

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

|                                   |   |                       |
|-----------------------------------|---|-----------------------|
| S.M., Appellant                   | ) |                       |
|                                   | ) |                       |
| and                               | ) | Docket No. 23-0353    |
|                                   | ) | Issued: July 13, 2023 |
| DEPARTMENT OF JUSTICE, BUREAU OF  | ) |                       |
| PRISONS, FEDERAL CORRECTIONAL     | ) |                       |
| INSTITUTION-OAKDALE, Oakdale, LA, | ) |                       |
| Employer                          | ) |                       |
|                                   | ) |                       |

*Appearances:*  
Alan J. Shapiro, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On January 13, 2023 appellant, through counsel, filed a timely appeal from a December 8, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## ISSUE

The issue is whether OWCP properly reduced appellant's wage-loss compensation effective April 6, 2022 based on his capacity to earn wages in the constructed position of a legal investigator.

## FACTUAL HISTORY

On September 22, 2010 appellant, then a 38-year-old correctional officer, filed a traumatic injury claim (Form CA-1) alleging that on that date he felt a pop and experienced left hip pain walking up the stairs while in the performance of duty. OWCP accepted the claim for enthesopathy of the left hip region. It paid him for total disability on the supplemental rolls effective November 7, 2010, and on the periodic rolls effective December 19, 2010. On November 17, 2010 appellant underwent left hip surgery. On March 23, 2011 he returned to work with restrictions.

On March 7, 2019 appellant stopped work due to the withdrawal of his limited-duty position. OWCP paid him wage-loss compensation from March 6 through June 2, 2019, when he resumed work. Appellant again stopped work on December 4, 2019 and did not return. OWCP paid him wage-loss compensation for total disability on the supplemental rolls from December 4, 2019 through January 4, 2020 and on the periodic rolls effective January 5, 2020.

On January 3, 2020 OWCP referred appellant to Dr. James Elmer Butler, III, a Board-certified orthopedic surgeon, for a second opinion examination.

In a report dated February 6, 2020, Dr. Butler provided his review of the medical evidence of record, including the results of diagnostic testing. On examination he found full strength of the lower extremities and tenderness to palpation of the left hip. Dr. Butler diagnosed enthesopathy of the left hip, a left hip labral tear, left hip femoroacetabular impingement, and left hip osteoarthritis. He attributed the diagnosed conditions to the September 22, 2010 employment injury. Dr. Butler recommended a total hip replacement. He advised that a functional capacity evaluation (FCE) performed on February 6, 2020 demonstrated that appellant was unable to resume his usual employment but could work in a light-duty capacity.<sup>3</sup> In a work capacity evaluation (Form OWCP-5c) of even date, Dr. Butler advised that he could perform light-duty employment with restrictions on pushing, pulling, and lifting up to 20 pounds for two hours per day and kneeling for two hours per day.

Based on Dr. Butler's report, on March 31, 2020, OWCP expanded its acceptance of appellant's claim to include specific joint derangements of the left hip, left hip sprain, and unilateral primary osteoarthritis of the left hip.

On March 31, 2020 OWCP referred appellant to a vocational rehabilitation counselor for vocational rehabilitation.

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<sup>3</sup> A February 6, 2020 FCE indicated that appellant had put forth reliable effort and that he could perform at a light physical demand level.

In an initial vocational rehabilitation report dated April 30, 2020, the vocational rehabilitation counselor noted that appellant had graduated high school and had attended a university from 1991 to 1993 with a major in nursing. Appellant was employed as a correctional officer performing duties such as passing and clearing food trays, and searching, cuffing, escorting, and moving inmates. Prior to that, he worked as a boilermaker, dog trainer, and pipefitter. The vocational rehabilitation counselor indicated that the positions of pipefitter, boilermaker, and dog trainer were skilled positions and that the position of correctional officer was a semi-skilled position. She identified the positions of cardiac monitor technician, security officer, and warehouse manager as suitable for appellant based on a transferrable skills analysis.

On June 9, 2020 the vocational rehabilitation counselor completed a job classification (Form CA-66) for the position of legal investigator. The duties included researching and preparing cases related to administrative appeals, examining government, personnel, college, and university rules and regulations, answering questions on rights and benefits, advising how to apply rules to individual situations, presenting arguments and evidence at appeal hearings, and calling upon witnesses to testify at hearings. The vocational rehabilitation counselor advised that the position had a specific vocational preparation (SVP) of seven and required two to four years of training. She found that appellant met the SVP because it was a skilled position and he had “held skilled positions in his past work history.” The vocational rehabilitation counselor determined that the job was performed in sufficient geographical numbers in appellant’s area at a weekly wage of \$13.03 per hour according to employment data.

In a vocational rehabilitation plan dated June 9, 2020, an unidentified individual found that the position of legal investigator was medically suitable. The plan noted that appellant had worked in a position where he monitored persons and equipment and noticed details, which would aid him as a legal investigator.

A rehabilitation plan and award dated June 9, 2020 provided appellant with 90 days of job placements services with a goal to obtaining a position as a legal investigator or lock assembler. OWCP subsequently approved extensions of job placement services through March 25, 2021.

In a Form CA-66, for the position of legal investigator, dated July 3, 2021, the vocational rehabilitation counselor found that the position was reasonably available within appellant’s commuting area based on federal employment data at a weekly wage of \$17.18 per hour.

In a closure report dated July 3, 2021, the vocational rehabilitation counselor identified the jobs of security officer, lock assembler, and legal investigator as suitable for appellant.

On March 2, 2022 OWCP advised appellant of its proposed reduction of his wage-loss compensation as the evidence established that he could earn wages in the selected position of legal investigator earning wages of \$687.20 per week. It afforded him 30 days to submit evidence or argument regarding the proposed reduction of his compensation. No response was received.

By decision dated April 6, 2022, OWCP reduced appellant’s wage-loss compensation effective that date as he had the capacity to earn wages of \$687.20 per week as a legal investigator, Department of Labor, *Dictionary of Occupational Titles* (DOT) No. 119.267-022. It found that the February 6, 2020 report from Dr. Butler represented the weight of the medical evidence and

established that appellant could perform the selected position. OWCP applied the formula set forth in *Albert C. Shadrick*<sup>4</sup> as codified in section 10.403 of OWCP's regulations (20 C.F.R. § 10.403), to determine appellant's loss of wage-earning capacity (LWEC).

On April 27, 2022 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

A telephonic hearing was held on September 23, 2022. Counsel noted that the duties of a legal investigator included researching and preparing cases, answering questions about rights and benefits, and present arguments at appeal hearings. Appellant related that he had one year of college and that his duties as a correctional officer consisted of escorting and securing inmates. He indicated that he was unfamiliar with researching rules and regulations. Appellant advised that he had worked as a pipefitter for 8 years and as a correctional officer for 17 years. Counsel asserted that the job was not within appellant's vocational capabilities as it required an entirely different skill set.

By decision dated December 8, 2022, OWCP's hearing representative affirmed the April 6, 2022 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.<sup>5</sup> 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.<sup>6</sup> An employee's actual earnings generally best reflect his or her wage-earning capacity.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup>

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

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

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

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

<sup>8</sup> *Id.*

<sup>9</sup> 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).

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.<sup>10</sup> The medical evidence OWCP relies upon must provide a detailed description of the employee's condition and the evaluation must be reasonably current.<sup>11</sup> 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.<sup>12</sup>

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's, *Dictionary of Occupational Titles* or otherwise available in the open market, that fits the employee's capabilities with regard to his physical limitations, education, age, and prior experience.<sup>13</sup> 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.<sup>14</sup> Lastly, OWCP applies the principles set forth in *Shadrick*<sup>15</sup> as codified in section 10.403 of OWCP's regulations,<sup>16</sup> to determine the percentage of the employee's LWEC.

### ANALYSIS

The Board finds that OWCP improperly reduced appellant's wage-loss compensation effective April 6, 2022 based on his capacity to earn wages in the constructed position of a legal investigator.

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.<sup>17</sup>

In a report dated February 6, 2020, Dr. Butler, an OWCP referral physician, diagnosed enthesopathy of the left hip, a left hip labral tear, left hip femoroacetabular impingement, and left hip osteoarthritis causally related to the September 22, 2010 employment injury. He opined that an FCE performed on that date indicated that appellant could work in a light-duty capacity. In an

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

<sup>11</sup> 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).

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

<sup>13</sup> *Id.* at *Vocational Rehabilitation Services*, Chapter 2.813.7b (February 2011).

<sup>14</sup> *Id.* at Chapter 2.816.6.a (June 2013); see also *C.M.*, Docket No. 18-1326 (issued January 4, 2019).

<sup>15</sup> *Supra* note 4.

<sup>16</sup> 20 C.F.R. § 10.403.

<sup>17</sup> *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).

accompanying Form OWCP-5c, Dr. Butler provided work restrictions of pushing, pulling, and lifting up to 20 pounds for two hours per day and kneeling for two hours per day.

OWCP relied upon Dr. Butler's opinion in finding that appellant could perform the duties of the selected position of legal investigator. Its procedures, however, provide that medical suitability of an offered position must be based on a reasonably current medical evaluation.<sup>18</sup> OWCP's procedures further provide that, if the medical evidence is unclear, equivocal, or old enough to be considered stale, which is generally greater than 18 months, the claims examiner should seek clarification from a physician regarding the suitability of the position.<sup>19</sup>

The Board finds that Dr. Butler's report is more than two years earlier than OWCP's reduction of appellant's compensation and thus not reasonably current.<sup>20</sup> OWCP, therefore, failed to establish that he had the capacity to earn wages in the selected position.

Additionally, the Board finds that OWCP has not established that appellant had the specific vocational preparation required for the position of legal investigator. The position requires two to four years of vocational preparation, with duties that include researching and preparing cases related to administrative appeals, examining government, personnel, college, and university rules and regulations, answering questions on rights and benefits, advising how to apply rules to individual situations, presenting arguments and evidence at appeal hearings, and calling upon witnesses to testify at hearings. The rehabilitation counselor indicated that appellant met the SVP for the position as he had performed other skilled positions. She noted in a report dated April 30, 2020 that he had performed the skilled positions of dog trainer and pipefitter and the semi-skilled position as a correctional officer. The rehabilitation counselor, however, did not explain how appellant's work in the skilled positions of pipefitter or dog trainer qualified him to perform the duties of a legal investigator.<sup>21</sup> The burden of proof is on OWCP to establish that appellant has the wage-earning capacity of a legal investigator. This requires it to establish how he met the specific vocational preparation for the selected position. There is nothing in the record to indicate that appellant had the necessary background and experience to perform the selected position.<sup>22</sup>

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<sup>18</sup> *Supra* note 11 at Chapter 2.816.4(d) (June 2013). *See also G.F.*, Docket No. 20-1031 (issued December 31, 2020) (the Board found that the medical evidence relied upon by OWCP was over two years old and thus not reasonably current); *M.A.*, 59 ECAB 624 (2008); *Carl C. Green, Jr.*, 47 ECAB 737, 746 (1996); *Anthony Pestana*, 39 ECAB 980 (1988) (where the Board found that a three-year-old medical evaluation is not reasonably current for a wage-earning capacity determination).

<sup>19</sup> *Supra* note 11 at Chapter 2.816.4 (June 2013); *P.B.*, Docket No. 22-0199 (issued September 6, 2022); *G.F.*, Docket No. 20-1031 (issued December 31, 2020).

<sup>20</sup> *G.F.*, *id.*

<sup>21</sup> *See M.D.*, Docket No. 09-0514 (issued October 9, 2009); *Luis R. Flores*, 54 ECAB 250 (2002); *Harold D. Snyder*, 38 ECAB 763 (1987).

<sup>22</sup> *See Robert W. Carlisle*, Docket No. 97-1299 (issued December 3, 1998).

As OWCP has not met its burden of proof to establish that the selected position was medically or vocational suitable, the Board will reverse OWCP's December 8, 2022 decision.

**CONCLUSION**

The Board finds that OWCP improperly reduced appellant's wage-loss compensation effective April 6, 2022 based on his capacity to earn wages in the constructed position of a legal investigator.

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 8, 2022 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 13, 2023  
Washington, DC

Alec J. Koromilas, 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