

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

_____)	
T.K., Appellant)	
)	
and)	Docket No. 24-0827
)	Issued: October 24, 2024
DEPARTMENT OF JUSTICE, FEDERAL)	
BUREAU OF INVESTIGATION, Miami, FL,)	
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 August 12, 2024 appellant filed a timely appeal from a July 26, 2024 merit 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.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the July 26, 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 has met its burden of proof to reduce appellant's wage-loss compensation, effective March 4, 2024, based on his capacity to earn wages in the constructed position of contract clerk.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On May 14, 2001 appellant, then a 40-year-old special agent, filed a traumatic injury claim (Form CA-1) alleging that on April 27, 2001 he sustained injuries to his left wrist, right knee, right ankle, and lower back due to an automobile accident while in the performance of duty. OWCP accepted the claim for right knee open wound, lumbar sprain/strain, right ankle sprain/strain, and left wrist strain/sprain. It subsequently expanded the acceptance of the claim to include closed fracture of the right metatarsal, bilateral chondromalacia of the patella, left foot plantar fasciitis, left heel spur, right hip trochanteric bursitis, and left ankle synovitis. OWCP authorized right knee arthroscopic surgery, which was performed on November 12, 2002; right ankle arthroscopic surgery, which was performed on January 14, 2003; and right metatarsophalangeal joint arthroplasty with hemi-implant and superficial peroneal nerve neurolysis, which was performed on June 4, 2003. It paid appellant wage-loss compensation on the supplemental rolls, effective November 11, 2002, and on the periodic rolls, effective January 26, 2003.

By decision dated May 28, 2014, OWCP terminated appellant's wage-loss compensation, effective June 1, 2014. On December 17, 2014 its hearing representative vacated the termination decision and remanded the case to determine whether a conflict in the medical evidence existed. On July 31, 2015 OWCP resumed wage-loss compensation payments, retroactive to June 1, 2014.

On January 6, 2022 OWCP referred appellant, together with a statement of accepted facts (SOAF), the medical record, and list of questions, to Dr. Jon D. Donshik, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the nature and extent of disability due to the accepted employment conditions.

In a report dated February 4, 2022, Dr. Donshik described the history of appellant's employment injury and provided his review of the evidence of record. On physical examination appellant reported pain in the thoracolumbar spine when bending down to touch his toes, no palpable thoracolumbar spasm, good thoracolumbar range of motion, right knee pain, no right hip pain, negative McMurray, and some swelling around right lateral malleolus. Dr. Donshik related appellant's diagnoses as low back pain; right ankle, knee, and great toe pain. He related that since appellant's injury occurred in 2001, appellant was not likely to make any gains in his physical capacity, and additional medical care would not play a significant role in his recovery. On an

³ Docket No. 14-2047 (issued June 2, 2015); Docket No. 13-1833 (issued March 10, 2014); Docket No. 12-1157 (issued December 21, 2012); Docket No. 08-914 (issued January 14, 2009); Docket No. 06-503 (issued July 11, 2006).

attached work capacity evaluation (Form OWCP-5c), Dr. Donshik indicated that appellant was capable of performing sedentary work and that his restrictions were permanent.

In a visit note dated May 18, 2022, Dr. Andrew S. Elowitz, a Board-certified orthopedic surgeon, diagnosed right knee and low back pain.

On October 13, 2022 OWCP referred appellant for vocational rehabilitation services.

In a progress report dated November 18, 2022, Dr. Elowitz again diagnosed low back and right knee pain.

An unsigned chart note dated December 5, 2020 reported diagnoses of post-traumatic right ankle and foot osteoarthritis, right foot hallux rigidus, and displacement of internal fixation devices of foot and toes. Appellant's restrictions were noted as limited weight bearing, and limited dorsiflexion position.

In a vocational rehabilitation report dated March 21, 2023, the vocational rehabilitation counselor noted that appellant had obtained a bachelor's degree in public administration/government and achieved a law degree. He was employed as a policeman/investigator from 1994 to 1997. Additionally, the vocational rehabilitation counselor supervised the development of computer data bases to improve the bureau's investigative functions. He also trained and instructed police personnel in various computer systems. From October 2004 to March 2005, the vocational rehabilitation counselor worked as an investigator with the Southeast Region Police Commissioner's officer investigating insurance fraud and providing insurance claims training to representatives. He worked as an adjunct professor from August 2006 to May 2010, and then worked with another local police department. The vocational rehabilitation counselor identified the positions of human resources clerk and recruiter based on a transferrable skills analysis.

In a May 19, 2023 visit note, Dr. Elowitz provided physical examination findings, and diagnosed low back and right knee pain. In an attached Form OWCP-5c of even date, he diagnosed chronic back, knee, and foot pain. Dr. Elowitz advised that appellant could work with restrictions. Appellant's restrictions were noted as pushing, pulling, lifting up to 15 pounds limited to two hours a day. He also checked "yes" regarding limitations for squatting, kneeling, and climbing.

On June 20, 2023 the OWCP vocational rehabilitation counselor completed a job classification and labor market form for the position of contract clerk, Department of Labor, *Dictionary of Occupational Titles (DOT)* No. 119.267-018. The duties of a contract clerk included reviewing agreements or proposed agreements, analyzing contracts and conferring with various department heads, recommending modifications, and converting agreements into contract form or preparing amended agreement for approval by the legal department. The *DOT* described the physical requirements of the contract work as sedentary involving exertion up to 10 pounds of occasional force or negligible amounts frequent force to lift, push, carry, pull, or otherwise move objects, and occasional of walking or standing. The position involved mostly sitting, with some standing or walking for brief periods of time. The vocational rehabilitation counselor recommended remote work as an accommodation for appellant's need to make frequent bathroom breaks. He determined that the contract clerk job was performed in a sufficient geographical number in appellant's area at a weekly wage of \$750.00 according to a labor market survey dated

May 2022. The vocational rehabilitation counselor also noted that the possibility of remote work would further expand the labor market.

Appellant submitted an October 2, 2023 magnetic resonance imaging (MRI) scan of appellant's cervical spine. The findings were related as mild disc desiccation and disc bulge at C3-4 with superimposed right paracentral annular tear and disc herniation encroaching on the ventral cord, degenerative disc disease at C4-T1, and left foraminal disc herniation at C7-T1.

OWCP also received a visit note and Form OWCP-5c dated November 17, 2023 wherein Dr. Ellowitz' opinion and work restrictions were unchanged from his prior reports.

In a letter dated August 4, 2023, OWCP advised appellant that the selected position of contract clerk was suitable to his restrictions. It advised him that he would receive 90 days of placement assistance to help locate work in this position, if he cooperated with such effort. OWCP explained that appellant's wage-loss compensation benefits would be reduced based upon the salary of contract clerk at the end of the 90-day placement assistance period.

By notice dated January 25, 2024, OWCP informed appellant that it proposed to reduce his wage-loss compensation, pursuant to 5 U.S.C. § 8106 and 5 U.S.C. § 8115, because he had the capacity to earn \$750.00 in weekly wages in the constructed position of contract clerk. It informed him that the opinion of Dr. Donshik represented the best assessment of his capacity to work and that his vocational rehabilitation counselor properly determined that he was vocationally and medically capable of working as a contract clerk. As appellant's wage-earning capacity was less than the current pay of the job he held when injured, 47 percent, OWCP proposed to reduce his wage-loss compensation benefits to \$4,220.00 every four weeks. It afforded him 30 days to submit evidence and argument regarding the proposed reduction of his compensation.

In a January 28, 2024 response, appellant noted that he had been seeking reemployment.

By decision dated March 4, 2024, OWCP reduced appellant's wage-loss compensation, effective that date, based on his capacity to earn wages as a contract clerk with weekly earnings of \$750.00. It accorded the weight of the evidence to Dr. Donshik's report.

On March 12, 2024 appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on June 7, 2024. He asserted that he was unable to perform the duties of contract clerk. Appellant requested that his case be referred for an impartial medical evaluation.

In a decision dated July 26, 2024, OWCP's hearing representative affirmed the March 4, 2024 decision.

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.⁴ An injured

⁴ See *N.B.*, Docket No. 23-1157 (issued March 23, 2024); *L.M.*, Docket No. 20-1038 (issued March 10, 2021); *E.D.*, Docket No. 17-1064 (issued March 22, 2018).

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 loss of wage-earning capacity (LWEC).⁵

An employee's actual earnings generally best reflect his or her wage-earning capacity.⁶ 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.⁷ 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 or her disabled condition.⁸

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.⁹ The medical evidence OWCP relies upon must provide a detailed description of the employee's condition and the evaluation must be reasonably current.¹⁰ 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.¹¹

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.¹² 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

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

⁶ *See N.B., id.*; *T.D.*, Docket No. 20-1088 (issued June 14, 2021); *Hayden C. Ross*, 55 ECAB 455, 460 (2004).

⁷ *Id.*

⁸ *Supra* note 1 at § 8115(a); *N.B., id.*; *S.F.*, Docket No. 20-0869 (issued October 14, 2021); *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

⁹ *See N.B., id.*; *M.H.*, Docket No. 21-1055 (issued March 30, 2022); *M.A.*, 59 ECAB 624, 631 (2008).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.4d (June 2013); *see also J.H.*, Docket No. 18-1319 (issued June 26, 2019).

¹¹ *Id.* at Chapter 2.816c; *see also N.J.*, 59 ECAB 171 (2007).

¹² *Id.* at Chapter 2.813.7b (February 2011).

service.¹³ Lastly, OWCP applies the principles set forth in *Albert C. Shadrick*¹⁴ as codified in section 10.403 of OWCP's regulations,¹⁵ to determine the percentage of the employee's LWEC.

ANALYSIS

The Board finds that OWCP properly reduced appellant's wage-loss compensation, effective March 4, 2024, based on his capacity to earn wages in the constructed position of contract clerk.

Appellant's vocational rehabilitation counselor properly determined that appellant could earn wages in the constructed position of contract clerk, as it was commensurate with his education and past work experience. The vocational rehabilitation counselor indicated that a state labor market survey from May 2022 demonstrated that the contract clerk position was reasonably available within appellant's commuting area, with an average beginning wage of \$750.00 per week.¹⁶

Moreover, the evidence of record establishes that the physical requirements of the position of contract clerk were within the best measure of appellant's work capacity. The physical requirements were within the work restrictions of Dr. Donshik, OWCP'S referral physician. The restrictions were also within those provided by Dr. Elowitz, appellant's treating physician, of working eight hours per day with up to two hours of pushing, pulling and lifting no more than 15 pounds. The position of contract clerk had a sedentary strength level with a restriction of exerting up to 10 pounds of force occasionally. OWCP then properly applied the principles set forth in the *Shadrick* decision to calculate appellant's LWEC.¹⁷ Accordingly, the Board finds that OWCP properly found that the contract clerk position reflected appellant's wage-earning capacity.¹⁸

Appellant may request modification of the July 26, 2024 LWEC determination, supported by new evidence or argument, at any time before OWCP.

CONCLUSION

The Board finds that OWCP properly reduced appellant's compensation, effective March 4, 2024, to reflect appellant's LWEC based on the constructed position of contract clerk.

¹³ *Id.* at Chapter 2.816.6a (June 2013); *see also C.M.*, Docket No. 18-1326 (issued January 4, 2019).

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

¹⁵ 20 C.F.R. § 10.403.

¹⁶ *See J.S.*, Docket No. 23-0518 (issued April 9, 2024); *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).

¹⁷ *Supra* note 15.

¹⁸ *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 July 26, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 24, 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