

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

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**L.M., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Pompano Beach, FL, Employer**

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**Docket No. 12-1363  
Issued: December 27, 2012**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
PATRICIA HOWARD FITZGERALD, Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On June 11, 2012 appellant filed a timely appeal from a February 24, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether OWCP properly determined that the selected position of information clerk represented appellant's wage-earning capacity.

**FACTUAL HISTORY**

The case was before the Board on a prior appeal. In a decision dated June 6, 2011, the Board noted that OWCP had accepted a right shoulder contusion and right incisional hernia with repair resulting from on November 26, 1997 employment incident.<sup>2</sup> The Board reversed a

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> Docket No. 10-2203 (issued June 6, 2011).

July 7, 2009 OWCP decision finding that appellant had, without good cause, failed to participate in vocational rehabilitation services. The Board found that her election of Office of Personnel Management (OPM) retirement benefits did not establish a failure to participate without good cause in vocational rehabilitation. The history of the case provided in the Board's prior decision is incorporated herein by reference.<sup>3</sup>

With respect to medical evidence, in a report dated December 3, 2010, attending physician Dr. Robert Baylis, a Board-certified orthopedic surgeon, indicated that there was no change with respect to appellant's complaints of right shoulder pain. He indicated that she was retired and her restrictions continued to be occasional overhead use of her right shoulder. Dr. Baylis completed a work capacity evaluation (OWCP-5c) also indicating that appellant was limited to occasional overhead reaching with the right shoulder. He submitted a similar OWCP-5c dated November 14, 2011.

A review of appellant's emotional condition claim indicates that the last medical report discussing appellant's work restrictions was an OWCP-5c report dated April 11, 2008 from Dr. Daniel Chervony, a psychiatrist, who indicated that she could work eight hours, but he recommended that appellant not return to the employing establishment work site as this would cause anxiety. As to the 1995 claim for an anaphylactic reaction to bee stings, in a report dated August 15, 2011, Dr. Leslie Hurwitz, an osteopath, stated that appellant remained allergic to bites from ants, bees and wasps. Dr. Hurwitz stated that appellant had been advised not to walk through grass or dirt areas and not to park on grassy areas where the possibility of an insect bite would be greater.

On return of the case record, OWCP requested that a rehabilitation specialist (RS) provide updated information on the positions of information clerk and customer services representative, that had been previously identified through vocational rehabilitation. In a report dated July 14, 2011, the RS stated that the position of information clerk was reasonably available in appellant's area with an entry level wage of \$9.87 per hour (\$394.80 weekly based on 40 hours). The record contains a description of the information clerk position, Department of Labor's *Dictionary of Occupational Titles* No. 237.367-022. The position was a sedentary position with occasional lifting of up to 10 pounds, occasional reaching and handling. OWCP indicated that information received from the employing establishment established appellant's current date-of-injury pay rate as \$943.61 per week. The figure was based on a weekly salary of \$928.21(\$48,267.00 annually) plus \$15.40 per week in night differential and Sunday premium pay.

In a letter dated December 14, 2011, OWCP advised appellant that it proposed to reduce her further entitlement to wage-loss compensation based on her wage-earning capacity in the selected position of information clerk at \$394.80 per week.<sup>4</sup> By letter dated December 17, 2011, appellant stated that she disagreed with the proposed reduction. She stated that her disability had

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<sup>3</sup> The Board noted that appellant has two other claims: a claim accepted on May 25, 1993 for anaphylactic reaction to bee stings, (File No. xxxxxx476, appellant alleged four incidents from April 6, 1988 to May 31, 1991 involving bee stings) and a June 19, 1996 claim accepted for anxiety attack File No. xxxxxx961.

<sup>4</sup> Appellant was not currently receiving compensation for wage loss as she had selected OPM benefits.

not changed and the Board had found her compensation should not be reduced. In a letter dated January 6, 2012, appellant again stated that she disagreed with the proposed reduction.

By decision dated February 24, 2012, OWCP finalized its proposed reduction of entitlement to compensation for wage loss. It found that the selected position of information clerk represented appellant's wage-earning capacity.

### **LEGAL PRECEDENT**

Once OWCP has made a determination 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 in such benefits.<sup>5</sup>

Under 5 U.S.C. § 8115(a), wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, his degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.<sup>6</sup>

When OWCP makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to OWCP wage-earning capacity specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* 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.<sup>7</sup> Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.<sup>8</sup>

### **ANALYSIS**

Although the record indicates that appellant is not currently receiving compensation for wage loss, OWCP made a determination under 5 U.S.C. § 8115 as to her wage-earning capacity.<sup>9</sup> The selected position was information clerk, a sedentary position that involved occasional walking, standing, reaching and handling, with lifting up to 10 pounds. In reviewing the medical

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<sup>5</sup> *Carla Letcher*, 46 ECAB 452 (1995).

<sup>6</sup> *See Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); *see also* 5 U.S.C. § 8115(a).

<sup>7</sup> *See Dennis D. Owen*, 44 ECAB 475 (1993).

<sup>8</sup> 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.403.

<sup>9</sup> As the Board noted in its prior decision, OWCP's procedures indicate that a wage-earning capacity determination may be appropriate when a claimant is receiving OPM benefits, in case the claimant chooses to reinstate compensation benefits. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Vocational Rehabilitation Services*, Chapter 2.813.18 (February 2011).

evidence from all of appellant's accepted injuries, the evidence indicates the selected position was medically suitable. The only shoulder restriction noted by Dr. Baylis was for the right shoulder with occasional reaching above the shoulder. The selected position involves occasional reaching, with no indication that such activity was above the shoulder or in any way would exceed the restrictions of Dr. Baylis. With respect to an allergic reaction to bee stings, Dr. Hurwitz recommended only that appellant avoid walking on grass or dirt or parking on grassy areas. There is no evidence the selected position violated the work restriction. As to the emotional condition claim, Dr. Chervony indicated that appellant could work full time, with the only restriction that she not return to the employing establishment work site where her 1996 injury occurred. The selected position is not outside this work restriction.

The Board accordingly finds that, based on the evidence of record, the selected position was medically suitable. The RS indicated that the position was vocationally suitable and found that it was reasonably available in appellant's work area. No contrary evidence was submitted. The wage rate was determined to be \$394.80 per week, based on the employment date cited by the RS.

As noted above, the final step in the process is the application of 20 C.F.R. § 10.403, comparing the wages in the selected position (\$394.80) with the current wages for the date-of-injury position (\$943.61) to obtain the wage-earning capacity in terms of percentage. In this case, OWCP followed its procedures in determining appellant's loss of wage-earning capacity.

In accord with established procedures, OWCP notified appellant of its proposed determination and provided her an opportunity to respond.<sup>10</sup> The Board finds that OWCP properly followed its procedures and properly found the selected position represented appellant's wage-earning capacity.

On appeal, appellant states that she remains totally disabled for work. The Board has reviewed the medical evidence of record and, as noted above, finds no probative medical evidence establishing the selected position was outside appellant's work restrictions. Appellant also stated that an information clerk was a small part of her capabilities and it was insulting to suggest such a trivial position. The issue presented is whether the selected position was medically and vocationally suitable to support a wage-earning capacity determination. It is not a question of whether the selected position would fully utilize appellant's skills nor is there a requirement that he be employed in an information clerk position.<sup>11</sup> The evidence of record supports that the selected position was within appellant's vocational abilities.

Appellant also generally argues that OWCP has ignored relevant evidence in her case, but again, the issue in the case is whether OWCP properly found the selected position represented appellant's wage-earning capacity. The Board has reviewed the relevant evidence and finds that OWCP properly found that the information clerk position represented appellant's wage-earning capacity, if she chooses OWCP benefits rather than OPM benefits.

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<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(e) (October 2009).

<sup>11</sup> See, e.g. *Merle J. Marceau*, 53 ECAB 197, 203 (2001).

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated February 24, 2012 is affirmed.

Issued: December 27, 2012  
Washington, DC

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

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board