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<b>C.M., Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 23-1169</b>
	)	<b>Issued: March 20, 2024</b>
<b>DEPARTMENT OF JUSTICE, FEDERAL</b>	)	
<b>BUREAU OF PRISONS, FEDERAL</b>	)	
<b>CORRECTIONAL INSTITUTION</b>	)	
<b>WILLIAMSBURG, Salters, SC, Employer</b>	)	
	)	

*Case Submitted on the Record*

Before:  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
JANICE B. ASKIN, Judge  
JAMES D. MCGINLEY, Alternate Judge

On September 15, 2023 appellant filed a timely appeal from a June 27, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

<sup>2</sup> The Board notes that, following the issuance of the June 27, 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 wage-loss compensation benefits, effective June 27, 2023, based on her capacity to earn wages in the constructed position of cashier.

## **FACTUAL HISTORY**

On August 20, 2013 appellant, then a 36-year-old correctional officer, filed a traumatic injury claim (Form CA-1) alleging that on July 12, 2013 she sustained a left lateral ankle sprain when she twisted the ankle ascending stairs while in the performance of duty. She stopped work on July 13, 2013 and returned on October 22, 2013. OWCP accepted appellant's claim for left ankle sprain. It paid her wage-loss compensation on the supplemental rolls from August 27, 2013 through September 20, 2014. OWCP paid appellant wage-loss compensation.

On August 13, 2014 appellant underwent left lower extremity peroneal tendon tenolysis and fibular groove deepening. On October 14, 2019 she underwent left tarsal tunnel release.

On January 26, 2021 appellant attended a second opinion examination with Dr. Seth Jaffe, an osteopath and Board-certified orthopedic surgeon, to determine the nature and extent of the accepted work-related conditions, the extent of disability, and appropriate treatment. After reviewing a December 1, 2020 functional capacity evaluation, on March 22, 2021, Dr. Jaffe submitted an addendum to this report. He recommended work restrictions of limitation of ladder climbing, no work lower than twelve inches from the floor, and no sustained low-level crouching, which he described as medium-duty work, for eight hours per day.

On April 30, 2021 OWCP referred appellant for vocational rehabilitation services.

Appellant participated in vocational rehabilitation from April 30, 2021 through February 3, 2023. Initially, appellant returned to a temporary, light-duty position effective May 20, 2021. However, the temporary position expired on July 19, 2021.

On March 9, 2022 the vocational rehabilitation counselor assigned a plan for permanent reemployment as a cashier or sales attendant, pursuant to the Department of Labor, *Dictionary of Occupational Titles* (DOT) #211.462-010 and #299.677.010, based upon appellant's age, experience, education, medical restrictions from Dr. Jaffe, 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 cashier and sales attendant were reasonably available within appellant's commuting area, and that the entry pay level for the cashier position was \$431.20 per week, while the entry pay for the sales attendant position was \$541.20 per week.

In a letter dated March 28, 2022, OWCP advised appellant that the position of a cashier, DOT #211.462-010, weekly wage of \$431.20 or sales attendant, DOT #299.677-010, weekly wage of \$541.20, was suitable to her work restrictions. It informed her that she would receive 90 days of placement assistance to help her locate work in these positions provided that she cooperated with such effort. OWCP further advised appellant that her wage-loss compensation benefits would be reduced based upon the salary of a cashier or sales attendant at the end of the 90-day placement period.

The rehabilitation counselor provided updated wage-earning capacity data on January 8, 2023 for the positions of cashier, DOT #211.462-010, and sales attendant, DOT #299.677-010. In a labor market survey dated January 27, 2023, the counselor noted that these positions remained within her accepted work restrictions and constituted weekly wages of \$442.80 for the cashier position and \$463.60 for the sales attendant position.

Following the 90-day placement assistance period, vocational rehabilitation services concluded on February 3, 2023. The vocational rehabilitation closure memorandum indicated that both selected positions remained vocationally suitable for appellant and were reasonably available within her commuting area.

By notice dated February 21, 2023, OWCP advised appellant that it proposed to reduce her wage-loss compensation on the basis that she was no longer totally disabled, but rather partially disabled, and that she had the capacity to work in the light-work constructed position as a cashier, DOT #211.462-010, at the rate of \$442.80 per week. It attached the job classification for cashier 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 \$442.80 per week. OWCP explained that the cashier position was determined to be within appellant's permanent work restrictions. It calculated that her compensation rate should be adjusted to \$2,769.00 every four weeks using the *Albert C. Shadrick* formula.<sup>3</sup> OWCP provided appellant 30 days to submit additional evidence regarding her capacity to earn wages in the position described.

In a March 16, 2023 statement, appellant asserted that the selected positions of cashier and sales associate were outside her medical restrictions and that several employers had informed her that they could not ensure accommodation for her restrictions. She further contended that she had submitted necessary documentation to obtain assisted reemployment services with Crystal Clear Cleaning Services. However, appellant noted that the rehabilitation counselor stated that she had contacted the potential employer regarding a start date for employment but had not received notification about the matter.

By decision dated June 27, 2023, OWCP found that appellant was able to perform the constructed position of cashier. It noted that the reports of Dr. Jaffe, 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 cashier represented appellant's loss of wage-earning capacity (LWEC). It determined that appellant was capable of earning \$442.80 per week and adjusted her compensation rate to a gross payment of \$2,352.00 every four weeks effective that date using the *Albert C. Shadrick* formula.<sup>4</sup>

### **LEGAL PRECEDENT**

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of the compensation benefits.<sup>5</sup> An injured employee who is either unable to return

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<sup>3</sup> 5 ECAB 376 (1953).

<sup>4</sup> *Id.*

<sup>5</sup> See *E.B.*, Docket No. 22-1053 (issued April 10, 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).

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.<sup>6</sup>

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.<sup>7</sup>

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.<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup> Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.<sup>11</sup>

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 an LWEC that can be attributed to the accepted employment injury and for which the claimant may receive compensation.<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 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

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<sup>6</sup> *Id.*

<sup>7</sup> 5 U.S.C. § 8115(a).

<sup>8</sup> *C.M.*, Docket No. 18-1326 (issued January 4, 2019).

<sup>9</sup> *Id.*

<sup>10</sup> *J.H.*, Docket No. 18-1319 (issued June 26, 2019).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

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.<sup>13</sup> Lastly, OWCP applies the principles set forth in *Albert C. Shadrick*,<sup>14</sup> as codified in section 10.403 of OWCP's regulations,<sup>15</sup> to determine the percentage of the employee's LWECE.<sup>16</sup>

### ANALYSIS

The Board finds that OWCP has met its burden of proof to reduce appellant's wage-loss compensation, effective June 27, 2023, based on her capacity to earn wages in the constructed position of cashier.

OWCP determined that appellant's wage-earning capacity was represented by the constructed position of cashier, as it was within the medical restrictions provided by Dr. Jaffe, the second opinion physician. Dr. Jaffe opined that appellant was permanently partially disabled as a result of the employment injury, and provided permanent work restrictions of limitation of ladder climbing, no work lower than twelve inches from the floor, and no sustained low-level crouching, which he described as medium-duty work, for eight hours per day. OWCP, therefore, referred appellant for vocational rehabilitation services, as the weight of the medical opinion evidence established that she was no longer totally disabled from work due to residuals of her accepted employment injury.<sup>17</sup> The vocational rehabilitation counselor determined that the light-duty position of cashier was within appellant's work restrictions as provided by Dr. Jaffe and performed a labor market survey for the position of cashier, 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 cashier, as this position was within the medical restrictions provided by Dr. Jaffe. The Board, therefore, finds that the weight of the medical evidence established that appellant had the physical capacity to perform the duties of the selected position.<sup>18</sup>

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.<sup>19</sup> In this case, the rehabilitation counselor determined that the cashier position was vocationally suitable for appellant and available in appellant's commuting area.

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<sup>13</sup> *C.M.*, *supra* note 8; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Vocational Rehabilitation Services*, Chapter 2.813.19d (November 2011).

<sup>14</sup> *Supra* note 2.

<sup>15</sup> 20 C.F.R. § 10.403.

<sup>16</sup> 5 U.S.C. § 8115(a).

<sup>17</sup> *See S.F.*, Docket No. 20-0869 (issued October 14, 2021); *C.M.*, Docket No. 19-0360 (issued February 25, 2020).

<sup>18</sup> *Id.*

<sup>19</sup> *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.<sup>20</sup>

The Board thus finds that OWCP properly determined that the constructed position of cashier reflected appellant's wage-earning capacity.<sup>21</sup>

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 she had the capacity to perform the constructed position of cashier.<sup>22</sup> The Board further finds that OWCP properly applied the *Shadrick* formula, as codified in section 10.403 of its regulations,<sup>23</sup> 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 compensation benefits, effective June 27, 2023, based on her capacity to earn wages in the constructed position of cashier.

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<sup>20</sup> *C.H.*, Docket No. 19-0136 (issued May 23, 2019); *supra* note 13 at Chapter 2.816.6(b) (June 2013).

<sup>21</sup> *Supra* note 17.

<sup>22</sup> *See S.F.*, *supra* note 17; *T.B.*, Docket No. 17-1777 (issued January 16, 2019).

<sup>23</sup> *Supra* note 15.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 27, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 20, 2024  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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