

FACTUAL HISTORY

On September 21, 2004 appellant, then a 46-year-old general office clerk, filed an occupational disease claim alleging that she suffered from carpal tunnel syndrome in her right wrist as a result of performing fine, manipulative repetitive duties during her federal employment. On January 5, 2005 OWCP accepted her claim for carpal tunnel syndrome of the right hand and right wrist sprain. On May 25, 2006 it updated appellant's claim to include acceptance of left carpal tunnel syndrome. Appellant underwent a right carpal tunnel release on November 4, 2005 and a left carpal tunnel release on August 27, 2006. On April 25, 2007 OWCP accepted that she sustained a recurrence on February 20, 2007 and on September 29, 2010, it accepted a recurrence as of September 17, 2010.

In a September 9, 2010 report, Dr. Jeffrey Kirschman, appellant's treating physician who is Board-certified in family and occupational medicine, noted that appellant was working with restrictions. In a work capacity evaluation of the same date, he indicated that she could intermittently lift 10 pounds; could sit 6 hours a day; stand or walk 7 hours a day; kneel, bend or stoop 1 hour a day; twist ½ hour a day; push/pull 45 pounds 2 hours a day; do simple grasping 2 to 4 hours a day; and do fine manipulation and reaching above the shoulder 1 to 2 hours a day. Dr. Kirschman updated this report on March 11, 2011 and listed the same restrictions.

On October 22, 2010 OWCP referred appellant for vocational rehabilitation services. In a May 20, 2011 report, the vocational counselor conducted a thorough assessment of her education and work history, personal profile, functional abilities and assessments pursuant to placement surveys and tests. He noted that, prior to working as a general office clerk for the employing establishment, appellant worked as a clerk typist/secretary and that she has had computer training. The vocational counselor listed possible employment goals as hospital admitting clerk and data examination clerk, but noted that appellant would benefit from a work adjustment program and career counseling. In a July 27, 2011 report, he listed acceptable employment options as sales attendant, counter clerk and information clerk. In a July 31, 2011 job classification report, the vocational counselor indicated that an appointment clerk (alternate titles: front desk receptionist, reception clerk) would be acceptable. He noted that appellant had sufficient vocational preparation for this position and noted that the job was available in sufficient numbers so as to make it reasonably available to her within her commuting area. In a July 12, 2012 report, the vocational counselor indicated that a position as a physical clerk required light lifting, frequent reaching and handling and occasional fingering. The form defines frequent as an activity that exists one-third to two-thirds of the time and occasional as an activity which exists up to one-third of the time. The form also indicates that light strength level involves occasional lifting of up to 20 pounds and frequent lifting of up to 10 pounds. The vocational counselor indicated that appellant could earn \$481.00 a week as an appointment clerk.

On July 5, 2012 OWCP issued a notice proposing to reduce appellant's compensation as it determined that the position of appointment clerk was medically and vocationally suitable for her and represented her wage-earning capacity.

By decision dated August 7, 2012, OWCP reduced appellant's benefits effective that date to reflect that she was capable of performing the duties of an appointment clerk.

On August 10, 2012 appellant requested a telephone hearing before an OWCP hearing representative. At the hearing held on November 19, 2012, she testified that she is now employed as a temporary payment processing clerk at the Cleveland Clinic Foundation making \$9.25 an hour or \$370.00 per week. Appellant noted that this position will end December 28, 2012. Her counsel contended that appellant's loss of wage-earning capacity should be based on the \$370.00 that she is actually making and not the \$481.00 that was found to be her wage-earning capacity.

By decision dated February 4, 2013, the hearing representative affirmed the August 7, 2012 loss of wage-earning capacity determination.

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.² Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.³

Section 8115 of FECA⁴ provides that 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 wage-earning capacity or the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of his or her injury, the 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 or circumstances which may affect his or her wage-earning capacity in his or her disabled condition. Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.⁵ 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.⁶ The fact that an employee has been unsuccessful in obtaining work in the selected position does not establish that the work is not reasonably available in the commuting area.⁷

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 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.

²D.C., Docket No. 13-747 (issued June 25, 2013); *see also Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

³*See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁴5 U.S.C. §§ 8101-8193, 8115.

⁵*Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

⁶*Id.*

⁷*See Leon A. Cartier*, 32 ECAB 652, 657 (1981).

Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service.⁸ 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.⁹

ANALYSIS

OWCP accepted that appellant suffered from bilateral carpal tunnel syndrome and a right wrist sprain as a result of her federal duties and paid appropriate compensation and medical benefits. However, it reduced her compensation benefits effective August 7, 2012 as it found that she had the capability of working as an appointment clerk.

In reducing compensation benefits based on a constructed position, the position must be both vocationally and medically suitable based on claimant's specific medical condition. The Board notes that the record reflects that the position of appointment clerk is vocationally suitable, given her educational level and work experience.¹⁰

However, in determining an employee's wage-earning capacity based on a position deemed suitable but not actually held, OWCP must consider the degree of physical impairment, including impairments resulting from the employment-related injury and preexisting conditions.¹¹ The selected position was not within work restrictions provided by Dr. Kirschman. For example, the vocational counselor completed a form describing the physical duties of the appointment clerk position, which included occasional reaching and handling and occasional fingering. Pursuant to the form, frequent is defined one-third to two-thirds of the time or approximately 2.66 to 5.33 hours in an 8-hour workday. Dr. Kirschman limited appellant to two to four hours of simple grasping. Furthermore, the position required light strength, which is defined as occasional lifting of up to 20 pounds, but he indicated that appellant could only intermittently lift 10 pounds. Dr. Kirschman also limited fine manipulation to one to two hours a day, but the position as described by the vocational counselor required occasional fingering. As occasional is defined as up to one-third of the time and one-third of an 8-hour day is 2.66 hours, this exceeds appellant's restrictions.

OWCP's procedures state that, unless the medical evidence is clear and unequivocal, OWCP should seek the advice of a physician regarding the medical suitability of the position. The Board finds that the medical evidence is not clear and unequivocal in this case.¹² Therefore, OWCP did not meet its burden in this case.

⁸G.A., Docket No. 12-1826 (issued June 25, 2013).

⁹See *Dennis D. Owen*, 44 ECAB 475, 479-80 (1993); *Wilson L. Clow, Jr.*, 44 ECAB 157, 171-75 (1992); *Albert C. Shadrick*, 5 ECAB 376 (1953).

¹⁰See *J.L.*, Docket No. 12-44 (issued May 21, 2012).

¹¹See *N.J.*, 59 ECAB 171 (2007).

¹²*D.C.*, *supra* note 2.

CONCLUSION

The Board finds that OWCP did not meet its burden to establish that the constructed position of appointment clerk represented appellant's wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 4, 2103 is reversed.

Issued: September 9, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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