

ISSUE

The issue is whether OWCP properly reduced appellant's wage-loss compensation effective October 19, 2021 based on her capacity to earn wages in the constructed position of an administrative assistant.

FACTUAL HISTORY

On December 16, 2015 appellant, then a 60-year-old advance medical support assistant, filed a traumatic injury claim (Form CA-1) alleging that on December 14, 2015 she experienced heart palpitations, trauma, and a loss of focus when she was threatened by a patient while in the performance of duty. She stopped work on December 15, 2015. OWCP accepted the claim for acute post-traumatic stress disorder (PTSD). It paid appellant wage-loss compensation for total disability on the supplemental rolls effective February 1, 2016 and on the periodic rolls effective August 21, 2016.

In a report dated February 21, 2019, Dr. Louis Turchetta, a psychologist, indicated that he had treated appellant since February 2016 for trauma related to a patient threatening her at work on December 14, 2015. He diagnosed PTSD due to the December 14, 2015 employment incident and advised that she continued to have recurrent thoughts and memories of the event. Dr. Turchetta advised that appellant "would have significant difficulty reentering the work force in the same job in which [appellant] has to interact with potentially aggressive psychiatric patients. It is my recommendation that she be reassigned to a position which does not require dealing directly with patients." He found that she might be able to participate in vocational rehabilitation if there was no interaction with patients. Dr. Turchetta related, "It is my recommendation that whatever job is suggested be reviewed by this office for appropriateness."

On March 12, 2019 the employing establishment requested that OWCP provide appellant with vocational rehabilitation services. It indicated that its positions required working with the public.

In February 26, 2020 and February 25, 2021 reports, Dr. Turchetta discussed his treatment of appellant for PTSD due to the accepted employment injury. He found that she could participate in vocational rehabilitation, but that she could not work in a position dealing with patients directly. Dr. Turchetta again advised that his office should review any job offer to determine whether it was appropriate.

A physician assistant noted that appellant was under care of Dr. James D. Kang, a Board-certified orthopedic surgeon, for lumbar stenosis with neurogenic claudication. The physician assistant provided work restrictions.

On December 7, 2020 OWCP referred appellant to a vocational rehabilitation counselor for vocational rehabilitation.

In an initial vocational rehabilitation report dated January 15, 2021, the vocational rehabilitation counselor noted that appellant had graduated from college and had worked in data processing handling admission and billing issues, and had also worked as a freelance sports

reporter, administrative manager, compensation and claim clerk, and administrative assistant. He advised that a position in human resources or as an administrative manager was within her restrictions.

In a March 2, 2021 rehabilitation plan and award (Form OWCP-15), OWCP approved 90 days of job placement services for the positions of administrative assistant, office manager, and human resources adviser.

On April 20, 2021 OWCP received an unsigned report from Dr. Kang, who advised that he was treating appellant for lumbar spinal stenosis with neurogenic claudication. Dr. Kang found that she could not lift over 5 to 10 pounds or sit or stand more than 10 minutes at a time.

On April 23, 2021 Dr. Turchetta diagnosed PTSD due to the December 14, 2015 employment injury. He discussed appellant's continued symptoms of psychological distress and a rapid heartbeat when reminded of the event. Dr. Turchetta advised that she could not perform a position interacting with "potentially aggressive psychiatric patients" and recommended that she "be reassigned to a position which does not require dealing directly with patients."

In a rehabilitation action report (Form OWCP-44) dated July 16, 2021, the vocational rehabilitation counselor advised that appellant had accepted a part-time position as an administrative assistant at a hospital.

In a report dated July 28, 2021, Dr. Turchetta asserted that he had treated appellant since she was assaulted by a patient at the employing establishment and "developed a post-traumatic reaction." He related, "[Appellant's] recent job offer at [a hospital] resulted in a flashback to her original trauma." Dr. Turchetta opined that appellant could work, but in "a setting that does not put [appellant] in constant contact with the public and not in a hospital setting." He again asked that he review any offer for appropriateness.

In a closure report dated August 6, 2021, the vocational rehabilitation counselor noted that appellant had experience working as an administrative manager, office manager, and in human resources, and found that these positions were within the restrictions set forth by Dr. Turchetta.

The vocational rehabilitation counselor completed a job classification (Form CA-66) on August 16, 2021 for the position of administrative assistant. The duties included coordinating office services such as personnel, and could include interviewing job applicants and orienting new employees. The vocational rehabilitation counselor advised that appellant met the specific vocational preparation for the position through her college degree in communications/public relations and office administration experience. He specially determined that the job of administrative assistant was performed in sufficient geographical numbers in her area according to state employment data.

On August 16, 2021 OWCP's vocational rehabilitation specialist recommended preparation of a loss of wage-earning capacity (LWEC) determination. The rehabilitation specialist noted that the constructed position of administrative assistant was sedentary and found that appellant could earn \$562.80 per week in that position.

By a September 16, 2021 notice, OWCP advised appellant of its proposed reduction of her wage-loss compensation as the evidence established that she could earn wages in the selected position of administrative assistant, Department of Labor, *Dictionary of Occupational Titles* (DOT) #169.167-010. It afforded her 30 days to submit evidence or argument regarding the proposed reduction of her compensation. No response was received.

By decision dated October 19, 2021, OWCP reduced appellant's wage-loss compensation effective that date as she had the capacity to earn wages of \$562.80 per week as an administrative assistant. It found that the April 23, 2021 report from Dr. Turchetta represented the weight of the evidence and established that she could perform the duties of the selected position. OWCP applied the formula set forth in *Albert C. Shadrick*³ 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.⁴ 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.⁵ An employee's actual earnings generally best reflect his or her wage-earning capacity.⁶ Absent evidence that actual earnings do not fairly and reasonably represent the employee's wage-earning capacity, such earnings must be accepted as representative of the individual's wage-earning capacity.⁷ 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 or her disabled condition.⁸

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.⁹ The medical evidence OWCP relies upon must provide a detailed description of the employee's

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

⁴ See *L.M.*, Docket No. 20-1038 (issued March 10, 2021); *E.D.*, Docket No. 17-1064 (issued March 22, 2018).

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

⁶ See *T.D.*, Docket No. 20-1088 (issued June 14, 2021); *Hayden C. Ross*, 55 ECAB 455, 460 (2004).

⁷ *Id.*

⁸ 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).

⁹ See *M.H.*, Docket No. 21-1055 (issued March 30, 2022); *M.A.*, 59 ECAB 624, 631 (2008).

condition and the evaluation must be reasonably current.¹⁰ 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 post-injury or subsequently acquired conditions.¹¹

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, DOT or otherwise available in the open market, that fits the employee's capabilities with regard to his physical limitations, education, age, and prior experience.¹² 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.¹³ Lastly, OWCP applies the principles set forth in *Shadrick*¹⁴ as codified in section 10.403 of OWCP's regulations,¹⁵ to determine the percentage of the employee's LWEC.

ANALYSIS

The Board finds that OWCP improperly reduced appellant's wage-loss compensation effective October 19, 2021 based on her capacity to earn wages in the constructed position of an administrative assistant.

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.¹⁶

In a February 26, 2020 report, Dr. Turchetta diagnosed PTSD due to appellant's December 14, 2015 employment injury. He found that she could not work in a position dealing directly with patients. In an April 23, 2021 report, Dr. Turchetta advised that appellant experienced psychological distress and a rapid heartbeat when reminded of the employment injury. He recommended that she not work in a position dealing with patients. On July 28, 2021 Dr. Turchetta related that a recent job offer extended to appellant by a hospital had caused her to flashback to her original trauma. He found that she was unable to work in a position that required "constant contact" with the public or in a hospital setting.

OWCP procedures provide that, in assessing an employee's ability to perform a constructed position, if the evidence is unclear, equivocal, or old enough to be considered stale, the claims

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.4d (June 2013); *see also J.H.*, Docket No. 18-1319 (issued June 26, 2019).

¹¹ *Id.* at Chapter 2.816.4c; *see also N.J.*, 59 ECAB 171 (2007).

¹² *Id.* at Chapter 2.813.7b (February 2011).

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

¹⁴ *Supra* note 3.

¹⁵ 20 C.F.R. § 10.403.

¹⁶ *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).

examiner should seek clarification from a physician regarding the suitability of the position. Dr. Turchetta's finding that appellant should not work in a position with "constant contact" with the public is unclear.¹⁷ OWCP failed to obtain a clear opinion from Dr. Turchetta as to whether she had the capacity to work in the selected position prior to reducing her wage-loss compensation.¹⁸ It consequently failed to meet its burden of proof to reduce appellant's compensation effective October 19, 2021 based on its finding that she had the capacity to earn wages as an administrative assistant.

CONCLUSION

The Board finds that OWCP improperly reduced appellant's wage-loss compensation effective October 19, 2021 based on her capacity to earn wages in the constructed position of an administrative assistant.

ORDER

IT IS HEREBY ORDERED THAT the October 19, 2021 decision of the Office of Workers' Compensation Programs is reversed.

Issued: February 10, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

¹⁷ See *S.B.*, Docket No. 19-0781 (issued February 2, 2022); *G.E.*, Docket No. 18-0663 (issued December 21, 2018).

¹⁸ See *G.E.*, *id.*; *W.C.*, Docket No. 17-0562 (issued November 17, 2017).