

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

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L.H., Appellant)	
)	
and)	Docket No. 21-0244
)	Issued: October 27, 2022
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Champaign, IL, Employer)	
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Appearances:
Alan J. Shapiro, Esq. for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On December 14, 2020 appellant, through counsel, filed a timely appeal from a November 30, 2020 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 an 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 November 30, 2020 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 May 24, 2020, based on her capacity to earn wages as a telemarketing solicitor.

FACTUAL HISTORY

On March 7, 2017 appellant, then a 28-year-old mail handler assistant, filed a traumatic injury claim (Form CA-1) alleging that on January 15, 2017 she strained her right shoulder when lifting packages while in the performance of duty. She stopped work on January 24, 2017. OWCP accepted the claim for right shoulder strain, right shoulder impingement syndrome, and right shoulder bicipital tendinitis. Appellant accepted a limited-duty job offer of modified work on March 24, 2017. The employing establishment terminated her employment on December 9, 2017 as she was unable to perform her job due to the injury. OWCP paid appellant wage-loss compensation on the supplemental rolls effective March 2, 2017 and on the periodic rolls effective April 1, 2018.

On June 18, 2018 appellant underwent right shoulder arthroscopy, which was performed by Dr. Edward H. Kolb, a Board-certified orthopedic surgeon. On August 2, 2018 Dr. Kolb opined that she had restrictions of no lifting over 25 pounds and limited overhead use of the right shoulder. On October 8, 2018 he advised that appellant could not lift over 40 pounds. In a February 18, 2019 progress report, Dr. Kolb noted that her January 21, 2019 functional capacity evaluation indicated that she could not perform her previous job duties. He released appellant to be seen on an as-needed basis.

On April 17, 2019 appellant underwent an OWCP-directed second opinion examination with Dr. Eric M. Orenstein, a Board-certified orthopedic surgeon. In a medical report, Dr. Orenstein reviewed a November 15, 2018 statement of accepted facts (SOAF) and her medical record. Examination findings of appellant's right shoulder included a positive Neer test, positive impingement sign, positive Yergason's sign, tenderness over the right biceps tendon, and loss of range of motion of the right shoulder compared to the unaffected left shoulder. Dr. Orenstein opined that the objective medical findings of the right shoulder examination indicated that the work-related conditions were unresolved and that her symptoms have persisted despite the June 2018 surgery. He opined that appellant was able to perform full-time modified-duty work with restrictions. These include no overhead activities involving the right upper extremity, a 20-pound weight restriction for lifting, pulling, pushing for no more than 4 hours, and carrying activities, no forceful gripping, pinching, and torqueing with the right hand and fingers. Dr. Orenstein opined that appellant was at maximum medical improvement and no further medical treatment, other than continued anti-inflammatory medication for pain relief and continued home exercises, was needed. He also completed a work capacity evaluation (Form OWCP -5c) outlining her restrictions.

On May 17, 2019 OWCP referred appellant for vocational rehabilitation services based on Dr. Orenstein's April 17, 2019 report, which indicated that she was capable of performing modified-work duties. A vocational rehabilitation counselor was assigned on May 22, 2019. On July 10, 2019 the case was referred to plan development status as the employing establishment was nonresponsive regarding availability of a suitable position. On August 7, 2019 the vocational rehabilitation counselor completed a job classification report for positions as a telemarketing

solicitor, under the Department of Labor, *Dictionary of Occupational Titles* (DOT), No. 299.357-014, at a rate of \$370.00 per week; a desk clerk, under DOT No. 238.367-038, at a rate of \$480.00 per week; and a security guard, under DOT No. 372.567-034, at a rate of \$480.00 per week. The telemarketing solicitor position was classified as sedentary in nature, with lifting up to 10 pounds required, while the desk clerk and security guard positions were classified as light in nature. In a September 19, 2019 memorandum, the vocational rehabilitation counselor determined that appellant was capable of returning to work as a telemarketing solicitor, under DOT No. 299.357-014, a clerk, under DOT No. 238.367-014, and a security guard, under DOT No. 372.667-034. Placement assistance began on October 1, 2019.

In a letter dated October 15, 2019, OWCP advised appellant that it had reviewed the plan for her return to work. It determined that the selected positions were within her medical limitations and informed her 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, regardless of her employment status, based upon the hourly salary of the selected position.

In a December 16, 2019 report, Dr. Kolb noted examination findings and diagnosed right shoulder pain, unspecified chronicity. No comments on appellant's limitations or work capacity was provided.

Placement assistance concluded on March 9, 2020. In the March 9, 2020 closure memorandum, the vocational rehabilitation counselor confirmed that the targeted positions remained vocationally and medically appropriate within appellant's medical restrictions and that her past work experience and education met the requirements of those positions. He also confirmed that, based on the August 7, 2019 Labor Market Survey information, the targeted positions existed in sufficient numbers within the reasonable commuting area as documented on the CA-66 forms of August 7, 2019 and research. The vocational rehabilitation counselor noted that appellant had accepted a part-time position with the Census, but her current employment status was not clear.

On April 22, 2020 OWCP issued a notice proposing 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 telemarketing solicitor, DOT No. 299.357-024, at the rate of \$370.00 per week, which it deemed to be medically and vocationally suitable. OWCP explained that her 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 \$1,271.00 each four weeks. It attached the August 7, 2019 job classifications for telephone solicitor and desk clerk and a copy of Dr. Orenstein's April 27, 2019 second opinion report. OWCP allotted appellant 30 days to respond to the proposed reduction.

On May 20, 2020 OWCP received a copy of an e-mail from appellant to her counsel which advised that appellant had relapsed with her bipolar disorder and was currently in a manic state. Appellant noted that she was having a hard time finding employment with a job within her restrictions. No medical evidence was received.

By decision dated June 1, 2020, OWCP reduced appellant's compensation, effective May 24, 2020, on the basis that she had the capacity to earn wages as a telemarketing solicitor, DOT No. 299.357-024, at the rate of \$370.00 per week. It noted that the April 17, 2019 report of

Dr. Orenstein was the best representation of her work capabilities and constituted the weight of the medical evidence as he provided a rationalized opinion on her work ability based on an examination and the medical evidence of record. OWCP further found that the vocational rehabilitation counselor had properly considered all appropriate factors and evidence and that the position of telemarketing solicitor represented appellant's loss of wage-earning capacity (LWEC).

On June 19, 2020 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, which was held telephonically on September 17, 2020. During the hearing appellant testified that she had been diagnosed with a bipolar condition at age 15. She indicated that her employment injury and inability to work had triggered her bipolar condition and that performing the duties of a telemarketer position would trigger further symptoms of her bipolar condition.

In an August 10, 2020 report, Dr. Roselin Arunachaiam, a Board-certified psychiatrist, diagnosed anxiety disorder, insomnia due to other mental disorder, and history of post-traumatic stress disorder. She noted that appellant's last appointment was on May 4, 2020 that appellant was not currently receiving psychotherapy, and had been off medication for about two months. Dr. Arunachaiam noted that appellant has a past history of bipolar disorder with current episode hypomanic. She indicated that appellant's significant hypomanic symptoms have affected many aspects of appellant's life. Appellant was sleeping very poorly.

By decision dated November 30, 2020, an OWCP hearing representative affirmed OWCP's June 1, 2020 decision.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of the 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 LWEC.⁵

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.⁶ 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.⁷ 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

⁴ See *J.F.*, Docket No. 19-0864 (issued October 25, 2019); *C.H.*, Docket No. 19-0136 (issued May 23, 2019).

⁵ *Id.*

⁶ 5 U.S.C. § 8115(a).

⁷ *C.M.*, Docket No. 18-1326 (issued January 4, 2019).

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.⁸

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.⁹ Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.¹⁰

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.¹¹

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 of Commerce, employing establishment contacts, and actual job postings.¹² Lastly, OWCP applies the principles set forth in *Albert C. Shadrick*,¹³ as codified in section 10.403 of OWCP's regulations,¹⁴ to determine the percentage of the employee's LWEC.¹⁵

ANALYSIS

The Board finds that OWCP has not met its burden of proof to reduce appellant's wage-loss compensation, effective May 24, 2020, based on her capacity to earn wages as a telemarketing solicitor.

⁸ *Id.*

⁹ *J.H.*, Docket No. 18-1319 (issued June 26, 2019).

¹⁰ *Id.*

¹¹ *Id.*

¹² *C.M.*, *supra* note 7; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Vocational Rehabilitation Services*, Chapter 2.813.19d (November 2011).

¹³ 5 ECAB 376 (1953).

¹⁴ 20 C.F.R. § 10.403.

¹⁵ 5 U.S.C. § 8115(a).

OWCP determined that appellant's wage-earning capacity was represented by the selected position of telemarketing solicitor, as it was within the medical restrictions provided by second opinion physician, Dr. Orenstein. While it relied on his April 17, 2019 report to determine that the telemarketing position was within her medical restrictions, it did not clarify whether she had any restrictions due to her preexisting bipolar condition.¹⁶

Any preexisting condition must be considered in determining an LWEC.¹⁷ This principle is evident in OWCP's procedures which instruct that the claims examiner is responsible for determining whether the medical evidence establishes that the claimant is able to perform the selected jobs, taking into consideration medical conditions due to the accepted work-related injury or disease and any preexisting medical conditions.¹⁸

Prior to the June 1, 2020 LWEC determination, OWCP learned that appellant may have a preexisting bipolar condition. Appellant thereafter testified during the September 17, 2020 hearing that her bipolar condition had been diagnosed when she was 15 years old. OWCP received an August 10, 2020 report from Dr. Arunachaiam addressing appellant's bipolar condition. The hearing representative addressed this report in her September 17, 2020 decision, but found that it did not establish that appellant's preexisting bipolar condition was employment related. As previously noted, to determine whether a claimant can perform a selected position, both employment related and preexisting conditions must be considered.¹⁹ The Board finds that OWCP has not properly evaluated appellant's preexisting condition and whether this condition affected her ability to perform the duties of the selected telemarketing position. OWCP did not meet its burden of proof as it did not prepare a SOAF noting her preexisting and employment-related conditions and it did not forward a complete SOAF, along with the position description of a telemarketing solicitor to appropriate physicians to determine whether she had the capacity to perform the telemarketing position.²⁰

The Board therefore finds that OWCP has not met its burden of proof to reduce appellant's wage-loss compensation, effective May 24, 2020, based on her capacity to earn wages as a telemarketing solicitor.

¹⁶ See *B.H.*, Docket No. 20-0729 (issued March 19, 2021).

¹⁷ *Id.*

¹⁸ *Supra* note 16; see also *supra* note 12 at Chapter 2.1501 (June 2013). See *J.M.*, Docket No. 18-0196 (issued July 12, 2018).

¹⁹ *Supra* note 11.

²⁰ *Supra* note 16.

CONCLUSION

The Board finds that OWCP has not met its burden of proof to reduce appellant's wage-loss compensation, effective May 24, 2020, based on her capacity to earn wages as a telemarketing solicitor.

ORDER

IT IS HEREBY ORDERED THAT the November 30, 2020 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 27, 2022
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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