

³ The Board notes that following the July 8, 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 January 6, 2021, based on her capacity to earn wages in the constructed position of reception clerk.

FACTUAL HISTORY

On August 3, 2009 appellant, then a 40-year-old criminal program specialist, filed an occupational disease claim (Form CA-2) alleging that her new office desk and chair provided in July 2008 placed stress on her bulging disc at C5-7 level causing a pinched nerve. She noted that she first became aware of her condition on November 10, 2008 and realized its relation to her federal employment on July 6, 2009. OWCP accepted the claim for brachial neuritis or radiculitis, ulnar nerve lesion, cervical spondylosis without myelopathy, and degeneration of cervical intervertebral disc. Appellant stopped work on October 19, 2009 and returned to full-time light-duty work on December 28, 2009. She stopped work again on December 12, 2016 and has not returned. OWCP authorized all appropriate medical treatment, including epidural steroid injections, medial branch-blocks, intra-articular facet joint injections, trigger point injections, an October 21, 2009 anterior cervical discectomy and fusion C6-7, a December 13, 2016 removal of previous C6-7 instrumentation and C3-6 anterior cervical discectomy and arthrodesis, an August 24, 2017 left shoulder arthroplasty, and a December 5, 2017 left carpal tunnel release. It paid appellant wage-loss compensation on the periodic compensation rolls effective January 8, 2017.

In an August 27, 2018 report, Dr. Gregory Zeider, an osteopathic physician and orthopedic surgeon serving as OWCP's second opinion physician, noted appellant's history of injury and his review of her medical records. He presented her physical examination findings, noting that her arms, neck, and shoulder complaints were subjectively out of proportion to physical examination findings. Dr. Zeider opined that appellant had made a functional recovery from her degenerative cervical spine condition, but had compounding issues associated with fibromyalgia and accompanying headaches. He also opined that bilateral shoulder and lumbar spine interventions would not be due to residuals of the accepted work-related conditions; however, appellant would benefit from right carpal tunnel release, which would be work related. Dr. Zeider advised it was difficult to assess appellant's prognosis secondary to the compounding issues of chronic headaches as well as fibromyalgia, but he believed she would be at maximum medical improvement two to three months post right carpal tunnel release with graded physical therapy and weight loss for her lumbar spinal issues, followed by a functional capacity evaluation (FCE) to assess permanent restrictions. He opined that appellant would be able to return to her date-of-injury position with the appropriate ergonomic devices as needed and restrictions as detailed in the attached work capacity evaluation (Form OWCP-5c).⁴

⁴ In a December 31, 2018 Form OWCP-5c, Dr. Zender opined that appellant could return to full duty with no more than four hours reaching above the shoulder, no more than 100 pounds of pushing and pulling, 35 pounds of lifting, and no more than four hours bending/stooping, squatting, kneeling, and climbing. He also opined that she required 15-minute breaks 2 times in a 4-hour period.

An FCE dated December 7, 2018 found that appellant was capable of sustaining a medium level of work, with 40 pounds of occasional force, and/or 25 pounds of force frequently, and/or 10 pounds of force constantly.

On January 30, 2019 OWCP referred Dr. Zeider's August 27, 2018 report and the December 7, 2018 FCE to appellant's treating physician Dr. John W. Ellis, a Board-certified family practitioner.

In a February 4, 2019 report, Dr. Ellis opined that appellant remained temporarily totally disabled. He indicated that the December 7, 2018 FCE caused appellant such severe pain that she was in tears throughout the examination, and was bedridden for several days following the evaluation. Dr. Ellis also opined that appellant was not a candidate for vocational rehabilitation because she was undergoing active treatment for her work-related injuries and was awaiting medical clearance for surgical intervention. He continued to submit reports indicating that appellant was temporarily totally disabled.

On June 21, 2019 OWCP determined that a conflict in medical opinion existed between Dr. Ellis and Dr. Zeider in their assessments of appellant's current work capacity. It referred appellant, along with a July 2, 2018 statement of accepted facts (SOAF) and medical record, to Dr. Brian Chalkin, an osteopathic Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict of medical opinion.

In a July 15, 2019 report, Dr. Chalkin, serving as the impartial medical examiner (IME), noted that he only evaluated appellant's wrists and elbows to determine work capacity. He provided an impression of no significant dysfunction of the bilateral upper extremities, aside from some paraesthesias in the small and ring finger bilaterally, without obvious findings of carpal tunnel syndrome (CTS) on the right side. Dr. Chalkin opined that appellant did not require CTS surgery as her symptoms were more consistent ulnar neuropathy, with normal EMG studies. He also opined that no further medical treatment was warranted for her hands or elbows, but he could not comment on her cervical spine as that was out of his scope of practice. Dr. Chalkin opined that his opinion regarding appellant's restrictions did not take into account her shoulders, neck, cervical spine, headaches, or her medications. He concluded that appellant could return to full-duty work without restriction and no further treatment was warranted with regards to her hands, wrists and elbows.

On July 22, 2019 OWCP determined that a conflict remained in the medical opinion evidence and referred appellant to Dr. Cheng L. Soo, a Board-certified orthopedic surgeon, for an impartial medical evaluation. In an August 13, 2019 report, Dr. Soo noted appellant's history of injury, and her accepted conditions. He related appellant's physical examination findings and provided an assessment of long-term use of opiate analgesic; left cervical radiculopathy; left lumbar radiculopathy; lateral listhesis L4-5; spinal stenosis, lumbar region without neurogenic claudication; left L4-5 postlaminectomy syndrome, status post anterior cervical discectomy and fusion (ACDF) C3-4 to C6-7; and left hip trochanteric bursitis. Dr. Soo indicated that appellant's cervical spine x-rays showed a solid fusion of C3-4, C4-5, C5-6 and C6-7 and her lumbar spine x-ray showed a lateral listhesis over L4-5, with both diagnoses causally related to the work injury by aggravation. He explained that she had a cumulative cervical spine injury. Dr. Soo indicated that appellant had multiple cervical spine surgeries related to the work injury, which resulted in limitation of her cervical spine motion. He opined that she reached maximum medical

improvement (MMI) for her neck pain and no further treatment or additional therapy would be helpful. Based on clinical presentation, Dr. Soo opined that appellant was capable of returning to her date-of-injury job as a criminal program specialist with restrictions which he set forth in great detail. He explained that while the FCE showed some self-limited effect, the fact that she completed at least 50 percent of the FCE indicated the test was valid. Dr. Soo also noted that as appellant was on central nervous system depressant drugs and as the criminal program specialist position appeared to be a mentally highly stressful job, she should gradually ease into her job. In a Form OWCP-5c), Dr. Soo also provided work restrictions for a full-time eight hour sedentary or light-duty position if she was unable to return to her usual job with restrictions. He indicated that appellant was able to work a full eight-hour job as long as the duties did not require sitting/walking/standing more than 30 minutes at a time; reaching above shoulder no more than 1 hour; bending/stooping no more than 4 hours; operating a motor vehicle at work no more than 30 minutes at a time; operating a motor vehicle to and from work less than 1 hour with no more than 30 minutes driving at a time; no lifting over 10 pounds, no /pushing/pulling over 8 pounds; no squatting over 6 hours; and no kneeling or climbing. Appellant was also to have 15-minute breaks four times every 4 hours.

Reports from Dr. Adam Wallace, a Board-certified pain management and anesthesiologist, were received by OWCP which indicated that bilateral L4-5 lumbar transforaminal epidural steroid injections were performed.

In an October 22, 2019 report, Dr. Ellis continued to opine that appellant was totally disabled from work. He opined that her work injuries were permanent in nature and she had developed intense daily headaches, difficulty lifting and sitting, pain between her shoulder blades and has decreased range of motion and weakness.

On December 3, 2019 OWCP administratively combined OWCP File Nos. xxxxxx884 and xxxxxx049, with the latter serving as the master file.⁵

In letters dated October 30, 2019 and March 5, 2020, OWCP requested that the employing establishment provide a job offer consistent with Dr. Soo's August 13, 2019 report, noting that it constituted the weight of the medical evidence.

On March 5, 2020 the employing establishment indicated that it was unable to provide suitable employment within appellant's restrictions.

On March 18, 2020 OWCP referred appellant for vocational rehabilitation services. It noted that the weight of the medical evidence was accorded to Dr. Soo's August 13, 2019 report.

In a report dated April 22, 2020, appellant's vocational rehabilitation counselor noted that appellant was evaluated by Dr. Chalkin on July 15, 2019 who released her to full unrestricted duty. Based on Dr. Chalkin's report, the counselor determined that appellant could work as a receptionist

⁵ In OWCP File No. xxxxxx884 appellant alleged an October 19, 2015 traumatic injury. After OWCP's denial of the claim, by decision dated October 24, 2019, the Board found that she had established that the October 19, 2015 incident occurred as alleged. By decision dated December 31, 2019, OWCP found that appellant had established that the October 19, 2015 incident occurred as alleged and caused an injury; however, that the claim would remain closed and denied as it would be administratively combined with OWCP File No. xxxxxx049 as she was receiving medical care and compensation benefits for the same medical conditions in the prior claim.

clerk or telemarketer and that current state labor market surveys showed that those positions were reasonably available in appellant's commuting area. The receptionist clerk position, under the Department of Labor, *Dictionary of Occupational Titles* (DOT) #237.367-038, was characterized as sedentary in nature. The duties of the position were described as: receives callers at establishment, determines nature of business, and directs callers to destination; obtains caller's name and arranges for appointment with person called upon; and directs caller to destination and records name, time of call, nature of business, and person called upon. May operate Private Branch Exchange (PBX) telephone console to receive incoming messages, may type memoranda, correspondence, report, and other documents, and may issue a visitor's pass when required. The vocational rehabilitation counselor indicated that appellant met the specific vocational preparation for the position based on reported work experiences and education.

On May 27, 2020 appellant signed a vocational rehabilitation plan, which noted that the medical suitability of the receptionist clerk and telemarketer positions were based on Dr. Chalkin's July 15, 2019 report releasing her to work "full[-]duty without restrictions."

On June 9, 2020 OWCP determined that the job duties of the selected position(s) were within appellant's limitations and provided her with 90 days of job placement assistance. It noted under 5 U.S.C. § 8113 that placement assistance may be terminated prior to 90 days if she failed to put forth her best effort, and action would be taken to reduce her compensation to reflect her wage-earning capacity based on a position which OWCP has determined to be within her restrictions and abilities.

On November 3, 2020 OWCP closed vocational rehabilitation services following an unsuccessful placement effort. It noted that the receptionist clerk position identified by the vocational rehabilitation counselor was performed in sufficient numbers within appellant's commuting area with weekly wages of \$392.00.

On November 20, 2020 OWCP proposed to reduce appellant's wage-loss compensation to \$2,666.00 every four weeks based on her capacity to earn wages in the constructed position of receptionist clerk at the rate of \$392.00 per week. It found that the position was medically suitable based on Dr. Soo's August 13, 2019 report, which found that she was capable of working with restrictions. OWCP further found that the position was vocationally suitable and represented her wage-earning capacity. It provided a worksheet explaining its application of the *Shadrick* formula, finding that the weekly pay rate when disability recurred, December 12, 2016, was \$1,192.73 and that the current pay rate for the job and step when appellant was injured was \$1,315.96, effective November 3, 2020. OWCP afforded appellant 30 days to respond to the proposed reduction in her compensation.⁶

Appellant continued to submit progress reports and work status notes from Dr. Ellis which opined that she was temporarily totally disabled. Physical therapy notes were also provided.

By decision dated January 6, 2021, OWCP reduced appellant's wage-loss compensation, effective that date, based on her capacity to earn wages as a receptionist clerk.

⁶ *Albert C. Shadrick*, 5 ECAB 376 (1953), codified at 20 C.F.R. § 10.403.

On February 1, 2021 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review, which was held telephonically on April 28, 2021.

OWCP subsequently received physical therapy notes and a June 14, 2021 letter from Dr. Ellis regarding the medical necessity for prescription medication.

By decision dated July 8, 2021, OWCP's hearing representative affirmed the January 6, 2021 decision.

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.⁷ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁸

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.⁹ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.¹⁰ 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.¹¹ 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.¹²

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.¹³

⁷ *M.W.*, Docket No. 20-0111 (issued September 21, 2020); *C.F.*, Docket No. 19-0595 (issued September 9, 2019); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

⁸ *M.W.*, *id.*; *S.N.*, Docket No. 17-1589 (issued January 3, 2018); *Del K. Rykert*, 40 ECAB 284 (1988).

⁹ 5 U.S.C. § 8115(a); *K.S.*, Docket No. 19-0678 (issued October 25, 2019); *E.W.*, Docket No. 14-0584 (issued July 29, 2014).

¹⁰ 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).

¹¹ *C.M.*, Docket No. 18-1326 (issued January 4, 2019).

¹² *Id.*; see also *Leo A. Chartier*, 32 ECAB 652 (1981).

¹³ *Z.W.*, Docket No. 18-1000 (issued June 24, 2019); see *William H. Woods*, 51 ECAB 619 (2000).

Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.¹⁴

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

ANALYSIS

The Board finds that OWCP failed to meet its burden of proof to reduce appellant's wage-loss compensation, effective January 5, 2021, based on her capacity to earn wages in the constructed position of receptionist clerk.

In determining appellant's work capacity, OWCP properly found a conflict of medical opinion existed between Dr. Ellis, who opined that appellant was temporarily totally disabled, and Dr. Zeiders, who opined that appellant was able to return to work with restrictions, and referred appellant to Dr. Chalkin for an impartial medical examination pursuant to 5 U.S.C. § 8123(a).¹⁸ Following the receipt of Dr. Chalkin's July 15, 2019 report, OWCP determined that a conflict in medical opinion remained as Dr. Chalkin was unable to address all of appellant's accepted medical conditions and, therefore, could not constitute the special weight of the medical evidence.¹⁹ Thus, OWCP properly referred appellant for a second IME with Dr. Soo to resolve the issue of appellant's work capacity.

In his August 13, 2019 report, Dr. Soo accurately described the accepted employment injury, provided his review of the medical record and performed a thorough clinical examination with detailed examination findings. He is a specialist in the appropriate field and reached a reasoned conclusion that appellant was capable of returning to her date-of-injury job as a criminal

¹⁴ See *Z.W.*, *id.*

¹⁵ *Supra* note 10 at Chapter 2.816.6a (June 2013).

¹⁶ *Supra* note 6.

¹⁷ 20 C.F.R. § 10.403.

¹⁸ Section 8123(a) of FECA provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, OWCP shall appoint a third physician (known as a referee physician or IME) who shall make an examination. 5 U.S.C. § 8123(a); *R.R.*, Docket No. 19-0086 (issued February 10, 2021); *L.S.*, Docket No. 19-1730 (issued August 26, 2020); *M.S.*, 58 ECAB 328 (2007).

¹⁹ See *B.M.*, Docket No. 21-0101 (issued December 15, 2021); *D.M.*, Docket No. 18-0746 (issued November 26, 2018); *R.H.*, 59 ECAB 382 (2008); *James P. Roberts*, 31 ECAB 1010 (1980).

program specialist with restrictions, or that she was capable of a full-time eight-hour sedentary or light-duty position with restrictions. The Board, finds that Dr. Soo's opinion is entitled to the special weight accorded to an IME with regard to the issue of appellant's work capacity.²⁰

The vocational rehabilitation specialist, however, based the medical suitability of the constructed position on Dr. Chalkin's July 15, 2019 report. OWCP did not obtain a supplemental report from the vocational rehabilitation specialist which offered an opinion that the constructed position was within Dr. Soo's restrictions.

As OWCP based its loss of wage-earning capacity determination on an incorrect vocational and medical assessment of appellant's work capacity, the Board finds that OWCP failed to meet its burden of proof.

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to reduce appellant's wage-loss compensation, effective January 5, 2021, based on her capacity to earn wages in the constructed position of receptionist clerk.

ORDER

IT IS HEREBY ORDERED THAT the July 8, 2021 decision of the Office of Workers' Compensation Programs is reversed.

Issued: February 6, 2023
Washington, DC

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

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

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

²⁰ See *W.N.*, Docket No. 21-0123 (issued December 29, 2021); see also *F.A.*, Docket No. 20-1652 (issued May 21, 2021); *R.R.*, Docket No. 19-0086 (issued February 10, 2021).