

FACTUAL HISTORY

OWCP accepted that on April 12, 2006 appellant, then a 45-year-old mail processing clerk, sustained a right rotator cuff rupture and sprain while lifting tubs of mail.² He had intermittent work absences through June 2007.³

On June 14, 2007 Dr. Wadith Joseph Absi, an attending Board-certified orthopedic surgeon, performed arthroscopic repair of a partial thickness rotator cuff tear and debridement to address recurrent right shoulder impingement. He released appellant to limited duty on June 25, 2007 but noted that he wished to remain off work. Appellant received wage-loss compensation on the periodic rolls.

In a July 24, 2007 report, Dr. Philip Wiltz Jr., an attending orthopedic surgeon, noted considerable right shoulder girdle atrophy. He diagnosed degenerative changes and tendinitis of the right shoulder.⁴ Dr. Wiltz submitted progress notes through January 24, 2008 finding that appellant could return to work if he was not required to use his right arm.

Beginning on October 9, 2007 appellant was followed by Dr. Kamal Kabakibou, an attending Board-certified anesthesiologist specializing in pain management, who noted chronic degenerative changes in the right shoulder with atrophy, spasm and limited abduction. Dr. Kabakibou diagnosed chronic myofascial pain and prescribed medication. In reports through April 24, 2009 he diagnosed advanced degenerative joint disease in the right shoulder, right ankle and left wrist.

In December 2007 OWCP referred appellant for vocational rehabilitation. On February 12, 2008 appellant underwent a functional capacity evaluation demonstrating a light-duty work capacity. The examiner noted that he exhibited a submaximal effort. Dr. Wiltz reviewed the results on February 21, 2008 and opined that appellant could perform full-time sedentary work.

On March 28 and 31, 2008 Dr. Wiltz provided permanent restrictions against reaching above shoulder level with the right arm, repetitive right upper extremity motion, pulling, pushing or lifting with the right arm and operating a motor vehicle at work. He approved the employing establishment's offer of a modified clerk position. Appellant worked from April 3 to 7, 2008,

² The record indicates that OWCP denied appellant's claim for continuation of pay associated with the April 12, 2006 injury. Under a separate claim, it accepted that he sustained a November 21, 1997 right shoulder injury with arthroscopic repair on August 10, 1998. Appellant sustained a recurrence of disability on February 19, 2004, requiring a second right shoulder arthroscopy on June 29, 2004. Under claim number xxxxxx450, OWCP accepted a right foot injury. This claim is not before the Board on the present appeal.

³ An April 30, 2007 arthrogram of the right shoulder showed cystic degenerative changes of the glenoid rim, acromioclavicular joint, tendinitis of the rotator cuff, a partial tear at the junction of the supraspinatus and infraspinatus tendons.

⁴ Dr. Wiltz referred appellant to Dr. Efrim C. Moore, a Board-certified anesthesiologist, for pain management. In an August 29, 2007 report, Dr. Moore diagnosed right shoulder dysfunction and recommended physical therapy in lieu of narcotic medications.

then stopped due to increased right shoulder symptoms. OWCP accepted an April 7, 2008 recurrence of disability, finding that the modified clerk job exceeded his restrictions.

Dr. Wiltz submitted progress reports from May through August 2008, noting limited abduction and extension of the right shoulder. He opined that appellant could not perform repetitive or overhead tasks with his right arm. Appellant remained off work and received benefits on the periodic rolls.

On September 23, 2008 appellant fell down stairs at his home and sustained left calcaneus and left wrist fractures. In a September 25, 2008 report, Dr. Wiltz noted that appellant had a fractured scaphoid in the left wrist and on calcis in his left foot. On examination of the right shoulder Dr. Wiltz observed generalized tenderness, mild weakness and atrophy. He found appellant medically able to work full time as a modified mail clerk, doing scanning with no overhead tasks.

On December 9, 2008 OWCP obtained a second opinion from Dr. Barry A. Koffler, a Board-certified orthopedic surgeon, who provided a detailed history of injury and treatment referencing the medical record and statement of accepted facts provided for his use. On examination, Dr. Koffler found restricted abduction, extension and internal rotation of the right shoulder. He diagnosed tendinitis and impingement syndrome of the right shoulder, status post three arthroscopic surgeries. In an April 7, 2009 supplemental report, Dr. Koffler found that appellant had reached maximum medical improvement. He found appellant able to perform sedentary work with permanent restrictions. Dr. Koffler limited pushing, pulling and lifting to 15 pounds for no more than four hours a day, no reaching above shoulder level and no abducting or flexing the right shoulder more than 90 degrees. Also, appellant could not drive a motor vehicle at night due to side effects of narcotic medication.

In a May 21, 2009 report, Dr. Wiltz noted 70 degrees right shoulder abduction and limited internal rotation. He released appellant to sedentary work regarding the right rotator cuff injury. Dr. Wiltz noted that appellant recently underwent wrist and ankle surgery.

In a May 22, 2009 report, Dr. Kabakibou noted that appellant had recent left foot surgery. He submitted progress reports through December 18, 2009 noting left ankle pain.

On September 25, 2009 a vocational rehabilitation counselor administered vocational aptitude tests. The counselor noted that appellant had a high school diploma and completed two years of electronics training. Based on a transferable skills analysis, the vocational rehabilitation counselor selected order clerk, U.S. Department of Labor's, *Dictionary of Occupational Titles* (DOT) number 249.362-026, as a vocational goal commensurate with appellant's education and physical abilities. The position was classified as sedentary, with lifting, carrying, pulling and pushing up to 10 pounds. Duties included checking records, compiling statistics and making telephone calls. Work was performed in an office setting while sitting, with brief periods of standing and walking.

On November 30, 2009 OWCP implemented a placement plan with employment goals of order clerk and information clerk. The vocational rehabilitation counselor noted that both jobs were sedentary clerical positions within Dr. Koffler's April 7, 2009 restrictions. In a

November 30, 2009 letter, OWCP advised appellant that the positions of order clerk and service clerk were suitable work. Appellant would receive 90 days of job placement assistance ending on March 1, 2010.

On December 7, 2009 the vocational rehabilitation counselor provided appellant with a resume and business cards to use in his job search. During a January 29, 2010 teleconference, appellant stated that he would not cooperate with the placement plan as OWCP had “lies” in its files and was biased against him. The counselor forwarded him 10 job leads through February 17, 2010. Appellant did not contact the prospective employers.

OWCP closed the vocational rehabilitation effort on March 2, 2010. A labor market survey showed that order clerk positions remained available in appellant’s commuting area with entry level wages of \$320.00 a week.

By notice dated March 30, 2010, OWCP proposed reducing appellant’s wage-loss compensation based on his ability to earn \$320.00 a week in the selected position of order clerk. It found the position to be suitable work. OWCP afforded appellant 30 days to submit additional evidence or argument.

In an April 25, 2010 letter, appellant contended that he wanted to return to work at the employing establishment. He submitted an April 9, 2010 report from Dr. Kabakibou noting pending left foot surgery to revise a previous fusion. Dr. Kabakibou diagnosed advanced degenerative joint disease of the left ankle and chronic right shoulder pain.

By decision dated May 6, 2010, OWCP reduced appellant’s compensation effective January 31, 2010 under sections 8106 and 8115 of FECA, based on his ability to earn \$320.00 a week in the selected position of order clerk. It calculated a wage-earning capacity of 32 percent based on a recurrent pay rate effective April 7, 2008. OWCP found that appellant did not submit evidence establishing that he was medically unable to perform the job. Appellant remained entitled to medical benefits for treatment of the accepted conditions.

LEGAL PRECEDENT

Once OWCP determines that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of benefits.⁵ Under section 8115(a), wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent his or her wage-earning capacity or if the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his or her usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect wage-earning capacity in his or her disabled condition.⁶

⁵ *David W. Green*, 43 ECAB 883 (1992).

⁶ *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

When OWCP makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to OWCP's wage-earning capacity specialist for selection of a position, listed in the Department of Labor's *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. Once this selection is made, a determination of wage rate and availability in the labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in *Albert C. Shadrick*,⁷ will result in the percentage of the employee's loss of wage-earning capacity.⁸

ANALYSIS

OWCP accepted that appellant sustained a right rotator cuff rupture and sprain necessitating surgical repair. Appellant was off work from June 2007 to April 3, 2008, then again from April 8, 2008 and continuing. Dr. Wiltz, an attending orthopedic surgeon, opined on September 25, 2008 that appellant could work eight hours a day as a modified clerk with limited use of the right arm. OWCP obtained a second opinion from Dr. Koffler, a Board-certified orthopedic surgeon, to further delineate appellant's work restrictions. Dr. Koffler submitted December 9, 2008 and April 7, 2009 reports providing a detailed history of injury and treatment based on the medical record and statement of accepted facts. He opined that appellant could perform sedentary work with pushing, pulling and lifting no more than 15 pounds and no abducting or flexing the right shoulder more than 90 degrees.

As Dr. Koffler found that appellant was no longer totally disabled for work, OWCP referred appellant for vocational rehabilitation. Based on his restrictions, aptitude testing and a transferable skills analysis, a vocational rehabilitation counselor identified the position of order clerk as within appellant's medical and vocational capabilities. The order clerk position was classified as sedentary, with occasional lifting up to 10 pounds. These physical requirements are within the restrictions set forth by Dr. Koffler. The vocational requirements were found by the counselor to be commensurate with appellant's education and experience. The specialist then determined the prevailing wage rate of these positions and their reasonable availability in the open labor market. Based on these calculations, the Office issued a May 6, 2010 decision reducing appellant's compensation based on his ability to earn \$320.00 a week as an order clerk.

The Board finds that OWCP considered the proper factors, such as availability of order clerk positions and appellant's physical limitations, in determining that the order clerk position represented his wage-earning capacity. Dr. Wiltz and Dr. Koffler opined that appellant was medically capable of full-time light-duty work at the physical demand level required by the order clerk position.

The vocational rehabilitation counselor found that order clerk positions were reasonably available in appellant's commuting area. Also, OWCP followed the established procedures under the *Shadrick* decision in calculating appellant's employment-related loss of wage-earning capacity. Appellant does not contest OWCP's calculations.

⁷ 5 ECAB 376 (1953).

⁸ *Francisco Bermudez*, 51 ECAB 506 (2000); *James A. Birt*, 51 ECAB 291 (2000).

Appellant did not submit medical evidence to establish that he was not capable of working eight hours a day. The Board finds that he was medically and vocationally capable of working eight hours a day as an order clerk. Thus, the Office's May 6, 2010 decision reducing appellant's compensation based on his ability to earn wages in the selected position of order clerk is proper under the law and facts of this case.⁹

On appeal, appellant asserts that OWCP reduced his compensation before giving him 30 days to respond to the notice of proposed reduction. OWCP provided his notice of the proposed reduction of compensation on March 30, 2010. The final decision reducing appellant's compensation was issued on May 6, 2010, more than 30 days after March 30, 2010. Therefore, appellant's contention is not supported by the record. Appellant also asserts that OWCP did not fully consider the opinions of his physicians; but the record demonstrates that OWCP did consider Dr. Wiltz' opinion that appellant could return to work in a full-time clerical position. The Board notes that Dr. Kabakibou, an attending Board-certified anesthesiologist, did not address appellant's work capacity.

CONCLUSION

The Board finds that OWCP properly determined that the selected position of general clerk reasonably represented appellant's wage-earning capacity.

⁹ *E.T.*, Docket No. 10-559 (issued March 28, 2011).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 6, 2010 is affirmed.

Issued: August 15, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board