

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

C.M., Appellant)	
)	
and)	Docket No. 22-0205
)	Issued: August 17, 2022
U.S. COURTS, OFFICE OF THE FEDERAL)	
PUBLIC DEFENDER, Little Rock, AR,)	
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
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On November 15, 2021 appellant filed a timely appeal from a May 19, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees'

¹ Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from OWCP's May 19, 2021 decision was November 15, 2021. Since using November 19, 2021, the date the appeal was received by the Clerk of the Appellate Boards would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is November 15, 2021, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1). Appellant also appealed a purported May 20, 2021 decision of OWCP, but this document is an informational letter rather than a final decision of OWCP. The Board's jurisdiction is limited to final adverse decisions of OWCP issued within 180 days of the appeal and, therefore, there is no final adverse decision dated May 20, 2021 within the Board's jurisdiction. *See* 20 C.F.R. §§ 501.2(c) and 501.3.

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

ISSUE

The issue is whether OWCP has met its burden of proof to reduce appellant's compensation benefits, effective January 4, 2021, based on her actual earnings as a minister.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts of the case as set forth in the prior Board decisions and orders are incorporated herein by reference. The relevant facts are as follows.

OWCP accepted that on November 1, 2006 appellant, then a 41-year-old investigator, sustained a medial meniscus tear of her left knee when she fell from a ladder retrieving a box while in the performance of duty. Appellant stopped work on November 6, 2006 and underwent OWCP-authorized anterior cruciate ligament reconstruction and medial/lateral meniscus debridement of her left knee on December 12, 2006. She received wage-loss compensation for periods of partial and total disability. Appellant was terminated by the employing establishment on May 22, 2007, because she did not return to available light-duty work despite the fact that an attending physician had released her to such work. OWCP accepted her claim for a recurrence of disability, effective May 23, 2007, and paid her disability compensation on the periodic rolls.

On June 10, 2009 appellant underwent OWCP-authorized left knee surgery, including meniscectomy and anterior cruciate ligament revision surgery. On September 11, 2009 OWCP expanded the acceptance of her claim to include sprain of the acromioclavicular joint of the right shoulder and several additional left knee conditions -- bone contusion, cruciate ligament sprain, re-tear of the medial meniscus, re-tear of the lateral meniscus, and anterior cruciate ligament disruption.

By decision dated February 25, 2010, OWCP terminated appellant's wage-loss compensation, effective March 14, 2010, and by decisions dated July 26, 2010 and February 28, 2011, it denied modification of its termination action.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the May 19, 2021 decision, appellant submitted additional evidence to OWCP and on appeal to the Board. 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.*

⁴ Docket No. 11-1988 (issued June 6, 2012); *Order Granting Petition for Reconsideration and Modifying Prior Decision of the Board*, Docket No. 11-1988 (issued July 25, 2013); Docket No. 14-1302 (issued May 5, 2015); Docket No. 16-1638 (issued October 6, 2017); Docket No. 18-1120 (issued November 26, 2018).

Appellant appealed to the Board and, by decision dated June 6, 2012,⁵ the Board reversed the February 28, 2011 termination decision. The Board found that the medical evidence OWCP relied upon for its termination action was insufficiently rationalized. OWCP returned appellant to the periodic rolls.

In February 2013, appellant reported that she had been employed since April 19, 2012 by the Department of Veterans Affairs as a clinical pastoral education resident (student chaplain) at a rate of pay of \$13.17 per hour. In accordance with the Board's June 6, 2012 decision, OWCP made supplemental payments to appellant to effectively reinstate her wage-loss compensation retroactive to the date of the March 14, 2010 termination. Based on her wages as a clinical pastoral education resident, beginning April 19, 2012 and continuing, it made an informal determination in which it calculated her loss of wage-earning capacity (LWEC) under the principles of the *Albert C. Shadrick* case.⁶

By decision dated January 28, 2014, OWCP terminated appellant's wage-earning compensation, effective February 9, 2014. Appellant appealed to the Board and, by decision dated May 5, 2015,⁷ the Board reversed the January 28, 2014 decision and returned her to the periodic rolls.

Effective August 6, 2017, through an informal determination, OWCP reduced appellant's compensation based upon her employment and earnings as a chaplain for the Central Arkansas Veterans Health Care System.

Effective October 1, 2018, through an informal determination, OWCP reduced appellant's compensation based upon her employment and earnings as a minister with a church.

In a July 29, 2020 work capacity evaluation (Form OWCP-5c), Dr. Kevin J. Collins, a Board-certified orthopedic surgeon, indicated that appellant could work eight hours per day with restrictions, including lifting/pushing/pulling no more than 10 pounds, and no twisting, bending, or stooping. He recommended that she take breaks of varying lengths after performing certain physical tasks, including sitting, standing, and engaging in repetitive wrist and elbow motions.

The case record contains pay records and statements from appellant and officials from a different church, submitted to OWCP in early-2021, which reflect that on January 4, 2021 appellant began employment as a minister. Appellant worked 18 to 20 hours per week in the minister position at a gross pay rate of \$829.69 per week.

By decision dated May 19, 2021, OWCP reduced appellant's compensation benefits, effective January 4, 2021, based on her actual earnings as a minister. It found that the position fairly and reasonably represented her wage-earning capacity as she had been performing the position since January 4, 2021 and had demonstrated the ability to perform the duties of the

⁵ Docket No. 11-1988 (issued June 6, 2012).

⁶ See *Albert C. Shadrick*, 5 ECAB 376 (1953).

⁷ Docket No. 14-1302 (issued May 5, 2015).

modified job for 60 days or more. OWCP asserted that the minister position to which appellant had returned met the criteria of 20 C.F.R. § 10.510 for a light-duty position.⁸

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of the compensation benefits.⁹ 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 from all gainful employment, is considered partially disabled and is entitled to compensation computed on loss of wage-earning capacity.¹⁰

Section 8115(a) of FECA provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his or her actual earnings if his or her actual earnings fairly and reasonably represent his or her wage-earning capacity.¹¹ Generally, wages actually earned are the best measure of a wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.¹² Once OWCP determines that the actual wages of a given position represent an employee's wage-earning capacity, OWCP applies the principles developed in the *Albert C. Shadrick*¹³ decision, now codified at 20 C.F.R. § 10.403, in order to calculate the adjustment in the employee's compensation. Compensation payments are based on the wage-earning capacity determination, and OWCP's finding remains undisturbed until properly modified.¹⁴

A light-duty position that fairly and reasonably represents an employee's ability to earn wages may form the basis of an LWEC determination if that light-duty position is a classified position to which the injured employee has been formally reassigned.¹⁵ The position must conform

⁸ OWCP based its reduction of appellant's compensation on the principles developed in the *Albert C. Shadrick* decision. *See supra* note 6.

⁹ *M.K.*, Docket No. 17-0208 (issued April 17, 2018); *H.N.*, Docket No. 09-1628 (issued August 19, 2010); *T.F.*, 58 ECAB 128 (2006).

¹⁰ 20 C.F.R. §§ 10.402 and 10.403; *J.H.*, Docket No. 18-1319 (issued June 26, 2019); *John D. Jackson*, 55 ECAB 465 (2004).

¹¹ 5 U.S.C. § 8115(a); *B.W.*, Docket No. 19-0207 (issued August 23, 2019); *N.J.*, 59 ECAB 171 (2007).

¹² *B.G.*, Docket No. 17-1763 (issued April 9, 2018); *Lottie M. Williams*, 56 ECAB 302 (2005).

¹³ 5 ECAB 376 (1953). The formula developed in the *Shadrick* decision has been codified at 20 C.F.R. § 10.403(d), which provides that the employee's wage-earning capacity in terms of percentage is obtained by dividing the employee's actual earnings or the pay rate of the position selected by OWCP, by the current pay rate for the job held at the time of the injury.

¹⁴ *D.M.*, Docket No. 16-1527 (issued July 25, 2017); *Katherine T. Kreger*, 55 ECAB 633 (2004).

¹⁵ 20 C.F.R. § 10.510.

to the established physical limitations of the injured employee; the employing establishment must have a written position description outlining the duties and physical requirements; and the position must correlate to the type of appointment held by the injured employee at the time of injury.¹⁶ If these circumstances are present, a determination may be made that the position constitutes regular federal employment.¹⁷ In the absence of a light-duty position as described above, OWCP will assume that the employee was engaged in noncompetitive, makeshift, or odd-lot employment.¹⁸

ANALYSIS

The Board finds that OWCP has not met its burden of proof to reduce appellant's compensation benefits, effective January 4, 2021, based on her actual earnings as a minister.

On January 4, 2021 appellant began employment as a minister. On May 19, 2021 OWCP issued a decision finding that the position fairly and reasonably represented her wage-earning capacity as she had been performing the position since January 4, 2021 and had demonstrated the ability to perform the duties of the modified job for 60 days or more. It maintained that the minister position to which appellant had returned met the criteria of 20 C.F.R. § 10.510 for a light-duty position.

The Board finds, however, that the current record does not establish that the minister position complied with OWCP's regulations regarding light-duty job offers as established in 20 C.F.R. § 10.510. The evidence of record does not contain a written position description outlining the duties and physical requirements of the minister position. Accordingly, the Board is unable to determine from the evidence of record whether the physical requirements of the minister position were within appellant's medical restrictions.¹⁹ As the record is incomplete in this regard, the Board finds that OWCP has not met its burden of proof to reduce appellant's compensation benefits based on her earnings in the position.

CONCLUSION

The Board finds that OWCP has not met its burden of proof to reduce appellant's compensation benefits, effective January 4, 2021, based on her actual earnings as a minister.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *See E.F.*, Docket No. 19-1019 (issued November 6, 2019); *W.R.*, Docket No. 18-1782 (issued May 29, 2019).

ORDER

IT IS HEREBY ORDERED THAT the May 19, 2021 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 17, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board