

¹ 5 U.S.C. § 8101 *et seq.*

June 6, 2008, OWCP accepted the claim for aggravation of preexisting bilateral sacroiliac joint dysfunction and disc herniation at L3-4.

The Board notes that, under case File No. xxxxxx427, appellant injured her back when lifting a tray of mail on April 22, 2004. OWCP accepted the claim for lumbosacral sprain/strain and bilateral sacroiliac joint dysfunction. File No. xxxxxx427 was administratively combined with this claim, File No. xxxxxx918, into master claim, File No. xxxxxx427.²

Beginning October 6, 2008, appellant was provided with a modified letter carrier position. Effective November 3, 2008, she was provided with work restrictions of sedentary work only, no bending, no twisting, intermittent sitting/standing every 60 minutes, no mail delivery and limited walking/standing up to 15 minutes total of 2 hours per day. The physical requirements of appellant's position included limited lifting, intermittent standing/sitting, no bending, no repetitive twisting, no pushing/pulling over 20 pounds, no mail delivery and limited walking/standing.

Appellant continued to work in the modified position until August 28, 2010. At that time she was sent home due to no availability of work within her restrictions.

By letter dated October 20, 2010, OWCP requested that Dr. Lynette Green-Mack, appellant's treating physician and Board-certified in physical medicine and rehabilitation, provide information regarding appellant's work capabilities and continuing treatment as a result of her work-related back condition.

In an October 19, 2010 duty status report (Form CA-17), Dr. Green-Mack opined that appellant was capable of performing full-time work with restrictions of eight hours continuous sitting per day, intermittent standing up to six hours per day, intermittent walking up to six hours per day, no climbing, five hours intermittent kneeling per day, three hours intermittent bending/stooping, intermittent twisting, pushing/pulling 50 pounds six hours per day, reaching above shoulder 10 pounds for six hours and driving intermittently six hours per day.

On December 21, 2010 appellant was referred for vocational rehabilitation services with Laura Feters, a vocational rehabilitation counselor, based on Dr. Green-Mack's restrictions. She completed vocational testing on February 11, 2011 and a vocational rehabilitation plan was formulated targeting the positions of general office clerk or billing machine operator.

By letter dated June 16, 2011, OWCP informed appellant that the positions of general office clerk or billing machine operator were suitable to return to work with her current restrictions and that she would receive 90 days of placement assistance to help locate work in one of those positions. OWCP also informed appellant that her compensation would likely be reduced based upon her wage-earning capacity.

The Department of Labor, *Dictionary of Occupational Titles* (DOT) provided a position description of billing machine operator which described permanent physical restrictions and job

² The Board notes that appellant has nine prior retired OWCP claims as well as four current claims before OWCP. More complete information pertaining to the remaining claims is not available for review by the Board.

strength demands as sedentary. It noted that the position earned an average weekly rate of \$590.80. The position of general office clerk provided permanent physical restrictions and job strength demands as light. It provided an average earned weekly rate of \$452.00.

On December 18, 2012 appellant elected to receive Office of Personnel Management (OPM) disability retirement benefits in lieu of OWCP benefits. She also declined a modified letter carrier position in lieu of receiving disability retirement. Appellant's rehabilitation counselor documented that there were enough billing machine operator and general office clerk positions available within the provided physical limitations and worked with appellant for at least 90 days to secure one of the two stated positions.

On March 4, 2013 OWCP proposed to reduce appellant's compensation based on her capacity to earn wages as a billing machine operator within the restrictions identified by Dr. Green-Mack. It noted that given the nature of her injury and physical impairment, the billing machine operator position was determined to be more within the provided permanent physical restrictions since the position was described as sedentary regarding job strength demands while the general office clerk position was described as light. OWCP further noted that Ms. Fetters documented that there were enough such positions available in appellant's commuting area and that the entry pay level for the position of billing machine operator was \$590.80 per week. It calculated that appellant's compensation rate should be adjusted to \$1,330.00 each four weeks using the *Albert C. Shadrick*³ formula. Appellant was provided 30 days to submit any additional evidence regarding her capacity to earn wages in the position described.

By decision dated April 16, 2013, OWCP finalized the proposed reduction of compensation finding that appellant was capable of performing the duties of billing machine operator.

On April 18, 2013 appellant, through counsel, requested a telephone hearing before the Branch of Hearings and Review.

At the August 13, 2013 hearing, counsel for appellant argued that the weekly salary for a billing machine operator seemed high for an entry-level position and questioned appellant's capacity to earn wages in that amount. The record was held open for 30 days. No additional evidence was received.

By decision dated October 29, 2013, the Branch of Hearings and Review affirmed OWCP's April 16, 2013 decision reducing appellant's wage-loss compensation based on her capacity to earn wages as a billing machine operator.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.⁴ An injured employee who is either unable to return to

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

⁴ *James M. Frasher*, 53 ECAB 794 (2002).

the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.⁵

Section 8115 of FECA and the implementing federal regulations provide 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, age, 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.⁶

OWCP must initially determine a claimant's medical condition and work restrictions before selecting an appropriate position that reflects his or her wage-earning capacity. The medical evidence upon which OWCP relies must provide a detailed description of the condition.⁷ Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.⁸

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 DOT or otherwise available in the open market, that fits that 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 open labor market should be made through contact with the state employment service or other applicable service.⁹ Finally, application of the principles set forth in *Shadrick*,¹⁰ as codified in section 10.403 of OWCP's regulations,¹¹ will result in the percentage of the employee's loss of wage-earning capacity.¹²

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 20 C.F.R. §§ 10.402, 10.403; *John D. Jackson*, 55 ECAB 465 (2004).

⁶ 5 U.S.C. § 8115; 20 C.F.R. § 10.520; *John D. Jackson*, *id.*

⁷ *William H. Woods*, 51 ECAB 619 (2000).

⁸ *John D. Jackson*, *supra* note 5.

⁹ *James M. Frasher*, *supra* note 4.

¹⁰ *Supra* note 3.

¹¹ 20 C.F.R. § 10.403.

¹² *James M. Frasher*, *supra* note 4.

vocational qualifications and the availability of suitable employment.¹³ 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.¹⁴

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 both injury-related and preexisting conditions, but not impairments resulting from postinjury or subsequently acquired conditions. Any incapacity to perform the duties of the selected position resulting from subsequently acquired conditions is immaterial to the loss of wage-earning capacity that can be attributed to the accepted employment injury and for which appellant may receive compensation.¹⁵

ANALYSIS -- ISSUE 1

The Board finds that OWCP met its burden of proof to reduce appellant's compensation effective April 16, 2013 based on her capacity to earn wages as a billing machine operator.

The medical evidence includes an October 19, 2010 Form CA-17 from Dr. Green-Mack which noted that appellant could return to work full time with restrictions of eight hours continuous sitting per day; intermittent standing up to six hours per day; intermittent walking up to six hours per day; no climbing; five hours intermittent kneeling per day; three hours intermittent bending/stooping; intermittent twisting; pushing/pulling 50 pounds six hours per day; reaching above shoulder 10 pounds for six hours and driving intermittently six hours per day.

On December 21, 2010 OWCP referred appellant for vocational rehabilitation counseling performed on February 11, 2011. Appellant's vocational rehabilitation counselor identified the two positions of billing machine operator and general office clerk that met appellant's physical skill and educational requirements and were available in the area. A vocational rehabilitation plan was formulated utilizing the positions of general office clerk or billing machine operator.

On March 4, 2013 OWCP proposed to reduce appellant's compensation, noting that she had not secured a position despite placement services. Based on Dr. Green-Mack's Form CA-17 and the rehabilitation plan, it determined that appellant had the capacity to earn wages as a billing machine operator. By decision dated April 16, 2013, OWCP finalized the proposed reduction of compensation finding that appellant was capable of performing the duties of billing machine operator and had the ability to earn wages of \$590.80 per week.

¹³ *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).

¹⁴ *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

¹⁵ *John D. Jackson*, *supra* note 5.

The Board finds that the medical evidence establishes that appellant was capable of performing the duties required for the selected position of billing machine operator. In the October 19, 2010 Form CA-17, Dr. Green-Mack advised that appellant could return to a full day of light-duty work with restrictions. The vocational rehabilitation counselor determined that appellant was able to perform the position of a billing machine operator and provided a job description which was comprised of sedentary requirements of frequent reaching and handling, constant fingering and no climbing, balancing, stooping, kneeling, crouching and crawling. The vocational counselor determined that the position fell within appellant's medical restrictions, that it was available in sufficient numbers so as to make it reasonably available within appellant's commuting area and that the wage of the position was \$590.80 per week.

The Board finds that OWCP considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment and age and employment qualifications, in determining that the position of billing machine operator represented her wage-earning capacity.¹⁶ OWCP used the information provided by the rehabilitation counselor of the prevailing wage rate in the area for a billing machine operator, and established that jobs in the position selected for determining wage-earning capacity were reasonably available in the general labor market in the geographical commuting area in which the employee lived, as confirmed by state officials.¹⁷ The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of billing machine operator and that such a position was reasonably available within the general labor market of appellant's commuting area. Appellant has not submitted any evidence to support that such positions were not reasonably available in the general labor market.

OWCP properly applied the principles set forth in the *Shadrick*¹⁸ decision to determine appellant's employment-related loss of wage-earning capacity. It calculated that her compensation rate should be adjusted to \$1,330.00 using the *Shadrick* formula. OWCP indicated that appellant's salary as of August 28, 2010, the date she stopped working, was \$1,050.37 per week. It stated that her current, adjusted pay rate for the job on the date of injury was \$1,086.69. OWCP determinate that appellant was currently capable of earning \$590.80 per week, the rate of a billing machine operator. Therefore OWCP determined that appellant had a 54 percent wage-earning capacity, which when multiplied by 2/3 amounted to a compensation rate of \$322.11. It found that her current adjusted compensation rate, per four-week period, was \$1,330.00. OWCP therefore properly determined that the position of billing machine operator reflected appellant's

¹⁶ *James M. Frasher, supra* note 4.

¹⁷ *W.T.*, Docket No. 12-857 (issued January 10, 2013).

¹⁸ *Supra* note 3; *see also* 20 C.F.R. § 10.403.

wage-earning capacity and using the *Shadrick* formula, reduced her compensation effective April 16, 2013.¹⁹

CONCLUSION

The Board finds that OWCP met its burden of proof in reducing appellant's compensation based on its determination that the position of a billing machine operator represented her wage-earning capacity effective April 16, 2013.

ORDER

IT IS HEREBY ORDERED THAT the October 29, 2013 decision of the Office of Workers' Compensation Programs is affirmed.²⁰

Issued: June 4, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁹ The Board notes that appellant elected to receive OPM benefits in lieu of OWCP benefits effective December 18, 2012. Where an employee is undergoing vocational rehabilitation, or where OWCP is attempting to otherwise place that employee in a suitable job, and that employee elects to receive retirement benefits from OPM instead of benefits under FECA, OWCP may proceed with a loss of wage-earning capacity determination, which may reduce FECA entitlement as long as the determination is based on the evidence of record at the time of such election. 20 C.F.R. § 10.521.

²⁰ Richard J. Daschbach, Chief Judge, who participated in the preparation of the decision, was no longer a member of the Board after May 16, 2014.