

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

S.B., Appellant)	
)	
and)	Docket No. 23-0700
)	Issued: September 26, 2023
DEPARTMENT OF THE AIR FORCE, 566 th)	
AIRCRAFT MAINTENANCE SQUADRON,)	
TINKER AIR FORCE BASE, OK, Employer)	
)	

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 March 27, 2023 appellant filed a timely appeal from a March 9, 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.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the March 9, 2023 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 compensation benefits, effective March 9, 2023, based on his capacity to earn wages in the constructed position of hotel clerk.

FACTUAL HISTORY

On March 21, 2014 appellant, then a 53-year-old aircraft mechanic, filed a traumatic injury claim (Form CA-1) alleging that on March 19, 2014 he injured his right elbow while installing a two rudder balance bay track, while in the performance of duty. OWCP accepted this claim for right lateral epicondylitis and right elbow and forearm sprain.

On April 14, 2014 appellant filed another traumatic injury claim (Form CA-1) alleging that on April 4, 2014 he injured his left arm and shoulder while lifting a heavy air hose over a table with a coworker, while in the performance of duty. OWCP accepted this claim for left shoulder and upper arm sprain, left biceps tendon rupture, and left tenosynovitis of the hand and wrist.³

Appellant stopped work on April 4, 2014 and underwent left bicep tendon rupture surgery on that day. He underwent right elbow chronic lateral epicondylitis surgery on November 26, 2014. OWCP paid appellant intermittent wage-loss compensation on the supplemental rolls and on the periodic rolls effective March 3, 2019.

In a November 16, 2018 report, Dr. Richard Ruffin, an orthopedic hand surgery specialist and treating physician, noted that appellant had residual abnormalities of the upper extremities and right elbow lateral epicondylitis, left wrist inflammation with prior surgical procedure with residual tendinitis, left elbow biceps tendon repair with lateral antebrachial cutaneous nerve injury, and right wrist stiffness with contracture and ankylosis with no prior operation. He opined that the end result of the bilateral upper extremity conditions was significant grip weakness, inflammation and dysfunction, resulting in a profound inability to perform any work activities consistent with aircraft mechanic or other repetitive motion and activity. Dr. Ruffin further opined that no further surgical treatment would be of benefit to appellant and that he needed permanent restrictions which included no repetitive activity with either upper extremity, no repetitive handling or usage of power tools or vibrating tools, and a lifting limit of approximately 25 pounds.

On March 22, 2021 appellant attended a second opinion examination with Dr. Christopher S. Jordan, an orthopedic surgery specialist, to determine the nature and extent of the accepted work-related conditions, the extent of disability, and appropriate treatment. Dr. Jordan noted appellant's history of injury and medical treatment. He related appellant's physical examination findings and diagnosed right and left lateral epicondylitis, left distal biceps tendon rupture, and median nerve neuropathy. Dr. Jordan explained that, while the work-related conditions had not resolved, appellant needed an electromyography (EMG) scan to accurately assess the residuals to determine whether further improvement was expected. He noted that appellant could not return to his date-of-injury position, however, appellant had reasonable grip

³ The two claims were administratively combined by OWCP, with OWCP File No. xxxxxx344 serving as the master file.

strength and any job that did not require fine motor control in his left hand would be manageable. Dr. Jordan advised that appellant was an excellent candidate for vocational rehabilitation. He completed a work capacity form, noting that appellant could work sedentary or light duty with no pushing, pulling, or lifting of over 30 pounds.

In a September 20, 2021 addendum, Dr. Jordan noted that appellant did not wish to have an EMG, as it would be difficult for him. He again related that appellant could perform work on the medium work category, although he would have difficulty with fine motor control.

On October 7, 2021 OWCP again referred appellant for a second opinion examination with Dr. Jordan to determine the nature and extent of the accepted work-related conditions, the extent of disability, and appropriate treatment.

In a February 9, 2022 report, Dr. Jordan noted that, while he had related that appellant could perform medium work with a 30-pound lifting limit, appellant could not perform this type of work occasionally, but not for 8 hours. Appellant would be limited to light-duty work for eight hours of work per day.

On March 16, 2022 OWCP referred appellant for vocational rehabilitation services.

Appellant participated in vocational rehabilitation from July 13 through November 4, 2022. In a report dated November 4, 2022, the vocational rehabilitation counselor assigned a plan for reemployment as a hotel clerk or customer-service clerk, according to the Department of Labor, *Dictionary of Occupational Titles* (DOT) #238.367-03, based upon appellant's age, experience, education, medical restrictions from Dr. Jordan, and a labor market survey. Both positions were listed as light work. The vocational rehabilitation counselor conducted labor market research and documented that the positions of hotel clerk or customer service clerk were reasonably available within appellant's commuting area and that the entry pay level for the hotel clerk position was \$10.00 per hour, while the entry pay for the customer-clerk position was \$15.00 to \$17.00 per hour.

In a letter dated June 29, 2022, OWCP advised appellant that the position of a customer service clerk, DOT#299.367-010, weekly wage of \$498.00 or hotel clerk, DOT#238.367-038, weekly wage of \$408.00, was suitable to his work restrictions. It informed him that he would receive 90 days of placement assistance to help him locate work in these positions provided that he cooperated with such effort. OWCP further advised appellant that his wage-loss compensation benefits would be reduced based upon the salary of a customer service clerk or hotel clerk at the end of the 90-day placement assistance period.

Following the 90-day placement assistance period, vocational rehabilitation services concluded on November 4, 2022. The vocational rehabilitation closure memorandum indicated that both selected positions remained vocationally suitable for appellant and reasonably available with his commuting area.

By notice dated January 6, 2023, OWCP advised appellant that it proposed to reduce his wage-loss compensation on the basis that he was no longer totally disabled, but rather partially disabled, and that he had the capacity to work in the light-work constructed position as a hotel clerk, DOT No. 237.367-039, at the rate of \$408.00 per week. It attached the job classification for

hotel clerk and noted that the rehabilitation specialist documented that such positions were available in appellant's commuting area and that the entry pay level for the position was \$408.00 per week. OWCP explained that the hotel clerk position was determined to be within appellant's permanent work restrictions. It calculated that his compensation rate should be adjusted to \$2,507.00 every four weeks using the *Albert C. Shadrick* formula.⁴ OWCP provided appellant 30 days to submit additional evidence regarding his capacity to earn wages in the position described.

In a January 28, 2023 statement, appellant noted that he injured his right elbow on March 19, 2014 and that OWCP incorrectly stated that he sprained his right shoulder and upper arm, despite several calls to correct the error. He further noted that he sustained a second injury on April 10, 2014 to his left distal biceps tendon, and after surgery, he could not move his fingers or wrist. Appellant related that, after four months, he had a little feeling in his left forearm, just below the incision; however, he had another surgery to correct his left wrist from popping due to inactivity of the wrist because of paralysis. He explained that he was suffering psychologically because of the trauma from his injuries, loss of his career as an aircraft mechanic, loss of grip strength, and continued paralysis and numbness in his left hand and all five digits.

By decision dated March 9, 2023, OWCP found that appellant was able to perform the constructed position of hotel clerk. It noted that the reports of Dr. Jordan, the second opinion physician, constituted the weight of the medical evidence. OWCP found that the vocational rehabilitation counselor had properly considered all appropriate factors and evidence and that the position of hotel clerk represented appellant's loss of wage-earning capacity (LWEC). It determined that appellant was capable of earning \$408.00 per week and adjusted his compensation rate to a gross payment of \$2,507.00 every four weeks effective that date using the *Albert C. Shadrick* formula.⁵

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 an 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

⁴ 5 ECAB 376 (1953).

⁵ *Id.*

⁶ See *E.B.*, Docket No. 22-1053 (issued April 1-0, 2023); *R.H.*, Docket No. 21-0145 (issued May 3, 2022); *W.S.*, Docket No. 21-1118 (issued April 28, 2022); *B.H.*, Docket No. 20-0729 (issued March 19, 2021).

⁷ *Id.*

⁸ 5 U.S.C. § 8115(a).

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 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. Any incapacity to perform the duties of the selected position resulting from subsequently-acquired conditions is immaterial to a LWEC that can be attributed to the accepted employment injury and for which the claimant may receive compensation.¹³

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, local Chamber of Commerce, employing establishment contacts, and actual job postings.¹⁴ Lastly, OWCP applies

⁹ *C.M.*, Docket No. 18-1326 (issued January 4, 2019).

¹⁰ *Id.*

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

¹² *Id.*

¹³ *Id.*

¹⁴ *C.M.*, *supra* note 9; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Vocational Rehabilitation Services*, Chapter 2.813.19d (November 2011).

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

ANALYSIS

The Board finds that OWCP has met its burden of proof to reduce appellant's wage-loss compensation, effective March 9, 2023, based on his capacity to earn wages in the constructed position of hotel clerk.

OWCP determined that appellant's wage-earning capacity was represented by the constructed position of hotel clerk, as it was within the medical restrictions provided by Dr. Jordan, the second opinion physician. Dr. Jordan opined that appellant was permanently partially disabled as a result of the employment injuries and unable to return to his aircraft mechanic position. However, he also provided permanent work restrictions and found that appellant was capable of performing sedentary and light-duty work. OWCP, therefore, referred appellant for vocational rehabilitation services, as the medical opinion evidence established that he was no longer totally disabled from work due to residuals of his accepted employment injuries.¹⁸ The vocational rehabilitation counselor determined that the light-duty position of hotel clerk was within appellant's work restrictions as provided by Dr. Jordan and performed a labor market survey for the position of hotel clerk, documenting that the position was reasonably available within appellant's commuting area.

The Board finds that OWCP properly determined that appellant had the physical capacity to perform the duties of a hotel clerk, as this position was within the medical restrictions provided by Dr. Jordan. 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

In assessing the employee's ability to perform the selected position, OWCP must consider not only physical limitations, but also work experience, age, mental capacity, and educational background.²⁰ In this case, the rehabilitation counselor determined that the hotel clerk position was vocationally suitable for appellant and available in appellant's commuting area.

¹⁵ *Supra* note 4.

¹⁶ 20 C.F.R. § 10.403.

¹⁷ 5 U.S.C. § 8115(a).

¹⁸ *S.F.*, Docket No. 20-0869 (issued October 14, 2021); *C.M.*, Docket No. 19-0360 (issued February 25, 2020).

¹⁹ *Id.*

²⁰ *Id.*

As the vocational rehabilitation counselor is an expert in the field of vocational rehabilitation, OWCP may rely on their opinion in determining whether a job is vocationally suitable and reasonably available.²¹

The Board thus finds that OWCP properly determined that the constructed position of hotel clerk reflected appellant's wage-earning capacity.²²

Appellant objected to the proposed reduction of his wage-loss compensation and argued that he should receive full compensation because he suffered psychologically from his work injuries. He did not, however, submit any medical evidence to substantiate his allegations that he was unable to work due to an emotional condition.

The Board, therefore, finds that OWCP considered the proper factors, including the availability of suitable employment, appellant's physical limitations, and employment qualifications in determining that he had the capacity to perform the constructed position of hotel clerk.²³ The Board further finds that OWCP properly applied the *Shadrick* formula, as codified in section 10.403 of its regulations,²⁴ in determining appellant's LWEC.

Appellant may request modification of the LWEC determination, supported by new evidence or argument, at any time before OWCP.

CONCLUSION

The Board finds that OWCP has met its burden of proof to reduce appellant's wage-loss compensation, effective March 9, 2023, based on his capacity to earn wages in the constructed position of hotel clerk.

²¹ *C.H.*, Docket No. 19-0136 (issued May 23, 2019); *supra* note 14 at Chapter 2.816.6(b) (June 2013).

²² *Supra* note 19.

²³ *S.F.*, *supra* note 18; *T.B.*, Docket No. 17-1777 (issued January 16, 2019).

²⁴ *Supra* note 16.

ORDER

IT IS HEREBY ORDERED THAT the March 9, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 26, 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