

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **ISSUE**

The issue is whether OWCP properly reduced appellant's wage-loss compensation benefits, effective July 15, 2024, based on his 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 of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On July 18, 1985, appellant, then a 26-year-old border patrol agent trainee, filed a traumatic injury claim (Form CA-1) alleging that on April 26, 1985 he injured his groin when running during physical training while in the performance of duty. He was initially diagnosed with a groin pull; however, x-rays and bone scans taken in October and November 1985 revealed a fracture of the right hip with sclerosis of the femoral head. Appellant resigned from his federal position on July 19, 1985, and has not returned to work since that date.

OWCP accepted appellant's claim for aseptic necrosis of the right femoral head, right hip unilateral osteoarthritis, and degenerative disease of right hip.<sup>4</sup> The record reflects that OWCP paid him wage-loss compensation for total disability on the periodic rolls effective June 16, 2002. Appellant underwent a right total hip arthroplasty on March 14, 2011.

Dr. Kevin Scott, a Board-certified orthopedic surgeon and second opinion physician, examined appellant on January 8, 2021 to determine the status of his accepted conditions. He opined that appellant had degenerative right hip osteoarthritis, which was aggravated by the employment injury. Dr. Scott opined that appellant could not return to full-duty work, but he could perform sedentary work with no prolonged standing or walking.

On June 19, 2021, OWCP assigned appellant a vocational rehabilitation counselor.

On June 9, 2023, OWCP again referred appellant, along with the case record, a statement of accepted facts (SOAF), and a series of questions to Dr. Scott for a second opinion examination to determine the status of his accepted medical conditions and extent of disability.

In a report dated July 14, 2023, Dr. Scott recounted appellant's medical history. He related appellant's physical examination findings and found that he had loss of motion in the right hip and that his subjective complaints including pain correlated with the objective findings. Dr. Scott diagnosed post right total hip arthroplasty. He opined that the work-related conditions had not resolved, and that appellant was not capable of returning to his date-of-injury job as outlined in the SOAF. Dr. Scott recommended that appellant undergo a functional capacity evaluation (FCE) and noted that he would defer to the FCE to determine appellant's work restrictions.

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<sup>3</sup> Docket No. 93-474 (issued March 2, 1994).

<sup>4</sup> On February 26, 1990, OWCP granted appellant a schedule award for 50 percent loss of use of his right leg. The period of award was from February 11, 1990 to November 24, 1992.

Appellant underwent an FCE on October 23, 2023.

On December 19, 2023, OWCP requested a supplemental report from Dr. Scott, noting that appellant underwent an FCE on October 23, 2023. It provided Dr. Scott a copy of the FCE report and requested that Dr. Scott determine appellant's physical capabilities and restrictions.

In a December 27, 2023 addendum, Dr. Scott opined that appellant was partially disabled as a result of the employment injury. He noted that he last saw appellant on July 14, 2023, and diagnosed status post right total hip arthroplasty. Dr. Scott reviewed the FCE and completed a work capacity evaluation (Form OWCP-5c). He opined that appellant was capable of performing work up to eight hours per day with the following medical restrictions: sitting up to two hours frequently; walking up to one hour occasionally; standing up to one hour occasionally; reaching up to one hour occasionally; reaching above shoulder for up to one hour occasionally; no twisting/bending/stooping/pushing/climbing/kneeling/squatting/climbing; and occasional lifting up to 15 pounds.

In a January 4, 2024 report, the vocational rehabilitation counselor related that he had worked with appellant from January 14 to June 30, 2022 to find gainful employment in the private sector. The positions of customer service representative and dispatcher were selected as representative of appellant's work capacity. Although the counselor had several good contacts, given appellant's disability and his years out of work, appellant was unable to obtain gainful employment within his expertise. As there was no possibility of return to work with the former employer, appellant's case was closed effective immediately.

On January 12 and February 20, 2024, the employing establishment requested a formal loss of wage-earning capacity (LWEC) determination. It provided a January 11, 2024 report from Dr. James Caviness, Board-certified in preventative and occupational medicine, who reviewed appellant's medical records on behalf of the employing establishment. Dr. Caviness concluded that there was no meaningful distinction between appellant's 2021 work restrictions and the new second opinion restrictions based on the FCE. He recommended immediate referral of the case to OWCP for preparation of a constructed LWEC determination.

On February 16, 2024, the vocational rehabilitation counselor completed a job classification and labor market information form (Form OWCP-66). He related that based on the medically determined residuals of appellant's injury, and taking into consideration all significant preexisting impairments and pertinent nonmedical factors, appellant was able to perform the position of customer service representative and that such work was reasonably available within the commuting area. The job description was cited from the Department of Labor, *Dictionary of Occupational Titles* (DOT), of customer service representative, DOT # 239.362-014 as a sedentary position. The job description was noted as: alternate titles: adjustment clerk, application clerk, order clerk, outside contact clerk, and service representative; interviews applicants and records interview information into computer for water, gas, electric, telephone, or cable television system service; talks with customers by telephone or in person and receives orders for installation, turn-on, discontinuance, or change in service; fills out contract forms, determines charges for service requested, collects deposits, prepares change of address records, and issues discontinuance orders, using computer; may solicit sale of new or additional services; may adjust complaints concerning billing or service rendered, referring complaints of service failures, such as low voltage or low pressure, to designated departments for investigation; may visit customers at their place of

residence to investigate conditions preventing completion of service-connection orders and to obtain contract and deposit when service is being used without contract; and may discuss cable television equipment operation with customer over telephone to explain equipment usage and to troubleshoot equipment problems. The vocational rehabilitation counselor concluded that appellant could perform this position based upon appellant's age, experience, and education, the medical restrictions from Dr. Scott, and a labor market survey. Appellant's high school and college education were cited, as well as his prior work experience as an assistant manager of a restaurant, and as a ski instructor. The vocational rehabilitation counselor conducted labor market research and documented that the position of customer service clerk was reasonably available full and part time within appellant's commuting area, and that the entry pay level for the customer service clerk position was \$538.40 per week.

OWCP thereafter received a February 27, 2024 report from Dr. John S. Xenos, a Board-certified orthopedic surgeon and treating physician. In progress notes of even date, Dr. Xenos related that appellant presented for his annual visit and that he was doing well, without concerns. He also provided an attending physician's report (Form CA-20) noting appellant's diagnoses of status post right total hip arthroplasty and left hip trochanter bursitis. Dr. Xenos opined that appellant was limited by mechanical restriction, had a permanent injury and disability, and was unable to work. He also completed a Form OWCP-5c and indicated that appellant had a permanent injury and could work zero hours.

In a March 13, 2024 report, the vocational rehabilitation counselor determined that the position of customer service representative, DOT # 239.362-014, was most representative of appellant's work abilities, based on appellant's work capacity, prior college education, and work experience as an assistant restaurant manager and a ski instructor. On March 15, 2024, OWCP closed the case for vocational rehabilitation services.

In an April 2, 2024 notice, OWCP proposed to reduce appellant's wage-loss compensation based on his capacity to earn wages in the constructed position of customer service representative at the weekly pay rate of \$538.40. It noted that the physical requirements of the customer service representative position were consistent with the work restrictions provided by Dr. Scott and that the selected position was medically suitable. OWCP found that the position was vocationally suitable based on the vocational rehabilitation counselor's report. It calculated 57 percent wage-earning capacity or 43 percent LWEC, with a new gross compensation rate each four weeks of \$991.00. OWCP attached the job classification for the customer service representative position completed by the vocational rehabilitation counselor on February 16, 2024, and Dr. Scott's July 14 and December 27, 2023 work restrictions. It afforded appellant 30 days to submit evidence and argument challenging the proposed action.

In an April 9, 2024 letter, appellant responded that he was unable to find employment as a customer service representative because of his unemployment for the past 39 years, that he was now 65 years old and had not worked since his injury when he was 26. He alleged that his disability was caused by inadequate medical treatment of his work injury. Appellant also related that because of his receipt of FECA benefits he was not eligible for Social Security benefits and was required to pay for Medicare Part A and Part B from his FECA benefits.

OWCP received physical therapy reports and claims for outstanding bills from May 2021.

By decision dated July 15, 2024, OWCP reduced appellant's wage-loss compensation effective that date, as he had the capacity to earn wages of \$538.40 per week in the constructed position of a customer service representative, DOT #239.362-014. It found that the December 27, 2023 report from Dr. Scott represented the weight of the evidence and established that appellant could perform the selected position. OWCP applied the formula set forth in *Albert C. Shadrick*<sup>5</sup> 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.<sup>6</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>7</sup> An employee's actual earnings generally best reflect his or her wage-earning capacity.<sup>8</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>9</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 employment, the availability of suitable employment and other factors and circumstances that may affect wage-earning capacity in his disabled condition.<sup>10</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>11</sup> The medical evidence OWCP relies upon must provide a detailed description of the employee's condition and the evaluation must be reasonably current.<sup>12</sup> Where suitability is to be determined based on a position not actually held, the selected position must accommodate the employee's

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

<sup>6</sup> See *C.B.*, Docket No. 23-0795 (issued December 28, 2023); see *L.M.*, Docket No. 20-1038 (issued March 10, 2021); *E.D.*, Docket No. 17-1064 (issued March 22, 2018).

<sup>7</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>8</sup> See *T.D.*, Docket No. 20-1088 (issued June 14, 2021); *Hayden C. Ross*, 55 ECAB 455, 460 (2004).

<sup>9</sup> *Id.*

<sup>10</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>11</sup> See *M.H.*, Docket No. 21-1055 (issued March 30, 2022); *M.A.*, 59 ECAB 624, 631 (2008).

<sup>12</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).

limitations from both injury-related and preexisting conditions, but not limitations attributable to postinjury or subsequently-acquired conditions.<sup>13</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 DOT or otherwise available in the open market, that fits the employee's capabilities with regard to his or her physical limitations, education, age, and prior experience.<sup>14</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>15</sup> The fact that an employee has been unsuccessful in obtaining work in the selected position does not establish that the work is not reasonably available in his commuting area.<sup>16</sup>

Lastly, OWCP applies the principles set forth in *Albert C. Shadrick*<sup>17</sup> as codified in section 10.403 of OWCP's regulations,<sup>18</sup> to determine the percentage of the employee's LWEC.

### ANALYSIS

The Board finds that OWCP properly reduced appellant's wage-loss compensation benefits, effective July 15, 2024, based on his capacity to earn wages in the constructed position of a customer service representative.

Appellant provided a February 27, 2024 report from his treating physician, Dr. Xenos, who diagnosed status post right total hip arthroplasty and left hip trochanter bursitis. Dr. Xenos opined that appellant was limited by mechanical restriction, had a permanent injury and disability, and was unable to work. However, he also related that appellant was "doing well, without concerns." The Board finds that Dr. Xenos did not provide medical reasoning or justification as to why appellant was totally disabled from work due to his accepted conditions.

OWCP properly referred appellant to Dr. Scott for a second opinion examination to determine his work capacity. In a July 14, 2023 report, Dr. Scott found that appellant had loss of motion in the right hip and pain and diagnosed post right total hip arthroplasty. He opined that the work-related conditions had not resolved, and that appellant was not capable of returning to his date of injury job as outlined in the SOAF. Dr. Scott recommended that appellant undergo an FCE. Appellant underwent an FCE on October 23, 2023, and OWCP requested a supplemental report from Dr. Scott and provided him with a copy of the FCE report. In a December 27, 2023 addendum, Dr. Scott diagnosed status post right total hip arthroplasty and opined that appellant was partially disabled as a result of the employment injury. He opined that appellant was capable

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

<sup>14</sup> *Id.*

<sup>15</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>16</sup> *F.M.*, Docket No. 24-0673 (October 18, 2024); *see B.G.*, Docket No. 17-0477 (issued September 20, 2017).

<sup>17</sup> *Supra* note 6.

<sup>18</sup> 20 C.F.R. § 10.403.

of performing sedentary work up to eight hours per day with work restrictions of sitting up to two hours frequently; walking up to one hour occasionally; standing up to one hour occasionally; reaching up to one hour occasionally; reaching above shoulder for up to one hour occasionally; no twisting/bending/stooping/pushing/climbing/kneeling/squatting/climbing; and occasional lifting up to 15 pounds.

OWCP's vocational rehabilitation counselor, properly proceeded to determine appellant's LWEC as the medical evidence established that he was no longer totally disabled from work and could perform sedentary work.<sup>19</sup>

The Board finds that OWCP properly determined that appellant had the physical capacity to perform the duties of a customer service representative. The position is classified as sedentary and the vocational rehabilitation counselor determined that the customer service representative position allowed for a variety of duties, none of which exceeded Dr. Scott's restrictions.<sup>20</sup> There is no contradictory rationalized medical evidence of record. For these reasons, the Board finds that the weight of the medical evidence, as represented by Dr. Scott, establishes that appellant had the physical capacity to perform the duties of the selected position.<sup>21</sup>

In assessing the employee's ability to perform the selected position, OWCP must consider not only physical limitations, but also consider work experience, age, mental capacity, and educational background.<sup>22</sup> The vocational rehabilitation counselor determined that the customer service representative position was suitable for appellant based on his work capacity, prior college education, and work experience as an assistant restaurant manager and a ski instructor. For the customer service representative position, the vocational rehabilitation counselor determined that the position was medically and vocationally suitable and existed in sufficient numbers within the reasonable commuting area, with an average weekly wage of \$538.40. As the vocational rehabilitation counselor is an expert in the field of vocational rehabilitation, OWCP may rely on his opinion in determining whether a job is vocationally suitable and reasonably available.<sup>23</sup> The Board finds that OWCP considered the proper factors, including the availability of suitable employment, appellant's physical limitations, and employment qualifications in determining that he had the capacity to perform the customer service representative position.<sup>24</sup> The record reflects that his relevant work experience established that he had the requisite physical ability, skill, and experience to perform the customer service representative position, which was reasonably available within the general labor market of his commuting area at a weekly wage of \$538.40.<sup>25</sup>

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<sup>19</sup> *S.C.*, Docket No. 19-1381 (issued November 24, 2020); *C.H.*, Docket No. 19-0136 (issued May 23, 2019).

<sup>20</sup> *M.H.*, Docket No. 19-1410 (issued November 5, 2020); *J.H.*, Docket No. 18-1319 (issued June 26, 2019).

<sup>21</sup> *Id.*; see also *S.B.*, Docket No. 23-0700 (issued September 26, 2023).

<sup>22</sup> *M.H.*, *supra* note 20; *C.P.*, Docket No. 19-0595 (issued September 9, 2019).

<sup>23</sup> See *M.H.*, *id.*; *J.B.*, Docket No. 17-0817 (issued April 26, 2018).

<sup>24</sup> *S.B.*, *supra* note 21; *T.B.*, Docket No. 17-1777 (issued January 16, 2019); *Clayton Varner*, 37 ECAB 248 (1985).

<sup>25</sup> *C.M.*, Docket No. 18-0742 (issued March 12, 2020).

OWCP properly applied the *Shadrick* formula, as codified in section 10.403 of its regulations,<sup>26</sup> in determining appellant's LWEC. Accordingly, the Board finds that OWCP properly found that the customer service representative position reflected appellant's wage-earning capacity.<sup>27</sup>

While appellant's participation in the vocational rehabilitation program did not result in appellant's reemployment in the selected position, the fact that an employee has been unsuccessful in obtaining work in the selected position does not establish that the work is not reasonably available in his commuting area.<sup>28</sup>

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

### **CONCLUSION**

The Board finds that OWCP properly reduced appellant's wage-loss compensation benefits, effective July 15, 2024, based on his capacity to earn wages in the constructed position of a customer service representative.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the July 15, 2024 decision of the Office of Workers' Compensation Programs is affirmed.<sup>29</sup>

Issued: January 31, 2025  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>26</sup> 5 ECAB 376 (1953), codified at 20 C.F.R. § 10.403.

<sup>27</sup> See *M.H.*, *supra* note 20; *J.F.*, Docket No. 19-0864 (issued October 25, 2019).

<sup>28</sup> *Supra* note 18.

<sup>29</sup> James D. McGinley, Alternate Judge, participated in the preparation of this decision, but was no longer a member of the Board effective January 12, 2025.