

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

B.H., Appellant	)	
	)	
and	)	Docket No. 20-0729
	)	Issued: March 19, 2021
U.S. POSTAL SERVICE, POST OFFICE,	)	
Rancho Cordova, CA, Employer	)	
	)	

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On February 13, 2020 appellant filed a timely appeal from a September 16, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that, following the September 16, 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 September 17, 2019, based on her capacity to earn wages as an information clerk.

## FACTUAL HISTORY

On November 22, 2013 appellant, then a 48-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date she sustained injuries to her left hand, thumb, knee, and hip when she slipped on a grape while in the performance of duty. She stopped work on November 23, 2013.

OWCP accepted the claim for left knee contusion, lumbosacral sprain, left foot sprain, and left thumb sprain.<sup>3</sup> It paid appellant wage-loss compensation on the supplemental rolls effective January 7, 2014 and on the periodic rolls effective April 6, 2014.

Appellant received treatment from Dr. Rudolf Iskander, Board-certified in physical medicine and rehabilitation. In January 8 and 22, 2014 narrative and work status reports, Dr. Iskander stated that appellant was capable of modified-duty work with restrictions of no lifting/carrying over 10 pounds, limited driving of commercial vehicles to three hours per day, repetitive bending/twisting to less than one hour per day, and occasional standing, walking, and climbing of less than one hour per day.

On March 14, 2014 OWCP referred appellant for vocational rehabilitation services based on Dr. Iskander's January 22, 2014 report, which indicated that she was capable of performing modified work duties.

In a June 10, 2014 memorandum, the vocational rehabilitation counselor determined that appellant was capable of returning to work as an information clerk, under the Department of Labor, *Dictionary of Occupational Titles* (DOT), No. 237.367-022, and an insurance clerk, under DOT No. 214.362-022. Both positions were classified as sedentary in nature.

In a letter dated June 20, 2014, OWCP advised appellant that it had reviewed the plan for her return to work as an information or insurance clerk. It determined the positions were within her medical restrictions and informed appellant that she would receive 90 days of placement assistance. OWCP explained that appellant's wage-loss compensation benefits would be reduced at the end of the 90-day placement assistance period based upon the salary of \$10.00 to \$13.00 per hour.

In a July 21, 2014 report, Dr. Iskander indicated that appellant's work restrictions were lifting or carrying 15 to 20 pounds, repetitive bending/twisting less than three hours per day,

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<sup>3</sup> The record reflects that appellant has a prior claim for a September 6, 2011 work-related dog bite, under OWCP File No. xxxxxx386. Appellant was released to full duty on September 16, 2011. The claim was administratively handled by OWCP as no time lost. She was involved in a nonwork-related motor vehicle accident on September 29, 2014.

standing, walking, and climbing occasionally up to two hours per day, and limited kneeling. In a January 5, 2015 report, he released appellant to return to her usual work.

In a July 13, 2015 report, the vocational rehabilitation counselor noted that appellant successfully completed her computer training for a certificate in medical insurance billing and coding at Occupational Skills Center Computer Training. Placement services for appellant were approved until November 20, 2015.

On December 1, 2015 the vocational rehabilitation counselor reported that on November 30, 2015 appellant began working part time at a supermarket as a courtesy clerk. OWCP informally adjusted appellant's compensation payments beginning November 30, 2015, based on her actual earnings.

On December 2, 2015 the vocational rehabilitation counselor completed a job classification report for positions as an information clerk, DOT No. 237.367-022, and an insurance clerk, DOT No. 214.362-022.

On March 25, 2016 the vocational rehabilitation counselor documented that the information clerk position remained vocationally suitable in relation to appellant's age, education, and experience because of her training and work as a letter carrier and as an office clerk in an appliance parts center. The vocational rehabilitation counselor noted that the information clerk position had a weekly salary range from \$410.00 to \$436.00. The vocational rehabilitation counselor recommended a rating of \$10.25 per hour based on actual employer contacts.

On October 15, 2018 OWCP referred appellant for a second opinion examination with Dr. Frank Guellich, a Board-certified orthopedic surgeon. Dr. Guellich was asked to address whether appellant continued to suffer objective residuals of the November 22, 2013 employment injury, which caused left knee contusion, lumbosacral sprain, left foot sprain, and left thumb sprain. He was also specifically asked to address whether appellant was capable of performing letter carrier duties. OWCP did not request that Dr. Guellich address appellant's ability to perform the duties of the information clerk position.

In a December 20, 2018 report, Dr. Guellich noted appellant's history of injury and treatment. He examined appellant and diagnosed: left thumb contusion and strain, industrial and resolved; left foot contusion and strain, industrial and resolved; lumbosacral spine L3 to L5 disc bulges, industrial, not resolved; and left knee mild patella facet arthritic changes, industrial, not resolved. Dr. Guellich opined that appellant was partially disabled as a result of the employment injury and unable to return to her letter carrier position.

On February 27, 2019 a supermarket representative advised that appellant began her employment on November 5, 2015 performing clerical duties and worked between 16 and 24 hours per week.

By letter dated June 3, 2019, OWCP requested that appellant provide a detailed description of her job duties as a cashier or copies of the position description with the physical requirements. On June 26, 2019 it received a response from appellant indicating that she scanned customers' groceries, took payments, and occasionally bagged groceries.

On August 15, 2019 OWCP proposed to reduce appellant's wage-loss compensation benefits because she was no longer totally disabled and had the capacity to earn wages in the position of information clerk, DOT No. 237.367-022, at the rate of \$494.00 per week. It considered appellant's actual earnings as a cashier and explained that appellant had earned wages at the supermarket since 2015 and her actual earnings did not represent her wage-earning capacity, as she was paid for part-time employment.<sup>4</sup> OWCP explained that appellant's wage-earning capacity was less than the current rate of pay of the job she held when injured and proposed to reduce her wage-loss compensation to \$2,005.00 each four weeks. It attached the job classification for information clerk.<sup>5</sup> OWCP allotted appellant 30 days to respond to the proposed reduction. No response was received.

By decision dated September 16, 2019, OWCP found that appellant was able to perform the position of information clerk and reduced her compensation effective September 17, 2019. It found that the vocational rehabilitation counselor had properly considered all appropriate factors and evidence and that the position of information clerk represented appellant's loss of wage-earning capacity (LWEC). OWCP noted that the report of Dr. Guellich was the most recent medical report of record and constituted the weight of the medical evidence. It further related that, while Dr. Guellich indicated that appellant could not return to the letter carrier position, he had related that appellant was partially disabled as a result of the employment injury.

### **LEGAL PRECEDENT**

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of the compensation benefits.<sup>6</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>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.<sup>8</sup> Reemployment may not be considered representative of the injured employee's wage-

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<sup>4</sup> OWCP noted that, while working part-time as a cashier/clerk, appellant was required to stand and/or walk the entire shift, with a few minutes for breaks. It also noted that appellant would be handling items in excess of 10 to 20 pounds when bagging groceries.

<sup>5</sup> The job description for the information clerk position, DOT 237.067.022, is as follows: "Answers inquiries from persons entering establishment; provides information regarding activities conducted at establishment, and location of departments, offices, and employees within the organization; informs customer of location of store merchandise in retail establishment; provides information concerning services, such as laundry and valet services in hotel; receives and answers requests for information from company officials and employees; may call employees or officials to information desk to answer inquiries; and may keep record of questions asked."

<sup>6</sup> See *J.F.*, Docket No. 19-0864 (issued October 25, 2019); *C.H.*, Docket No. 19-0136 (issued May 23, 2019).

<sup>7</sup> *Id.*

<sup>8</sup> 5 U.S.C. § 8115(a).

earning capacity when an injured employee has been released to full-time work, but working less than full-time hours.<sup>9</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>10</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>11</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>12</sup> Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.<sup>13</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 impairments resulting from both injury-related and preexisting conditions, but not impairments resulting from post injury or subsequently-acquired conditions. 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>14</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

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<sup>9</sup> Federal (FECA) Procedure Manual, Part 2-- Claims, *Determining Wage-Earning Capacity Based on Actual Earnings*, Chapter 2.815.2(b) (June 2013).

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

<sup>11</sup> *Id.*

<sup>12</sup> *J.H.*, Docket No. 18-1319 (issued June 26, 2019).

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

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

of Commerce, employing establishment contacts, and actual job postings.<sup>15</sup> Lastly, OWCP applies the principles set forth in *Albert C. Shadrick*,<sup>16</sup> as codified in section 10.403 of OWCP's regulations,<sup>17</sup> to determine the percentage of the employee's LWEC.<sup>18</sup>

### ANALYSIS

The Board finds that OWCP has not met its burden of proof to reduce appellant's wage-loss compensation, effective September 17, 2019, based on her capacity to earn wages as an information clerk.

The record reflects that OWCP considered appellant's part-time work at a supermarket since 2015. It properly determined that her actual earnings did not represent her wage-earning capacity, since they were due to part-time employment and appellant had the capacity to perform full-time work.<sup>19</sup>

OWCP determined that appellant's wage-earning capacity was represented by the constructed position of information clerk, as it was within the medical restrictions provided by second opinion physician, Dr. Guellich. In a December 20, 2018 report, Dr. Guellich opined that appellant was partially disabled as a result of the employment injury and unable to return to her letter carrier position. The Board finds that OWCP improperly determined that Dr. Guellich found that appellant could perform the duties of the constructed position. OWCP did not forward a copy of the information clerk position description to Dr. Guellich, and it did not ask that he address whether appellant could perform the duties of the constructed position. Furthermore, Dr. Guellich did not provide appellant's work restrictions for the information clerk position. The Board, therefore, finds that Dr. Guellich's December 20, 2018 report did not establish that appellant was medically able to perform the duties of the information clerk position.

The Board therefore finds that OWCP has not met its burden of proof to reduce appellant's wage-loss compensation, effective September 17, 2019, based on her capacity to earn wages as an information clerk.

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<sup>15</sup> *C.M.*, *supra* note 10; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Vocational Rehabilitation Services*, Chapter 2.813.19d (November 2011).

<sup>16</sup> 5 ECAB 376 (1953).

<sup>17</sup> 20 C.F.R. § 10.403.

<sup>18</sup> 5 U.S.C. § 8115(a).

<sup>19</sup> *Supra* note 9.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 16, 2019 decision of the Office of Workers' Compensation Programs is reversed.

Issued: March 19, 2021  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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