

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

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<b>J.N., Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 25-0653</b>
	)	<b>Issued: August 12, 2025</b>
<b>DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, Florence, CO, Employer</b>	)	
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*Appearances:*

*Appellant, pro se*

*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge

PATRICIA H. FITZGERALD, Deputy Chief Judge

JANICE B. ASKIN, Judge

**JURISDICTION**

On June 27, 2025, appellant filed a timely appeal from a June 16, 2025 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.

**ISSUE**

The issue is whether OWCP properly reduced appellant's wage-loss compensation benefits, effective June 16, 2025, based on his capacity to earn wages in the constructed position of customer service representative.

**FACTUAL HISTORY**

On November 5, 2021, appellant, then a 49-year-old correctional officer, filed a traumatic injury claim (Form CA-1) alleging that he contracted COVID-19 on October 27, 2021 while in the

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

performance of duty. He stopped work on October 28, 2021. OWCP accepted the claim for COVID-19 and subsequently expanded its acceptance of the claim to include post-COVID-19 condition, unspecified. It paid appellant wage-loss compensation on the supplemental rolls, effective December 13, 2021, and on the periodic rolls, effective February 27, 2022.

On December 1, 2022, OWCP referred appellant, along with the case record, a statement of accepted facts (SOAF), and a series of questions to Dr. David L. Orgel, Board-certified in internal and occupational medicine, for a second opinion examination to determine the status of his accepted medical conditions and extent of disability.

In a report dated January 4, 2023, Dr. Orgel recounted appellant's history of injury and medical treatment. He diagnosed COVID-19 and long COVID. Dr. Orgel opined that appellant was capable of returning to sedentary work with the use of supplemental oxygen. In a work capacity evaluation (Form OWCP-5c) of even date, he related that appellant's work restrictions included no more than eight hours of pushing, pulling, and lifting up to 10 pounds, no climbing and no operating a motor vehicle at work.

On February 10, 2023, OWCP assigned appellant a vocational rehabilitation counselor.

Appellant participated in vocational rehabilitation computer skills training from February 15 through July 2, 2024. In a vocational rehabilitation action report (Form OWCP-44) dated July 3, 2024, the vocational rehabilitation counselor advised that appellant had completed his training.

On July 17, 2024, referred appellant, along with the case record, a statement of accepted facts (SOAF), and a series of questions to Dr. William Brady, III, Board-certified in occupational medicine, for a second opinion examination to determine the status of his accepted medical conditions and extent of disability.

In a report dated August 22, 2024, Dr. Brady recounted appellant's history of injury and medical treatment. He diagnosed COVID-19 and long COVID. Dr. Brady stated that appellant required oxygen 24/7 but had the capacity and tolerance to work in a sedentary position. He then reviewed the positions of data entry/keyer/typist and customer service representative and opined that these positions were within appellant's physical restrictions.

In a September 26, 2024 Form OWCP-5c, Dr. Brady advised that appellant was capable of performing sedentary work, noting he used oxygen 24/7. He listed work restrictions for an eight-hour day of up to one hour each of walking and standing; two hours each, up to 20 pounds, of pushing, pulling, squatting, two hours of kneeling; no climbing; and a 10-minute break, every two hours.

On December 9, 2024, the vocational rehabilitation counselor completed a job classification and labor market information form (Form OWCP-66). She related that based on the medically determined residuals of appellant's injury, and taking into consideration all significant preexisting impairments and pertinent nonmedical factors, appellant was able to perform the position of customer service representative and that such work was reasonably available within the commuting area. The job description was cited from the Department of Labor, *Dictionary of Occupational Titles* (DOT), of customer service representative, DOT #239.362-014 as a sedentary

position. The job description was noted as: interviews applicants and records interview information into computer for water, gas, electric, telephone, or cable television system service; customer service duties and the troubleshooting of equipment problems. The vocational rehabilitation counselor concluded that appellant could perform this position based upon his age, experience, and education, the medical restrictions from Drs. Orgel and Brady and a labor market survey. Appellant's high school and associate of arts degree in criminal justice were cited, as well as his prior work experience working in law enforcement for approximately 24 years and at a treatment facility for at-risk youths for 11 years. The vocational rehabilitation counselor conducted labor market research and documented that the position of customer service clerk was reasonably available full and part time within appellant's commuting area, and that the entry pay level for the customer service clerk position was \$662.00 per week.

In an April 22, 2025 notice, OWCP proposed to reduce appellant's wage-loss compensation based on his capacity to earn wages in the constructed position of customer service representative at the weekly pay rate of \$662.00. It noted that the physical requirements of the customer service representative position were consistent with the work restrictions provided by Drs. Brady and Orgel and that the selected position was medically suitable. OWCP found that the position was vocationally suitable based on the vocational rehabilitation counselor's report. Utilizing the *Shadrick* formula it calculated 37 percent wage-earning capacity, with a new gross compensation rate each four weeks of \$3,273.00. OWCP attached the job classification for the customer service representative position completed by the vocational rehabilitation counselor on December 28, 2023, Dr. Orgel's January 4, 2023 work restrictions, and Dr. Brady's August 22 and September 26, 2024 work restrictions. It afforded appellant 30 days to submit evidence and argument challenging the proposed action. No reply was received.

By decision dated June 16, 2025, OWCP finalized the reduction of appellant's wage-loss compensation effective that date, as he had the capacity to earn wages of \$662.00 per week in the constructed position of a customer service representative, DOT #239.362-014. It found that the August 22, 2024 report and September 26, 2024 supplemental report from Dr. Brady represented the weight of the evidence and established that appellant could perform the selected position. OWCP applied the formula set forth in *Albert C. Shadrick*<sup>2</sup> 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.<sup>3</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>4</sup> An employee's actual earnings generally

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<sup>2</sup> 5 ECAB 376 (1953), codified at 20 C.F.R. § 10.403.

<sup>3</sup> See *K.L.*, Docket No. 24-0950 (issued January 31, 2025); *C.B.*, Docket No. 23-0795 (issued December 28, 2023); see *L.M.*, Docket No. 20-1038 (issued March 10, 2021); *E.D.*, Docket No. 17-1064 (issued March 22, 2018).

<sup>4</sup> 5 U.S.C. § 8115(a); 20 C.F.R. §§ 10.402, 10.403; see *Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

best reflect his or her wage-earning capacity.<sup>5</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>6</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 disabled condition.<sup>7</sup>

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>8</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>9</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 postinjury or subsequently-acquired conditions.<sup>10</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 experience.<sup>11</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>12</sup>

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 commuting area.<sup>13</sup>

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<sup>5</sup> See *K.L.*, *supra* note 3; *T.D.*, Docket No. 20-1088 (issued June 14, 2021); *Hayden C. Ross*, 55 ECAB 455, 460 (2004).

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

<sup>7</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).

<sup>8</sup> See *M.H.*, Docket No. 21-1055 (issued March 30, 2022); *M.A.*, 59 ECAB 624, 631 (2008).

<sup>9</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 A.E.*, Docket No. 22-0119 (issued February 13, 2023); *J.H.*, Docket No. 18-1319 (issued June 26, 2019).

<sup>10</sup> *Id.* at Chapter 2.813.7b (February 2011).

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

<sup>12</sup> *Id.* at Chapter 2.816.6.a (June 2013); *see also S.M.*, Docket No. 23-0353 (issued July 13, 2023); *C.M.*, Docket No. 18-1326 (issued January 4, 2019).

<sup>13</sup> *F.M.*, Docket No. 24-0673 (October 18, 2024); *see B.G.*, Docket No. 17-0477 (issued September 20, 2017).

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 LWEC.

### ANALYSIS

The Board finds that OWCP properly reduced appellant's wage-loss compensation benefits, effective June 16, 2025, based on his capacity to earn wages in the constructed position of customer service representative.

OWCP initially referred appellant to Dr. Orgel for second opinion evaluations to determine the status of his accepted medical conditions and extent of disability. In a report dated January 4, 2023, Dr. Orgel's recounted appellant's diagnoses of COVID-19 and long COVID. He found that appellant was capable of returning to sedentary work and provided work restrictions. After appellant completed vocational rehabilitation training, OWCP subsequently referred appellant to Dr. Brady for a second opinion evaluation to determine appellant's work capacity and to determine whether the selected position was suitable. In an August 22, 2024 report, Dr. Brady diagnosed COVID-19 and long COVID. He found that appellant had the physical capacity to perform the duties of customer service representative. In a September 26, 2024 work capacity evaluation, Dr. Brady noted that appellant required oxygen 24/7 and he provided work restrictions within an eight-hour workday. Appellant's restrictions included up to one hour each of walking and standing; up to 20 pounds two hours each of pushing, pulling, squatting; two hours of kneeling; no climbing; and a 10-minute break, every two hours.

The Board finds that OWCP properly determined that appellant had the physical capacity to perform the duties of a customer service representative. The position is classified as sedentary and none of the duties exceeded the restrictions provided by Drs. Brady and Orgel.<sup>16</sup> There is no contradictory rationalized medical evidence of record. For these reasons, the Board finds that the weight of the medical evidence, as represented by Drs. Brady and Orgel, establishes that appellant had the physical capacity to perform the duties of the selected position.<sup>17</sup>

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.<sup>18</sup> The vocational rehabilitation counselor determined that the customer service representative position was suitable for appellant based on his high school education and Associate of Arts degree in Criminal Justice, as well as prior work experience working in law enforcement at a treatment facility. For the customer service representative position, the vocational rehabilitation counselor determined that the position was medically and vocationally

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

<sup>15</sup> 20 C.F.R. § 10.403.

<sup>16</sup> *K.L.*, Docket No. 24-0905 (issued January 31, 2025); *M.H.*, Docket No. 19-1410 (issued November 5, 2020); *J.H.*, Docket No. 18-1319 (issued June 26, 2019).

<sup>17</sup> *Id.*; *see also S.B.*, Docket No. 23-0700 (issued September 26, 2023).

<sup>18</sup> *K.L.*, *supra* note 16; *M.H.*, *supra* note 16; *C.P.*, Docket No. 19-0595 (issued September 9, 2019).

suitable and existed in sufficient numbers within appellant's reasonable commuting area, with an average weekly wage of \$662.00. As the vocational rehabilitation counselor is an expert in the field of vocational rehabilitation, OWCP may rely on his opinion in determining whether a job is vocationally suitable and reasonably available.<sup>19</sup> 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 he had the capacity to perform the customer service representative position.<sup>20</sup> The record reflects that he had the requisite physical ability, skill, and experience to perform the customer service representative position, which was reasonably available within the general labor market of his commuting area at a weekly wage of \$662.00.<sup>21</sup> OWCP properly applied the *Shadrick* formula, as codified in section 10.403 of its regulations,<sup>22</sup> in determining appellant's LWEC. Accordingly, the Board finds that OWCP properly found that the customer service representative position reflected appellant's wage-earning capacity.<sup>23</sup>

While appellant's participation in the vocational rehabilitation program did not result in appellant's reemployment in the selected position, 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 commuting area.<sup>24</sup>

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 properly reduced appellant's wage-loss compensation benefits, effective June 16, 2025, based on his capacity to earn wages in the constructed position of customer service representative.

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<sup>19</sup> See *K.L.*, *id.*; *M.H.*, *id.*; *J.B.*, Docket No. 17-0817 (issued April 26, 2018).

<sup>20</sup> *S.B.*, *supra* note 17; *T.B.*, Docket No. 17-1777 (issued January 16, 2019); *Clayton Varmer*, 37 ECAB 248 (1985).

<sup>21</sup> *K.L.*, *supra* note 16; *C.M.*, Docket No. 18-0742 (issued March 12, 2020).

<sup>22</sup> 5 ECAB 376 (1953), codified at 20 C.F.R. § 10.403.

<sup>23</sup> See *K.L.*, *supra* note 16; *M.H.*, *supra* note 16; *J.F.*, Docket No. 19-0864 (issued October 25, 2019).

<sup>24</sup> *Supra* note 15.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 16, 2025 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 12, 2025  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board