



## **ISSUES**

The issues are: (1) whether OWCP properly reduced appellant's compensation, effective August 14, 2022, to reflect appellant's loss of wage-earning capacity (LWEC), based on the constructed position of order clerk; and (2) whether appellant has met his burden of proof to modify the August 4, 2022 LWEC determination.

## **FACTUAL HISTORY**

This case has previously been before the Board on a different issue.<sup>3</sup> The facts and circumstances of the case as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On April 27, 2005 appellant, then a 55-year-old transportation security screener, filed a traumatic injury claim (Form CA-1) alleging that on April 18, 2005 he twisted his back when loading bags and injured his right hip when he tripped over a floor mat while in the performance of duty. OWCP accepted his claim for lumbago, and subsequently expanded the acceptance of his claim to include permanent aggravation of degenerative disc disease, spinal stenosis of L3-4, L4-5, and L5-S1, permanent aggravation of right hip arthritis, right hip contusion, right knee contusion, lumbar radiculitis, and bursitis of the hip. Appellant stopped work in mid-2005 and OWCP paid him wage-loss compensation on the supplemental rolls, effective June 6, 2005, and on the periodic rolls, effective July 10, 2005.

On March 25, 2019 OWCP referred appellant and the case record, along with a series of questions and a statement of accepted facts (SOAF), for a second opinion examination and evaluation with Dr. Richard C. Smith, a Board-certified orthopedic surgeon. It requested that Dr. Smith provide an opinion on appellant's injury-related disability/residuals and his ability to work.

In a report dated April 8, 2019, Dr. Smith discussed appellant's factual and medical history, and noted his complaints of low back pain, which radiated down into his legs. He reported his physical examination findings, noting that appellant exhibited pain over L4-5, L5-S1, and pain with bilateral straight leg raising. Dr. Smith determined that appellant was partially disabled as a result of the April 18, 2005 employment injury and was capable of working with restrictions. In an April 8, 2019 work capacity evaluation (Form OWCP-5c), he indicated that appellant could work eight hours per day with restrictions. Appellant could sit, walk, or stand for four hours per day for each activity, and engage in pushing, pulling, or lifting up to 10 pounds for four hours per day for each activity. He could not engage in twisting, bending, or stooping.

In an April 16, 2019 report, Dr. Kenneth Botwin, a Board-certified physiatrist, reported physical examination findings and diagnosed lumbar radiculitis, back muscle spasm, spinal stenosis of the lumbar spine, and spinal enthesopathy of the lumbar spine. He noted that electromyogram/nerve conduction velocity (EMG/NCV) studies did not show lower extremity radiculopathy or peripheral neuropathy.

---

<sup>3</sup> Docket No. 11-735 (issued October 19, 2011); Docket No. 14-1425 (issued October 22, 2014).

On March 24, 2020 OWCP requested that Dr. Smith clarify appellant's work tolerance limitations, including the number of hours he could work per day. In an April 6, 2020 Form OWCP-5c, Dr. Smith advised that, although appellant was not capable of returning to his date-of-injury job, he could return to work in a full-time sedentary position for eight hours per day.

In an April 6, 2020 report, Dr. Botwin diagnosed lumbar radiculitis, back muscle spasm, spinal stenosis of the lumbar region, lumbar disc displacement, degeneration of lumbar or lumbosacral intervertebral disc, lumbar myofascial pain, and spinal enthesopathy of the lumbar spine.

In late-April 2020, OWCP referred appellant for vocational rehabilitation services. Based on appellant's test scores and a review of other vocational and medical evidence, appellant's vocational rehabilitation counselor indicated that the position of order clerk (Department of Labor's *Dictionary of Occupational Titles* (DOT) #249.362-026) with beginning average wages of \$400.00 per week (as of December 2020) was suitable to appellant's restrictions. The DOT describes the position of order clerk as sedentary with lifting, carrying, pushing, or pulling up to 10 pounds occasionally (up to 1/3 of the time). The position involved mostly sitting, with some standing or walking for brief periods of time.

In an attending physician's report (Form CA-20) dated November 10, 2020, Dr. Botwin listed the date of injury as April 18, 2005, and diagnosed lumbago, radiculopathy, degenerative disc disease of the lumbar spine, and lumbar stenosis. He checked a box marked "Yes" to indicate that the diagnosed conditions were caused or aggravated by the April 18, 2005 employment injury, and indicated that appellant was permanently disabled. In a narrative report of even date, Dr. Botwin diagnosed several low back conditions and opined that appellant was unable to work on a permanent basis.

On October 27, 2021 OWCP notified appellant that it proposed to reduce his wage-loss compensation benefits as he was partially disabled and had the capacity to earn wages as an order clerk at a rate of \$400.00 per week. It afforded him 30 days to provide additional evidence or argument challenging the proposed action.

OWCP referred the case file back to appellant's vocational rehabilitation counselor for a current labor market survey. It was determined that a labor market survey from July 2022 demonstrated that the position of order clerk now had average wages of \$509.20 per week and was reasonably available within appellant's commuting area.

Appellant submitted a December 16, 2021 report, wherein Dr. Botwin diagnosed generalized anxiety disorder, and opined that appellant was unable to work on a permanent basis. He also submitted diagnostic test results from 2021 and 2022.

By decision dated August 4, 2022, OWCP reduced appellant's wage-loss compensation, effective August 14, 2022, to reflect his ability to earn wages in the constructed position of order clerk. It found that he was no longer totally disabled, but could earn wages at a rate of \$509.20

per week. OWCP applied the principles set forth in the decision of *Albert C. Shadrick*<sup>4</sup> to calculate appellant's LWEC.

On August 12, 2022 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

On November 21, 2022 OWCP received an undated Form CA-20, wherein Dr. Botwin referenced an unspecified "injury at work" and indicated that he had seen appellant on November 16, 2022. Dr. Botwin diagnosed radiculopathy, stenosis, and listhesis, and opined that appellant was permanently disabled from work.

A hearing was held on December 8, 2022, during which counsel argued that appellant was physically incapable of working as an order clerk.

By decision dated February 21, 2023, OWCP's hearing representative affirmed OWCP's August 4, 2022 decision. She found that OWCP properly reduced appellant's compensation, effective August 14, 2022, based on the constructed position of order clerk. The hearing representative also found that appellant had not met his burden of proof to modify the August 4, 2022 LWEC determination.

### **LEGAL PRECEDENT -- ISSUE 1**

Once OWCP accepts a claim, it has the burden of proof 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

---

<sup>4</sup> 5 ECAB 376 (1953).

<sup>5</sup> *T.D.*, Docket No. 20-1088 (issued June 14, 2021); *James B. Christenson*, 47 ECAB 775, 778 (1996); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

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

<sup>7</sup> *T.D., id.*; *Hayden C. Ross*, 55 ECAB 455, 460 (2004).

<sup>8</sup> *S.J.*, Docket No. 19-0186 (issued August 2, 2019); *Hayden C. Ross, id.*

suitable employment and other factors and circumstances that may affect wage-earning capacity in his disabled condition.<sup>9</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>10</sup> The medical evidence it 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 medical determination of partial disability and of specific work restrictions, it may refer the employee's case 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 the employee's capabilities with regard to his or her 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> Finally, application of the principles set forth in the *Shadrick* decision will result in the percentage of the employee's LWEC.<sup>15</sup>

### ANALYSIS -- ISSUE 1

The Board finds that OWCP properly reduced appellant's wage-loss compensation, effective August 14, 2022, to reflect his LWEC based on the constructed position of order clerk.

Appellant's vocational rehabilitation counselor properly determined that appellant was capable of earning wages in the constructed position of order clerk (DOT #249.362-026). The vocational rehabilitation counselor indicated that a state labor survey from July 2022 demonstrated that the order clerk position was reasonably available within appellant's commuting area with an

---

<sup>9</sup> 5 U.S.C. § 8115(a); *L.M.*, Docket No. 20-1038 (issued March 10, 2021); *MaryJo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

<sup>10</sup> *L.M., id.*; *M.A.*, 59 ECAB 624, 631 (2008).

<sup>11</sup> *Id.*; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.4d (June 2013).

<sup>12</sup> *N.J.*, 59 ECAB 171, 176 (2007); Federal (FECA) Procedure Manual, *id.* at Chapter 2.816.4c (June 2013).

<sup>13</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Vocational Rehabilitation Services*, Chapter 2.813.7b (February 2011).

<sup>14</sup> The job selected for determining wage-earning capacity must be a position that is reasonably available in the general labor market in the commuting area in which the employee resides. *B.E.*, Docket No. 22-0423 (issued December 1, 2022); *David L. Scott*, 55 ECAB 330, 335 n.9 (2004); Federal (FECA) Procedure Manual, *supra* note 11 at Chapter 2.816.6 (June 2013).

<sup>15</sup> 20 C.F.R. § 10.403(d); *see Albert C. Shadrick*, *supra* note 4.

average beginning wage of \$509.20 per week. OWCP properly relied on the vocational rehabilitation counselor's opinion that appellant was vocationally capable of working as an order clerk and that the position was reasonably available.<sup>16</sup>

Moreover, the evidence of record showed that the physical requirements of the position of order clerk were within the best measure of appellant's work capability at the time. The physical requirements were within the work restrictions of Dr. Smith, OWCP'S referral physician. The position of order clerk had a sedentary strength level with a restriction of exerting up to 10 pounds of force occasionally (up to 1/3 of the time).<sup>17</sup> Although appellant submitted a November 10, 2020 Form CA-20 wherein Dr. Botwin, an attending physician, found that appellant was permanently disabled, this report is of limited probative value because Dr. Botwin did not provide a rationalized medical opinion, supported by specific objective findings, relating this disability to the April 18, 2005 employment injury or a preexisting condition.<sup>18</sup> Appellant also submitted additional reports from Dr. Botwin dated 2020 and 2021, some of which found total disability; however, none of these reports contained a rationalized medical opinion on causal relationship.<sup>19</sup> OWCP then properly applied the principles set forth in the *Shadrick* decision to calculate appellant's LWEC.<sup>20</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.<sup>21</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>22</sup>

---

<sup>16</sup> See *M.P.*, Docket No. 18-0094 (issued June 26, 2018) (finding that the vocational rehabilitation counselor is an expert in the field of vocational rehabilitation and that OWCP may rely on his or her opinion in determining whether the job is vocationally suitable and reasonably available).

<sup>17</sup> In an April 8, 2019 Form OWCP-5c, Dr. Smith had advised that appellant could work eight hours per day with restrictions, including pushing, pulling, or lifting up to 10 pounds for four hours per day for each activity. In an April 6, 2020 Form OWCP-5c, he indicated that appellant could perform sedentary work for eight hours per day and did not provide any additional restrictions on pushing, pulling, or lifting.

<sup>18</sup> See *T.T.*, Docket No. 18-1054 (issued April 8, 2020); *Y.D.*, Docket No. 16-1896 (issued February 10, 2017) (a report is of limited probative value regarding causal relationship if it does not contain medical rationale explaining how a given medical condition/level of disability has an employment-related cause).

<sup>19</sup> *Id.*

<sup>20</sup> See *supra* note 4.

<sup>21</sup> *C.R.*, Docket No. 14-111 (issued April 4, 2014); *Sharon C. Clement*, 55 ECAB 552 (2004).

<sup>22</sup> See *T.M.*, Docket No. 08-975 (issued February 6, 2009).

## ANALYSIS -- ISSUE 2

The Board finds that appellant has not met his burden of proof to modify the August 4, 2022 LWEC determination.

An employee may establish that modification of an LWEC determination is warranted if he or she establishes that the determination was, in fact, erroneous.<sup>23</sup> Appellant has not demonstrated that OWCP's original August 4, 2022 LWEC determination was, in fact, erroneous.

Appellant has not established that modification of the August 4, 2022 LWEC determination was warranted by establishing that there was a material change in the nature and extent of his injury-related condition which rendered him unable to work in the constructed position of order clerk.<sup>24</sup>

On November 21, 2022 OWCP received an undated Form CA-20, wherein Dr. Botwin referenced an unspecified "injury at work" and indicated that he had seen appellant on November 16, 2022. Dr. Botwin diagnosed radiculopathy, stenosis, and listhesis, and indicated that appellant was permanently disabled. However, this report is of limited probative value in that Dr. Botwin did not provide any notable discussion of the accepted work-related conditions, or explain how they worsened to the extent that appellant could not work in the constructed position of order clerk. As noted above, a report is of limited probative value regarding causal relationship if it lacks rationale.<sup>25</sup> Thus, the Board finds that the medical evidence of record does not show that there was a material change in the nature and extent of the employee's employment-related condition such that he could no longer work as an order clerk.

Appellant also did not establish that modification of the August 4, 2022 LWEC determination was warranted by establishing that he was vocationally rehabilitated after OWCP adjusted his compensation per its August 4, 2022 LWEC determination.<sup>26</sup> The case record does not contain evidence of such rehabilitation.

For these reasons, appellant has not met his burden of proof to modify the August 4, 2022 LWEC determination.

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 compensation, effective August 14, 2022, to reflect appellant's LWEC based on the constructed position of order clerk.

---

<sup>23</sup> See *supra* note 20.

<sup>24</sup> See *supra* note 20.

<sup>25</sup> See *supra* note 18.

<sup>26</sup> See *supra* note 20.

The Board further finds that appellant has not met his burden of proof to modify the August 4, 2022 LWEC determination.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 21, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 9, 2024  
Washington, DC

Patricia H. Fitzgerald, Deputy 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