

FACTUAL HISTORY

On May 31, 2018 appellant, then a 52-year-old transportation security officer, filed a traumatic injury claim (Form CA-1) alleging that on May 30, 2018 she slipped and fell, scraping her left wrist and injuring her neck, while in the performance of duty. She stopped work on that date.

OWCP accepted the claim for sprain of the ligaments of the cervical spine, contusion of left wrist, and contusion of the neck. It subsequently expanded acceptance of the claim to include temporary aggravation of cervical degenerative disc disease at C3-C4, C4-C5, C5-C6, cervical facet disease at C3-C4, C4-C5, C5-C6, cervical radiculopathy at C5-C6, and bursitis of the left shoulder. On December 1, 2020 OWCP expanded acceptance of the claim to include complete rotator cuff tear or rupture of right shoulder. It paid appellant wage-loss compensation on the supplemental rolls beginning December 9, 2018, and on the periodic rolls beginning May 26, 2019.

On July 2, 2020 OWCP referred appellant for a second opinion examination with Dr. William Dinenberg, a Board-certified orthopedic surgeon, to determine the nature and extent of the accepted work-related conditions, the extent of disability, and appropriate treatment.

In a report dated July 24, 2020, Dr. Dinenberg noted appellant's history of injury and treatment and determined that she was partially disabled as a result of the employment injury. He opined that she could not return to her date-of-injury job as a transportation security officer; however, she was capable of working with restrictions. Dr. Dinenberg completed a work capacity evaluation (Form OWCP-5c) and provided restrictions of no more than three hours of reaching above the shoulder, no more than one hour of twisting, and no more than one hour of bending/stooping. He also advised that appellant could not do more than three hours of pushing, three hours of pulling, three hours of lifting, and one hour of squatting, kneeling or climbing. Dr. Dinenberg placed a 20-pound restriction on pushing, pulling, and lifting, and a 10-pound restriction on squatting, kneeling, and climbing.

On August 31, 2020 based upon the opinion of Dr. Dinenberg, OWCP referred appellant for vocational rehabilitation services with instructions to begin with consideration of placement with the employing establishment.

Appellant participated in vocational rehabilitation from August 23, 2020 through November 22, 2020. Based upon her age, experience, education, medical restrictions, and a labor market survey, the rehabilitation counselor assigned a plan for reemployment as an information clerk, according to the Department of Labor, *Dictionary of Occupational Titles* (DOT) #237.367-022. This position was selected as being the most appropriate for appellant because it met the work limitations provided by Dr. Dinenberg. The DOT described the physical requirements of the information clerk position as sedentary strength level with no climbing, no balancing, no stooping, no kneeling, no crouching, no crawling, occasional reaching, frequent handing, and frequent fingering.

On July 8 and August 27, 2021 the rehabilitation counselor conducted labor market research and documented that information clerk positions were reasonably available within appellant's commuting area and that the entry pay level for this position was \$500.00 per week.

By letter dated October 29, 2021, OWCP advised appellant that the position of information clerk was suitable to her restrictions.³ It advised her that she would receive 90 days of placement assistance to help locate work in this position, provided that she cooperated with such effort. OWCP explained that appellant's wage-loss compensation benefits would be reduced based upon the salary of an information clerk at the end of the 90-day placement assistance period.

In a January 11, 2022 vocational progress report, the rehabilitation counselor noted that no work as an information clerk or telephone solicitor was available with the employing establishment.

In an April 19, 2022 report, the rehabilitation counselor noted that appellant had been in job placement since November 2021, her current plan would expire on April 22, 2022, and she did not currently have a job nor had she been offered work. However, the rehabilitation counselor explained that appellant was capable of conducting her own job search without any further need for vocational rehabilitation services.

By notice dated May 3, 2022, OWCP advised appellant that it proposed to reduce her wage-loss compensation on the basis that she could work as an information clerk, DOT No. 237.367-022, at the rate of \$500.00 per week. It attached the job classification for information clerk and noted that the rehabilitation specialist documented that such positions were available in appellant's commuting area and that the entry pay level for the position was \$500.00 per week. OWCP explained that the information clerk position was determined to be within appellant's permanent work restrictions since it was sedentary. It calculated that her compensation rate should be adjusted to \$942.00 every four weeks using the *Albert C. Shadrick* formula.⁴ OWCP provided appellant 30 days to submit additional evidence regarding her capacity to earn wages in the position described.

In a letter dated May 17, 2022, appellant noted that she did not agree with the proposed reduction in compensation because she followed all instructions and did everything required of her during the vocational rehabilitation period and it was not her fault that she could not find employment. She argued that she was told by a few recruiters that although she had the right qualifications, there were physical requirements that she would have difficulty performing due to her work-related limitations and she would be a "liability to them."

In a May 12, 2022 report, Dr. Mark A. Seldes, a Board-certified family practitioner, opined that while he agreed that appellant could return to work, it was highly unlikely that any company would hire her due to her work-related injuries. He explained that she had "a significantly high-risk potential for reinjury that no company wishes to take on that burden."

By decision dated June 14, 2022, OWCP found that appellant was able to perform the position of information clerk. It noted that the report of Dr. Dinembeg, the second opinion physician, constituted the weight of the medical evidence. OWCP 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). It determined that appellant was capable of earning \$500.00 per week and adjusted appellant's

³ OWCP also noted that a telephone solicitor was within her restrictions.

⁴ 5 ECAB 376 (1953).

compensation rate to a gross payment of \$942.00 every four weeks using the *Albert C. Shadrick* formula, effective that date.⁵

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of the compensation benefits.⁶ 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 an LWEC.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.⁸

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.⁹ 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.¹⁰

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.¹¹ Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.¹²

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

⁵ *Id.*

⁶ See *R.H.*, Docket No. 21-0145 (issued May 3, 2022); *W.S.*, Docket No. 21-1118 (issued April 28, 2022); *B.H.*, Docket No. 20-0729 (issued March 19, 2021).

⁷ *Id.*

⁸ 5 U.S.C. § 8115(a).

⁹ *C.M.*, Docket No. 18-1326 (issued January 4, 2019).

¹⁰ *Id.*

¹¹ *J.H.*, Docket No. 18-1319 (issued June 26, 2019).

¹² *Id.*

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 an LWEC that can be attributed to the accepted employment injury and for which the claimant may receive compensation.¹³

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.¹⁴ Lastly, OWCP applies the principles set forth in *Albert C. 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 June 14, 2022, based upon her wage-earning capacity in the constructed position of information clerk.

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 Dr. Dinenberg, the second opinion physician. Dr. Dinenberg opined that appellant was permanently disabled as a result of the employment injury and unable to return to her transportation security officer position. However, he also provided permanent work restrictions and found that appellant was capable of performing sedentary and light work duties. OWCP, therefore, referred appellant for vocational rehabilitation services, as the medical opinion evidence established that appellant was no longer disabled from work due to residuals of her accepted employment injury.¹⁸ The vocational rehabilitation counselor performed a labor market survey for the position of information clerk within appellant's work restrictions as provided by Dr. Dinenberg.

The Board finds that OWCP properly determined that appellant had the physical capacity to perform the duties of an information clerk, as this position was within the medical restrictions

¹³ *Id.*

¹⁴ *C.M.*, *supra* note 9; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Vocational Rehabilitation Services*, Chapter 2.813.19d (November 2011).

¹⁵ *Supra* note 4.

¹⁶ 20 C.F.R. § 10.403.

¹⁷ 5 U.S.C. § 8115(a).

¹⁸ *S.F.*, Docket No. 20-0869 (issued October 14, 2021); *C.M.*, Docket No. 19-0360 (issued February 25, 2020).

provided by Dr. Dinenberg. The Board, therefore, finds that the weight of the medical evidence establishes that appellant had the physical capacity to perform the duties of the selected position.¹⁹

In assessing the employee's ability to perform the selected position, OWCP must consider not only physical limitations, but also work experience, age, mental capacity, and educational background.²⁰ In this case, the rehabilitation counselor determined that the information clerk position was vocationally suitable for appellant and available in appellant's commuting area.

As the rehabilitation counselor is an expert in the field of vocational rehabilitation, OWCP may rely on their opinion in determining whether a job is vocationally suitable and reasonably available.²¹ The Board thus finds that OWCP properly determined that the position of information clerk reflected appellant's wage-earning capacity.²²

The report from the rehabilitation counselor also explained that the wage data for appellant's commuting area revealed a wage of \$500.00 per week for the information clerk position. Appellant objected to the proposed reduction of her wage-loss compensation and argued that she was unable to find a position in the private sector due to her work-related conditions. However, a determination that she has a wage-earning capacity based upon a constructed position does not actually involve job placement in the position, but rather is a selection of a position listed in the DOT or otherwise available in the open market, which reflects her wage-earning capacity.²³ Dr. Seldes offered a speculative opinion that no employer would hire appellant because she had previously sustained injury. However, as previously noted, the rehabilitation counselor is an expert in the field of vocational rehabilitation and OWCP may rely on their opinion in determining whether a job is reasonably available.²⁴

The Board therefore 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 information clerk.²⁵ The Board properly determined that appellant was capable of earning \$500.00 per week. The Board further finds that OWCP properly applied the *Shadrick* formula, as codified in section 10.403 of its regulations,²⁶ in determining appellant's LWEC and reducing her gross compensation to \$942.00 every four weeks.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *C.H.*, Docket No. 19-0136 (issued May 23, 2019); *supra* note 14 at Chapter 2.816.6(b) (June 2013).

²² *S.F.*, *supra* note 18; *C.M.*, *supra* note 18.

²³ 20 C.F.R. § 10.403.

²⁴ *Supra* note 21.

²⁵ *S.F.*, *supra* note 18; *T.B.*, Docket No. 17-1777 (issued January 16, 2019).

²⁶ 20 C.F.R. § 10.403.

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 compensation benefits, effective June 14, 2022, based on her capacity to earn wages in the constructed position of information clerk.

ORDER

IT IS HEREBY ORDERED THAT the June 14, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 10, 2023
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