

ISSUE

The issue is whether OWCP has met its burden of proof to reduce appellant's wage-loss compensation, effective August 2, 2021, based on her capacity to earn wages in the constructed position of secretary.

FACTUAL HISTORY

This case has previously been before the Board on a different issue.⁴ The facts and circumstances of the case as set forth in the Board's prior order are incorporated herein by reference. The relevant facts are as follows.

On December 22, 2015 appellant, then a 35-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that on December 21, 2015 she sprained her left ankle when she stepped into a hole while in the performance of duty. In an undated narrative statement, she related that on December 21, 2015 her neck slung back and forth, and her back popped when her left foot fell into a hole in the yard while walking up to a home to deliver a package.

OWCP accepted the claim for sprain of unspecified ligament of the left ankle, other instability, and left ankle, other postprocedural complications and disorders of nervous system, other specified acquired deformities of musculoskeletal system: peroneal tendinitis, left leg; spontaneous rupture of extensor tendons, left ankle and foot; and sprain of unspecified ligament of left ankle. It paid appellant intermittent wage-loss compensation on the supplemental rolls as of February 6, 2016. On February 26, 2016 appellant underwent OWCP-authorized decompression of left superficial peroneal nerve and left sural nerve, excision of peroneal brevis tear, transfer of left peroneal longus tendon, left peroneal retinacular repair, application of left short cast. On April 13, 2016 she underwent OWCP-authorized left ankle arthroscopy with microfracture arthroplasty and synovectomy of ankle microfracture of talar dome, and open peroneal tendon exploration with debridement of distal muscle of brevis with repair of brevis and retinacular repair. On January 9, 2017 appellant underwent OWCP-authorized left ankle fibular groove osteotomy with tenosynovectomy.

OWCP initially paid appellant wage-loss compensation on the supplemental rolls for intermittent disability from work as of February 6, 2016 and subsequently paid wage-loss compensation on periodic rolls for total disability commencing May 27, 2018.

On September 6, 2018 OWCP referred appellant, together with a statement of accepted facts (SOAF), the medical record, and a list of questions, to Dr. Joseph McGowin, III, a Board-certified orthopedic surgeon, for a second opinion examination to determine the nature of her employment-related conditions and extent of disability.

In a September 26, 2018 medical report, Dr. McGowin reviewed the SOAF, the medical record, and the history of appellant's December 21, 2015 employment injury. He reported findings on physical examination. Dr. McGowin provided impressions of tibiotalar arthritis status post osteochondral talar dome injury; peroneal tendon injury, instability, and chronic tendinitis/tenosynovitis with subsequent transfer; and superficial peroneal nerve and sural nerve

⁴ *Order Dismissing Appeal*, Docket No. 18-1210 (issued March 7, 2019).

neuropathies, left. He opined that appellant was unable to return to her rural carrier position. In an accompanying work capacity evaluation (Form OWCP-5c) of even date, Dr. McGowin advised that she could work eight hours per day with permanent restrictions of walking up to two hours per day, standing up to four hours per day, pushing, pulling, and lifting to 20 pounds, and no climbing.

In a letter dated October 17, 2018, addressed to the employing establishment, OWCP requested, if possible, that a position be offered to appellant in writing, within the restrictions provided by Dr. McGowin, the second opinion physician.

On November 6, 2018 OWCP, based on Dr. McGowin's report, referred appellant for vocational rehabilitation services.

In a February 15, 2019 report, the vocational rehabilitation counselor described appellant's education, training, work experience, past and future education attainment, and on-the-job training. He noted that two sedentary jobs had been identified for her that were within her medical restrictions and reasonably available in her commuting area. The positions identified were secretary, *Dictionary of Occupational Titles* (DOT) No. 201.362.030, and receptionist DOT No. 237.368-038. The vocational rehabilitation counselor also completed a job classification (Form CA-66) on February 15, 2019 and noted that the secretary position was sedentary, required no climbing, balancing, stooping, kneeling, crouching, crawling, feeling, taste/smelling, far visual acuity, depth perception, accommodation, color vision, or field of vision, and required frequent reaching, handling, fingering, talking, hearing, and near visual acuity, all of which were consistent with appellant's medical restrictions. He also noted that she had an associate degree in arts and was pursuing a bachelor's degree in criminal justice. The vocational rehabilitation counselor advised that appellant met the specific vocational preparation required for the position as she had prior work experience, past and current educational attainment, and on-the-job training. He advised that the position was reasonably available within her commuting area, based on Alabama Department of Labor-Labor Market Division employment data the entry level wages for the position was \$12.52 per hour, \$500.83 per week, \$26,043.00 annually.

On June 25, 2019 OWCP informed the employing establishment that it had previously provided inadequate pay rate information regarding appellant's rural carrier associate position, earnings for eight months prior for a similar employee instead of one year prior. By letter of even date, it requested that the employing establishment provide the pay rate for her rural carrier associate, Grade 5/Step W, position for the period December 21, 2014 through December 21, 2015. OWCP noted that the employing establishment had previously provided pay rate information for that position for the period April 18 through December 21, 2015.

In a response letter dated June 28, 2019, the employing establishment indicated that the earnings one year prior for a rural carrier, Grade 5/Step W for the period December 21, 2014 through December 21, 2015 were \$22,729.59.

OWCP subsequently paid appellant wage-loss compensation based on a weekly pay rate of \$437.11 (\$22,729.59 divided by 52 weeks).

By notice dated August 23, 2019, OWCP informed appellant that it proposed to reduce her wage-loss compensation, pursuant to 5 U.S.C. § 8106 and 5 U.S.C. § 8115, because she had the

capacity to earn \$393.10 in weekly wages in the constructed position of receptionist. It informed her that the opinion of Dr. McGowin represented the best assessment of her capacity to work and that her vocational rehabilitation counselor properly determined that she was vocationally and medically capable of working as a receptionist. As appellant's wage-earning capacity was less than the current pay of the job she held when injured, 84 percent, OWCP proposed to reduce her wage-loss compensation benefits to \$223.00 every four weeks. It afforded her 30 days to submit evidence and argument regarding the proposed reduction of her compensation.

In a September 17, 2019 response letter, appellant noted that she had made several unsuccessful attempts to obtain a receptionist position. She noted that employers were unwilling to hire her due to her medical restrictions. Appellant also indicated that she received a letter dated July 2, 2019 which contained an incorrect pay rate. She submitted rejection letters from prospective employers.

OWCP, by decision dated October 4, 2019, reduced appellant's wage-loss compensation effective August 23, 2019, based on her capacity to earn wages as a receptionist with weekly earnings of \$393.10. It accorded the weight of the evidence to Dr. McGowin's second opinion report.

On October 22, 2019 appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on February 12, 2020.

In a decision dated April 13, 2020, an OWCP hearing representative set aside the October 4, 2019 decision and remanded the case to OWCP to determine appellant's correct pay rate for compensation purposes. Since appellant had not worked in the position for a full year prior to injury, the hearing representative related that appellant's pay rate should be based upon the earnings of a similarly situated employee who had earnings for a full year. The hearing representative also remanded the case for reinstatement of appellant's compensation for total disability.

On remand, after further development of the record, OWCP, in a July 7, 2020 letter, adjusted appellant's wage-loss compensation payments based on the total weekly pay rate of \$650.25 as a rural carrier associate, Level 5/Step W.

On July 8, 2020 OWCP again referred appellant to vocational rehabilitation to conduct labor market surveys to determine whether the previously identified positions remained available in sufficient numbers in appellant's local commuting area.

On September 21, 2020 appellant's vocational rehabilitation counselor related that state labor market surveys on that date showed that the previously identified positions of secretary and receptionist were still reasonably available in appellant's commuting area. He found that appellant's previous work experience, past and future education attainment, and on-the-job training enabled her to successfully compete and obtain these jobs.

OWCP, by letter dated October 6, 2020, requested that the employing establishment provide the gross annual salary for a Grade 5/Step W position effective the date of its letter.

In an October 15, 2020 letter, the employing establishment responded to OWCP's request. It advised that the pay rate for a grade 5/Step W employee as of the date of its letter was \$18.56 per hour and \$38,605.00 per year.

By notice dated October 15, 2020, OWCP informed appellant that it proposed to reduce her wage-loss compensation, under 5 U.S.C. § 8106 and 5 U.S.C. § 8115, based on her capacity to earn \$400.00 per week in the constructed position of secretary. It noted that appellant's pay rate when disability began was \$650.25, the current pay rate for the position was \$742.40, and that, based on her constructed work capacity, her four-week compensation would be reduced to \$974.00. OWCP also informed her that the opinion of Dr. McGowin represented the best assessment of her capacity to work and that her vocational rehabilitation counselor properly determined that she was vocationally and medically capable of working as a secretary. It afforded appellant 30 days to submit evidence and argument regarding the proposed reduction of her compensation. No response was received.

By decision dated November 18, 2020, OWCP again reduced appellant's wage-loss compensation, effective November 19, 2020, based on her capacity to earn wages as a secretary with weekly earnings of \$400.00.

On December 9, 2020 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on March 16, 2021.

In a May 28, 2021 decision, an OWCP hearing representative set aside the November 18, 2020 decision and remanded the case to OWCP to verify the pay rate for the secretary position and to clearly explain how it determined the \$400.00 weekly pay rate for this position, and reinstatement of appellant's compensation for total disability. She also noted that, contrary to appellant's contention during the hearing that appellant was physically unable to perform the secretary position, the medical evidence of record was insufficient to establish that she was totally disabled and unable to perform the duties of the constructed position.

On June 3, 2021 appellant's record was again referred to a vocational rehabilitation counselor to obtain an updated labor market survey for the secretary position.

On June 22, 2021 a vocational rehabilitation specialist conducted a labor market survey for employment as a secretary DOT 201.362-030 within appellant's commuting area. She attached a job classification for the position. The vocational rehabilitation specialist advised that appellant met the specific vocational preparation required for the position as she had prior work experience, past and current educational attainment, and on-the-job training. She noted that the entry-level salary for secretary position was \$12.90 per hour or \$516.00 per week. The vocational rehabilitation specialist also noted that 4,520 jobs were available. She indicated that the source of wage data was the Department of Labor (DOL), Occupational Employment and Wage Statistics for Mobile, Alabama, updated May 2020.

In a notice dated June 24, 2021, OWCP informed appellant that it proposed to reduce her compensation based on the June 22, 2021 labor market survey, which indicated that the entry-level salary for the constructed secretary position was \$516.00 per week. It calculated that her compensation rate should be adjusted to \$644.00 every four weeks using the *Albert C. Shadrick*

formula.⁵ OWCP afforded appellant 30 days to respond to the proposed action. No response was received.

By decision dated July 29, 2021, OWCP reduced appellant's wage-loss compensation, effective August 2, 2021, based on her ability to earn wages as a secretary.

On September 29, 2021 appellant, through counsel, requested reconsideration and submitted an April 16, 2021 report, from Dr. Robert Agee, a Board-certified family practitioner. Dr. Agee described appellant's rural carrier associate duties and noted a history of her December 21, 2015 employment injury. He diagnosed the accepted conditions of sprain of unspecified ligament of the left ankle, initial encounter; other instability of the left ankle; injury of the peroneal nerve at the lower left leg; other acquired deformities of musculoskeletal system; peroneal tendinitis of the left leg; other postprocedural complications and disorders of the nervous system. Dr. Agee also diagnosed reflex sympathetic dystrophy, also known as complex regional pain syndrome. He concurred with the opinion of an unknown neurologist that appellant was unable to hold meaningful employment due to her permanent debilitating condition resulting from her surgeries on the peroneal nerve at lower leg level.

By decision dated October 6, 2021, OWCP denied modification of the July 29, 2021 decision.

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 loss of wage-earning capacity (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

⁵ 5 ECAB 376 (1953); codified by regulation at 20 C.F.R. § 10.403(c)-(e).

⁶ See *S.C.*, Docket No. 19-1381 (issued November 24, 2020); *C.H.*, Docket No. 19-0136 (issued May 23, 2019).

⁷ *J.F.*, Docket No. 19-0864 (issued October 25, 2019).

⁸ 5 U.S.C. § 8115(a).

⁹ *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.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 impairments resulting from both injury-related and preexisting conditions, but not impairments resulting from postinjury or subsequently-acquired conditions.¹³ 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.¹⁴

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, a local "Chamber of Commerce," employing establishment contacts, and actual job postings.¹⁵ Lastly, OWCP applies the principles set forth in *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 has met its burden of proof to reduce appellant's wage-loss compensation, effective August 2, 2021, based on her capacity to earn wages in the constructed position of secretary.

¹⁰ *Id.*

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

¹² *Id.*

¹³ *G.E.*, Docket No. 18-0663 (issued December 21, 2018).

¹⁴ *Id.*

¹⁵ *C.M.*, *supra* note 9; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Vocational Rehabilitation Services*, Chapter 2.813.7a(3) (February 2011).

¹⁶ *Supra* note 5.

¹⁷ 20 C.F.R. § 10.403.

Dr. McGowin, an OWCP second physician, opined that appellant could work eight hours per day with permanent restrictions that included walking up to two hours per day, standing up to four hours per day, pushing, pulling, and lifting up to 20 pounds, and no climbing. OWCP therefore properly referred her for vocational rehabilitation in November 2018 as the medical evidence established that she was no longer totally disabled from work due to residuals of her employment injury.¹⁸

The Board finds that OWCP properly determined that appellant had the physical capacity to perform the duties of a secretary. The position is classified as sedentary employment requiring lifting up to 10 pounds, frequent reaching, handling, and fingering all of which are consistent with the assigned restrictions. The vocational rehabilitation counselor noted that the position of secretary allowed for a variety of duties, none of which exceeded her medical restrictions. 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

Appellant submitted Dr. Agee's September 15, 2021 report. Dr. Agee opined that appellant was totally disabled from work due to her OWCP-authorized left lower leg peroneal nerve surgery. However, he offered no medical rationale supporting his opinion. Where no such rationale is present, the medical opinion is of diminished probative value.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 her June 22, 2021 report, the vocational rehabilitation specialist attached a job classification for the secretary position. She indicated that the source of wage data was the May 2020 DOL, Occupational Employment and Wage Statistics for Mobile, Alabama. For the secretary position, 4,520 jobs were available in appellant's commuting area with a weekly wage of \$516.00 for entry level positions. As the vocational rehabilitation specialist is an expert in the field of vocational rehabilitation, OWCP may rely on 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 secretary.²³ Following significant development of the record, it properly applied the *Shadrick* formula, as codified in section 10.403

¹⁸ See *supra* note 6.

¹⁹ *Id.*

²⁰ See *M.W.*, Docket No. 20-0111 (issued September 21, 2020); *J.M.*, Docket No. 19-1169 (February 7, 2020).

²¹ *C.M.*, *supra* note 9.

²² *Supra* note 6; *supra* note 15 at Chapter 2.816.6b (June 2013).

²³ *T.B.*, Docket No. 17-1777 (issued January 16, 2019).

of its regulations,²⁴ in determining appellant's LWEC. The Board thus finds that OWCP properly determined that the position of secretary reflected appellant's wage-earning capacity.²⁵

CONCLUSION

The Board finds that OWCP has met its burden of proof to reduce appellant's wage-loss compensation, effective August 2, 2021, based on her capacity to earn wages in the constructed position of secretary.

ORDER

IT IS HEREBY ORDERED THAT the October 6, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 13, 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

²⁴ *Supra* notes 16 and 17, respectively.

²⁵ *C.M.*, *supra* note 9.