

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

K.S., Appellant)	
)	
and)	Docket No. 24-0314
)	Issued: May 13, 2024
DEPARTMENT OF JUSTICE, FEDERAL)	
BUREAU OF PRISONS, FEDERAL)	
CORRECTIONAL INSTITUTION-ASHLAND,)	
Ashland, KY, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

ORDER REVERSING CASE

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

On February 7, 2024 appellant, through counsel, filed a timely appeal from a January 22, 2024 merit decision of the Office of Workers' Compensation Programs (OWCP). The Clerk of the Appellate Boards assigned the appeal Docket No. 24-0314.

On November 8, 2017 appellant, then a 41-year-old correctional systems officer, filed a traumatic injury claim (Form CA-1) alleging that on November 3, 2017 he injured his shoulder when lifting heavy boxes of inmate property while in the performance of duty.² He worked with

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 OWCP assigned the present claim OWCP File No. xxxxxx013. Under OWCP File No. xxxxxx005 OWCP accepted a May 3, 2011 injury for right knee strain. Under OWCP File No. xxxxxx461 it accepted an October 21, 2015 claim for lower back muscle, fascia, and tendon strain. Under OWCP File No. xxxxxx051, OWCP accepted the condition of right common extensor tendon tear/lateral epicondylitis due to a June 6, 2016 employment injury. It combined OWCP File Nos xxxxxx013, xxxxxx051, and xxxxxx461, with the latter designated as the master file.

restrictions until stopping work on February 2, 2018. OWCP accepted the claim for right shoulder impingement syndrome. It paid appellant wage-loss compensation on the supplemental rolls effective February 9, 2018, and on the periodic rolls effective August 19, 2018.

OWCP authorized right shoulder arthroscopic subacromial decompression surgery, right arthroscopic rotator cuff repair surgery, and right biceps tendon repair surgery, which was performed on April 18, 2018.

On December 9, 2021 OWCP referred appellant, along with a statement of accepted facts (SOAF) and a series of questions, to Dr. Anbu K. Nadar, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding the nature and extent of appellant's accepted employment-related conditions and his work capacity. The October 29, 2021 SOAF noted only the accepted condition of right shoulder impingement syndrome under the current claim, OWCP File No. xxxxxx013. It also noted a surgical procedure on April 18, 2022.

In a report dated January 28, 2022, Dr. Nadar noted appellant's history, reviewed medical evidence, and provided examination findings. He diagnosed right shoulder impingement syndrome and right lateral epicondylitis, common extensor tendon tear. Dr. Nadar opined that appellant had reached maximum medical improvement for the work-related conditions and that further treatment was not indicated. He further opined that appellant was unable to return to his date-of-injury job, but he could work with restrictions. In a December 29, 2021 work capacity evaluation (Form OWCP-5c), Dr. Nadar opined that appellant was permanently restricted to working a sedentary or light-work position, due to his accepted conditions.

On April 13, 2022 OWCP referred appellant for vocational rehabilitation services. In a September 12, 2022 report, appellant's vocational rehabilitation counselor determined that appellant was capable of earning wages in the selected position of dispatcher, Department of Labor, *Dictionary of Occupational Titles* (DOT) #215-362-010.

By notice dated March 29, 2023, OWCP advised appellant that, under 5 U.S.C. § 8106 and § 8115, it proposed to adjust his wage-loss compensation based on his ability to earn wages as dispatcher, clerk, DOT # 215-362-010. It informed him that the duties of the position were within the December 29, 2021 work restrictions of its second opinion physician, Dr. Nadar. OWCP afforded appellant 30 days to submit evidence and argument challenging the proposed reduction. No response was received.

By decision dated June 5, 2023, OWCP reduced appellant's wage-loss compensation, effective that date, based on its determination that he was medically and vocationally capable of earning wages in the constructed position of dispatcher.

On June 19, 2023 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on November 8, 2023.

By decision dated January 22, 2024, an OWCP hearing representative affirmed the June 5, 2023 loss of wage-earning capacity (LWEC) determination.

The Board, having duly considered the matter, finds that OWCP failed to meet its burden of proof to reduce appellant's wage-loss compensation.

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.³ The Board notes that the October 29, 2021 SOAF failed to list all of his accepted claims and conditions under OWCP File Nos. xxxxxx005, xxxxxx051, and xxxxxx461. Dr. Nadar, the second opinion physician, was therefore not provided with a complete SOAF upon which to render his opinion.

It is OWCP's responsibility to provide a complete and proper frame of reference for a physician by preparing a SOAF.⁴ OWCP's procedures dictate that, when a district medical adviser, second opinion specialist, or referee physician renders a medical opinion based on a SOAF, which is incomplete or inaccurate, or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.⁵

As Dr. Nadar's report was not based on a complete factual framework, it cannot represent the weight of the medical evidence in determining his LWEC based on a constructed position.⁶ The Board therefore finds that OWCP failed to meet its burden of proof. Accordingly,

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.4c (June 2013); *see also N.J.*, 59 ECAB 171 (2007).

⁴ *Order Reversing Case, W.C.*, Docket No. 23-0494 (issued January 30, 2024); *J.M.*, Docket No. 23-0743 (issued December 6, 2023); *C.C.*, Docket No. 22-0460 (issued October 12, 2022); *M.B.*, Docket No. 21-0060 (issued March 17, 2022); *J.N.*, Docket No. 19-0215 (issued July 15, 2019); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

⁵ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.6003 (October 1990); *C.C., id.; R.W.*, Docket No. 19-1109 (issued January 2, 2020).

⁶ *See supra* note 4; *G.C.*, Docket No 18-0842 (issued December 20, 2018).

IT IS HEREBY ORDERED THAT the January 22, 2024 decision of the Office of Workers' Compensation Programs is reversed.

Issued: May 13, 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