

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On March 7, 1994 appellant, then a 37-year-old letter carrier, injured her lower back when she lifted a flat tub at work. OWCP accepted the claim for lumbosacral sprain/strain and paid appropriate compensation. Appellant stopped work on March 7, 1994 and returned to a limited-duty position on May 23, 1994. She stopped working again on August 30, 1994 due to a recurrence of disability. Appellant was treated by Dr. Ira C. Sachs, an osteopath, on September 20, 1994 for back pain and he noted that an electromyogram (EMG) revealed chronic bilateral L4, L5 and S1 radiculopathy. Dr. Sachs advised that a magnetic resonance imaging (MRI) scan revealed slight posterior disc bulge at L4-5.

On September 18, 1995 the employing establishment offered appellant a full-time position as a modified letter carrier. The position was in compliance with the medical restrictions set forth by her treating physician. Appellant accepted the position and began working on September 18, 1995.

By decision dated July 16, 1996, OWCP indicated that appellant had been employed as a full-time modified letter carrier effective September 18, 1995, which was over 60 days, and that the pay in that position was equivalent to the pay rate for the position she held at the time of her injury; thus, no loss of wages occurred. It concluded that the position of full-time modified letter carrier fairly and reasonably represented her wage-earning capacity. Thereafter, the record indicates that appellant worked in different jobs for the employing establishment.

On May 14, 2007 the employing establishment offered appellant a full-time modified letter carrier position. The job complied with the restrictions of her treating physician, Dr. Nathaniel Abramson, an osteopath, who limited appellant to sedentary work and no lifting over 10 pounds. Appellant accepted the job and began working on May 14, 2007. Dr. Abramson continued to note her status and work restrictions.

On December 31, 2008 appellant filed a notice of recurrence of disability stating that she stopped work on December 29, 2008 when the employing establishment could no longer provide work for her within her permanent restrictions. In a January 6, 2009 CA-7a, time analysis form, the employing establishment noted that her limited-duty hours were withdrawn. On January 16, 2009 OWCP accepted appellant's claim for a recurrence of disability and began paying her wage-loss compensation.

On February 17, 2009 OWCP referred appellant to a second opinion physician. In a report dated March 19, 2009, Dr. Kevin Hanley, a Board-certified orthopedic surgeon, indicated that he reviewed the records provided to him and examined her. He noted an essentially normal objective examination with negative straight leg raises, normal reflexes and normal strength with no evidence of ongoing discogenic problems. Dr. Hanley diagnosed chronic lumbosacral sprain/strain. He advised that lumbar strain generally resolved but appellant remained symptomatic. Dr. Hanley indicated that she had residual pain syndrome related to the accepted condition. In a work capacity evaluation, he noted that appellant could return to work full time with permanent restrictions of sitting limited to six hours a day, walking and standing limited to two hours a day and no reaching. Dr. Hanley noted that all of the restrictions were subject to a

10-pound pushing, pulling and lifting limit. He advised that appellant reached maximum medical improvement.

On January 26, 2010 appellant was referred for vocational rehabilitation. The vocational rehabilitation counselor recommended a 90-day job placement plan and noted that appellant could perform work in the light sedentary physical level. Appellant desired to return to work for the employing establishment in a rehabilitation position. However, the vocational rehabilitation counselor advised that the employing establishment could not accommodate appellant's restrictions. On March 2, 2010 appellant and her vocational rehabilitation counselor prepared a rehabilitation plan with the objective of obtaining a position of hospital admitting clerk, appointment clerk and sorter. The vocational rehabilitation counselor noted that appellant had a high school diploma and credits toward an associate's degree in office management. A July 27, 2010 vocational testing report determined that appellant was capable of performing a variety of sedentary jobs. OWCP determined that the position of hospital admitting clerk was within her work limitations as set forth by Dr. Hanley. The average annual salary for hospital admitting clerk, DOT #205.362.018, was \$655.60 a week. The vocational rehabilitation counselor stated that the jobs were within appellant's educational capabilities based on vocational testing services and were reasonably available in her commuting area. The vocational rehabilitation counselor attached a job classification for the position.² In a closure report dated January 18, 2011, the vocational rehabilitation counselor advised that placement services were offered to appellant, but appellant did not cooperate or express and motivation to return to work. In a March 31, 2011 memorandum, OWCP advised that appellant received 90 days of placement services but did not obtain employment.

On March 31, 2011 OWCP proposed to reduce appellant's compensation, finding that she was no longer totally disabled. It noted that she was partially disabled and had the capacity to earn wages as a hospital admitting clerk, DOT #205.362.018, at the rate of \$655.60 a week. OWCP noted that this position was consistent with Dr. Hanley's restrictions and vocational testing.

In a June 3, 2011 decision, OWCP reduced appellant's wage-loss compensation effective June 5, 2011 to reflect her wage-earning capacity as a hospital admitting clerk.

On July 1, 2011 appellant requested an oral hearing which was held on October 12, 2011. She submitted a November 14, 2011 report from Dr. Abramson who noted treating her since 2005. Dr. Abramson noted a history of appellant's work injury of March 1994 and advised the she reported chronic low back pain that was radicular in nature and exacerbated by prolonged sitting and standing. He noted that an October 23, 2011 MRI scan of the lumbar spine revealed mild facet hypertrophy at L4-5 and L5-S1. Dr. Abramson noted findings of thoracic kyphosis with decreased lumbar lordosis, sacral base unleveling, mild scoliotic curve and tenderness over L1-5. He noted that the neurological examination revealed deep tendon reflexes were somewhat diminished in all extremities while muscle strength was normal. Appellant had limited range of motion of the lumbar spine with positive straight leg raises bilaterally. Dr. Abramson diagnosed

² The job classification for hospital admitting clerk advised that the position was sedentary in nature with occasional lifting up to 10 pounds.

chronic severe low back pain with bilateral lower extremity radiculopathy which impaired her ability to lift more than five pounds or prolonged sitting and standing over 10 minutes.

In a decision dated January 3, 2012, OWCP's hearing representative affirmed the June 3, 2011 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.³

Section 8115(a) of FECA,⁴ titled "Determination of Wage-Earning Capacity" states in pertinent part: "In determining compensation for partial disability, the wage-earning capacity of an employee is determined by his or her actual earnings if his or her actual earnings fairly and reasonably represent his or her wage-earning capacity." Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.⁵ If the actual earnings do not fairly and reasonably represent wage-earning capacity or if the employee has no actual earnings, his or her wage-earning capacity is determined with due regards to the nature of his or her injury, his or her degree of physical impairment, his or her usual employment, his or her age, his or her qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his or her wage-earning capacity in his or her disabled condition.⁶ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.⁷ The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.⁸ In determining an employee's wage-earning capacity, OWCP may not select a makeshift or odd lot position or one not reasonably available on the open labor market.⁹

When OWCP makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by OWCP or to an 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 labor market, that fits that employee's capabilities with regards to his or her physical limitation, education, age and prior experience. Once this selection is made, a determination of wage rate

³ *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

⁴ 5 U.S.C. § 8115.

⁵ *Hubert F. Myatt*, 32 ECAB 1994 (1981); *Lee R. Sires*, 23 ECAB 12 (1971).

⁶ *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

⁷ *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

⁸ *Id.*

⁹ *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

and availability in the open labor market should be made through contact with the state employment service or other applicable service.¹⁰ 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.¹¹

ANALYSIS

OWCP accepted the claim for a lumbosacral sprain.¹² It developed the medical evidence and referred appellant to a second opinion physician to determine whether she had residuals of her accepted condition and whether she was totally disabled from work. Consequently, OWCP properly referred her to Dr. Hanley.

In a March 19, 2009 report, Dr. Hanley indicated that he reviewed the entire case record and statement of accepted facts. He examined appellant thoroughly and related his clinical findings. Dr. Hanley diagnosed chronic lumbosacral sprain/strain. He noted an essentially normal objective examination with negative straight leg raises, normal reflexes and normal strength with no evidence of ongoing discogenic problems. Dr. Hanley advised that lumbar appellant's strain generally resolved but she remained symptomatic. He indicated that she had residual pain syndrome related to the accepted condition. In a work capacity evaluation, Dr. Hanley noted that appellant could return to work full time with permanent restrictions of sitting limited to six hours a day, walking and standing limited to two hours a day and no reaching. He noted that all of the restrictions were subject to a 10-pound pushing, pulling and lifting limit. Dr. Hanley did not make any finding that appellant remained totally disabled or unable to do any work due to residuals of her accepted conditions.

Thereafter, OWCP referred appellant for vocational rehabilitation counseling. The vocational rehabilitation counselor advised that appellant had a high school diploma with college credits toward an associate's degree in office management and could perform light sedentary work. When appellant was unable to secure employment as part of her vocational rehabilitation, the vocational counselor on March 2, 2010, identified several positions, including the position of the position of a hospital admitting clerk, as jobs that appellant would be capable of performing and which was available in her area.¹³ The vocational rehabilitation counselor identified the position in the Department of Labor's *Dictionary of Occupational Titles*, DOT #205.362.018,

¹⁰ *Karen L. Lonon-Jones*, 50 ECAB 293, 297 (1999).

¹¹ *Id.* See *Shadrick* 5 ECAB 376 (1953).

¹² As noted, *infra*, OWCP reduced appellant's compensation to zero on July 16, 1996, OWCP based on her actual earnings as a full-time modified letter carrier. On January 16, 2009 it accepted that she sustained a recurrence of total disability and began paying her wage-loss compensation for total disability. The Board notes that, when OWCP accepted the recurrence of total disability on January 16, 2009, it effectively modified the July 16, 1996 loss of wage-earning capacity determination. See *E.E.*, Docket No. 10-1063 (December 3, 2010).

¹³ Where vocational rehabilitation is unsuccessful, the vocational rehabilitation counselor will prepare a final report, which lists two or three jobs which are medically and vocationally suitable for the employee and proceed with information from a labor market survey to determine the availability and wage rate of the position. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(b) (December 1995); see also *Dorothy Jett*, 52 ECAB 246 (2001).

and provided the required information concerning the position description, the availability of the position within appellant's commuting area and pay ranges within the geographical area, as confirmed by state officials. She determined that the hospital admitting clerk was in accord with appellant's background, education and experience. The vocational rehabilitation counselor advised that an updated labor market survey revealed that the job market was favorable for a hospital admitting clerk and that the position was readily available in sufficient numbers both full and part time in appellant's commuting area. She advised that the job market remained favorable, but that appellant did not find employment because she did not cooperate or express and motivation to return to work. The average weekly wage of a hospital admitting clerk, DOT #205.362.018, was \$655.60 a week with hiring occurring regularly. The vocational rehabilitation counselor further noted that the position was consistent with the medical restrictions provided by Dr. Hanley and appellant's vocational testing. The Board finds that the duties of a hospital admitting clerk are consistent with the restrictions set forth by Dr. Hanley. At the time that OWCP reduced appellant's compensation, there was no current medical evidence to indicate that appellant was unable to perform the duties of a hospital admitting clerk.

Thereafter, appellant submitted a November 14, 2011 report from Dr. Abramson who diagnosed chronic severe low back pain with bilateral lower extremity radiculopathy which impaired appellant's ability to lift more than five pounds or prolonged sitting and standing over 10 minutes. Dr. Abramson noted that appellant's chronic low back pain was exacerbated by prolonged sitting and standing. However, he did not provide sufficient medical rationale¹⁴ explaining how any of appellant's injury-related conditions would disable appellant from a position of a hospital admitting clerk. Dr. Abramson did not specifically address appellant's ability to perform the duties of a hospital admitting clerk or explain any change in appellant's injury-related condition that would render appellant unable to perform the position of a hospital admitting clerk. Therefore, this report is of limited probative value.

The Board finds that OWCP met its burden of proof to reduce appellant's compensation based on her ability to earn wages as a hospital admitting clerk. The medical evidence establishes that appellant is capable of performing the duties required for the selected position of hospital admitting clerk and the vocational evidence establishes that the position is reasonably available and that it is within her vocational abilities. OWCP considered the proper factors, such as availability of suitable employment and her physical limitations, usual employment and age and employment qualifications, in determining that the position of hospital admitting clerk represented her wage-earning capacity. The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of hospital admitting clerk and that such a position was reasonably available within the general labor market of her commuting area. OWCP properly determined that the position of hospital admitting clerk reflected her wage-earning capacity and properly reduced her compensation effective June 3, 2011.

On appeal, appellant asserts that OWCP's reduction of compensation was erroneous and that OWCP did not consider her driving restriction in determining her wage-earning capacity.

¹⁴ See *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

As explained, the weight of the evidence establishes that she was able to perform the hospital admitting clerk position. Appellant has also not offered medical evidence explaining why she has any driving limitations that would preclude her from performing the selected position and why appropriate public transportation would not be available.

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

CONCLUSION

The Board finds that OWCP properly determined that the position of hospital admitting clerk reflects appellant's wage-earning capacity effective June 5, 2011.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated January 3, 2012 is affirmed.

Issued: February 19, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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