

ISSUE

The issue is whether OWCP properly reduced appellant's wage-loss compensation, effective March 6, 2020, based upon his wage-earning capacity in the constructed position of gate guard.

FACTUAL HISTORY

On April 15, 2014 appellant, then a 53-year-old conveyer car dumper operator, filed a traumatic injury claim (Form CA-1) alleging that on March 19, 2014 he sustained a left shoulder injury when shoveling a coal spill while in the performance of duty. He did not stop work. OWCP accepted the claim for left shoulder impingement syndrome and subsequently expanded the acceptance of the claim to include left shoulder and upper arm rotator cuff sprain, left shoulder tendons and bursae disorder, and aggravation of left shoulder primary osteoarthritis. It authorized left shoulder arthroscopic and rotator cuff repair surgery, which was performed on August 12, 2014. OWCP paid appellant on the supplemental rolls commencing May 7, 2014 and on the periodic rolls commencing August 24, 2014.

An April 9, 2015 functional capacity evaluation (FCE) report by Andrew E. Smith, a physical therapist, noted an 80 percent reliability measure, and that results of the evaluation suggested that appellant gave a self-limited effort with 39 of the 49 consistency measures within expected limits. The physical therapist, based on the FCE findings, found that appellant was capable of performing light-duty work with occasional lifting of 11 to 20 pounds, frequent lifting of 1 to 10 pounds, negligible constant lifting, frequent carrying up to 15 pounds, pushing to 16 pounds absolute force, pulling up to 12 pounds absolute force, occasional walking, no ladder climbing, and no left arm overhead reaching.

In a report dated April 30, 2015, Dr. Paul C. Brady, a Board-certified orthopedic surgeon, reviewed the FCE results and placed appellant on permanent light-duty work with restrictions of occasional lifting of 11 to 20 pounds, and occasional, frequent or negligible constant lifting of 1 to 10 pounds. In form reports dated April 30 and November 19, 2015 and March 3, 2016, he noted that appellant was capable of limited-duty work and referenced the April 9, 2015 FCE for restrictions.

On July 15, 2015 OWCP referred appellant, together with a statement of accepted facts (SOAF), medical record, and list of questions, to Dr. Michael A. MacKay, a Board-certified orthopedic surgeon, for a second opinion evaluation. It asked him to address appellant's current work restrictions. In an August 3, 2015 report, Dr. MacKay noted appellant's history of injury history and medical treatment. He examined appellant and diagnosed left rotator cuff tear, most likely recurrent. Dr. MacKay opined that appellant was unable to perform his regular duties of a conveyor car dumper operator, but could work with restrictions. In a September 15, 2015 work capacity evaluation (Form OWCP-5c), he provided permanent light-duty work restrictions, which included up to one to two hours of reaching above the shoulder, up to one to two hours of pushing up to 15 pounds, up to two hours of pulling up to 15 pounds, up to one hour of lifting up to 15 pounds, and up to four hours of climbing.

The employing establishment terminated appellant's employment, effective September 6, 2016, and requested that OWCP refer him for vocational rehabilitation services.

In a form report dated October 27, 2017, Dr. Brady again referred to the FCE for a determination of appellant's work capacity.

On January 30, 2018 OWCP referred appellant to Dr. Nicholas A. Grimaldi, an osteopath Board-certified in orthopedic surgery. It requested that he address whether appellant continued to suffer objective residuals of the March 19, 2014 employment injury. OWCP further requested that Dr. Grimaldi address whether appellant was capable of performing the duties of a conveyer car dumper operator and/or whether he was capable of working a limited or sedentary job.

In a February 23, 2018 report, Dr. Grimaldi noted appellant's history of injury and medical treatment. He examined appellant and diagnosed resolved left shoulder sprain, left shoulder rotator cuff tear, and left shoulder arthritis. Dr. Grimaldi explained that the left shoulder cuff tear would remain present due to the worsening of appellant's arthritis and his rotator cuff tendon would continue to undergo degenerative-type tearing. He attributed appellant's current symptoms to appellant's left shoulder arthritis, which he opined had been aggravated by the employment injury. Dr. Grimaldi found that appellant was capable of working a limited-duty job eight hours per day with restrictions. In an attached Form OWCP-5c, he indicated that appellant was capable of performing light-duty work with no reaching above his shoulder.

On March 6, 2018 OWCP referred appellant for vocational rehabilitation services based on Dr. Grimaldi's February 23, 2018 report, which indicated that he was capable of performing light-duty work.

In a March 22, 2018 report, the vocational rehabilitation counselor described appellant's education, training, and work experience. She contacted the employing establishment to explore whether a modified job within his work restrictions was available. The employing establishment advised that it was unable to accommodate appellant's work restrictions. In a letter dated April 12, 2018, the vocational rehabilitation counselor referred him for vocational testing to assist in determining his occupational/vocational goals and rehabilitation planning.

A May 10, 2018 career focus basic vocational assessment report recommended that appellant be considered for training programs to obtain his general educational diploma.

In a vocational rehabilitation plan dated August 13, 2018, OWCP's vocational rehabilitation counselor determined that appellant was capable of returning to work as a gate guard under Department of Labor, *Dictionary of Occupational Titles* (DOT), No. 372.667-060, security guard, under DOT No. 372.667-034, and surveillance system monitor, under DOT No. 379.367-010. The vocational 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 letter dated September 28, 2018, OWCP advised appellant that it had reviewed the plan for his return to work as a security guard, surveillance system monitor, or gate guard. It determined that the positions were within his medical restrictions and informed him that he 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 \$400.00 per week.

On April 12, 2019 OWCP closed vocational rehabilitation services following an unsuccessful placement effort. It noted the security guard, surveillance system monitor, and gate guard positions identified by the vocational rehabilitation counselor were performed in sufficient numbers within appellant's commuting area with hourly wages of \$10.00. An attached job classification for the position of gate guard noted that it was a light-duty position and that on-the-job training would be provided for the position.

In a May 15, 2019 supplemental report, Dr. Grimaldi, based on his review of new medical reports, the proposed positions, and physical examination findings advised that appellant's work restriction were unchanged. He reviewed the physical requirements and job description for the proposed positions of security guard, surveillance system monitor, and gate guard, and concluded that they were within appellant's work restrictions.

By decision dated July 2, 2019, OWCP expanded the acceptance of appellant's claim to include aggravation of left shoulder osteoarthritis.

Dr. Grimaldi, in a supplemental report dated July 22, 2019, indicated that the accepted left shoulder impingement condition had resolved, and that appellant's work restrictions were unchanged due to his left shoulder osteoarthritis.

On August 13, 2019 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 gate guard, at the weekly pay rate of \$400.00. It noted that the physical requirements of the gate guard 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 vocational rehabilitation counselor's report, and found 32 percent wage-earning capacity or a 68 percent loss of wage-earning capacity (LWEC), with a new gross compensation rate of \$2,333.00.³ It attached the DOT job description for gate guard, and Dr. Grimaldi's February 23, 2018 work restrictions and May 15 and July 22, 2019 supplemental reports. The physical demands indicated that the strength level was light, involving exerting up to 20 pounds of force occasionally and lifting up to 10 pounds of force frequently.

On August 29, 2019 appellant disagreed with the proposal to reduce his wage-loss compensation. He asserted that his lack of a high school diploma was a reason given by prospective employers for not hiring him. Additionally, appellant's preexisting chronic obstructive pulmonary disease (COPD) and left knee osteoarthritis were not considered by Dr. Grimaldi in considering whether the gate guard position was within appellant's restrictions.

³ The vocational rehabilitation counselor noted that the source of wage data was a Bureau of Labor Statistics labor market survey dated May 2017 and State of Tennessee Department of Labor & Workforce Development market survey dated June 2016. For the gate guard position, 14,120 jobs were found to be available in appellant's commuting area with a weekly wage of \$400.00 for full-time entry-level positions.

He claimed that he could not work due to his inability to hold his arm above his shoulder and to sleep at night due to pain.

By decision dated September 25, 2019, OWCP reduced appellant's wage-loss compensation, effective October 13, 2019, consistent with its finding that the constructed position of gate guard with weekly earnings of \$400.00 represented his wage-earning capacity.

On October 7, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

On October 17, 2019 OWCP issued a corrected decision reducing appellant's wage-loss compensation, effective October 13, 2019, but reflecting an effective pay rate date of March 19, 2014, the date of injury, and not the pay rate date of May 7, 2014 used in the August 13, 2019 proposal to reduce his wage-loss compensation and in the September 25, 2019 decision finalizing the reduction of his wage-loss compensation.

Appellant, through counsel, reiterated his request for a telephonic hearing.

Following a preliminary review, by decision dated December 18, 2019, OWCP's hearing representative reversed the October 17, 2019 LWEC determination due to factual errors in the decision concerning the date of appellant's injury. She related that on return of the case record OWCP should issue a *de novo* decision.

On January 14, 2020 OWCP reinstated appellant's compensation on the periodic rolls for temporary total disability, effective January 5, 2020.

On January 17, 2020 OWCP again referred appellant to Dr. Grimaldi for an updated assessment of his work-related condition.

Dr. Grimaldi, in a report dated February 3, 2020, noted that appellant's past medical history included COPD, bronchitis, hypertension, depression, anxiety, sleep apnea, and hypothyroid conditions. Appellant related that he was unable to obtain a job due to his lack of a high school diploma. Additionally, he stated that he was trying to get his right shoulder condition accepted as work related. Dr. Grimaldi noted that appellant was seeking further compensation due to his right shoulder and left knee conditions, which were unrelated to the accepted left shoulder work conditions. He advised that the work restrictions previously provided were unchanged. Dr. Grimaldi concluded that appellant was capable of performing the constructed position of gate guard.

By decision dated March 6, 2020, OWCP finalized the August 13, 2019 proposal to reduce appellant's wage-loss compensation based on the constructed position of gate guard.

On March 20, 2020 appellant, through counsel requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on July 15, 2020.

In a July 16, 2020 report, Dr. Brady, diagnosed left shoulder glenohumeral degenerative joint disease. He informed appellant that if ,appellant's current job as a security job did not fit

within the restrictions set forth in his FCE, then the job was unsuitable. However, if the job was within the restrictions, then appellant was capable of performing that job.

In a decision dated September 29, 2020, OWCP's hearing representative affirmed the March 6, 2020 decision.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proof to establish that the disability has ceased or lessened before it may terminate or modify compensation benefits.⁴ 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 his or her LWEC.⁵

When OWCP makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an OWCP wage-earning capacity counselor or specialist for selection of a position, listed in the Department of Labor, DOT or otherwise available in the open market, that fit 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 labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in *Albert C. Shadrick*⁶ and codified by regulations at 20 C.F.R. § 10.403 should be applied. Subsection (d) of the regulations 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.⁷

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.⁸ Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.⁹

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

⁴ *B.H.*, Docket No. 20-0729 (issued March 19, 2021); *S.C.*, Docket No. 19-1680 (issued May 27, 2020); *Betty F. Wade*, 37 ECAB 556, 565 (1986).

⁵ 20 C.F.R. §§ 10.402, 10.403.

⁶ 5 ECAB 376 (1953).

⁷ *See J.N.*, Docket No. 1901986 (issued August 27, 2020); *S.W.*, Docket No. 15-0598 (issued June 22, 2015); *supra* note 5 at § 10.403(d).

⁸ *B.H.*, *supra* note 4; *J.H.*, Docket No. 18-1319 (issued June 26, 2019).

⁹ *Id.*

resulting from postinjury 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.¹⁰

OWCP's procedures provide that:

"After initial adjudication, it may be determined that the claimant is no longer entitled to compensation or medical benefits, or any portion of those benefits. Per 20 C.F.R. § 10.540 (c) through (e), some terminations require notice prior to final cessation of benefits, while others do not. OWCP will not provide such written notice when the beneficiary has no reasonable basis to expect that payment of compensation will continue."¹¹

OWCP's procedures further explain that pretermination notice is required if wage-loss benefits are being paid on the periodic rolls.¹²

ANALYSIS

The Board finds that OWCP did not meet its burden of proof to reduce appellant's wage-loss compensation, effective March 6, 2020, based upon his wage-earning capacity in the constructed position of gate guard.

OWCP initially issued a notice on August 13, 2019 proposing to reduce appellant's wage-loss compensation based upon his ability to earn wages on the constructed position of gate guard, at the rate of \$400.00 per week. This notice of proposed reduction of benefits was made final on September 25, 2019.

On October 7, 2019 appellant, through counsel, timely requested a hearing before a representative of OWCP's Branch of Hearings and Review. Prior to the hearing, on October 17, 2019 OWCP issued a corrected decision finalizing the proposed reduction of appellant's wage-loss compensation, based on the constructed position of gate guard. OWCP noted that it was issuing a corrected decision as the initial decision did not properly reflect his date-of-injury pay rate.

By decision dated December 18, 2019, following preliminary review, OWCP's hearing representative reversed the October 17, 2019 decision. She found that OWCP had improperly noted that the injury had occurred on April 4, 2005 while the injury had in fact occurred on March 19, 2014. The hearing representative concluded that appellant was entitled to a decision which accurately depicted the factual portion of the claim. She remanded the case for a *de novo* decision regarding his wage-earning capacity.

¹⁰ *Id.*

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400 (February 2013).

¹² *Id.* at Chapter 2.1400.4b(1) (February 2013).

On January 14, 2020 OWCP reinstated appellant's temporary total disability benefits on the periodic rolls.

OWCP issued a decision on March 6, 2020 finalizing the August 13, 2019 the notice of proposed reduction of appellant's compensation based upon his capacity to earn wages as a gate guard.

The Board finds that as appellant's wage-loss benefits had been reinstated on the periodic rolls on January 14, 2020 OWCP's procedures required that OWCP issue a new notice of proposed reduction of compensation benefits, prior to its March 6, 2020 decision finalizing the LWECD determination.¹³

As OWCP did not issue a new notice of proposed reduction of wage-loss compensation prior to its March 6, 2020 final decision reducing appellant's compensation based on his capacity to earn wages as a gate guard, the Board finds that OWCP improperly reduced his wage-loss compensation.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to reduce appellant's wage-loss compensation, effective March 6, 2020, based on his capacity to earn wages in the constructed position of gate guard.

¹³ See *Harry J. Day*, Docket No. 02-1720 (issued January 28, 2003); *James M. Hamada*, Docket No. 01-1806 (issued June 25, 2002); and *Jimmy W. Bassett*, Docket No. 99-22 (issued July 21, 1999).

ORDER

IT IS HEREBY ORDERED THAT the September 29, 2020 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 21, 2022
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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