

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

W.F., Appellant

and

**DEPARTMENT OF THE ARMY, RED RIVER
ARMY DEPOT, Texarkana, TX, Employer**

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**Docket No. 11-877
Issued: March 9, 2012**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 23, 2011 appellant filed a timely appeal from a November 15, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) regarding a wage-earning capacity determination, a December 22, 2010 nonmerit decision denying reconsideration, and a January 11, 2011 decision suspending his compensation benefits. 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.

ISSUES

The issues are: (1) whether OWCP properly determined that the selected position of cashier properly represented appellant's wage-earning capacity as of November 21, 2010; (2) whether it properly denied his request for reconsideration; and (3) whether OWCP properly suspended appellant's compensation benefits effective January 16, 2011 on the grounds that he failed to complete a Form EN1032 as requested.

¹ 5 U.S.C. § 8101 *et seq.*

On appeal, appellant asserts that the selected position was not suitable work as his attending physician opined he could not work full time.

FACTUAL HISTORY

This is the third appeal before the Board. By decision and order issued July 8, 2010,² the Board affirmed OWCP's September 14, 2009 decision regarding an overpayment of compensation. The facts of the case as set forth in the Board's prior decision are incorporated by reference.

OWCP accepted that on June 5, 1998, appellant sustained a right arm and shoulder strain and a ruptured right biceps tendon. He stopped work in December 2000 and did not return. OWCP placed appellant's case on the periodic rolls as of February 24, 2002.³

Appellant submitted periodic medical reports from Dr. Rodney R. Chandler, an attending family practitioner, dated from October 19, 2001 to February 12, 2008. Dr. Chandler found appellant totally and permanently disabled for work due to pain and weakness in the right arm. Dr. Roshan Sharma, an attending Board-certified physiatrist, found appellant totally disabled commencing January 16, 2002 due to the accepted shoulder and biceps tendon injuries.

On November 20, 2008 OWCP obtained a second opinion from Dr. Robert E. Holladay, IV, a Board-certified orthopedic surgeon, who diagnosed a ruptured distal right biceps tendon. Dr. Holladay found appellant able to perform full-time light duty with lifting limited to 10 pounds.

OWCP found a conflict of medical opinion between Dr. Holladay and appellant's attending physicians. To resolve the conflict, it selected Dr. Ollie Doak Raulston, Jr., a Board-certified orthopedic surgeon, as the impartial medical examiner. OWCP provided a statement of accepted facts and the medical record for the physician's review. During the February 13, 2009 examination, Dr. Raulston found 3/5 muscle strength in the right biceps, with minimal tenderness over the biceps and triceps musculature. He diagnosed chronic rupture of the right distal biceps tendon. Dr. Raulston found appellant able to perform full-time light duty, with lifting limited to 10 pounds and pulling limited to 20 pounds for no more than four hours a day. He also limited driving and repetitive elbow motion to four hours a day and restricted reaching above the shoulder.

In February 5 and April 14, 2009 reports, Dr. Chandler advised that appellant remained totally and permanently disabled for work.⁴

² Docket No. 09-2347 (issued July 8, 2010).

³ On June 17, 2004 OWCP granted appellant a schedule award for a 15 percent permanent impairment of the right upper extremity.

⁴ In a February 13, 2009 report, Dr. Ronnie D. Shade, a Board-certified orthopedic surgeon to whom appellant was referred by Dr. Chandler, noted atrophy of the right triceps and biceps and mild degenerative joint disease of the right elbow. He diagnosed a ruptured right biceps tendon and a nonoccupational neck condition. Dr. Shade did not address appellant's work capacity.

As the medical record indicated that appellant could perform light-duty work, OWCP referred him for vocational rehabilitation in May 2009. It noted that appellant had nonoccupational conditions of bilateral hearing loss, cervical strain with bilateral radiculopathy and right shoulder impingement.

In a July 11, 2009 report, the vocational rehabilitation counselor noted that appellant completed two years of high school. Appellant had job experience as a warehouse worker, truck driver, assembly line worker and poultry plant worker. The counselor opined that he had no transferable skills as all past relevant work was semi-skilled. She noted vocational goals of Cashier II, DOT (U.S. Department of Labor, *Dictionary of Occupational Titles*) # 211.462-010 and Fast Food Worker, DOT # 311.472-010. Both positions were classified as light duty, with frequent lifting up to 10 pounds and specific vocational preparation at class 2, requiring 30 days of on-the-job training and no prior work experience.

In a July 30, 2009 report, Dr. Sharma diagnosed a ruptured and contracted right biceps muscle and chronic right shoulder pain.

In an October 12, 2009 report, the vocational rehabilitation counselor noted that appellant tested at the first grade level in reading, spelling and arithmetic. She identified three cashier and three fast food worker positions available in his commuting area. May 2008 labor market statistics showed that both positions were reasonably available in appellant's commuting area, with the mean salary for a cashier at \$8.11 an hour and the mean salary for a fast food worker at \$7.46 an hour.

In a January 18, 2010 report, Dr. Raulston checked "yes" that appellant was medically capable of performing either the selected cashier or fast food worker position for eight hours a day.

On May 10, 2010 appellant signed a 90-day rehabilitation plan with the vocational goal of reemployment as a cashier or fast food worker, with projected estimated hourly earnings of \$298.40 to \$324.40 a week. From May 12 through August 2010, the vocational rehabilitation counselor assisted him in registering at two employment offices and identified eight fast food and one cashier position in his commuting area. Appellant applied for positions but was not hired. OWCP closed the vocational rehabilitation effort on September 2, 2010.

By notice dated September 21, 2010, OWCP advised appellant that it proposed to reduce his wage-loss compensation benefits based on his capacity to earn \$324.40 a week as a cashier. It determined that the selected position was within his physical limitations and vocational capacities. OWCP afforded appellant 30 days to submit additional evidence and argument.

In a September 27, 2010 letter, appellant disagreed with the proposed reduction of his compensation as he had not been hired.

On October 13, 2010 OWCP sent appellant an affidavit of earnings and employment Forms CA-1032 and EN1032 to his address of record. It instructed him to answer all questions, sign and return the form within 30 days or his compensation would be suspended.

On October 19, 2010 appellant completed and signed the Form EN1032. In response to the questions 1 through 3 regarding his employment or self-employment during the prior 15 months, appellant wrote checkmarks instead of answering “yes” or “no” as instructed. Similarly, he placed checkmarks next to “yes or no” questions in Part C regarding his dependents and Part D regarding other federal benefits.

On October 28, 2010 OWCP advised appellant that he did not properly complete the Form CA-1032 signed on October 19, 2010. It afforded him 15 days to complete the form as instructed.

By decision issued November 15, 2010,⁵ OWCP reduced appellant’s compensation benefits effective November 21, 2010, based on his capacity to earn \$324.40 a week in the selected cashier position. It noted that he remained entitled to medical benefits for treatment of the accepted conditions.

In a December 9, 2010 letter, appellant requested reconsideration of OWCP’s November 15, 2010 decision. He submitted a November 23, 2010 letter and November 21, 30 and December 9, 2010 form reports from Dr. Sharma stating that appellant remained totally disabled for work due to the accepted conditions.

On December 21, 2010 appellant submitted a second copy of the Form EN1032 he signed on October 19, 2010. In addition to the checkmarks for questions one through three, he wrote “none” indicating that he did not perform any remunerated or volunteer work during the prior 15 months. Appellant also wrote “none” in Parts C and D of the form to indicate that he had no dependents other than his spouse and received no retirement or military service benefits.

By decision dated December 22, 2010, OWCP denied reconsideration on the grounds that the additional reports from Dr. Sharma did not warrant a merit review as they were repetitious and cumulative of his reports previously of record.

By decision dated January 11, 2011, OWCP suspended appellant’s compensation benefits effective January 16, 2011 on the grounds that he did not respond to its October 28, 2011 request. It enclosed an additional Form CA-1032 and advised him that it would restore his benefits retroactively if he properly completed the form.

LEGAL PRECEDENT -- ISSUE 1

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 of benefits.⁶ 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-

⁵ OWCP originally issued the decision on October 26, 2010, but it issued a corrected version on November 15, 2010.

⁶ *David W. Green*, 43 ECAB 883 (1992).

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.⁷

When OWCP makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an Office 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 regards 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*,⁸ will result in the percentage of the employee's loss of wage-earning capacity.⁹

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained a ruptured right biceps tendon and a right shoulder strain on June 5, 1998. Dr. Chandler, an attending family practitioner, and Dr. Sharma, an attending Board-certified physiatrist, found appellant totally and permanently disabled for work. Dr. Holladay, a Board-certified orthopedic surgeon and second opinion physician, advised that appellant could perform full-time light duty within physical limitations. OWCP found a conflict of medical opinion between Dr. Holladay and appellant's physicians and selected Dr. Raulston, a Board-certified orthopedic surgeon, to resolve it. On February 13, 2009 Dr. Raulston found appellant able to perform full-time light duty, with lifting and repetitive elbow motion limited to 10 pounds for no more than four hours a day. Appellant submitted additional reports from Dr. Chandler and Dr. Sharma reiterating that he remained totally disabled for work. The Board finds that the weight of medical opinion is representative by the report of Dr. Raulston, the impartial medical specialist.¹⁰

As the weight of medical evidence established that appellant could perform light duty, OWCP referred him for vocational rehabilitation. In July and October 2009 reports, a vocational rehabilitation counselor identified the position of Cashier II as within appellant's physical limitations and vocational aptitudes. The cashier position was classified as light, with frequent lifting up to 10 pounds. These physical requirements are within the restrictions set forth by Dr. Raulston. Also, Dr. Raulston specifically approved the cashier position on January 18, 2010. The vocational rehabilitation counselor then determined the prevailing wage rate of these positions and their reasonable availability in the open labor market. Based on these calculations,

⁷ *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

⁸ 5 ECAB 376 (1953).

⁹ *Francisco Bermudez*, 51 ECAB 506 (2000); *James A. Birt*, 51 ECAB 291 (2000).

¹⁰ See *Phillip H. Conte*, 56 ECAB 213 (2004).

OWCP issued a November 15, 2010 decision reducing appellant's compensation based on his ability to earn \$324.40 a week as a cashier.

The Board finds that OWCP considered the proper factors, such as availability of cashier positions and appellant's physical limitations and education, in determining that the job represented his wage-earning capacity. OWCP properly accorded Dr. Raulston's impartial opinion the weight of the medical evidence, as it was thorough, well rationalized and based on a complete history and statement of accepted facts.¹¹ It followed the established procedures under the *Shadrick* decision in calculating appellant's employment-related loss of wage-earning capacity.

Appellant did not submit probative medical evidence to establish that he was not capable of working eight hours a day. The Board finds that OWCP properly found that appellant was medically and vocationally capable of working eight hours a day as a cashier. Thus, OWCP's November 15, 2010 decision reducing appellant's compensation based on his ability to earn wages in the constructed position of cashier is proper under the law and the facts of this case.¹²

On appeal, appellant asserts that the selected position is not suitable as Dr. Sharma and Dr. Chandler opined that he was totally disabled. OWCP properly accorded Dr. Raulston the weight of the medical evidence in determining that the selected position was proper. Appellant may request modification of the wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

LEGAL PRECEDENT -- ISSUE 2

To require the office to reopen a case for merit review under section 8128(a) of FECA,¹³ section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.¹⁴ Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.¹⁵

¹¹ 5 U.S.C. § 8123(a); *Anna M. Delaney*, 53 ECAB 384 (2002) (in situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight).

¹² *E.T.*, Docket No. 10-559 (issued March 28, 2011).

¹³ 5 U.S.C. § 8128(a).

¹⁴ 20 C.F.R. § 10.606(b)(2).

¹⁵ *Id.* at § 10.608(b). *See also D.E.*, 59 ECAB 438 (2008).

In support of a request for reconsideration, an appellant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.¹⁶ Appellant need only submit relevant, pertinent evidence not previously considered by OWCP.¹⁷ When reviewing an OWCP decision denying a merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.¹⁸

ANALYSIS -- ISSUE 2

OWCP issued a November 15, 2010 decision finding that the selected position of cashier properly represented his wage-earning capacity. Appellant requested reconsideration on December 9, 2010, asserting that the selected position was not suitable work as Dr. Sharma opined that he could not work eight hours a day. He submitted Dr. Sharma's November 23, 2010 letter and November 21, 30 and December 9, 2010 form reports, stating that appellant remained totally disabled for work due to the accepted injuries. In a December 22, 2010 decision, OWCP denied reconsideration as the evidence submitted was cumulative and repetitious.

In his December 9, 2010 application for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law. He did not identify a specific point of law or show that it was erroneously applied or interpreted. Appellant did not advance a new and relevant legal argument. His argument was that additional reports from Dr. Sharma established that the selected position was not suitable work. However, the Board finds that Dr. Sharma's reports were repetitive of his prior opinions finding appellant totally disabled for work. Evidence or argument which is duplicative or cumulative in nature is insufficient to warrant reopening a claim for merit review.¹⁹ The duplicative nature of this evidence does not require reopening the record for further merit review.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP or submit relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

LEGAL PRECEDENT -- ISSUE 3

Pursuant to section 10.528 of OWCP's regulations, an employee receiving compensation benefits is required periodically to complete an affidavit as to any work or activity indicating an ability to work, which the employee had performed during the prior 15 months.²⁰ If an employee

¹⁶ *Helen E. Tschantz*, 39 ECAB 1382 (1988).

¹⁷ *See* 20 C.F.R. § 10.606(b)(3). *See also Mark H. Dever*, 53 ECAB 710 (2002).

¹⁸ *Annette Louise*, 54 ECAB 783 (2003).

¹⁹ *Denis M. Dupor*, 51 ECAB 482 (2000).

²⁰ 20 C.F.R. § 10.528.

who is required to file such a report fails to do so within 30 days of the date of the request, his or her right to compensation for wage loss is suspended until OWCP receives the requested report. At that time OWCP will reinstate compensation retroactive to the date of suspension if the employee remains entitled to compensation.²¹

ANALYSIS -- ISSUE 3

On October 13, 2010 OWCP sent appellant a correctly addressed request for completion of a Form EN1032. Appellant completed and signed the form on October 19, 2010, but did not answer all questions completely. In an October 28, 2010 letter, OWCP advised him to complete the form as instructed within 15 days. On December 21, 2010 appellant submitted a complete and corrected Form EN1032. By January 11, 2011 decision, OWCP suspended his compensation benefits effective January 16, 2011 on the grounds he did not respond to the October 28, 2010 request.

The Board finds, however, that as appellant responded on December 21, 2010 to the October 28, 2010 request letter and submitted a completed Form EN1032. Although appellant did not submit the form within 15 days of October 28, 2010, he did respond to OWCP's October 28, 2010 letter and complied with its instructions to complete his answers. Therefore, OWCP's January 11, 2011 finding that appellant failed to respond is erroneous, and the suspension of compensation was improper. The case will be returned for further development on appropriate compensation benefits.

CONCLUSION

The Board finds that OWCP properly found that the selected position of cashier properly represented appellant's wage-earning capacity. The Board further finds that it properly denied reconsideration. The Board further finds that OWCP improperly suspended appellant's compensation benefits effective January 16, 2011.

²¹ *Id.*, see also 20 C.F.R. § 10.525; *S.B.*, Docket No. 08-418 (issued September 9, 2008).

ORDER

IT IS HEREBY ORDERED THAT the December 22 and November 15, 2010 decisions of the Office of Workers' Compensation Programs are affirmed. The decision of OWCP dated January 11, 2011 is reversed. The case is returned to OWCP for further action consistent with this decision.

Issued: March 9, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board