

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

T.N., Appellant)	
)	
and)	Docket No. 24-0370
)	Issued: June 13, 2024
U.S. POSTAL SERVICE, FREDERICKSBURG)	
MAIN POST OFFICE, Fredericksburg, VA,)	
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
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On February 23, 2024 appellant filed a timely appeal from November 6, 2023 and February 12, 2024 merit decisions and a February 21, 2024 nonmerit 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.

ISSUES

The issues are: (1) whether OWCP properly reduced appellant's wage-loss compensation, effective November 6, 2023, based on her capacity to earn wages as an administrative clerk; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board on a different issue.² The facts and circumstances set forth in the Board's prior decision and order are incorporated herein by reference. The relevant facts are as follows.

On March 19, 2015 appellant, then a 42-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that she experienced mild pain in her right shoulder finishing her route while in the performance of duty. OWCP accepted the claim for a closed fracture of the acromial end of the right clavicle. It subsequently expanded the acceptance of the claim to include an injury to the muscles/tendons of the right rotator cuff, a temporary aggravation of right shoulder bursitis, and a temporary aggravation of other specified arthropathies of the right shoulder. OWCP paid appellant wage-loss compensation on the supplemental rolls effective April 25, 2015, and on the periodic rolls effective March 6, 2016.

A magnetic resonance imaging (MRI) scan of the right shoulder, obtained on July 10, 2015, demonstrated supraspinatus tendinopathy, subacromial subdeltoid bursitis, an old post-traumatic deformity of the distal clavicle, and acromioclavicular joint (AC) arthropathy with no acute joint injury, fracture, or rotator cuff tear.

In a report dated September 20, 2016, Dr. D. Burke Haskins, a Board-certified orthopedic surgeon and OWCP referral physician, diagnosed rotator cuff tendinopathy, biceps tendinitis, acromioclavicular (AC) degeneration, and subacromial subdeltoid bursitis aggravated by the accepted employment injury. He advised that appellant could work without using her right upper extremity. Dr. Haskins opined that surgery may be necessary if a steroid injection and physical therapy were inadequate.

On January 25, 2017 Dr. Kenneth J. Accousti, a Board-certified orthopedic surgeon and appellant's attending physician, noted that appellant had continued complaints of AC joint pain. He advised that she could work with a five-pound weight restriction. Dr. Accousti indicated that it had been two years since appellant's March 10, 2015 employment injury and advised that she had reached maximum medical improvement (MMI).

On June 22, 2017 OWCP referred appellant to a vocational rehabilitation counselor for vocational rehabilitation.

In an August 4, 2017 vocational rehabilitation report, the vocational rehabilitation counselor noted that appellant had an associate's degree in business administration and that she had worked as a certified nursing assistant, a teacher's assistant, a collection specialist, a clerical worker in a hospital, and a food service worker.

In a rehabilitation plan and award (Form OWCP-18) dated November 30, 2018, the vocational rehabilitation counselor recommended that appellant seek a position of general office

² Docket No. 22-0721 (issued September 14, 2022).

clerk or bank teller. She noted that appellant had performed jobs with the specific vocational preparation (SVP) of five doing clerical work in a hospital and as a collection specialist for a bank.

On December 18, 2018 Dr. Accousti diagnosed a closed fracture of the acromial end of the right clavicle with routine healing. He advised that appellant had no restrictions and could resume her usual employment. Dr. Accousti indicated that a September 20, 2017 functional capacity evaluation (FCE) were invalid due to lack of effort.

On January 25, 2019 OWCP advised appellant that she would receive 90 days of job placement services.

In a vocational rehabilitation report dated June 30, 2019, the vocational rehabilitation counselor noted that appellant had been released to full duty by her physician.

On October 30, 2019 OWCP ceased vocational rehabilitation services, noting that return to work efforts had not been successful. It indicated that appellant had the capacity to work as a bank teller and general office clerk.

By decision dated December 22, 2020, OWCP terminated appellant's wage-loss compensation and medical benefits, effective that date. It found that medical evidence from Dr. Accousti established that she had no disability causally related to her accepted employment injury.

On January 14, 2021, appellant requested reconsideration.

In a progress report dated January 8, 2021, Dr. Accousti noted that OWCP had denied his request for a second FCE. He indicated that a partially-completed FCE had demonstrated that appellant had a three-pound lifting limitation. Dr. Accousti advised that appellant was "going back to work full time and would like to limit her lifting at work temporarily." He recommended that she limit lifting to 50 pounds for four weeks and then return to her usual employment. In a duty status report (Form CA-17) of even date, Dr. Accousti advised that appellant could lift 30 pounds continuously and 50 pounds intermittently for up to eight hours per day. The form indicated that her job duties required continuous lifting of 35 pounds and intermittent lifting of 70 pounds.

By decision dated April 14, 2021, OWCP denied modification of its December 22, 2020 decision.

On April 23, 2021 appellant requested reconsideration. By decision dated July 21, 2021, OWCP denied modification of its April 14, 2021 decision.

On July 23, 2021 appellant requested reconsideration.

A September 4, 2021 report of an MRI scan of the right shoulder demonstrated mild tendinitis of the supraspinatus, infraspinatus, and subscapularis, moderate tendinosis and partial tearing of the intra-articular long head biceps, a healed displaced distal clavicle fracture deformity, and mild subacromial subdeltoid bursitis. A September 7, 2021 cervical MRI scan revealed multilevel mild central canal stenosis due to disc herniations and mild foraminal narrowing due to degenerative changes.

Electrodiagnostic testing of the upper extremities obtained on September 27, 2021 yielded normal findings.

In a progress report dated October 5, 2021, Dr. Warren Yu, a Board-certified orthopedic surgeon, evaluated appellant for pain in her right shoulder, neck pain, and numbness and pain in the right upper extremity. He noted that she had originally sustained an injury at work in 2015 when she fell and fractured her right distal clavicle. Dr. Yu diagnosed cervical disc disorder at C5-6 with radiculopathy and osseous stenosis of the neural canal of the cervical region.

On October 12, 2021 appellant requested that OWCP expand the acceptance of her claim to include the diagnoses from Dr. Yu.

By decision dated October 21, 2021, OWCP denied modification of its July 21, 2021 decision.

On October 28, 2021 appellant requested reconsideration.

By decision dated December 15, 2021, OWCP denied modification of its October 21, 2021 decision.

On December 15, 2021 appellant requested reconsideration.

In a report dated February 21, 2022, Dr. John A. Kuri, a Board-certified orthopedic surgeon, evaluated appellant for right shoulder pain that had begun in 2015 when she fell at work getting into her truck. He noted that she currently worked in the childcare field. Dr. Kuri indicated that appellant had a history of a prior distal clavicle fracture before her 2015 injury. He diagnosed right shoulder pain and opined that the 2015 injury likely exacerbated the prior right clavicle fracture. Dr. Kuri further diagnosed right AC joint arthritis, a right rotator cuff tear, cervical degenerative disc disease, and a labral tear of the long head of the right biceps tendon.

In a report dated March 3, 2022, Dr. Kuri advised that an MRI scan of the right shoulder demonstrated “partial long of the biceps tendon tearing along with what appears is a full-thickness tear at the distal supraspinatus.” He diagnosed arthritis of the right AC joint, a labral tear of the long head of the right biceps tendon, an incomplete rotator cuff tear or rupture of the right shoulder, not specified as traumatic, and cervical degenerative disc disease. Dr. Kuri recommended right shoulder surgery after evaluation by a spinal surgeon.

By decision dated March 15, 2022, OWCP denied modification of its December 15, 2021 decision.

On March 28, 2022 appellant requested reconsideration. She related that the MRI scans demonstrating increasing tears and degenerative changes. Appellant submitted a March 25, 2022 referral from Dr. Kuri for a computerized tomography (CT) scan and a March 25, 2022 progress report. She further resubmitted evidence already of record.

By decision dated April 7, 2022, OWCP denied appellant’s request for reconsideration as she had not submitted evidence or raised an argument sufficient to warrant reopening his claim for merit review under 5 U.S.C. § 8128(a).

Appellant appealed to the Board. By decision dated September 14, 2022, the Board reversed OWCP's termination of her wage-loss compensation as the medical evidence from Dr. Accousti was internally inconsistent.³

An FCE performed on October 19, 2022 revealed that appellant could perform full-time light-duty work with restrictions, including lifting 10 pounds occasionally and 5 pounds frequently from waist level to overhead, 15 pounds occasionally and 10 pounds frequently from waist to shoulder, 20 pounds occasionally and 10 pounds frequently from knee to waist, and carrying 20 pounds occasionally. It further found that she could perform occasional walking, climbing stairs, overhead reaching, and kneeling.

On October 28, 2022 OWCP referred appellant to Dr. Randy F. Davis, a Board-certified orthopedic surgeon, for a second opinion evaluation.

In a report dated November 15, 2022, Dr. Davis described appellant's complaints of right shoulder pain and found that appellant had residual disability because of her employment injury. He opined that she was unable to return to her usual employment but could perform sedentary or light work, as confirmed by the FCE. Dr. Davis advised that the "functional capacity limitations she has are well delineated on the [FCE] that was performed on October 19, 2022...." In a work capacity evaluation form (OWCP-5c) of even date, Dr. Davis found that appellant could work in a sedentary or light capacity reaching above her shoulder for eight hours per day and pushing, pulling, and lifting up to 20 pounds for eight hours per day.

By letter dated November 22, 2022, OWCP noted that appellant had begun working for the State of Maryland and requested that she indicate the hours that she worked, and the duties performed. In a November 22, 2022 response, appellant related that effective August 22, 2022 she was an inactive employee as a result of her restrictions.

On December 29, 2022 OWCP referred appellant to a new vocational rehabilitation counselor for an updated labor market survey.

The vocational rehabilitation counselor completed a job classification and labor market information form (Form OWCP-66) on January 6, 2023 for the position of administrative clerk, designated in the Department of Labor's *Dictionary of Occupational Titles* as DOT No. 219-362-010. The position required light strength and frequent reaching, handling, and fingering. Light work, according to the Department of Labor's *Dictionary of Occupational Titles*, requires exerting up to 20 pounds of force occasionally and up to 10 pounds of force frequently. The vocational rehabilitation counselor noted that Dr. Davis had found that appellant had an unspecified limitation in reaching above the shoulder but indicated that she could perform the activity for eight hours per day. He advised that a survey from the Bureau of Labor Statistics (BLS) indicated that for office clerks, including administrative clerks with the DOT No. 219-3662-010, overhead reaching was not required for 85.5 percent of positions. The vocational rehabilitation counselor opined that appellant met the SVP for the position of three to six months through her associate degree in business administration and history of clerical work in a hospital setting and working as a collections' specialist at a bank. He noted that independent evaluations supported the vocational

³ Id.

suitability and found that appellant could earn \$512.00 per week. In a labor market survey report, the vocational rehabilitation counselor relied upon state labor market information and a search of available positions within a reasonable commuting area in finding the job reasonably available within appellant's geographical area. He found that she could earn entry-level wages in the 10th percentile of \$12.80 per hour or \$512.00 per week.

In a report dated February 13, 2023, Dr. Thomas P. Cestare, a Board-certified anesthesiologist, evaluated appellant for cervical and right shoulder pain that began when she fell at work in March 2015. He reviewed diagnostic studies and provided findings on examination. Dr. Cestare diagnosed right shoulder pain, a fracture of the right clavicle with nonunion, impingement syndrome of the right shoulder, a right rotator cuff tear, and cervical radiculitis.

On September 26, 2023 OWCP advised appellant of its proposed reduction of her wage-loss compensation as she had the capacity to earn wages of \$512.00 per week as an administrative clerk, DOT No. 219.362-010. It afforded her 30 days to submit evidence or argument regarding the proposed reduction of his compensation.

In a response dated October 10, 2023, appellant asserted that physicians had not evaluated whether she could work as an administrative clerk. She noted that the position would require repetitive right shoulder motion.

In a report dated October 30, 2023, Dr. Cestare noted that he did not have anything to offer appellant as OWCP had previously denied right shoulder injections.

By decision dated November 6, 2023, OWCP reduced appellant's wage-loss compensation effective that date as she had the capacity to earn wages of \$512.00 per week as an administrative assistant, DOT No. 219.362-010. It found that the November 15, 2022 report from Dr. Davis 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*⁴ as codified in section 10.403 of OWCP's regulations, to determine appellant's loss of wage-earning capacity.

On November 29, 2023 appellant requested reconsideration. She advised that Dr. Ali R. Hashemi, a Board-certified orthopedic surgeon, advised that she was incapable of resuming work based on new imaging studies and a physical capacity evaluation.

Appellant submitted a November 27, 2023 physical capacity evaluation form report from Dr. Hashemi, who opined that she was disabled from employment. An x-ray of the right shoulder of even date showed a subacromial bone spur, possible calcification over the superior rotator cuff, and old distal clavicle injury and a possible old avulsion injury at the AC joint.

In a progress report dated November 27, 2023, Dr. Hashemi discussed appellant's complaints of right shoulder pain sometimes radiating into her neck and down her arm and difficulty with overhead activities after a right shoulder injury in 2015. He related that appellant's

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

symptoms had not resolved and that she also had “neck issues. I do think this is related to her original injury.” Dr. Hashemi recommended an MRI scan.

On December 12, 2023 OWCP referred appellant to Dr. Kevin F. Hanley, a Board-certified orthopedic surgeon, for a second opinion examination.

An MRI scan of the right shoulder, obtained on January 10, 2024, revealed a high-grade partial thickness articular surface tear of the supraspinatus tendons and a small low-grade partial-thickness articular surface tear of the infraspinatus tendon, moderate tendinosis of the intracapsular segment of the long head biceps tendon, mild-to-moderate subacromial/subdeltoid bursitis, and mild glenohumeral joint and AC joint osteoarthritis.

In a report dated January 12, 2024, Dr. Hanley described the history of appellant’s employment injury and provided his review of the evidence of record. On examination he “got the distinct impression that she is magnifying her symptomatology....” Dr. Hanley found no crepitus of the shoulder, and normal grip strength. He diagnosed a progressive partial tear of the right rotator cuff, post-traumatic degenerative arthritis of the AC joint of the right shoulder, and cervical spondylosis. Dr. Hanley noted that appellant had no cervical spine condition as a result of her March 10, 2015 employment injury. He opined that the possible progressive rotator cuff tear was not causally related to the March 10, 2015 employment injury. Dr. Hanley related that appellant had a permanent aggravation of degenerative AC joint disease which was not significant and did not require treatment. He found that her employment injury remained “active relative to the AC joint with mild loss of motion.” Dr. Hanley opined that appellant could “return to work as an administrative clerk, as outlined in a job offering dated January 6, 2023.” In a Form OWCP-5c of even date, he found that appellant could perform sedentary and light work duties.

By decision dated February 12, 2024, OWCP denied modification of its November 6, 2023 decision.

On February 13, 2024 appellant requested reconsideration.

In a physical capacity evaluation form dated February 21, 2024, Dr. Hashemi indicated that appellant was disabled from employment.

By decision dated February 21, 2024, OWCP denied appellant’s request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT -- ISSUE 1

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.⁵ 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

⁵ 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 loss of wage-earning capacity (LWEC).⁶ An employee's actual earnings generally best reflect his or her wage-earning capacity.⁷ 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.⁸ 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.⁹

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.¹⁰ The medical evidence OWCP relies upon must provide a detailed description of the employee's condition and the evaluation must be reasonably current.¹¹ 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.¹²

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, *Dictionary of Occupational Titles* or otherwise available in the open market, that fits the employee's capabilities with regard to his physical limitations, education, age, and prior experience.¹³ 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.¹⁴ Lastly, OWCP applies the

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

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

⁸ *Id.*

⁹ 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).

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

¹¹ 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).

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

¹³ *Id.* at Chapter 2.813.7b (February 2011).

¹⁴ *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).

principles set forth in *Shadrick*¹⁵ as codified in section 10.403 of OWCP's regulations,¹⁶ to determine the percentage of the employee's LWEC.

ANALYSIS -- ISSUE 1

The Board finds that OWCP improperly reduced appellant's wage-loss compensation effective November 6, 2023 based on her capacity to earn wages as an administrative clerk.

Initially, the Board notes that OWCP indicated in its proposed reduction of compensation that it was rating appellant for the position of administrative clerk, DOT No. 219.362-101, a light-duty position. In its November 6, 2023 decision, however, it referred to the position as that of an administrative assistant with the same DOT No. 219-362-010. The position of administrative assistant, however, is designated by DOT No. 169-167-010 and is a sedentary position. The Board finds that OWCP, in its November 6, 2023 decision, found that appellant had the capacity to perform the duties of an administrative clerk rather than an administrative assistant based on its reference to the Department of Labor's *Dictionary of Occupational Titles* number for the administrative clerk position and its prior finding in its proposed reduction of compensation that it was rating her for the position of administrative clerk.

OWCP relied upon the November 15, 2022 report from Dr. Davis, an OWCP referral physician, in finding that appellant had the physical ability to perform the position of administrative clerk. In his report dated November 15, 2022, Dr. Davis found that she could perform sedentary or light-duty work based on the findings from the FCE. He noted that the FCE performed on October 19, 2022 had "well delineated" appellant's limitations. In an OWCP-5c form dated November 15, 2022, Dr. Davis indicated that she could perform sedentary or light work reaching above her shoulder for eight hours per day and pushing, pulling, and lifting up to 20 pounds for eight hours per day. He provided as a rationale the FCE findings. The FCE upon which he based his findings, however, indicated that appellant could perform light-duty work only with additional restrictions, including lifting 10 pounds occasionally and 5 pounds frequently from waist level to overhead, and 15 pounds occasionally and 10 pounds frequently from waist level to shoulder. The position of administrative clerk required the ability to perform work at a light level, lifting up to 20 pounds occasionally and up to 10 pounds frequently according to the Department of Labor's *Dictionary of Occupational Titles*.

OWCP's procedures 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, the claims examiner should seek clarification from a physician regarding the suitability of the position.¹⁷

OWCP did not request that Dr. Davis review the job description for the selected position and provide an opinion as to whether she could perform the duties of the position. It is unclear

¹⁵ *Supra* note 5.

¹⁶ 20 C.F.R. § 10.403.

¹⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.4d (June 2013).

from Dr. Davis' report whether appellant has the physical capacity to perform the duties of an administrative assistant as the conclusions that he reached based on the FCE were inconsistent with the results of the FCE.¹⁸ The Board thus finds that OWCP failed to meet its burden of proof to reduce appellant's compensation effective November 6, 2023 based on its finding that she had the capacity to earn wages as an administrative clerk.¹⁹

CONCLUSION

The Board finds that OWCP improperly reduced appellant's wage-loss compensation, effective November 6, 2023, based on her capacity to earn wages as an administrative clerk.

ORDER

IT IS HEREBY ORDERED THAT the November 6, 2023 and February 12, 2024 merit decisions of the Office of Workers' Compensation Programs are reversed. The February 21, 2024 nonmerit decision of the Office of Workers' Compensation Programs is set aside as moot.

Issued: June 13, 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

¹⁸ See *M.P.*, Docket No. 22-0258 (issued February 10, 2023); *S.B.*, Docket No. 19-0781 (issued February 2, 2022); *G.E.*, Docket No. 18-0663 (issued December 21, 2018).

¹⁹ In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.