

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

C.M., Appellant)
)

and)
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DEPARTMENT OF HOMELAND SECURITY,)
TRANSPORTATION SECURITY)
ADMINISTRATION, East Elmhurst, NY,)
Employer)
-----)

**Docket No. 24-0336
Issued: June 11, 2024**

Appearances:
*Paul Kalker, Esq., for the appellant*¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On February 11, 2024 appellant, through counsel, filed a timely appeal from a September 13, 2023 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.³

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.*

³ The Board notes that, following the September 13, 2023 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. 20 C.F.R. § 501.2(c)(1). Evidence not before OWCP will not be considered by the Board for the first time on appeal." *Id.*

ISSUE

The issue is whether OWCP properly reduced appellant's wage-loss compensation effective September 13, 2023 based on its finding that she had the capacity to earn wages in the constructed position as a surveillance system monitor.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On February 27, 2019 appellant, then a 49-year-old airport security officer, filed a traumatic injury claim (Form CA-1) alleging that on February 20, 2019 she injured her left ankle, right knee, right shoulder, and back when she slipped and fell on ice in a parking lot walking to her vehicle to drive to a training session while in the performance of duty. OWCP accepted the claim for a right knee contusion and sprains of the cervical spine, lumbar spine, left ankle, and right rotator cuff. It paid appellant wage-loss compensation on the supplemental rolls effective April 8, 2019, and on the periodic rolls effective March 27, 2022.

In a report dated November 6, 2020, Dr. Orsuville Cabatu, who specializes in physical medicine and rehabilitation, diagnosed post-traumatic cervical strain/sprain with left radiculitis, disc bulges at C3 through C7 with foraminal stenosis, left C5 radiculopathy, post-traumatic lumbar strain/sprain with left radiculitis, a disc bulge at L4-5 with bilateral foraminal stenosis, left L5 radiculopathy, post-traumatic tension headaches, and right knee strain/sprain. He provided work restrictions.

In a progress report dated January 20, 2021, Dr. Monet A. France, an orthopedic surgeon, evaluated appellant for continued right knee pain. She diagnosed tri-compartment osteoarthritis of the right knee and a work-related injury.

On May 21, 2021 OWCP referred appellant to Dr. Frank J. Corrigan, a Board-certified orthopedic surgeon, for a second opinion examination.

In a report dated June 16, 2021, Dr. Corrigan discussed appellant's history of a February 20, 2019 employment injury and her current complaints of neck pain radiating into the left arm, back pain radiating into the right leg, occasional right shoulder pain, constant right knee pain, and occasional pain in the left ankle. He provided his review of the medical evidence and detailed findings on physical examination. Dr. Corrigan opined that appellant had recovered from her cervical strain, lumbar strain, left ankle sprain, right knee contusion, and right rotator cuff strain. He attributed her continued symptoms to "preexisting chronic and degenerative pathology and unrelated to the incident on February 20, 2019." Dr. Corrigan noted that diagnostic studies obtained in February and April 2019 indicated degenerative findings unrelated to trauma. He found that appellant could return to work with restrictions due to her preexisting degenerative conditions unrelated to her accepted employment injury. In a work capacity evaluation (Form OWCP-5c) of even date, Dr. Corrigan advised that she could perform full-time sedentary work pushing, pulling, and lifting up to 10 pounds for eight hours per day.

⁴ Docket No. 23-0565 (issued June 26, 2023).

In a report dated July 5, 2021, Dr. Cabatu diagnosed cervical strain/sprain with left radiculitis, left C5 and L5 radiculopathy, and lumbar strain/sprain with right radiculitis. He noted that appellant was not working. Dr. Cabatu advised that her complaints and the objective findings were consistent with her history of injury.⁵

On July 29, 2021 OWCP referred appellant to a vocational rehabilitation counselor for vocational rehabilitation services.

On August 27, 2021 the vocational rehabilitation counselor advised OWCP that he had attempted to reach appellant *via* telephone and letters since August 5, 2021.

In an initial vocational rehabilitation report dated September 23, 2021, the vocational rehabilitation counselor noted that he had made “a protracted effort to connect” with appellant for the meeting and that she had “been less than cooperative....” He questioned why she seemed to be available at only limited times and noted that he had sent her five letters and left numerous telephone messages. The vocational rehabilitation counselor expressed “deep concern about the claimant’s lack of cooperation....”

On October 19, 2021 OWCP notified appellant that the vocational rehabilitation counselor indicated that she had not responded to his letters. It afforded her 30 days to make a good faith effort to participate with vocational rehabilitation, or to submit additional evidence or argument substantiating that he was unable to participate. OWCP informed appellant that if she refused to cooperate without good cause her compensation would be reduced to zero unless evidence showed that a return to work would not result in a loss of wage-earning capacity (LWEC).

In an October 20, 2021 vocational rehabilitation report, the rehabilitation counselor indicated that he had finally met with appellant. He noted that she had worked in the security field for one year at a college following her graduation from high school, in security at a hospital for 18 years, and in security at the employing establishment from 2006 to 2019. The vocational rehabilitation counselor advised that the employing establishment did not have a position available for appellant and noted that she had taken disability retirement.

On October 21, 2021 OWCP approved the status change to plan development and requested that the vocational rehabilitation counselor submit a plan for approval.

In a December 30, 2021 vocational rehabilitation report, the vocational rehabilitation counselor identified the positions of security guard and surveillance system monitor as target occupations based on appellant’s job history, medical restrictions, and a labor market survey. He noted that she had over 30 years of experience in the field of security.

The vocational rehabilitation counselor completed job classifications (Form CA-66) for the positions of surveillance system monitor and security guard dated December 30, 2021. He advised that appellant met the specific vocational preparation for the positions through her over 30 years of experience in security work. The vocational rehabilitation counselor indicated that labor market data indicated that she could earn weekly wages of \$679.00 at the bottom 10 percent of salary

⁵ Dr. Cabatu provided similar progress reports in September and November 2021.

range. In a vocational rehabilitation plan of even date, he indicated that given appellant's work history, she could likely earn approximately \$750.00 to \$800.00 weekly.

In vocational rehabilitation progress reports dated February 8 and March 19, 2022, the vocational rehabilitation counselor requested approval to move into direct placement status.

On June 1, 2022 OWCP advised appellant that it had approved 90 days of job placement assistance for the selected positions of security guard and surveillance system monitor. It informed her that it would likely reduce her compensation based on her ability to earn wages of \$679.00 per week at the end of the 90-day period and that it was thus important for her to cooperate with vocational rehabilitation. OWCP further notified appellant of the provisions of 5 U.S.C. § 8115 and that it would terminate her placement assistance and reduce her compensation prior to 90 days if she failed to cooperate with vocational rehabilitation services.

In a rehabilitation action report (Form OWCP-44) dated August 24, 2022, the vocational rehabilitation counselor informed OWCP that appellant had failed to fully cooperate with vocational rehabilitation services. He related that she had not provided her email address, despite repeated requests or provided a job activity log. In a vocational rehabilitation progress report of even date, the vocational rehabilitation counselor listed the job openings set to appellant in letters dated July and August 2022.

In an OWCP-44 form dated September 13, 2022, the vocational rehabilitation counselor advised that appellant was not cooperating with vocational rehabilitation and recommended not extending job placement services.

On September 26, 2022 OWCP reduced appellant's compensation to zero for failure to participate in vocational rehabilitation. It determined that she had failed to participate in the essential preparatory effort of vocational rehabilitation. OWCP thus found that it was unable to determine what appellant's wage-earning capacity would have been had she undergone testing and vocational rehabilitation. It, consequently, reduced her compensation to zero under 20 C.F.R. § 10.519.

On December 6, 2022 OWCP referred appellant to Dr. Richard C. Smith, a Board-certified orthopedic surgeon, for a second opinion examination.

In a report dated January 5, 2023, Dr. Smith reviewed appellant's history of injury and current complaints of pain in her low back, right knee, left foot and ankle, neck, and right shoulder. He provided findings on examination and diagnosed cervical and lumbar sprains, left ankle sprain, a sprain of the right rotator cuff, and a right knee contusion. Dr. Smith determined that, in addition to the accepted conditions, appellant had sustained "cervical spondylosis, lumbar spondylosis, right rotator cuff tendinopathy, and aggravation of her right knee osteoarthritis." He opined that her cervical, lumbar, left ankle, and right rotator cuff sprains and right knee contusion had resolved but that she had residuals of underlying degenerative conditions in these areas. Dr. Smith found that appellant was unable to resume her usual employment. In a January 5, 2023 work capacity evaluation (Form OWCP-5c), he indicated that she could perform full-time light work sitting and walking for four hours per day, performing no reaching above the shoulder, twisting, or bending/stooping, squatting, kneeling, or climbing, and pushing, pulling, and lifting up to 20 pounds for four hours per day.

In a supplemental report dated February 21, 2023, Dr. Smith advised that appellant's cervical spondylosis, lumbar spondylolisthesis, right rotator cuff tendinopathy, and aggravation of right knee osteoarthritis were causally related to the accepted February 2019 employment injury.

On March 3, 2023 appellant appealed the September 26, 2022 decision to the Board.

On March 28, 2023 OWCP expanded its acceptance of the claim to include cervical spondylosis, lumbar spondylolisthesis, right rotator cuff tendinopathy, and an aggravation of right knee osteoarthritis.

By decision dated June 26, 2023, the Board reversed the September 26, 2022 decision.⁶ The Board found that the vocational rehabilitation counselor had identified the position as surveillance system monitor and security guard as vocational goals, which OWCP had relayed to appellant. The Board concluded that OWCP should have reduced her future monetary compensation based on the amount which would likely have been her wage-earning capacity had she undergone vocational rehabilitation instead of reducing her compensation to zero.

On July 7, 2023 OWCP advised appellant that she had refused to cooperate in the continued development in the rehabilitation effort, and that if she did not comply within 30 days of the date of the letter, it would reduce her compensation to reflect her probable wage-earning capacity as a security guard and surveillance system monitor.

OWCP subsequently received a May 9, 2023 report, wherein Dr. Ali Saberi, a Board-certified internist, evaluated appellant for neck and back pain due to a February 20, 2019 injury when she slipped and fell in the work parking lot. Dr. Saberi noted that she was currently retired. He diagnosed lumbar, cervical, left ankle, and right rotator cuff sprains, cervical spondylosis, and lumbar spondylolisthesis due to the accepted employment injury and recommended physical therapy.

By decision dated September 13, 2023, OWCP reduced appellant's compensation effective that date as she had the capacity to earn \$679.00 per week as a surveillance system monitor, Department of Labor's *Dictionary of Occupational Titles* (DOT) No. 379.367-010. It found that the June 16, 2021 report from Dr. Corrigan constituted the weight of the evidence and established that she had the capacity to perform the selected position. OWCP applied the formula set forth in *Albert C. Shadrick*⁷ as codified in section 10.403 of OWCP's regulations, to determine appellant's LWEC.

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.⁸ 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

⁶ *Supra* note 4.

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

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

compensation computed based on his or her LWEC.⁹ An employee's actual earnings generally best reflect his or her wage-earning capacity.¹⁰ 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.¹¹ 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.¹²

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.¹³ The medical evidence OWCP relies upon must provide a detailed description of the employee's condition and the evaluation must be reasonably current.¹⁴ 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.¹⁵

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.¹⁶ 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.¹⁷ Lastly, OWCP applies the principles set forth in *Shadrick*¹⁸ as codified in section 10.403 of OWCP's regulations,¹⁹ to determine the percentage of the employee's LWEC.

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

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

¹¹ *Id.*

¹² 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).

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

¹⁴ 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).

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

¹⁶ *Id.* at Chapter 2.813.7b (February 2011).

¹⁷ *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).

¹⁸ *Supra* note 7.

¹⁹ 20 C.F.R. § 10.403.

ANALYSIS

The Board finds that OWCP improperly reduced appellant's wage-loss compensation effective September 13, 2023 based on its finding that she had the capacity to earn wages in the constructed position as a surveillance system monitor.

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.²⁰

In a report dated June 16, 2021, Dr. Corrigan noted that appellant had recovered from her cervical strain, lumbar strain, left ankle sprain, right knee contusion, and right rotator cuff strain. He opined that she had restrictions due to degenerative conditions unrelated to the work injury. In an OWCP-5c form of even date, Dr. Corrigan determined that appellant could perform sedentary work pushing, pulling, and lifting up to 10 pounds for eight hours per day.

OWCP relied upon Dr. Corrigan's report in finding that appellant could perform the duties of surveillance system monitor. Its procedures, however, provide that medical suitability of an offered position must be based on a reasonably current medical evaluation.²¹ OWCP procedures further provide that in assessing an employee's ability to perform a constructed position, if the 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.²²

The Board finds that Dr. Corrigan's report is more than two years earlier than OWCP's reduction of appellant's compensation and thus not reasonable current.²³ The Board further notes that subsequent to the time Dr. Corrigan provided his report, OWCP expanded its acceptance of appellant's claim to include cervical spondylosis, lumbar spondylolisthesis, right rotator cuff tendinopathy, and an aggravation of right knee osteoarthritis as causally related to the accepted employment injury.²⁴ OWCP, consequently, failed to meet its burden of proof to reduce her compensation effective September 13, 2023 based on its finding that she had the capacity to earn wages as a surveillance system monitor.

²⁰ *C.B.*, Docket No. 23-0795 (issued December 28, 2023); *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).

²¹ *Supra* note 14 at Chapter 2.816.4 (June 2013); *see also G.F.*, Docket No. 20-1031 (issued December 31, 2020) (the Board found that the medical evidence relied upon by OWCP was over two years old and thus not reasonably current); *M.A.*, 59 ECAB 624 (2008); *Carl C. Green, Jr.*, 47 ECAB 737, 746 (1996); *Anthony Pestana*, 39 ECAB 980 (1988) (three-year-old medical evaluation is not reasonably current for a wage-earning capacity determination).

²² *Supra* note 14 at Chapter 2.806.4d; *see also S.M.*, Docket No. 23-0353 (issued July 13, 2023); *B.H.*, Docket No. 21-0892 (issued November 29, 2021).

²³ *S.M.*, *id.*; *G.F.*, *supra* note 20.

²⁴ The Board additionally notes that OWCP failed to obtain a current labor market survey. Its procedures provide that, if a labor market survey is more than one year old, the case should be returned to the rehabilitation specialist so that a current survey can be obtained. *Supra* note 14 at Chapter 2.816.6.a; *see also B.D.*, Docket No. 16-1611 (issued May 12, 2017).

CONCLUSION

The Board finds that OWCP improperly reduced appellant's wage-loss compensation effective September 13, 2023.

ORDER

IT IS HEREBY ORDERED THAT the September 13, 2023 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 11, 2024
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board