

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

P.S., Appellant	)	
	)	
and	)	Docket No. 24-0912
	)	Issued: December 2, 2024
U.S. POSTAL SERVICE, CLIFTON EAST END	)	
POST OFFICE, Baltimore, MD, Employer	)	
	)	

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On September 9, 2024 appellant filed a timely appeal from a September 3, 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 September 3, 2024 decision, OWCP received additional evidence. 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 September 3, 2024 based on its finding that she had the capacity to earn wages in the constructed position of a customer service representative.

## FACTUAL HISTORY

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

On November 5, 2015 appellant, then a 54-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that she injured her neck, shoulders, and the left side of her arm causally related to factors of her federal employment. OWCP accepted the claim for bicipital tendinitis of the left shoulder and an aggravation of cervical disc degeneration at the mid-cervical region. Appellant worked limited-duty employment beginning June 23, 2016.

On February 27, 2017 Dr. Umasuthan Srikumaran, a Board-certified orthopedic surgeon, performed a left shoulder subacromial decompression and debridement of the glenohumeral joint. OWCP paid appellant wage-loss compensation for total disability on the supplemental rolls beginning June 27, 2016, and on the periodic rolls beginning March 5, 2017.

Appellant returned to full-time limited-duty employment on September 11, 2017. She stopped work again on August 13, 2021 and OWCP paid her wage-loss compensation on the supplemental rolls, effective that date, and on the periodic rolls, effective January 30, 2022.

In a report dated September 9, 2021, Dr. Srikumaran noted that appellant had a history of left shoulder surgery four years earlier. He discussed her complaints of left shoulder stiffness and difficulty lifting and carrying. Dr. Srikumaran related that appellant's employer wanted her to resume lifting and carrying. He diagnosed status post shoulder surgery with a recent onset of tendinitis, capsulitis and synovitis. Dr. Srikumaran opined that appellant could perform sedentary, light work "with no mail carrying and no reaching, pushing, pulling, or lifting greater than [five] pounds." In a work note of even date, he reiterated her work restrictions, which he advised were permanent.

On January 11, 2022 OWCP referred appellant to a vocational rehabilitation counselor for vocational rehabilitation.

In a February 19, 2022 vocational rehabilitation report, the vocational rehabilitation counselor advised that appellant had notified him by telephone that she had filed for disability retirement. He related that appellant was unable to perform any work. The vocational rehabilitation counselor noted that appellant had 30 years of experience in customer service using both telephones and computers.

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<sup>3</sup> Docket No. 18-1438 (issued February 1, 2019).

On May 4, 2022 the vocational rehabilitation counselor performed a transferable skills analysis. He found that appellant had “extensive familiarity with clerk/office type work” and using computers and telephones in customer service. The vocational rehabilitation counselor recommended the positions of customer service representative and receptionist as suitable for appellant both vocationally and medically.

In a labor market survey of even date, the vocational rehabilitation counselor found that the occupation of customer service representative performed in sufficient numbers within appellant’s geographical area “to expect successful placement.”

The vocational rehabilitation counselor completed a job classification and labor market information (Form OWCP-66) on May 4, 2022 for the position of customer service representative, #239-362-014 in the Department of Labor’s *Dictionary of Occupational Titles (DOT)*. The position required sedentary strength, which the Department of Labor’s *DOT* provided was lifting no more than 10 pounds occasionally, occasional reaching and handling, and frequent fingering. The vocational rehabilitation counselor opined that appellant met the specific vocational preparation (SVP) for the position of six months to less than one year through her 30 years of past work experience and referenced the transferable skills analysis of even date. He advised that the job was being performed in sufficient numbers within appellant’s commuting area to be considered reasonably available based on the labor market survey and transferable skills analysis. The vocational rehabilitation counselor found that she could earn entry-level wages in the 10<sup>th</sup> percentile of \$529.60 per week.

In a rehabilitation action report (Form OWCP-44) dated May 5, 2022, an OWCP rehabilitation specialist changed the case status to direct placement from August 1 through September 1, 2022.

In rehabilitation reports dated June and July 2022, the vocational rehabilitation counselor noted that appellant did not want to resume work and was waiting for her application for disability retirement to be approved.

In correspondence dated August and September 2022, the vocational rehabilitation counselor provided appellant with job leads for various positions.

In a closure report dated November 14, 2022, the vocational rehabilitation counselor advised that appellant had not applied for positions or kept an activity log. He advised that the feasibility of success was poor. The vocational rehabilitation counselor reconfirmed the target occupations, including customer service representative, remained appropriate and reasonably available.

On November 17, 2022 Dr. Srikumaran provided examination findings and diagnosed status post arthroscopic shoulder surgery with no complications. In an attending physician’s report (Form CA-20) of even date, he diagnosed an incomplete left shoulder rotator cuff tear which he attributed to the employment activity of heavy lifting and reaching. Dr. Srikumaran opined that appellant was partially disabled from September 9, 2021 through the present and could resume light work with no lifting overhead or pushing greater than five pounds.

On February 24, 2023 OWCP's vocational rehabilitation specialist advised that appellant had not fully cooperated with vocational rehabilitation and thus assistance had been terminated on October 19, 2022. She advised that the position of customer service representative was vocationally suitable and reasonably available at a salary of \$529.60 per week.

On July 22, 2023 the vocational rehabilitation counselor provided an updated labor market survey and Form OWCP-66 for the position of customer service representative. He asserted that the position remained reasonably available at a minimum wage of \$600.00 per week.

On June 4, 2024 OWCP advised appellant of its proposed reduction of her wage-loss compensation as she had the capacity to earn wages of \$600.00 per week as a customer service representative, DOT #239.362-014. It afforded her 30 days to submit evidence or argument regarding the proposed reduction of her compensation. No response was received.

By decision dated September 3, 2024, OWCP reduced appellant's wage-loss compensation effective that date as she had the capacity to earn wages of \$600.00 per week as a customer service representative, DOT #239.362-014. It found that the September 9, 2021 and November 22, 2022 reports from Dr. Srikumaran represented the weight of the evidence and established that she could perform the selected position. OWCP applied the formula set forth in *Albert C. Shadrick*<sup>4</sup> as codified in section 10.403 of OWCP's regulations, to determine appellant's loss of wage-earning capacity.

### **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>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

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<sup>4</sup> 5 ECAB 376 (1953), codified at 20 C.F.R. § 10.403.

<sup>5</sup> See *L.M.*, Docket No. 20-1038 (issued March 10, 2021); *E.D.*, Docket No. 17-1064 (issued March 22, 2018).

<sup>6</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>7</sup> See *T.D.*, Docket No. 20-1088 (issued June 14, 2021); *Hayden C. Ross*, 55 ECAB 455, 460 (2004).

<sup>8</sup> *Id.*

employment, the availability of suitable employment and other factors and circumstances that may affect wage-earning capacity in his or her 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 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 Department of Labor, *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>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> Lastly, OWCP applies the principles set forth in *Shadrick*<sup>15</sup> as codified in section 10.403 of OWCP's regulations,<sup>16</sup> to determine the percentage of the employee's LWEC.

### ANALYSIS

The Board finds that OWCP improperly reduced appellant's wage-loss compensation effective September 3, 2024 based on its finding that she had the capacity to earn wages in the constructed position of a customer service representative.

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<sup>9</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>10</sup> *See M.H.*, Docket No. 21-1055 (issued March 30, 2022); *M.A.*, 59 ECAB 624, 631 (2008).

<sup>11</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>12</sup> *Id.* at Chapter 2.816.4c; *see also N.J.*, 59 ECAB 171 (2007).

<sup>13</sup> *Id.* at Chapter 2.813.7b (February 2011).

<sup>14</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>15</sup> *Supra* note 4.

<sup>16</sup> 20 C.F.R. § 10.403.

The issue of whether appellant has the physical capacity to perform a selected position is primarily a medical question that must be resolved by the medical evidence of record.<sup>17</sup>

On September 9, 2021 Dr. Srikumaran related that appellant complained of left shoulder stiffness and difficulty lifting and carrying. He diagnosed status post shoulder surgery with a recent onset of tendinitis, capsulitis and synovitis. Dr. Srikumaran opined that appellant could perform sedentary work with no reaching, pushing, pulling, or lifting more than five pounds and no mail carrying. In a work note of even date, he advised that these work restrictions were permanent. Dr. Srikumaran, on November 17, 2022, completed a Form CA-20 and advised that appellant could work with restrictions of no overhead lifting or pushing more than five pounds.

OWCP relied upon Dr. Srikumaran's opinion in finding that appellant could perform the duties of the selected position of customer service representative. Its procedures, however, provide that medical suitability of an offered position must be based on a reasonably current medical evaluation.<sup>18</sup> OWCP's procedures further provide that, if the medical evidence is unclear, equivocal, or old enough to be considered stale, which is generally greater than 18 months, the claims examiner should seek clarification from a physician regarding the suitability of the position.<sup>19</sup> Dr. Srikumaran's reports are more than 18 months older than OWCP's reduction of appellant's compensation and thus not reasonably current.<sup>20</sup>

Additionally, Dr. Srikumaran restricted appellant's lifting, pushing, and pulling to no more than five pounds. The Department of Labor's *DOT*, however, defines sedentary work as exerting up to 10 pounds of force occasionally (up to 1/3 of the time) to lift, carry, push, pull, or otherwise move objects. As this is outside the restrictions set forth by Dr. Srikumaran, the medical evidence does not establish that appellant had the physical capacity to perform the duties of the constructed position.<sup>21</sup>

Accordingly, OWCP failed to meet its burden of proof to reduce appellant's compensation benefits pursuant to 5 U.S.C. § 8115.

### **CONCLUSION**

The Board finds that OWCP improperly reduced appellant's wage-loss compensation effective September 3, 2024 based on its finding that she had the capacity to earn wages in the constructed position as a customer service representative.

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<sup>17</sup> *G.F.*, Docket No 20-1031 (issued December 31, 2020); *G.E.*, Docket No. 18-0663 (issued December 20, 2018); *Dennis D. Owen*, 44 ECAB 475 (1993).

<sup>18</sup> *Supra* note 11 at Chapter 2.816.4(d) (June 2013); *see also S.M.*, Docket No. 23-0353 (issued July 13, 2023); *G.F.*, Docket No. 20-1031 (issued December 31, 2020); *Anthony Pestana*, 39 ECAB 980 (1988).

<sup>19</sup> *Id.* at Chapter 2.816.4 (June 2013); *P.B.*, Docket No. 22-0199 (issued September 6, 2022); *G.F.*, *id.*

<sup>20</sup> *Id.*; *see also C.M.*, Docket No. 24-0336 (issued June 11, 2024); *S.M.*, Docket No. 23-0353 (issued July 13, 2023);

<sup>21</sup> *C.B.*, Docket No. 23-0795 (issued December 28, 2023); *K.K.*, Docket No. 07-786 (issued September 25, 2007).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 3, 2024 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 2, 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