

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

C.B., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
New Kensington, PA, Employer)

**Docket No. 23-0795
Issued: December 28, 2023**

Appearances:
Appellant, pro se
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 May 16, 2023 appellant filed a timely appeal from a May 16, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly reduced appellant's wage-loss compensation benefits, effective May 16, 2023, based on his capacity to earn wages in the constructed position of a customer service representative.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board on a different issue.² The facts and circumstances set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On April 21, 1997 appellant, then a 43-year-old part-time flexible letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date he injured his right knee and thigh while in the performance of duty. OWCP accepted the claim for a right knee sprain, right lower leg arthropathy, complications due to a right internal joint prosthesis, and a loose body in the right knee. Appellant underwent a right total knee replacement on June 22, 1999 and a right total knee replacement revision on April 22, 2004. OWCP paid him wage-loss compensation for intermittent disability until August 16, 2006, when he stopped work and did not return. It paid wage-loss compensation on the periodic rolls effective November 26, 2006.

On June 15, 2016 Dr. James P. McFadden, a Board-certified orthopedic surgeon, performed a revision of a failed right knee arthroplasty.

In a progress report dated March 16, 2022, Dr. McFadden diagnosed a history of a right knee replacement, bilateral osteoarthritis of the knees, unilateral primary osteoarthritis of the knee, and right knee osteoarthritis. In a work capacity evaluation (Form OWCP-5c) of even date, he found that appellant could work four hours per day in a sedentary capacity. Dr. McFadden provided restrictions of sitting for eight hours per day and walking, standing, reaching, reaching above the shoulder, twisting, bending/stooping, operating a motor vehicle at work and to and from work, pushing, pulling, lifting, squatting, kneeling, climbing, and performing repetitive movements with the wrists and elbows for four hours per day.

On July 25, 2022 OWCP referred appellant to a vocational rehabilitation counselor for vocational rehabilitation.

In a rehabilitation action report (Form OWCP-44) dated July 27, 2022, the vocational rehabilitation counselor advised that it was unclear from Dr. McFadden's restrictions whether appellant could sit for eight or four hours per day and requested clarification.

Subsequently, OWCP received a July 25, 2022 corrected copy of the March 16, 2022 Form OWCP-5c. Dr. McFadden indicated that appellant could perform all listed activities, including sitting, for four hours per day.

In a Form OWCP-44 dated July 28, 2022, the vocational rehabilitation counselor noted that four hours of standing was inconsistent with sedentary employment and advised that appellant would ask Dr. McFadden for clarification of his work restrictions.

On August 9, 2022 the employing establishment indicated that it had no work available for appellant.

² Docket No. 22-0539 (issued December 7, 2022).

On August 10, 2022 appellant asserted that he had preexisting injuries to his back and left foot, as well as hearing loss. He advised that he had upcoming appointments for carpal tunnel testing and a hearing evaluation. Appellant maintained that he was not healing after surgery on his ear.

On August 11, 2022 appellant submitted pay rate information that he deemed useful in the event that OWCP issued a loss of wage-earning capacity (LWEC) determination.

In a Form OWCP-44 dated August 12, 2022, the vocational rehabilitation counselor noted that appellant's case status was plan development as the employing establishment was unable to offer him a position. She requested authorization for vocational testing.

On August 13, 2022 appellant advised that he was able to communicate with his vocational rehabilitation counselor using a hearing-impaired telephone number. He noted that he could not view the text writing in the computer program required for meetings. Appellant related that he had not recovered from surgery on his ear and that he might lose his hearing.

In an OWCP-5c form dated August 16, 2022, Dr. McFadden advised that appellant could work for four hours per day. He found that appellant could sit and perform repetitive movements with the wrists and elbows for four hours per day, operate a motor vehicle at work for one hour per day, and walk, stand, reach, twist, bend/stoop, push, and pull for less than one hour per day and lift up to 10 pounds for less than one hour per day. Dr. McFadden indicated that appellant could sit for four hours per day five days a week and stand and walk "only as needed for bathroom breaks."

On August 16, 2022 appellant asserted that sedentary positions required occasional walking and standing, which was defined as up to one-third of the time, and were thus outside of his restrictions. He advised that he used a mobility scooter for long distances and a rolling walker for more than minimal walking. Appellant maintained that his injury had aggravated his preexisting back condition due to his antalgic gait resulting from right knee pain.

On August 17, 2022 an OWCP rehabilitation specialist requested that a claims examiner review the August 16, 2022 Form OWCP-5c from Dr. McFadden and advise whether this affected vocational rehabilitation.

In an initial vocational rehabilitation report dated August 20, 2022, the vocational rehabilitation counselor noted that appellant had graduated from college with a degree in business and had worked as a coal miner, cargo agent, and crane operator. The vocational rehabilitation counselor advised that appellant was morbidly obese with other health conditions and was limited to sitting for four hours per day and walking and standing only as needed for bathroom breaks.

On August 22, 2022 appellant indicated that he had difficult hearing because of packing in his ear following surgery. He provided an unsigned clinic note which indicated that his hearing was repacked in his correspondence. Appellant subsequently submitted an unsigned August 8, 2022 clinic note advising that he was status post revision of a July 15, 2022 mastoidectomy.

On August 24, 2022 appellant discussed how OWCP calculated wage-earning capacity and noted that he had used these figures in his resume in providing his requested salary. On

September 12 and 28, 2022 he copied in his correspondence a clinic note from Dr. Joseph B. Farrow, III, a Board-certified otolaryngologist, who indicated that appellant's ear was not fully healed and had been repacked.

Appellant underwent vocational testing on September 11, 2022.

On September 23, 2022 appellant questioned whether a part-time position was acceptable for determining LWEC as he had worked full time on the date of injury. On September 27, 2022 he included in his correspondence a copy of a electrodiagnostic testing finding moderate bilateral median neuropathy at the wrists.

In a response dated September 28, 2022, OWCP advised that a part-time position could form the basis of an LWEC if vocational rehabilitation counselor determined that suitable part-time jobs were available in sufficient numbers. It advised appellant of the provisions of 5 U.S.C. § 8113(b) that a worker who refused to participate in vocational rehabilitation may have compensation adjusted to reflect a presumed earning capacity.

Following an October 5, 2022 teleconference, OWCP determined that appellant was a candidate for placement under Schedule A hiring authority for persons with disability.

On October 22, 2022 appellant questioned whether he should have been referred to vocational rehabilitation as his restrictions did not meet the criteria for referral as he could lift 10 pounds for less than one hour in a four-hour work shift. He cited Board precedent in support of his contention. Appellant contended that he was not capable of sedentary work and thus should not have been referred for vocational rehabilitation. He noted that a sedentary position required walking and standing up to one-third of the time or 1 hour and 20 minutes in a 4-hour shift. Appellant provided a similar letter on October 28, 2022.

In correspondence dated November 10, 2022, appellant advised that he was refusing to sign the vocational rehabilitation plan as the identified positions of claims adjuster or customer complaint clerk were not medically or vocationally suitable. He reiterated that he should not have been referred for vocational rehabilitation services as he was unable to perform sedentary work and noted that the identified positions were not equivalent to his prior position. On November 14, 2022 appellant provided additional justification for failing to sign the rehabilitation plan. He asserted that his accepted right knee injury had aggravated his preexisting back condition due to his antalgic gait. Appellant provided his review of the medical evidence, which he maintained required clarification regarding whether he had sustained a consequential back condition.³

Appellant submitted an unsigned clinic note dated November 22, 2022 from Dr. Kishore Udyavar, an internist, who diagnosed diabetes, chronic low back pain/neuropathy, hypertension, coronary artery disease, hypercholesterolemia, prostate hyperplasia, and carpal tunnel syndrome.

In letters dated December 7 and 14, 2022, appellant requested a response from OWCP regarding his failure to sign the rehabilitation plan. On December 14, 2022 he also asked whether

³ On November 15, 2022 appellant contended that the employing establishment had retaliated against him in failing to provide him with another position.

he had been assigned another vocational rehabilitation counselor, as his vocational rehabilitation counselor had advised that she was transferring his file due to illness.

In a January 5, 2023 Form OWCP-44, the vocational rehabilitation counselor indicated that appellant had obstructed vocational rehabilitation by refusing to sign the job search plan and agreement.

On January 5, 2023 appellant advised that he had only received a job plan on October 27, 2022 and noted that the vocational rehabilitation counselor had missed one of their scheduled meetings. On January 9, 2023 he noted that OWCP had not responded to his numerous letters.

In a vocational rehabilitation report dated January 10, 2023, the vocational rehabilitation counselor noted that appellant did not believe that he should have been referred for vocational rehabilitation. She found a return to work unlikely due to his resistance.

OWCP received an October 3, 2022 rehabilitation plan and award (Form OWCP-16) for job placement services for the positions of claims adjuster and customer service representative.

On January 25, 2023 OWCP advised appellant that he would receive 90 days of job placement assistance.

On February 1, 2023 OWCP notified appellant that he had failed to cooperate with the vocational rehabilitation effort. It informed him that it would likely reduce his compensation based on his ability to earn wages of \$336.40 per week at the end of the 90-day period and that it was thus important for him to cooperate with vocational rehabilitation. OWCP further notified appellant of the provisions of 5 U.S.C. § 8113(b) and that it would terminate his placement assistance and reduce his compensation based on his probable wage-earning capacity as a claims adjuster or customer service representative if he failed to cooperate with vocational rehabilitation services. It provided him 30 days to comply with vocational rehabilitation efforts or show good cause for failing to participate.

In a February 19, 2023 response, appellant asserted that his referral to vocational rehabilitation services was improper as he was unable to perform sedentary work. He further contended that his right knee injury aggravated his preexisting back condition.

OWCP, in a February 27, 2023 response, advised appellant that the positions of customer service representative or claims adjuster for four hours per day were within his restrictions. It noted that he had not submitted any medical evidence in support of his contention that he was unable to perform the identified positions.

In a February 28, 2022 OWCP-44 form, the vocational rehabilitation counselor advised that appellant did not respond to job leads and continued to refuse to cooperate with the vocational rehabilitation plan. She recommended file closure.

In a March 1, 2023 letter, appellant questioned OWCP's calculation of its finding that he could earn \$336.40 per week.

The vocational rehabilitation counselor completed a job classification (Form CA-66) for the position of customer service representative on March 6, 2023. She advised that the occupation was available as part-time sedentary work in high demand in appellant's area, and that he had experience communicating with others and problem solving. The vocational rehabilitation counselor indicated that he met the specific vocational preparation for the positions as it was an entry level occupation that required no experience or training. She asserted that labor market data indicated that part-time positions were reasonable available within his geographical error, and provided a list of current openings, some of which were remote.

On March 9, 2023 OWCP advised appellant of its proposed reduction of his wage-loss compensation as he had the capacity to earn wages of \$336.40 per week in the constructed position of a customer service representative, *Dictionary of Occupational Titles* (DOT) #241.367-014. It afforded him 30 days to submit evidence or argument regarding the proposed reduction of his compensation.

On March 11, 2023 appellant requested clarification of the Form CA-66, noting that he did not meet the requirements for lifting, walking, and standing. He again asserted that he was unable to perform sedentary employment due to his restrictions.

In a March 23, 2023 response, appellant reiterated that he was unable to perform the position and noted that he had previously worked in a more skilled position. He questioned why he was not capable of earning over entry level wages. On March 25, 2013 appellant advised that he had other significant conditions, including an accepted left foot injury under OWCP File No. xxxxxx895 and a preexisting back condition.

By decision dated May 16, 2023, OWCP reduced appellant's wage-loss compensation effective that date as he had the capacity to earn wages of \$336.40 per week in the constructed position of a customer service representative, DOT #241.367-014. It found that the August 16, 2022 report from Dr. McFadden represented the weight of the evidence and established that he could perform the selected position. OWCP applied the formula set forth in *Albert C. Shadrick*⁴ as codified in section 10.403 of OWCP's regulations, to determine appellant's LWEC.

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.⁵ 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 based on his or her LWEC.⁶ An employee's actual earnings generally best reflect his or her wage-earning capacity.⁷ Absent evidence that actual earnings do not fairly

⁴ 5 ECAB 376 (1953), codified at 20 C.F.R. § 10.403.

⁵ See *L.M.*, Docket No. 20-1038 (issued March 10, 2021); *E.D.*, Docket No. 17-1064 (issued March 22, 2018).

⁶ 5 U.S.C. § 8115(a); 20 C.F.R. §§ 10.402, 10.403; see *Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

⁷ See *T.D.*, Docket No. 20-1088 (issued June 14, 2021); *Hayden C. Ross*, 55 ECAB 455, 460 (2004).

and reasonably represent the employee's wage-earning capacity, such earnings must be accepted as representative of the individual's wage-earning capacity.⁸ But if actual earnings do not fairly and reasonably represent the employee's wage-earning capacity or the employee has no actual earnings, then wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the employee's usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances that may affect wage-earning capacity in his disabled condition.⁹

OWCP must initially determine the employee's medical condition and work restrictions before selecting an appropriate position that reflects his or her vocational wage-earning capacity.¹⁰ The medical evidence OWCP relies upon must provide a detailed description of the employee's condition and the evaluation must be reasonably current.¹¹ Where suitability is to be determined based on a position not actually held, the selected position must accommodate the employee's limitations from both injury-related and preexisting conditions, but not limitations attributable to postinjury or subsequently-acquired conditions.¹²

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 Department of Labor, *Dictionary of Occupational Titles* 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.¹³ 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 or other applicable service.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.

⁸ *Id.*

⁹ 5 U.S.C. § 8115(a); *S.F.*, Docket No. 20-0869 (issued October 14, 2021); *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

¹⁰ *See M.H.*, Docket No. 21-1055 (issued March 30, 2022); *M.A.*, 59 ECAB 624, 631 (2008).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.4d (June 2013); *see also A.E.*, Docket No. 22-0119 (issued February 13, 2023); *J.H.*, Docket No. 18-1319 (issued June 26, 2019).

¹² *Id.* at Chapter 2.816.4c; *see also N.J.*, 59 ECAB 171 (2007).

¹³ *Id.* at Chapter 2.813.7b (February 2011).

¹⁴ *Id.* at Chapter 2.816.6.a (June 2013); *see also S.M.*, Docket No. 23-0353 (issued July 13, 2023); *C.M.*, Docket No. 18-1326 (issued January 4, 2019).

¹⁵ *Supra* note 4.

¹⁶ 20 C.F.R. § 10.403.

ANALYSIS

The Board finds that OWCP improperly reduced appellant's wage-loss compensation benefits, effective May 16, 2023, based on his capacity to earn wages in the constructed position of a customer service representative.

The issue of whether appellant has the physical capacity to perform a selected position is primarily a medical question that must be resolved by the medical evidence of record.¹⁷

In an OWCP-5c form dated August 16, 2022, Dr. McFadden found that appellant could work four hours per day sitting and performing repetitive movements with the wrists and elbows for four hours per day, operating a motor vehicle at work for one hour per day, walking, standing, reaching, twisting, bending/stooping, pushing, and pulling for less than one hour per day, and lifting up to 10 pounds for less than one hour per day. The position of customer service representative is classified by the Department of Labor's DOT #241.367-014 as sedentary, which requires occasional walking, standing, and lifting to 10 pounds. Occasionally, performing an activity means that the activity is performed up to one-third of the time during the workday, or up to 2.64 hours of an 8-hour workday or 1.32 hours of a 4-hour workday as in this case.¹⁸ As this is outside the restrictions set forth by Dr. McFadden, the medical evidence does not establish that appellant had the physical capacity to perform the duties of the constructed position.¹⁹ Accordingly, OWCP did not meet its burden of proof to reduce his compensation benefits pursuant to 5 U.S.C. § 8115.

CONCLUSION

The Board finds that OWCP improperly reduced appellant's wage-loss compensation benefits, effective May 16, 2023, based on his capacity to earn wages in the constructed position of a customer service representative.

¹⁷ *S.M.*, Docket No. 23-0353 (issued July 13, 2023); *G.F.*, Docket No. 20-1031 (issued December 31, 2020); *G.E.*, Docket No. 18-0663 (issued December 20, 2018); *Dennis D. Owen*, 44 ECAB 475 (1993).

¹⁸ Occasional is defined by the *Department of Labor, Dictionary of Occupational Titles*, as an activity/condition that exists up to one-third of the time. *See S.H.*, Docket No. 17-0990 (issued June 12, 2018); *see also E.S.*, Docket No. 21-1172 (issued July 14, 2023); *P.S.*, Docket No. 18-1789, n. 20 (issued April 11, 2019); *J.M.*, Docket No. 17-0397 (issued April 3, 2018).

¹⁹ *See E.S., id.*; *K.K.*, Docket No. 07-786 (issued September 25, 2007).

ORDER

IT IS HEREBY ORDERED THAT the May 16, 2023 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 28, 2023
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