

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

R.C., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
San Francisco, CA, Employer**

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**Docket No. 12-1635
Issued: May 6, 2013**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On July 25, 2012 appellant, through his attorney, filed a timely appeal from January 30 and July 11, 2012 merit decisions of the Office of Workers' Compensation Programs (OWCP). 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 reduced appellant's compensation effective January 30, 2012, based on his capacity to perform the duties of a customer complaint clerk; and (2) whether appellant has established that OWCP's wage-earning capacity determination should be modified.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

Appellant, a 49-year-old part-time letter carrier, was injured on July 8, 2008 when he used his right hand to protect his head from hitting the ground. He filed a claim for benefits on July 9, 2008, which OWCP accepted for contusion and closed fracture of the right forearm. OWCP commenced payment for temporary total disability compensation. Appellant has not returned to work with the employing establishment since that time.

In a work capacity evaluation dated November 23, 2010, Dr. Leslie H. Kim, Board-certified in orthopedic surgery and appellant's treating physician, indicated that appellant could work an eight-hour day with restrictions of no heavy repetitive pushing, pulling, lifting or carrying over 25 pounds; no repetitive forceful pushing, pulling, gripping, torquing or broad grasping and a four-hour limit on repetitive movements of the wrist.

On February 23, 2011 OWCP referred appellant for vocational rehabilitation services, based on Dr. Kim's November 23, 2010 form report.

In labor market surveys dated February 21 and 25, 2011, the rehabilitation counselor found that there were two positions for appellant listed in the Department of Labor's *Dictionary of Occupational Titles* (DOT), which were within his indicated restrictions and reasonably reflected his ability to earn wages, consumer complaint clerk, DOT #241.367-014 and information clerk, DOT #237.367-022. She advised that both jobs were being performed in sufficient numbers to make them reasonably available within appellant's commuting area and that the range of salary for these positions was \$10.00 to \$14.00 per hour.

The job classification for the customer complaint clerk position stated that this was a sedentary position, with lifting required of less than 10 pounds. The physical demands of the position listed occasional reaching, handling and fingering.

In reports dated March 11 and 21, 2011, appellant's rehabilitation counselor found that there was a \$440.00 weekly wage-earning capacity for the position of customer complaint clerk. She also noted that appellant had worked at a bank for 17 years and had an accounting background.

By letter dated March 23, 2011, OWCP advised appellant that the rehabilitation counselor had recommended a position as a customer complaint clerk which was within Dr. Kim's work restrictions. It informed him that it would provide him with 90 days of placement services to assist in gaining employment at this position. OWCP further stated that, based on a vocational evaluation and a survey of the local labor market, he would likely have a yearly wage-earning capacity ranging from \$20,800.00 to \$29,120.00.

In a report dated December 22, 2011, the vocational rehabilitation counselor summarized her efforts to find vocational training or suitable alternate employment for appellant within his indicated restrictions. The vocational counselor reiterated that there were two positions listed in the Department of Labor's *Dictionary of Occupational Titles*, which were within appellant's indicated restrictions and reasonably reflected his ability to earn wages: customer complaint clerk and information clerk. She also opined that he had the vocational and work history,

education, skills and training to qualify for job openings in this occupation, that the job was being performed in sufficient numbers as to make it reasonably available to him within his commuting area and that there was a positive labor market for the office clerk job. The vocational counselor stated that she had attempted to find a suitable job for appellant; however, after providing job placement assistance for more than 90 days, she was unable to locate a job for him.

By notice of proposed reduction dated December 30, 2011, OWCP advised appellant of its proposal to reduce his compensation because the factual and medical evidence established that he was no longer totally disabled and that he had the capacity to earn wages as a customer complaint clerk, DOT #241.367-014,² at the rate of \$440.00 per week, in accordance with the factors outlined in 5 U.S.C. § 8115.³ It calculated that his compensation rate should be adjusted to \$863.00 using the *Shadrick*⁴ formula. OWCP indicated that appellant's salary as of July 8, 2008, the date he stopped working, was \$508.08 per week, that his current, adjusted pay rate for his job on the date of injury was \$667.62 and that he was currently capable of earning \$440.00 per week, the rate of a customer complaint clerk. It therefore determined that he had a 59 percent wage-earning capacity, an adjusted wage-earning capacity of \$393.90, which when multiplied by 3/4 amounted to a compensation rate of \$205.29. OWCP found that his current adjusted compensation rate, per four-week period, was \$863.00. It stated that the case had been referred to a vocational rehabilitation counselor, who had located a position as a customer complaint clerk, which she found to be suitable for appellant given his work restrictions and was available in his commuting area. OWCP noted that the customer complaint clerk position was selected because it contained a substantial billing/accounting component, because appellant had a degree in applied economics and because he worked as an accountant for 17 years. It allowed him 30 days in which to submit any contrary evidence.

In a January 30, 2012 decision, OWCP reduced appellant's compensation to reflect his 59 percent wage-earning capacity, at a compensation rate of \$863.00 every four weeks.

² The job description stated: "Investigates customer complaints about merchandise, service, billing or credit rating: Examines records, such as bills, computer printouts, microfilm, meter readings, bills of lading and related documents and correspondence and converses or corresponds with customer and other company personnel, such as billing, credit, sales, service or shipping, to obtain facts regarding customer complaint. Examines pertinent information to determine accuracy of customer complaint and to determine responsibility for errors. Notifies customer and designated personnel of findings, adjustments and recommendations, such as exchange of merchandise, refund of money, credit of customers account or adjustment of customers bill. May recommend to management improvements in product, packaging, shipping methods, service or billing methods and procedures to prevent future complaints of similar nature. May examine merchandise to determine accuracy of complaint. May follow up on recommended adjustments to ensure customer satisfaction. May key information into computer to obtain computerized records. May trace missing merchandise and be designated Tracer Clerk (clerical). May investigate overdue and damaged shipments or shortages in shipments for common carrier and be designated Over-Short-And-Damage Clerk (clerical). May be designated according to type of complaint adjusted as Bill Adjuster (clerical); Merchandise-Adjustment Clerk (retail trade); Service Investigator (utilities; tel. & tel.)."

³ 5 U.S.C. § 8115.

⁴ *Albert C. Shadrick*, 5 ECAB 376 (1953); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.2 (April 1995).

By letter dated February 6, 2012, appellant's attorney requested an oral hearing, which was held on May 16, 2012. At the hearing, appellant's attorney stated that OWCP failed to justify why it selected the highest pay rate for the customer clerk position, as opposed to the lowest, when the salary range of the selected jobs was \$20,800.00 per year to \$29,120.00 or roughly \$400.00 to \$500.00 per week. He contended that OWCP failed to adhere to the principle of favoring the injured worker by giving appellant the most compensation possible. Counsel indicated that OWCP erred by failing to determine appellant's wage-earning capacity on entry-level employee earning \$400.00 a week; he asserted that the basis for seeking modification of the wage-earning capacity decision was that it chose the high range of the mythical wage, \$29,000.00, rather than the low end, \$20,800.00. He stated that they were not arguing that the claimant's condition had materially changed or that the claimant had been retrained or vocationally rehabilitated.

By decision dated July 11, 2012, an OWCP hearing representative affirmed the January 30, 2012 decision and found that appellant had not met his burden to modify the loss of wage-earning capacity determination. She stated that the labor market survey on which the rehabilitation counselor relied showed that the weekly salary of a customer complaint clerk ranged from \$10.00 to \$14.00 an hour and that the growth rate for the position is from 10.4 to 15.7 percent; the labor market survey for the information clerk position reflected a \$10.00 to \$12.00 hourly salary, with a projected growth rate from 4.1 to 9.8 percent. The hearing representative noted that the selected position of customer complaint clerk had a higher projected growth rate for job openings than did the information clerk position and that there were more current openings for the customer complaint clerk than for the information clerk job. She therefore found that the selection of the customer complaint clerk position was justified on the ground that it was more widely available.

In addition, the hearing representative found that OWCP properly determined that appellant had a constructed wage-earning capacity of \$440.00 per week in the selected position of customer complaint clerk. She rejected counsel's contention that OWCP used the highest wage of the selected position to determine his loss of wage-earning capacity. The hearing representative noted that the salary of the customer complaint clerk ranged from \$400.00 to \$560.00 a week, with a median salary of \$480.00 and that OWCP selected a figure below this median salary, \$440.00, to represent appellant's loss of wage-earning capacity.

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.⁵

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injuries and the degree of physical impairment, his or her usual employment, the employee's age and

⁵ *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

vocational qualifications and the availability of suitable employment.⁶ Accordingly, the evidence must establish that jobs in the position selected for determining wage-earning capacity are reasonably available in the general labor market in the commuting area in which the employee lives. 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.⁷

ANALYSIS -- ISSUE 1

Dr. Kim indicated in his November 23, 2010 form report that appellant could perform work for eight hours per day with restrictions on sitting, walking, reaching, reaching above the shoulder, pushing, pulling, lifting, bending, squatting, kneeling and climbing. The rehabilitation counselor assigned to assist appellant in placement efforts identified a position as a customer complaint clerk listed in the Department of Labor's *Dictionary of Occupational Titles*, appropriate for appellant based on Dr. Kim's work restriction evaluation. OWCP used the information provided by the rehabilitation counselor of the applicable wage rate in the area for a customer complaint clerk. Finally, it properly applied the principles set forth in the *Shadrick*⁸ decision to determine appellant's employment-related loss of wage-earning capacity. OWCP calculated that his compensation rate should be adjusted to \$863.00 using the *Shadrick* formula.

OWCP properly found that appellant was no longer totally disabled as a result of his accepted conditions and it followed established procedures for determining his employment-related loss of wage-earning capacity. The Board therefore finds that OWCP met its burden of justifying a reduction in his compensation for total disability in its January 30, 2012 decision.

LEGAL PRECEDENT -- ISSUE 2

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was, in fact, erroneous.⁹ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.¹⁰

ANALYSIS -- ISSUE 2

Subsequent to OWCP's January 30, 2012 wage-earning capacity determination, appellant's attorney requested a hearing and argued that it should be modified because it erred in finding that appellant had a \$440.00 weekly wage capacity for the customer complaint clerk job.

⁶ *Samuel J. Chavez*, 44 ECAB 431 (1993); *Hattie Drummond*, 39 ECAB 904 (1988); see 5 U.S.C. § 8115(a); A. Larson, *The Law of Workers' Compensation* § 57.22 (1989).

⁷ *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

⁸ *Shadrick*, *supra* note 4.

⁹ *Tamra McCauley*, 51 ECAB 375 (2000).

¹⁰ *Linda Thompson*, 51 ECAB 694 (2000).

Counsel contended that OWCP should have used the highest indicated wage of the selected position to determine his loss of wage-earning capacity. The Board finds that the record does not establish this contention. The hearing representative noted that the salary of the customer complaint clerk ranged from \$400.00 to \$560.00 per week, with a median salary of \$480.00 and that OWCP selected a figure below this median salary, \$440.00, to represent appellant's loss of wage-earning capacity. As noted above, OWCP thoroughly considered the issue and relied on relevant factors in calculating an appropriate constructed wage capacity for the customer complaint position. As appellant did not submit evidence showing that OWCP's original determination with regard to his wage-earning capacity was erroneous, he has not met his burden of proof to establish that the January 30, 2012 wage-earning capacity decision should be modified.

OWCP properly found that appellant was no longer totally disabled as a result of his July 8, 2008 employment injury and it followed established procedures for determining appellant's employment-related loss of wage-earning capacity. The Board therefore finds that he failed to establish error on the part of OWCP sufficient to warrant a modification of the January 30, 2012 wage-earning capacity determination. The July 11, 2012 OWCP decision is affirmed.

CONCLUSION

The Board finds that OWCP properly reduced appellant's compensation effective January 30, 2012, based on his capacity to perform the duties of a customer complaint clerk. The Board further finds that he has not established that OWCP's wage-earning capacity determination should be modified.

ORDER

IT IS HEREBY ORDERED THAT the July 11 and January 30, 2012 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 6, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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