

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

_____)	
J.L., Appellant)	
)	
and)	Docket No. 23-1024
)	Issued: April 2, 2024
U.S. POSTAL SERVICE, NORTH GARLAND)	
POST OFFICE, Garland, TX, Employer)	
_____)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 27, 2023 appellant filed a timely appeal from a May 18, 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 May 18, 2023 decision, appellant submitted additional evidence to OWCP. 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." 20C.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 May 18, 2023, based on her capacity to earn wages in the constructed position of unit clerk.

FACTUAL HISTORY

On April 1, 2019 appellant, then a 35-year-old mail carrier, filed an occupational disease claim (Form CA-2) alleging that she developed neck and right arm pain due to factors of her federal employment. She attributed her conditions to repetitive work factors, which included walking five to six hours per day, carrying a mailbag across her neck and middle back that weighed up to 60 pounds. Appellant indicated that she first became aware of her condition and its relation to her federal employment on February 21, 2019. She stopped work on February 21, 2019. On April 22, 2019 OWCP accepted appellant's claim for sprain of the ligaments of the cervical spine and temporary aggravation of radiculopathy of the cervical region. It paid appellant wage-loss compensation on the supplemental rolls, effective March 4, 2019, on the periodic rolls, effective July 21, 2019, and pursuant to a loss of wage-earning capacity determination (LWEC), effective May 21, 2023.

An electromyogram and nerve conduction velocity (EMG/NCV) study dated April 18, 2019 revealed muscle fiber membrane electrical instability of the left cervical paraspinal muscles and electrodiagnostic evidence of mild-to-moderate right median sensorimotor neuropathy in its wrist segment.

A magnetic resonance imaging (MRI) scan of the cervical spine dated May 17, 2019 demonstrated no compression fracture and straightening of the normal lordosis of the cervical spine possibly related to muscle spasm, retrolisthesis of C6 and C7, multilevel spondylosis with disc space narrowing, disc dehydration, endplate spurring, annular disc bulge and disc extrusion at C6-7 causing impingement at C6-7 and mild-to-moderate central canal narrowing, mild left neural foraminal narrowing at C5-6, severe left neural foraminal narrowing at C6-7, and mild right C6-7 neural foraminal narrowing.³

On March 29, 2021 OWCP referred appellant, the medical record, a statement of accepted facts (SOAF), and a series of questions, to Dr. Vinod Panchbhavi, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the nature and extent of her employment-related conditions and disability.

In an April 23, 2021 medical report, Dr. Panchbhavi noted a history of appellant's employment injury and medical record. He reported essentially normal findings on examination noting normal gait, no sensory deficits of the upper or lower extremities bilaterally, intact strength

³ A July 8, 2019 MRI scan of the right elbow revealed grade one strain of the common extensor tendon compatible with lateral epicondylitis, elbow joint effusion, and mild tendinopathy versus grade one strain of the triceps insertion. An MRI scan of the right shoulder of even date revealed thickness surface and intrasubstance partial tearing of the supraspinatus and infraspinatus tendons, glenohumeral joint effusion, and acromioclavicular (AC) joint capsule hypertrophy and lateral acromion down-sloping.

and motor testing of the bilateral upper and lower extremities, mild tenderness on palpation of the cervical spine at C6-7, positive and equal reflexes, normal heel and toe walk, normal foraminal compression test, and negative straight leg test bilaterally. Dr. Panchbhavi diagnosed sprain of ligaments of the cervical spine and radiculopathy of the cervical spine. He opined that the diagnosed conditions were causally related to appellant's work factors. Dr. Panchbhavi opined that, based on his review of the records and evaluation, appellant continued to have minimal residuals of the work-related injury with residual tenderness to palpation of the cervical spine and restricted range of motion of the cervical spine. He indicated that appellant could not return to her full-duty position as a letter carrier. Dr. Panchbhavi advised that a functional capacity evaluation (FCE) dated May 3, 2021 revealed physical limitations in lifting, pushing, and pulling heavy objects, as well as no overhead reaching, bending, kneeling or crouching. He noted that no further treatment was necessary, and the prognosis was poor for further improvement. Dr. Panchbhavi opined that appellant reached maximum medical improvement (MMI) on the day of examination. In a work capacity evaluation (Form OWCP-5c) dated May 3, 2021, he reiterated his opinion regarding appellant's work capacity advising that she could work eight hours a day with reaching above the shoulder limited to two hours; no bending/stooping, squatting, kneeling, and climbing; and pushing, pulling, and lifting up to 20 pounds no more than two hours a day. Dr. Panchbhavi noted that these restrictions were permanent.

An FCE dated May 3, 2021 revealed that appellant did not meet the essential physical job demands of her occupation as a letter carrier. Appellant demonstrated the overall ability to perform at a light physical demand level.

On June 15, 2021 OWCP referred appellant for vocational rehabilitation to identify an employment position within the restrictions set forth by Dr. Panchbhavi on April 23, 2021.⁴

In a November 3, 2022 job classifications (Form OWCP-66) appellant's vocational rehabilitation counselor identified the unit clerk position, Department of Labor, *Dictionary of Occupational Titles* (DOT) No. 245.362-014, as within appellant's medical and vocational abilities.

The job description indicated that a unit clerk prepares and compiles records in the nursing unit of a hospital or medical facility, including information on new patients, and copies information such as a patient's temperature, pulse rate, blood pressure, dietary requirements, and medication usage from nurse and physician reports. The position requires keeping files of medical records on patients, preparing patient discharge notices, requisitioning supplies, answering telephone and intercom calls, relaying messages to patients and medical staff, directing visitors to patients' rooms, and distributing mail, newspapers, and flowers to patients. It also involves keeping records of absences and hours worked by unit personnel, keying patient information into a computer, and transporting patients in wheelchairs or other conveyances to locations within the facility. The

⁴ In a letter dated December 3, 2021, OWCP notified appellant that it proposed to reduce her compensation based on her non-cooperation in vocational rehabilitation. By decision dated January 7, 2022, OWCP reduced appellant's compensation pursuant to section 8113(b) of FECA (5 U.S.C. § 8113(b)). It noted that appellant impeded the rehabilitation effort without good cause. By decision dated January 25, 2022, OWCP vacated the decision dated January 7, 2022 and reinstated her compensation effective the date of suspension. It noted that appellant agreed to participate and cooperate in the vocational rehabilitation efforts.

physical requirements of the position include light-level work with occasional lifting of no more than 20 pounds; no climbing, balancing, stooping, kneeling, crouching, or crawling; and frequent reaching, handling, and fingering. The vocational rehabilitation counselor indicated that appellant met the specific vocational preparation as she had prior relevant work experience. She also indicated that the position was reasonably available in appellant's commuting area and had a weekly wage of \$435.60. The vocational rehabilitation counselor noted that the source of the wage data was the Bureau of Labor Statistics (BLS) labor market survey dated 2021.

OWCP, in a letter dated November 15, 2022, approved the vocational rehabilitation counselor's proposed direct placement plan.

In an addendum Form OWCP-66 dated February 15, 2023, appellant's vocational rehabilitation counselor identified the unit clerk position, DOT No. 245.362-014, as within appellant's medical and vocational abilities. She provided the same job description for a unit clerk noted above. The vocational rehabilitation counselor documented that the unit clerk position remained vocationally suitable for appellant and was within her restrictions.

OWCP, in a March 31, 2023 notice, proposed to reduce appellant's wage-loss compensation based on her capacity to earn wages in the constructed position of unit clerk at the weekly pay rate of \$435.60. It noted that the physical requirements of the unit clerk position did not exceed the restrictions provided by Dr. Panchbhavi and that the selected position was medically suitable. OWCP further noted that the position was vocationally suitable based on the rehabilitation counselor's report, and found 44 percent wage-earning capacity or 56 percent LWEC, with a new gross compensation rate, each four weeks of \$1,533.00. It attached the job classification for the unit clerk position completed by the vocational rehabilitation counselor on February 15, 2023, and Dr. Panchbhavi's April 23, 2021 work restrictions. OWCP afforded appellant 30 days to submit evidence and argument challenging the proposed action. No evidence was received within the allotted time.

OWCP, by decision dated May 18, 2023, reduced appellant's wage-loss compensation, effective May 18, 2023, based on her ability to earn wages of \$435.60 per week as a unit clerk. Commencing May 18, 2023, it applied the formula in *Albert C. Shadrick*⁵ and thereafter paid appellant wage-loss compensation benefits at the new net compensation rate, each four weeks of \$1,533.00.

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.⁶ OWCP's

⁵ 5 ECAB 376 (1953), codified at 20 C.F.R. § 10.403.

⁶ *C.F.*, Docket No. 19-0595 (issued September 9, 2019); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.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. 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.⁸ Wage-earning capacity is a measure of the employee's ability to earn wages 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 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.¹¹

OWCP must initially determine a claimant'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 condition.¹² Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.¹³

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 DOT or otherwise available in the open labor market that, fits that 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 the principles set forth in

⁷ *S.N.*, Docket No. 17-1589 (issued January 3, 2018); *Del K. Rykert*, 40 ECAB 284 (1988).

⁸ 5 U.S.C. § 8115(a); *K.S.*, Docket No. 19-0678 (issued October 25, 2019); *E.W.*, Docket No. 14-0584 (issued July 29, 2014); 5 U.S.C. § 8115(a).

⁹ *See M.P.*, Docket No. 18-0094 (issued June 26, 2018); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.3 (June 2013).

¹⁰ *C.M.*, Docket No. 18-1326 (issued January 4, 2019).

¹¹ *See B.G.*, Docket No. 17-0477 (issued September 20, 2017).

¹² *Id.*

¹³ *Id.*

¹⁴ *Supra* note 9 at Chapter 2.816.6a (June 2013).

*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 May 18, 2023, based on her capacity to earn wages in the constructed position of a unit clerk.

Dr. Panchbhavi, an OWCP referral physician, opined that appellant could perform full-time modified work with the restrictions of reaching above the shoulder limited to two hours, no bending/stooping, squatting, kneeling and climbing; and pushing, pulling, and lifting up to 20 pounds no more than two hours a day. He explained that she was unable to perform her usual job as a letter carrier because she continued to suffer minimal residuals of the work-related injury with residual tenderness to palpation of the cervical spine and restricted range of motion of the cervical spine. OWCP, therefore, properly referred appellant for vocational rehabilitation in June 2021 as the medical evidence established that she was no longer totally disabled from work due to residuals of her February 21, 2019 employment injury.¹⁸

The Board finds that OWCP properly determined that appellant had the physical capacity to perform the duties of a unit clerk. The position is classified as light employment requiring occasional lifting up to 20 pounds; no climbing, balancing, stooping, kneeling, crouching, or crawling; and frequent reaching, handling, and fingering. The Board notes that the rehabilitation counselor also verified that the unit clerk position did conform to Dr. Panchbhavi restrictions, thus, falling within the requirements of the position. The vocational rehabilitation counsel noted that the unit clerk position allowed for a variety of duties, none of which exceeded Dr. Panchbhavi's medical restrictions.¹⁹ There is no contradictory medical evidence of record. For these reasons, the Board finds that the weight of the medical evidence, as represented by Dr. Panchbhavi, establishes that appellant had the physical capacity to perform the duties of the selected position.²⁰

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.²¹ In the November 3, 2022 labor market report, the vocational rehabilitation counselor attached a Form OWCP-66 for the unit clerk position. She indicated that the source of wage data was a BLS labor market survey dated 2021. For the unit clerk position,

¹⁵ *Supra* note 5.

¹⁶ 20 C.F.R. § 10.403.

¹⁷ *See D.S.*, Docket No. 17-0496 (issued May 25, 2017).

¹⁸ *S.C.*, Docket No. 19-1381 (issued November 24, 2020); *C.H.*, Docket No. 19-0136 (issued May 23, 2019).

¹⁹ *M.H.*, Docket No. 19-1410 (issued November 5, 2020); *J.H.*, Docket No. 18-1319 (issued June 26, 2019).

²⁰ *Id.*

²¹ *M.H.*, *supra* note 19; *C.P.*, Docket No. 19-0595 (issued September 9, 2019).

the vocational rehabilitation counselor determined that the position was medically and vocationally suitable, and existed in sufficient numbers within the reasonable commuting area, with an average weekly wage of \$435.60. In an addendum report dated February 15, 2023, she verified that the weekly wage of the unit clerk position was \$435.60. As the vocational rehabilitation counselor is an expert in the field of vocational rehabilitation, OWCP may rely on her opinion in determining whether a job is vocationally suitable and reasonably available.²² 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 she had the capacity to perform the unit clerk position.²³ The record reflects that her relevant work experience established that she had the requisite physical ability, skill, and experience to perform the unit clerk position, which was reasonably available within the general labor market of her commuting area at a weekly wage of \$435.60.²⁴ OWCP properly applied the *Shadrick* formula, as codified in section 10.403 of its regulations,²⁵ in determining appellant's LWEC. Accordingly, the Board finds that OWCP properly found that the unit clerk position reflected appellant's wage-earning capacity.²⁶

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 May 18, 2023, based on her capacity to earn wages in the constructed position of unit clerk.

²² See *M.H., id.*; *J.B.*, Docket No. 17-0817 (issued April 26, 2018).

²³ *T.B.*, Docket No. 17-1777 (issued January 16, 2019); *Clayton Varner*, 37 ECAB 248 (1985).

²⁴ *C.M.*, Docket No. 18-0742 (issued March 12, 2020).

²⁵ *Supra* notes 5 and 16.

²⁶ See *M.H.*, *supra* note 19; *J.F.*, Docket No. 19-0864 (issued October 25, 2019).

ORDER

IT IS HEREBY ORDERED THAT the May 18, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 2, 2024
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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