

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

P.B., Appellant)	
)	
and)	Docket No. 21-0768
)	Issued: October 21, 2022
U.S. POSTAL SERVICE, POST OFFICE,)	
Sturbridge, MA, Employer)	
)	

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 April 26, 2021 appellant filed a timely appeal from a March 24, 2021 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 to consider 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 March 24, 2021 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 February 22, 2021, based on her capacity to earn wages in the constructed position of a receptionist.

FACTUAL HISTORY

On November 28, 2015 appellant, then a 53-year-old rural letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on November 27, 2015 she sustained a left wrist injury when she was rear ended while in the performance of duty.⁴ She stopped work on the filing date of her claim. On January 15, 2016 OWCP accepted appellant's claim for left wrist strain and left hand strain. It paid appellant wage-loss compensation on the supplemental rolls commencing January 12, 2016 and on the periodic rolls commencing March 6, 2016.

On September 20, 2019 OWCP referred appellant, together with a statement of accepted facts, the medical record, and a list of questions, to Dr. Steven Silver, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the nature and extent of her employment-related conditions and disability.

In an October 15, 2019 medical report, Dr. Silver noted a history of the November 27, 2015 employment injury and his review of appellant's medical history. He reported essentially normal findings on examination of the right wrist with the exception of a mildly positioned Phalen's test. Dr. Silver also reported essentially normal findings on examination of the left wrist with the exception a positive Phalen's test with an equivocal Tinel's sign, tenderness over the left triangular fibrocartilage, and pain in the scapholunate region. He provided impressions of a healed fractured ulna and normal examination of the right wrist. Additionally, Dr. Silver provided impressions of the accepted conditions of scapholunate dissociation with ulnar abutment, and bilateral carpal tunnel syndrome. He opined that the diagnosed conditions were causally related to appellant's November 27, 2015 employment injury. Dr. Silver explained that his opinion on causal relationship regarding her fractured ulna, scapholunate dissociation with ulnar abutment, and degeneration was based on chronology and the lack of prior or preexisting difficulties. Regarding appellant's bilateral carpal tunnel syndrome, he reasoned that there were no prior or preexisting difficulties, and no comorbidities. Dr. Silver opined that appellant had no aggravation and her difficulties had returned to baseline. He noted, however, that her difficulties with her wrists and shoulders had not resolved. Dr. Silver recommended right carpal tunnel surgery, possible left carpal tunnel surgery, and left shoulder treatment. He advised that there was objective evidence of appellant's continuing disability from work commencing November 27, 2015 through the date of his report based on her hand weakness and carpal tunnel syndrome as noted by Dr. N. George Kasparyan, a Board-certified orthopedic surgeon. Dr. Silver also advised that she had not reached maximum medical improvement (MMI) because she required further shoulder treatment. He concluded that appellant was not capable of performing her date-of-injury position, but she could work eight hours per day provided that she did not perform repetitive motion with her wrists. Dr. Silver further concluded

⁴ Appellant has a prior claim for a March 30, 2002 traumatic injury assigned OWCP File No. xxxxxx316. OWCP accepted that claim for left tibia/fibula fracture. Appellant also has a January 22, 2014 traumatic injury assigned OWCP File No. xxxxxx398. OWCP accepted that claim for right knee sprain and right thigh muscle spasm. Appellant also filed a traumatic injury claim for a July 13, 2005 left knee injury, to which OWCP assigned File No. xxxxxx146. OWCP designated this claim as a short form closure. It has not administratively combined these files with the current claim.

that she was an excellent candidate for vocational rehabilitation. In a work capacity evaluation (Form OWCP-5c) dated October 11, 2019, he reiterated his opinion on appellant's work capacity. Dr. Silver explained that she was unable to perform her usual job without restriction because she could not lift more than 10 pounds. He provided additional restrictions, which included reaching, reaching above the shoulder, and twisting up to four hours, operating a motor vehicle at work and from work up to two hours, pushing, pulling, and lifting up to five pounds up to two hours, no repetitive motions of the wrists or elbows, and no climbing. Dr. Silver noted that these restrictions were for one year.

On November 15, 2019 OWCP requested that Dr. Silver clarify his diagnoses related to appellant's ulna and shoulder conditions. In his November 27, 2019 letter, Dr. Silver reiterated the examination findings and opinions set forth in his prior October 15, 2019 report. Additionally, he provided impressions of healed fracture of the left ulna and left scapholunate dislocation with ulnar abutment. Dr. Silver explained the development of appellant's bilateral carpal tunnel syndrome and need for further medical treatment for her wrist conditions. He concluded that MMI had not been reached because she required further treatment.

On November 27, 2019 OWCP expanded the acceptance of appellant's claim to include the additional conditions of healed fracture of the left ulna, left scapholunate dislocation with ulnar ligament abutment, and bilateral upper limb carpal tunnel syndrome.

On November 27, 2019 OWCP also referred appellant for vocational rehabilitation to identify an employment position within the restrictions set forth by Dr. Silver on October 15, 2019.

On January 16, 2020 OWCP requested that Dr. Silver provide a diagnosis for appellant's shoulder(s) condition and whether she would reach MMI if she did not undergo surgery. In an addendum report dated January 17, 2020, Dr. Silver opined that her bilateral shoulder condition, disability, and need for treatment were not causally related to her November 27, 2015 employment injury. He further opined that appellant would be at MMI if she did not undergo surgery. Dr. Silver advised that she may require a limited wrist fusion, but related that she should be given three months to decide if she wished to undergo surgery.

In an April 28, 2020 job classification (Form OWCP-66), a vocational rehabilitation counselor identified the appointment clerk/receptionist position, Department of Labor, *Dictionary of Occupational Titles* (DOT), No. 237.367-038, as within appellant's medical and vocational abilities. The job description indicated that a receptionist receives callers at establishment, determined nature of business, and directed callers to destination. Obtains caller's name and arranges for appointment with person called upon. Directs caller to destination and records name, time of call, nature of business, and person called upon. Depending on the type of office, may operate Private Branch Exchange telephone console to receive incoming messages; may type memoranda, correspondence, reports and other documents; may issue visitor's pass when required; may make future appointments and answer inquires; may perform variety of clerical duties and other duties pertinent to type of establishment; and may collect and distribute mail and messages. The position was listed at the sedentary level with occasional lifting of no more than 10 pounds, no climbing, balancing, stooping, kneeling, crouching, or crawling; occasional reaching, handling, and fingering. The rehabilitation counselor indicated that appellant met the specific vocational preparation as she had prior work experience. He also indicated that the position was reasonably available in her commuting area and had a weekly wage of \$600.80. The rehabilitation counselor

noted that the source of the wage data was the Bureau of Labor Statistics (BLS) labor market survey dated May 2019.

On May 11, 2020 OWCP requested that the rehabilitation counselor verify whether the selected receptionist position was within appellant's restrictions. It noted that the position required fingering/handling on an occasional basis while appellant was restricted to no repetitive movement of her wrists/elbows. OWCP also requested that the rehabilitation counselor verify whether the wage data provided was in the 10th percentile.

In a May 18, 2020 addendum report, the rehabilitation counselor contacted prospective employers and verified that no repetitive movements of the wrists or elbows were required in the receptionist position. He noted that the position had an hourly wage of \$10.16 and a yearly salary of \$21,130.00. On May 27, 2020 a vocational rehabilitation specialist reported that the weekly wage of the receptionist position was \$406.40 and in the 10th percentile.

OWCP, in a letter dated May 27, 2020, approved the rehabilitation counselor's proposed direct placement plan.

Subsequently, OWCP received medical evidence, including a June 20, 2020 report by Dr. Young-Ho Oh, an attending Board-certified orthopedic surgeon. Dr. Oh noted appellant's history of injury on November 27, 2015 and discussed examination findings. He provided impressions of chronic left wrist pain with healed nondisplaced distal ulnar fracture with underlying ulnar abutment syndrome with asymptomatic carpal tunnel syndrome, chronic left shoulder pain with post-traumatic impingement syndrome and myofascial pain syndrome, right wrist pain, and carpal tunnel syndrome. Dr. Ho opined that appellant's conditions were causally related to her November 27, 2015 employment injury. He advised that, while she could not perform her previous occupation, she could perform modified work with no repetitive activity with her left hand, wrist, and shoulder.

In a December 31, 2020 report, the rehabilitation counselor documented that the receptionist position remained vocationally suitable for appellant and was within her restrictions.

OWCP, in a February 22, 2021 notice, proposed to reduce appellant's wage-loss compensation based on her capacity to earn wages in the constructed position of receptionist at the weekly pay rate of \$406.40. It noted that the physical requirements of the receptionist position did not exceed the restrictions provided by Dr. Silver and that the selected position was medically suitable. OWCP further noted that the position was vocationally suitable, based on the rehabilitation counselor's report, and found 27 percent wage-earning capacity or 73 percent loss of wage-earning capacity (LWEC), with a new gross compensation rate, each four weeks of \$2,834.00. It attached the job classification for the receptionist position completed by the rehabilitation counselor on April 28, 2020 and Dr. Silver's October 15, 2019 work restrictions. OWCP afforded appellant 30 days to submit evidence and argument challenging the proposed action. Appellant submitted no additional evidence within the allotted time.

OWCP, by decision dated March 24, 2021, reduced appellant's wage-loss compensation, effective February 22, 2021, based on her ability to earn wages of \$406.40 per week as a

receptionist. Commencing March 28, 2021, it applied the formula in *Albert C. Shadrick*⁵ and thereafter paid appellant wage-loss compensation benefits at the new net compensation rate, each four weeks, of \$2,412.66.

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.⁶ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁷

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.⁸ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.⁹ 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.¹⁰ 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.¹¹

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.¹² Additionally, the Board has held that an LWEC determination must be based on a reasonably current medical evaluation.¹³

⁵ 5 ECAB 376 (1953).

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

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

⁸ 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).

⁹ *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).

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

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

¹² *Id.*

¹³ *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.¹⁴ Lastly, OWCP applies the principles set forth in *Shadrick*¹⁵ as codified in section 10.403 of OWCP's regulations,¹⁶ to determine the percentage of the employee's LWEC.¹⁷

ANALYSIS

The Board finds that OWCP has met its burden of proof to reduce appellant's wage-loss compensation, effective February 22, 2021, based on her capacity to earn wages in the constructed position of a receptionist.

Dr. Silver, an OWCP referral physician, opined that appellant could perform full-time modified work with the restrictions of no repetitive movement of her wrists and elbows, and reaching, reaching above the shoulder, and twisting up to four hours, operating a motor vehicle at work and from work up to two hours, and pushing, pulling, and lifting up to five pounds up to two hours. He explained that she was unable to perform her usual job because she could not lift more than 10 pounds. OWCP, therefore, properly referred appellant for vocational rehabilitation in November 2019 as the medical evidence established that she was no longer totally disabled from work due to residuals of her November 27, 2015 employment injury.¹⁸

The Board finds that OWCP properly determined that appellant had the physical capacity to perform the duties of a receptionist. The position is classified as sedentary employment requiring occasional lifting up to 10 pounds; no climbing, balancing, stooping, kneeling, crouching, or crawling; and occasional reaching, handling, and fingering. The Board notes that the rehabilitation counselor also verified with prospective employers that the receptionist position did not require repetitive movements, as requested by OWCP. Dr. Silver's restrictions, thus, fall within the requirements of the position. The vocational rehabilitation counsel noted that the position of receptionist allowed for a variety of duties, none of which exceeded Dr. Silver's medical restrictions.¹⁹ There is no contradictory medical evidence of record. The Board notes that appellant's own physician, Dr. Ho, opined that, although appellant could not perform her date-of-injury position, she could perform modified work with the restriction of no repetitive activity with her left hand and wrist. For these reasons, the Board finds that the weight of the medical evidence

¹⁴ *Supra* note 9 at Chapter 2.816.6.a (June 2013).

¹⁵ *Supra* note 5.

¹⁶ 20 C.F.R. § 10.403.

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

¹⁸ *S.C.*, Docket No. 19-1381 (issued November 24, 2020); *C.H.*, Docket No. 19-0136 (issued May 23, 2019).

¹⁹ *M.H.*, Docket No. 19-1410 (issued November 5, 2020); *J.H.*, Docket No. 18-1319 (issued June 26, 2019).

as represented by Dr. Silver, establishes that appellant had the physical capacity to perform the duties of the selected position.²⁰

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.²¹ In the April 28, 2020 labor market report, the rehabilitation counselor attached a Form OWCP-66 for the receptionist position. He indicated that the source of wage data was a BLS labor market survey dated May 2019. For the receptionist 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 weekly wage of \$600.80. In an addendum report dated May 18, 2020, he verified that the weekly wage of the receptionist position was \$406.40. As the rehabilitation counselor 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.²² 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 she had the capacity to perform the position of receptionist.²³ The record reflects that her relevant work experience established that she had the requisite physical ability, skill, and experience to perform the position of receptionist, which was reasonably available within the general labor market of her commuting area at a weekly wage of \$406.40.²⁴ OWCP properly applied the *Shadrick* formula, as codified in section 10.403 of its regulations,²⁵ in determining appellant's LWEC. Accordingly, the Board finds that OWCP properly found that the position of receptionist reflected appellant's wage-earning capacity.²⁶

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

CONCLUSION

The Board finds that OWCP has met its burden of proof to reduce appellant's wage-loss compensation, effective February 22, 2021, based on her capacity to earn wages in the constructed position of a receptionist.

²⁰ *Id.*

²¹ *M.H.*, *supra* note 19; *C.P.*, Docket No. 19-0595 (issued September 9, 2019).

²² *See M.H.*, *id.*; *J.B.*, Docket No. 17-0817 (issued April 26, 2018).

²³ *See M.H.*, *id.*; *T.B.*, Docket No. 17-1777 (issued January 16, 2019); *Clayton Varner*, 37 ECAB 248 (1985).

²⁴ *See M.H.*, *id.*; *C.M.*, Docket No. 18-0742 (issued March 12, 2020).

²⁵ *Supra* note 5.

²⁶ *See M.H.*, *supra* note 19; *J.F.*, Docket No. 19-0864 (issued October 25, 2019).

ORDER

IT IS HEREBY ORDERED THAT the March 24, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 21, 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