion that appellant's work status and restrictions remained unchanged, indicating that appellant could perform full-time sedentary, light- and medium-duty work. The vocational rehabilitation counselor noted that the position of internal security manager allowed for a variety of duties, none of which exceeded Dr. Berman's restrictions.<sup>20</sup> The position is classified as light-duty work, well within the work restrictions provided, which allow for medium-duty work. Furthermore, the internal security manager position does not exceed appellant's permanent work restrictions, which prohibit him from physical contact and restraint of others. Instead, the position entails a managerial role by supervising store detectives and employees. There is no contradictory

---

<sup>14</sup> *Supra* note 9 at Chapter 2.816.6.a (June 2013).

<sup>15</sup> 55 ECAB 376 (1953).

<sup>16</sup> 20 C.F.R. § 10.403.

<sup>17</sup> *See D.S.*, Docket No. 17-0496 (issued May 25, 2017).

<sup>18</sup> *S.C.*, Docket No. 19-1680 (issued May 27, 2020).

<sup>19</sup> *Id.*

<sup>20</sup> *J.H.*, Docket No. 18-1319 (issued June 26, 2019).

medical evidence of record. The Board, therefore, finds that the weight the medical evidence, as represented by Dr. Berman, establishes that appellant had the physical capacity to perform the duties of the selected position.<sup>21</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>22</sup> In the March 28, 2018 labor market report, the rehabilitation counselor attached a Form OWCP-66 for the internal security manager position dated March 23, 2018. She indicated that the source of wage data was a Bureau of Labor Statistics labor market survey dated March 23, 2018. For the internal security manager position, the rehabilitation counselor determined that the position was medically and vocationally suitable, and existed in sufficient numbers within the reasonable commuting area, with an average hourly wage of \$20.50 per hour.<sup>23</sup> As she is an expert in the field of vocational rehabilitation, OWCP may rely on his or her opinion in determining whether a job is vocationally suitable and reasonably available.<sup>24</sup> 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 information clerk.<sup>25</sup> The record reflects that appellant underwent training to become a CPP to aid in his vocational rehabilitation. His criminal justice bachelor's degree and relevant long-standing work experience further established that he had the requisite physical ability, skill, and experience to perform the position of internal security manager, which was reasonably available within the general labor market of his commuting area at a weekly wage of \$820.00.<sup>26</sup> OWCP properly applied the *Shadrick* formula, as codified in section 10.403 of its regulations,<sup>27</sup> in determining appellant's LWEC. Contrary to counsel's assertion on appeal that the LWEC determination was contrary to law and fact, OWCP properly found that the position of internal security manager reflected appellant's wage-earning capacity.<sup>28</sup>

Appellant may request modification of the LWEC determination, supported by new evidence or argument, at any time before OWCP.

---

<sup>21</sup> *C.H.*, Docket No. 19-0136 (issued May 23, 2019).

<sup>22</sup> *C.P.*, Docket No. 19-0595 (issued September 9, 2019).

<sup>23</sup> The record reflects that the rehabilitation counselor looked at job availability in all three locations where appellant resided and found that the selected position was reasonably available in all of these commuting areas. *See A.P.*, Docket No. 14-0995 (issued July 9, 2015).

<sup>24</sup> *See J.B.*, Docket No. 17-0817 (issued April 26, 2018).

<sup>25</sup> *See T.B.*, Docket No. 17-1777 (issued January 16, 2019); *Clayton Varner*, 37 ECAB 248 (1985).

<sup>26</sup> *C.M.*, Docket No. 18-0742 (issued March 12, 2020).

<sup>27</sup> *Supra* note 4.

<sup>28</sup> *J.F.*, Docket No. 19-0864 (issued October 25, 2019).

**CONCLUSION**

The Board finds that OWCP has met its burden of proof to reduce appellant's wage-loss compensation, effective September 30, 2018, based on his capacity to earn wages as an internal security manager.

**ORDER**

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

Issued: November 5, 2020  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

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