

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

T.B., Appellant

and

**DEPARTMENT OF JUSTICE, FEDERAL
BUREAU OF PRISONS-METROPOLITAN
DETENTION CENTER, Los Angeles, CA,
Employer**

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**Docket No. 17-1777
Issued: January 16, 2019**

Appearances:

Alan J. Shapiro, Esq., for the appellant¹

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 17, 2017 appellant, through counsel, filed a timely appeal from a June 2, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ 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.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly determined that the selected position of a customer complaint clerk represented appellant's wage-earning capacity as of July 24, 2016.

FACTUAL HISTORY

On January 25, 2006 appellant, then a 39-year-old communications specialist, filed a traumatic injury claim (Form CA-1), alleging that, on January 13, 2006, he was ascending stairs while carrying boxes of equipment when he tripped and hit his right knee on the stairs while in the performance of his job duties. OWCP initially accepted the claim for a right knee contusion and right knee patella chondromalacia. It subsequently expanded acceptance to the claim to include: right knee derangement; right venous embolism and thrombosis of deep vessels of lower extremity not otherwise specified; tear of the medial meniscus of the right knee; derangement of the right meniscus, not elsewhere classified; and acromioclavicular sprain of the right shoulder and upper arm.³ As appellant was unable to return to his date-of-injury position, OWCP paid wage-loss compensation benefits.

Appellant underwent a right knee arthroscopy on July 7, 2009. He was totally disabled from work from June 1, 2007 to January 13, 2008. Appellant returned to work on January 14, 2008. He remained off work until December 29, 2008. Appellant stopped work again on January 19, 2009 because the employing establishment could no longer accommodate his work restrictions.

In response to a November 23, 2015 request from OWCP for a medical opinion regarding appellant's ability to work, on December 11, 2015 Dr. Kouros Shamlou, a Board-certified orthopedic surgeon and treating physician, opined that appellant was not capable of performing his usual job. However, Dr. Shamlou advised that appellant was capable of performing modified duties. He advised permanent restrictions of no more than four hours of sitting, no more than one hour of walking, standing, reaching, reaching above the shoulder, twisting, bending and stooping, operating a motor vehicle to and from work and no more than two hours of operating motor vehicles at work. Additionally, Dr. Shamlou recommended no more than one hour of pushing, pulling, and lifting and no more than 10 pounds.

On December 23, 2015 OWCP referred appellant for vocational rehabilitation as the employing establishment was unable to accommodate the restrictions.

On December 29, 2015 OWCP noted that the current medical evidence documented appellant's work abilities. It advised appellant that he was being referred for vocational

³ The present claim was assigned OWCP File No. xxxxxx937. Appellant also has other claims before OWCP, including one wherein he alleged injury to his left knee on May 11, 1999 when restraining an inmate in this then-capacity as a correctional officer. OWCP assigned that claim File No. xxxxxx870 and accepted it for left knee strain. It has administratively combined File Nos. xxxxxx937 and xxxxxx870, with File No. xxxxxx937 serving as the master file.

rehabilitation as Dr. Shamlou opined that he was capable of performing modified duties with imposed restrictions.

By letter dated January 28, 2016, OWCP requested that Dr. Shamlou clarify appellant's work restrictions. In particular, it requested that he clarify whether appellant was limited to four hours of continuous sitting and whether he could work only six hours per day. OWCP also explained that they were trying to determine if appellant was capable of performing sedentary work, noting that the physical requirements required occasional lifting of up to 10 pounds, on an intermittent basis. Furthermore, appellant must be able to sit, stand and walk up to two and a half hours on an intermittent basis; however, he would be able to change positions (sit, stand, and walk as needed) during the workday. OWCP also asked Dr. Shamlou if based upon the definition of sedentary work, would appellant be able to work eight hours per day, if not, how many hours could he work.

In a letter dated February 16, 2016, appellant indicated that he could not participate in the vocational rehabilitation program as he had fallen on the weekend of February 12, 2016 when his left leg gave out and he injured his knee, back, and shoulders. He noted that he may have to have surgery and he was currently in a leg immobilizer. Appellant provided a copy of the hospital records and a work excuse note.

By letter dated February 22, 2016, Jeanine Metildi, the vocational rehabilitation counselor, advised that she was submitting appellant's vocational rehabilitation plan and supporting documentation without his signature because he cancelled their meeting on February 16, 2016 and asserted that he had an accident and could not meet with her. She further noted that he indicated he did not want the suggested plan and wanted to attend paralegal training.

In her report dated March 6, 2016, Ms. Metildi documented that she had spoken with Dr. Shamlou's office on February 5, 2016 and was informed that appellant could return to his usual and customary occupation with the exception that he could have no contact with inmates and would need to change positions as necessary.

In a March 21, 2016 letter advising her plan justification, Ms. Metildi noted that a job placement plan had been developed for appellant due to his education background and skills. She recommended job placement for information clerk and customer complaint clerk. Ms. Metildi noted that appellant had a B.S. degree in computer systems security and an A.S. degree in computer and electronic engineering, and his most recent work experience as a computer specialist with the employing establishment. She explained that both of the selected jobs were appropriate for appellant since they were sedentary and would not require lifting over 10 pounds. Ms. Metildi also indicated that the treating physician, Dr. Shamlou recommended no prolonged standing and walking, no kneeling and squatting, no lifting, pushing, pulling or carrying more than 10 to 15 pounds, no at or above the shoulder work with the right arm, and no repetitive bending, twisting or stooping.

On June 1, 2016 OWCP notified appellant that it proposed to reduce his compensation for wage loss to \$2,759.00 "each four weeks" as the medical and factual evidence established that he was no longer totally disabled, but rather partially disabled and had the capacity to earn wages as customer complaint clerk, Department of Labor's *Dictionary of Occupational Titles* (DOT)

#237.367-0-22 at the rate of \$600.00 per week. It noted that his wage-earning capacity was “less than the current pay” of his date-of-injury position. OWCP explained that the physical requirements of the customer complaint clerk did not exceed the restrictions imposed by Dr. Shamlou in his December 11, 2015 report or conversation with Ms. Metildi on February 5, 2016. Appellant was advised that the rehabilitation counselor had reported that based upon his experience, education, medical restrictions, and a labor market survey, he was employable as a customer complaint clerk. OWCP informed appellant that his vocational rehabilitation counselor had documented that the customer complaint clerk position was reasonably available in his commuting area and that the entry pay level for the position was \$400.00 per week; however, as noted above, he was capable of earning \$600.00 per week. It advised him that the physical requirements of the position were deemed to be vocationally suitable and consistent with the accepted work tolerance limitations. OWCP provided a calculation sheet indicating that appellant’s pay rate when his disability recurred on January 18, 2009 was \$1,406.32 per week; the current adjusted pay rate for his job on the date of injury was \$1,441.64 per week, effective March 15, 2016. It determined that he was currently capable of earning \$600.00 per week, the pay rate for a customer complaint clerk. OWCP determined that appellant had 42 percent wage-earning capacity, which resulted in an adjusted wage-earning capacity of \$590.60 per week. It determined that he had a loss of wage-earning capacity of \$815.67 per week. OWCP concluded that, based upon a three-fourths compensation rate, appellant’s compensation would be \$611.75 per week, increased by cost-of-living adjustments to \$611.75 or \$2,759.00 every four weeks. It provided appellant 30 days to submit additional evidence or argument in support of any objection to the proposed reduction. No response was received.

By decision dated July 11, 2016, OWCP reduced appellant’s compensation, effective July 24, 2016, based on his ability to work as a full-time customer complaint clerk, which was found to be medically and vocationally suitable.

In a letter dated August 25, 2016, appellant noted that the decision to reduce his compensation was based on the December 11, 2015 report of Dr. Shamlou. However, he explained that he had sustained a new injury, which was directly related to his employment injuries and a report was issued on February 14, 2016 that outlined his condition. Appellant argued that this omission was a direct violation and the medical evidence supported that he was totally disabled and did not have the capacity to earn wages. Subsequently, OWCP referred him for a second opinion examination on October 31, 2016 to Dr. Joseph S. Klemek, a Board-certified orthopedic surgeon to determine his ability to work.

In a November 15, 2016 report, Dr. Klemek noted appellant’s history of injury and treatment, examined appellant and provided findings. He determined that for the right knee, appellant reported right knee pain that was present all the time and weakness in the right knee with a feeling of instability. Dr. Klemek found appellant had a scar from surgery with corresponding operative report and limited range of motion. He found atrophy of the right quadriceps and no evidence of laxity.

Regarding the right shoulder, Dr. Klemek found that subjectively, appellant reported pain and grinding in the shoulder. However, objectively, there are no findings. Dr. Klemek opined that appellant had a fair prognosis and no need for active ongoing medical treatment. He recommended access to symptomatic medication, performing home exercises and explained that during flare ups,

he may benefit from cortisone injections. However, Dr. Klemek advised that appellant was not a candidate for surgical intervention. He advised that appellant continued to suffer some residuals; however, appellant's subjective complaints outweighed his objective findings. Dr. Klemek explained that there was evidence of residuals, and atrophy of the right quadriceps and some limited motion of the right knee and right shoulder. He explained that this was "more so due to guarding secondary to reported pain. I find no objective evidence of residuals for the right shoulder."

On July 21, 2016 counsel requested a telephonic hearing, which was held before an OWCP hearing representative on March 20, 2017. During the hearing, counsel argued that the job title of a customer complaint clerk was outdated. He noted that, despite living in an expansive job market area and having the intellectual capacity to perform the position, the issue was whether appellant had the physical capability to perform the position. Appellant testified that he had ongoing swelling and pain on a daily basis. He noted that both knees and arms were affected and his hips were also involved. Appellant explained that he still received medical treatment on both knees and was under the care of Dr. Shamlou. Additionally, he noted that he received periodic cortisone injections and required prescription medication on a daily basis.

By decision dated June 2, 2017, OWCP's hearing representative affirmed the July 11, 2016 decision.⁴

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.⁵

Section 8115(a) of FECA,⁶ provides in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent her wage-earning capacity. Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.⁷ If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, his/her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his/her usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his/her wage-earning capacity in the disabled condition.⁸ Wage-earning capacity is a measure of the employee's ability to earn wages

⁴ Although a reference is made to a customer service representative in the June 2, 2017 decision, this appears to be a mistake, as the rest of the decision indicates customer complaint clerk.

⁵ *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984). See *Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

⁶ 5 U.S.C. § 8115.

⁷ *Hubert F. Myatt*, 32 ECAB 1994 (1981); *Lee R. Sires*, 23 ECAB 12 (1971).

⁸ See *Pope D. Cox*, *supra* note 5. 5 U.S.C. § 8115(a).

in the open labor market under normal employment conditions.⁹ 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.¹⁰ In determining an employee's wage-earning capacity, OWCP may not select a makeshift or odd-lot position or one not reasonably available on the open labor market.¹¹

When OWCP makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by OWCP or to an OWCP wage-earning capacity specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits that employee's capabilities with regard to his/her physical limitation, 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 or other applicable service.¹² Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.¹³

ANALYSIS

The Board finds that Dr. Shamlou, the treating physician, provided an opinion that established that appellant could perform the customer complaint clerk position. Dr. Shamlou provided a December 11, 2015 report recommending that appellant could not perform his usual job, but advised that appellant was capable of performing modified duties. He recommended permanent restrictions of no more than four hours of sitting, no more than, one hour of walking, standing, reaching, reaching above the shoulder, twisting, bending and stooping, operating a motor vehicle to and from work and no more than two hours of operating motor vehicles at work. Additionally, Dr. Shamlou recommended no more than one hour of pushing, pulling, and lifting and no more than 10 pounds. Ms. Metildi also contacted Dr. Shamlou and determined that appellant could not engage in prolonged standing and walking, no kneeling and squatting, no lifting, pushing, pulling or carrying more than 10 to 15 pounds, no at or above the shoulder work with the right arm, and no repetitive bending, twisting or stooping.

Additionally, as the employing establishment could not accommodate appellant's restrictions, Ms. Metildi, the vocational rehabilitation counselor, identified two positions that were suitable and in accordance with appellant's restrictions. Ms. Metildi explained that both of the selected jobs were appropriate for appellant since they were sedentary and would not require lifting over 10 pounds. She reiterated that the treating physician, Dr. Shamlou recommended no prolonged standing and walking, no kneeling and squatting, no lifting, pushing, pulling or carrying

⁹ *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

¹⁰ *Id.*

¹¹ *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

¹² *Karen L. Lonon-Jones*, 50 ECAB 293, 297 (1999).

¹³ *Id.* See *Shadrick*, 5 ECAB 376 (1953); codified at 20 C.F.R. § 10.403(c)-(e).

more than 10 to 15 pounds, no at or above the shoulder work with the right arm, and no repetitive bending, twisting or stooping.

Ms. Metildi proceeded to identify an appropriate position that fit appellant's capabilities.¹⁴ She identified a customer complaint clerk position as being sedentary with occasional lifting of up to 10 pounds as within his physical limitations. Ms. Metildi indicated that the position fell within appellant's work restrictions and was reasonably available in appellant's commuting area. She noted that the position was available in sufficient numbers so as to make it reasonably available within appellant's commuting area and that the wage of the position was equal to \$600.00 per week. Evidence from the rehabilitation counselor also establishes that appellant has the appropriate knowledge, training and background to perform the selected position. The Board finds that the customer complaint clerk position conforms to work restrictions set forth by Dr. Shamlou. The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of customer complaint clerk.

The Board also notes that during the hearing, counsel for appellant mentioned that the position was somewhat old fashioned or outdated, however, he did not dispute that the positions were not reasonably available.

Consequently, OWCP met its burden of proof to establish that the constructed position of customer complaint clerk represented his wage-earning capacity effective July 24, 2016.

On appeal counsel argues that the decision references a customer service representative, which is not what the vocational rehabilitation counselor recommended. However, the Board notes that the decision indicates customer complaint clerk. Although a reference is made in the body of the hearing representative's June 2, 2017 decision to a customer service representative, this appears to be a mistake, as the rest of the decision and the June 2, 2016 proposed notice refer to the customer complaint clerk position.

CONCLUSION

The Board finds that OWCP properly determined that the selected position of a customer complaint clerk represented appellant's wage-earning capacity as of July 24, 2016.

¹⁴ See *supra* note 10.

ORDER

IT IS HEREBY ORDERED THAT the June 2, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 16, 2019
Washington, DC

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

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

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