

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

P.B., Appellant	)	
	)	
and	)	Docket No. 24-0566
	)	Issued: August 13, 2024
U.S. POSTAL SERVICE, VILLA PLATTE	)	
POST OFFICE, Ville Platte, LA, Employer	)	
	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On May 6, 2024 appellant filed a timely appeal from an April 15, 2024 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>

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

<sup>2</sup> The Board notes that, following the April 15, 2024 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. 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 properly reduced appellant's wage-loss compensation, effective April 11, 2024, based on his capacity to earn wages in the constructed position of athletic director.

## 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 decision are incorporated herein by reference. The relevant facts are as follows.

On November 4, 1998 appellant, then a 33-year-old mail carrier, filed an occupational disease claim (Form CA-2) alleging that he sustained left plantar fasciitis, possible severe tendinitis, and a possible neuroma of the left foot due to factors of his federal employment including prolonged walking his mail route when delivering mail. He noted that he first became aware of his conditions on October 16, 1998, and realized their relation to his federal employment on October 19, 1998. OWCP accepted the claim for left plantar fibromatosis.

On January 20, 1999 appellant underwent OWCP-authorized exploration and excision of a Morton's neuroma of the left second and third interspace. On October 28, 1999 he underwent cryotherapy of a neuroma of the left foot. On January 3, 2000 appellant underwent OWCP-authorized exploration and excision of neuroma of the left fourth interspace, and exploration and excision of scar tissue *versus* stump neuroma of the left second and third interspace. On November 29, 2000 he underwent exploration and excision of painful stump neuromas with cryotherapy, using the plantar approach and exposure of digital nerves.

OWCP paid appellant wage-loss compensation on the periodic rolls, effective June 16, 2002. In January 2003, appellant was reemployed as a modified carrier with no loss of wage-earning capacity as his actual earnings exceeded those of his date-of-injury position. He again stopped work in August 2004 and did not return.

On October 27, 2004 appellant underwent OWCP-authorized exploration and excision of painful neuromas of the left second, third, and fourth interspace with plantar approach. On October 6, 2006 he underwent resection of the left second, third, and fourth metatarsal heads. On August 25, 2010 appellant underwent OWCP-authorized hammertoe repair of the left fourth and fifth toes with extensor tendon lengthening and pinning of the left fourth toe. OWCP continued to pay him wage-loss compensation on the periodic rolls.<sup>4</sup>

On July 14, 2017 OWCP expanded acceptance of appellant's conditions to include plantar fibromatosis of the left foot, lesion of the left plantar nerve (Morton's neuroma), other peripheral

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<sup>3</sup> Docket No. 22-0199 (issued September 6, 2022).

<sup>4</sup> By decision dated May 12, 2014, OWCP granted appellant a schedule award for 16 percent permanent impairment of the left lower extremity. The period of the award ran for 46.08 weeks, from May 4, 2014 through March 22, 2015.

enthesopathy of the left foot, left Achilles tendinitis, enthesopathy of the left ankle and tarsus, acquired hammertoes, and foot surgeries.

In a May 5, 2020 report, Dr. Lon M. Baronne, a podiatrist, opined that appellant had reached maximum medical improvement (MMI) regarding his left foot in 2011. He last examined appellant on August 31, 2017. Dr. Baronne noted that appellant had chronic left foot pain and difficulty with ambulation.

A December 10, 2020 investigative memorandum by the employing establishment's Office of Inspector General (OIG) indicated that appellant's social media profiles reflected that he was a project manager/consultant for a private recreation and fitness corporation from January 2015 onward, and had volunteered as a baseball coach for a private school during the 2017-2018 and 2018-2019 academic years.

On May 15, 2023 OWCP referred appellant, a statement of accepted facts (SOAF), the medical record, and a series of questions to Dr. Gordon Gregory Gidman, a Board-certified orthopedic surgeon, for a second opinion examination regarding the nature and extent of the accepted conditions and his work capacity.

In a June 6, 2023 report, Dr. Gidman recounted a history of injury and treatment and reviewed the medical record and SOAF. On examination, he observed multiple surgical scars on the left foot, avoidance of weight bearing on the distal left forefoot and toe area, subjective numbness of the left fourth and fifth toes, and some tenderness to palpation of the left ankle. Dr. Gidman commented that appellant's subjective complaints correlated well with objective findings on examination. He obtained x-rays of the left foot, which revealed resection of the second, third, and fourth metatarsal heads. Dr. Gidman opined that while the accepted conditions were no longer active, appellant had residual symptoms of the left foot and toes which did not require additional treatment. He found appellant unable to resume his date-of-injury job as it required "a tremendous amount of standing and walking, which he would not be able to tolerate." Appellant's multiple left foot surgeries resulted in "metatarsal retractions, scarring of the nerves of the left foot area, and persistent symptoms to the left foot." Dr. Gidman opined that appellant could perform mostly seated work with "intermittent short episodes of standing and walking activities, avoiding prolonged standing and walking." Appellant should also avoid kneeling, crawling, squatting and climbing, but could lift at the light physical remand level. Dr. Gidman noted that these restrictions were based directly on the work injury and seven subsequent left foot surgeries.

In a work capacity evaluation (Form OWCP-5c) dated July 18, 2023, Dr. Gidman limited walking, standing, pushing, pulling, and lifting each up to one hour per day, restricted pushing, pulling, and lifting to 20 pounds, and noted that appellant could operate only automatic transmission vehicles and could not perform squatting, kneeling or climbing.

As the medical evidence established that appellant was no longer totally disabled, OWCP referred appellant for vocational rehabilitation services on July 24, 2023.

In an initial report dated August 21, 2023, the vocational rehabilitation counselor noted that appellant had obtained bachelor's and master's degrees in sports management and a doctorate in education. He enjoyed coaching children's sports as a hobby and desired employment in a teaching or coaching position.<sup>5</sup>

In a vocational rehabilitation plan justification report dated October 18, 2023, the vocational rehabilitation counselor identified the position of Athletic Director, Department of Labor's *Dictionary of Occupational Titles* (DOT) No. 090.117-022, as vocationally and medically appropriate.

Thereafter, OWCP received an August 26, 2023 state labor market survey, which demonstrated that entry-level positions as an athletic director, DOT No. 090.117-022, were available in appellant's commuting area with weekly wages of \$1,179.00. The position was classified as sedentary, with occasional lifting up to 20 pounds, frequent talking and hearing, occasional fingering, and no climbing, balancing, stooping, kneeling, crawling, reaching, or handling. The vocational rehabilitation counselor noted that the physical requirements of the position were within Dr. Gidman's June 6, 2023 work limitations. She also noted that the athletic director position required teaching courses pertaining to recreation, leisure, and fitness, which was commensurate with appellant's education and athletic coaching experience.

In an October 23, 2023 letter, OWCP advised appellant that it had approved 90 days of job placement assistance for the selected position of athletic director. It informed him that it would likely reduce his compensation based on his ability to earn wages of \$1,179.00 per week at the end of the 90-day period and that it was thus important for him to cooperate with vocational rehabilitation. OWCP further notified appellant of the provisions of 5 U.S.C. § 8115 and that it would terminate his placement assistance and reduce his compensation prior to 90 days if he failed to cooperate with vocational rehabilitation services.

On October 25, 2023 OWCP placed appellant's vocational rehabilitation program in placement new employer status.

In vocational rehabilitation progress reports dated October 23, 2023 through January 24, 2024, the vocational rehabilitation counselor noted that appellant had cooperated fully with job placement efforts but had not obtained employment. OWCP closed the vocational rehabilitation effort on January 24, 2024.

On January 25, 2024 OWCP received appellant's résumé, noting his employment as director of baseball operations with a baseball and softball sports company from January 2004 through 2009, and as a consultant regarding sports contracts and implementation of recreation and fitness programs for a private company from January 2014 through 2021. Appellant also served

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<sup>5</sup> In an August 21, 2023 rehabilitation action report (Form OWCP-44), OWCP noted that appellant had an advanced level of education and had explored potential careers appropriate for his education, work history, and physical demand level. The vocational counselor therefore requested waiver of a vocational evaluation. On August 22, 2023 OWCP waived vocational testing and requested that the vocational rehabilitation counselor proceed with plan development for a direct job placement.

as an assistant men's basketball coach at a high school from August 2012 through 2014, and assistant boys baseball coach at a private school from January 2017 through 2019.

On March 4, 2024 OWCP notified appellant that it proposed to reduce his wage-loss compensation pursuant to 5 U.S.C. §§ 8106 and 8115. It advised him that he was only partially disabled from work and that the position of athletic director, DOT No. 090.117-022, was medically and vocationally suitable with regard to his medical limitations, work experience, and education. OWCP explained that the physical requirements of the athletic director position did not exceed the restrictions imposed by Dr. Gidman's June 6, 2023 report. It found that appellant was capable of earning wages at the rate of \$1,179.00 per week as an athletic director and that the position was reasonably available within his commuting area. OWCP provided an attachment detailing the application of the formula set forth in *Albert C. Shadrick*.<sup>6</sup> It afforded appellant 30 days to submit evidence and argument challenging the proposed action.

In response, appellant submitted a March 4, 2024 statement. He contended that Dr. Gidman's reports did not alter prior medical evidence that he had attained maximum medical improvement and therefore remained permanently disabled.

By decision dated April 15, 2024, OWCP reduced appellant's compensation effective April 11, 2024 as he had the capacity to earn \$1,179.00 per week as an athletic director, DOT No. 090.117-022. It found that the July 18, 2023 report from Dr. Gidman constituted the weight of the evidence and established that appellant had the capacity to perform the selected position. OWCP applied the formula set forth in *Shadrick*<sup>7</sup> as codified in section 10.403 of OWCP's regulations, to determine appellant's loss of wage-earning capacity (LWEC). It calculated that appellant's compensation rate should be adjusted to \$686.00 each four weeks.

### **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>8</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>9</sup> An employee's actual earnings generally best reflect his or her wage-earning capacity.<sup>10</sup> Absent evidence that actual earnings do not fairly and reasonably represent the employee's wage-earning capacity, such earnings must be

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<sup>6</sup> 5 ECAB 376 (1953), codified at 20 C.F.R. § 10.403.

<sup>7</sup> *Id.*

<sup>8</sup> *See L.M.*, Docket No. 20-1038 (issued March 10, 2021); *E.D.*, Docket No. 17-1064 (issued March 22, 2018).

<sup>9</sup> 5 U.S.C. § 8115(a); 20 C.F.R. §§ 10.402, 10.403; *see Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

<sup>10</sup> *See T.D.*, Docket No. 20-1088 (issued June 14, 2021); *Hayden C. Ross*, 55 ECAB 455, 460 (2004).

accepted as representative of the individual's wage-earning capacity.<sup>11</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>12</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>13</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>14</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>15</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 physical limitations, education, age, and prior experience.<sup>16</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>17</sup> Lastly, OWCP applies the principles set forth in *Shadrick*<sup>18</sup> as codified in section 10.403 of OWCP's regulations,<sup>19</sup> to determine the percentage of the employee's LWEC.

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

<sup>12</sup> 5 U.S.C. § 8115(a); *C.M.*, Docket No. 24-0336 (issued June 11, 2024); *S.F.*, Docket No. 20-0869 (issued October 14, 2021); *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

<sup>13</sup> *See M.H.*, Docket No. 21-1055 (issued March 30, 2022); *M.A.*, 59 ECAB 624, 631 (2008).

<sup>14</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>15</sup> *Id.* at Chapter 2.816.4c; *see also N.J.*, 59 ECAB 171 (2007).

<sup>16</sup> *Id.* at Chapter 2.813.7b (February 2011).

<sup>17</sup> *Id.* at Chapter 2.816.6a (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>18</sup> *Supra* note 6.

<sup>19</sup> 20 C.F.R. § 10.403.

## ANALYSIS

The Board finds that OWCP properly reduced appellant's wage-loss compensation, effective April 11, 2024, based on his capacity to earn wages in the constructed position of athletic director.

Appellant's vocational rehabilitation counselor properly determined that appellant was capable of earning wages in the constructed position of athletic director, DOT No. 090.117-022, as it was commensurate with his degrees in sports management and education, as well as his employment and athletic coaching experience. The vocational rehabilitation counselor indicated that a state labor market survey from August 26, 2023 demonstrated that the athletic director position was reasonably available within appellant's commuting area with an average beginning wage of \$1,179.00 per week. OWCP properly relied on the vocational rehabilitation counselor's opinion that appellant was vocationally capable of working as an athletic director and that the position was reasonably available.<sup>20</sup>

Moreover, the evidence of record showed that the physical requirements of the position of athletic director were within the best measure of appellant's work capability at the time. The physical requirements were within the work restrictions of Dr. Gidman, OWCP's referral physician, who found appellant able to perform sedentary work with lifting limited to 20 pounds. The position of athletic director had a sedentary physical demand level with a restriction of exerting up to 10 pounds of force occasionally. Although appellant contended in his March 4, 2024 statement that Dr. Gidman's reports supported permanent disability from work, the selected athletic director position is within the physical limitations set forth in Dr. Gidman's June 6, 2023 narrative report and his July 18, 2023 Form OWCP-5c. OWCP then properly applied the principles set forth in the *Shadrick* decision to calculate appellant's LWEC.<sup>21</sup> Accordingly, the Board finds that OWCP properly found that the athletic director position reflected appellant's wage-earning capacity.<sup>22</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, effective April 11, 2024, based on his capacity to earn wages in the constructed position of athletic director.

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<sup>20</sup> *J.S.*, Docket No. 23-0518 (issued April 9, 2024); *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>21</sup> *Supra* note 6.

<sup>22</sup> *J.L.*, Docket No. 23-1024 (issued April 2, 2024); *M.H.*, Docket No. 19-1410 (issued November 5, 2020); *J.F.*, Docket No. 19-0864 (issued October 25, 2019).

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 15, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 13, 2024  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

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