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<b>K.L., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 11-659</b>
	)	<b>Issued: November 25, 2011</b>
<b>U.S. POSTAL SERVICE, POST OFFICE,</b>	)	
<b>Edison, NJ, Employer</b>	)	
	)	

*Thomas R. Uliase, Esq.*, for the appellant  
*Office of Solicitor*, for the Director

## DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

## ***JURISDICTION***

On January 26, 2011 appellant, through her attorney, filed a timely appeal of an October 22, 2010 Office of Workers' Compensation Programs' (OWCP) merit decision reducing her compensation benefits. Pursuant to the Federal Employees' Compensation Act (FECA)<sup>1</sup> and 20 C.F.R. §§ 501.2(c)(1) and 501.3, the Board has jurisdiction to consider the merits of the case.

**ISSUE**

The issue is whether OWCP met its burden of proof to reduce appellant's compensation benefits based on her capacity to earn wages as an information clerk effective April 11, 2010.

On appeal counsel argued that appellant submitted evidence that her physician, Dr. Stuart G. Dubowitch, an osteopath, found that she was totally disabled prior to the issuance of OWCP's April 7, 2010 decision.

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

This case has previously been on appeal before the Board. On December 28, 1991 appellant injured her right arm, shoulder and neck due to lifting tubs of mail. OWCP accepted her claim for right adhesive capsulitis, right medial epicondylitis and right carpal tunnel syndrome. Dr. Dubowitch performed an authorized decompression of the ulnar nerve in the right elbow and right carpal tunnel release on June 28, 1993. Appellant returned to work part time four hours a day on October 11, 1994.

Appellant stopped work and filed a recurrence of disability claim alleging that she had developed left carpal tunnel syndrome as a result of her employment injury. On September 13, 1999 OWCP denied appellant's claim for left carpal tunnel syndrome and appellant requested an oral hearing. By decision dated April 24, 2000, an OWCP hearing representative affirmed, finding that appellant had not established that her left carpal tunnel syndrome was due to her accepted employment injury. By decision dated March 1, 2002, the Board reversed the decision and remanded the case for additional development of the medical evidence.<sup>2</sup>

After further development, OWCP denied appellant's claim for left carpal tunnel syndrome in a June 20, 2002 decision. Appellant requested an oral hearing and by decision dated June 5, 2003, the OWCP hearing representative affirmed the June 20, 2002 decision. The Board reviewed this decision on November 26, 2003 and again remanded the case for additional development of the medical evidence.<sup>3</sup>

OWCP denied appellant's claim for left carpal tunnel syndrome in a March 3, 2004 decision. A hearing representative set aside this decision on January 19, 2005 and remanded the case for additional development of the evidence.

Dr. Dubowitch completed a work capacity evaluation on January 28, 2008 and found that appellant could work eight hours a day with restrictions. He noted that appellant should not reach above the shoulder, and should perform repetitive movements of her wrists and elbows for one hour a day. Dr. Dubowitch also limited appellant's lifting to 5 to 10 pounds up to three hours a day. OWCP referred appellant for vocational rehabilitation counseling on March 28, 2008.

The vocational rehabilitation counselor identified three positions within appellant's work limitations, information clerk, customer-complaint clerk and case aide. She recommended that Dr. Dubowitch review these positions to determine if appellant could perform the necessary fingering and handling.

Dr. Dubowitch completed a report on May 20, 2009 and stated that appellant could work in a sedentary clerical position with no repetitive use of the upper extremities and no lifting more than 10 pounds. OWCP requested a supplemental report from Dr. Dubowitch on June 25, 2009 and provide him with the requirements of information clerk and customer complaint clerk. It

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<sup>2</sup> Docket No. 00-2635 (issued March 1, 2002).

<sup>3</sup> Docket No. 03-2075 (issued November 26, 2003).

asked whether appellant could perform the occasional handling, up to three hours a day, required by both positions and the occasional fingering, up to three hours a day, required by the customer complaint clerk position. On July 1, 2009 Dr. Dubowitch stated that he reviewed both job positions and that appellant could perform the duties of either an information clerk or customer complaint clerk. He reiterated that appellant was limited from repetitive use of her hand and significant overhead activities.

The vocational rehabilitation counselor found that the position of information clerk was appropriate as appellant had 32 years of experience in advanced administrative/secretarial work as well as information clerk tasks. She stated that the position was being performed in sufficient numbers so as to make it reasonably available to the claimant within her commuting area, noting that there was a slight decline in the number of available administrative support positions. Appellant pursued job opportunities, however, in a report dated November 18, 2009, the vocational rehabilitation counselor closed her case noting that appellant did not receive a job offer during the allotted period.

In a letter dated December 30, 2009, OWCP proposed to reduce appellant's compensation benefits based on her capacity to earn wages as an information clerk at the rate of \$484.00 per week. It allowed her 30 days to respond.

On December 18, 2009 Dr. Dubowitch stated that appellant was developing increasing symptomatology including swelling in the right arm and significant neck pain radiating to the upper extremities and shoulders. He diagnosed exacerbation of cervical radiculopathy/radiculitis. Dr. Dubowitch stated, "Unfortunately, due to her significant amount of orthopedic problems, inclusive of peripheral nerve entrapment, radiculopathy and the amount of pain and discomfort she is experiencing, previously we had suggested work restrictions, but at this time, I believe that we are leaning toward full disability with inability to return to the [employing establishment]." In a report dated February 5, 2010, he stated that appellant could not return to her date-of-injury position. Dr. Dubowitch stated that appellant was working for the employing establishment performing repetitive activities of sorting, casing, and other motions referable to the upper extremities and cervical spine.<sup>4</sup>

By decision dated April 7, 2010, OWCP reduced appellant's compensation benefits effective April 11, 2010 based on a finding that she was capable of performing the duties of information clerk.

On April 13, 2010 appellant requested an oral hearing before an OWCP hearing representative. This was later changed to a request for a review of the written record.

On May 7, 2010 Dr. Dubowitch stated that appellant was not capable of returning to her date-of-injury position. Appellant was unable to work on a computer due to aching, fatigue and weakness in her arms. Dr. Dubowitch concluded that appellant was disabled from employment. He completed a work capacity evaluation and indicated that appellant could not work eight hours a day with restrictions and that she could perform no work activities. Dr. Dubowitch provided an

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<sup>4</sup> The record establishes that appellant has not worked within the 15 months prior to her wage-earning capacity determination.

undated form report diagnosing cervical radiculopathy, cubital and carpal tunnel syndromes. He indicated with a checkmark “yes” that appellant’s condition was aggravated by employment activity. Dr. Dubowitch further indicated that appellant could not return to work.

By decision dated October 22, 2010, the hearing representative found that the selected position fairly and reasonably represented appellant’s wage-earning capacity and that Dr. Dubowitch’s reports did not contain objective findings to support his conclusions that appellant was totally disabled.

### **LEGAL PRECEDENT**

Section 8115 of FECA<sup>5</sup> provides that wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent her wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or the employee has no actual earnings, her wage-earning capacity is determined with due regard to the nature of her injury, the degree of physical impairment, his usual employment, her age, her qualifications for other employment, the availability of suitable employment, and other factors or circumstances which may affect her wage-earning capacity in her disabled condition.<sup>6</sup>

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, *Dictionary of Occupational Titles* or otherwise available in the open market, that fits that employee’s capabilities with regard to 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. Finally, application of the principles set forth in *Albert C. Shadrick*<sup>7</sup> will result in the percentage of the employee’s loss of wage-earning capacity. The basic rate of compensation paid under FECA is 66 2/3 percent of the injured employee’s monthly pay.<sup>8</sup>

### **ANALYSIS**

OWCP accepted appellant’s claim for right adhesive capsulitis, right medial epicondylitis and right carpal tunnel syndrome. Appellant’s attending physician, Dr. Dubowitch, released appellant to return to light-duty work on May 20, 2009 with restrictions on repetitive use of the upper extremities and lifting more than 10 pounds.

OWCP referred appellant for vocational rehabilitation and the vocational rehabilitation counselor identified two jobs that appellant could perform and that were reasonably available. One of these positions was information clerk. Dr. Dubowitch reviewed the requirements of this

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<sup>5</sup> 5 U.S.C. §§ 8101-8193, 8115.

<sup>6</sup> *N.J.*, 59 ECAB 171 (2007).

<sup>7</sup> 5 ECAB 376 (1953).

<sup>8</sup> *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

position on July 1, 2009 and stated that appellant could work an information clerk. The vocational rehabilitation counselor found that the position of information clerk was vocationally appropriate based on appellant's extensive administrative experience. She further found that the position was being performed in sufficient numbers so as to make it reasonably available to the claimant within her commuting area, even though there was a slight decline in the number of available administrative support positions.

Dr. Dubowitch submitted reports on December 18, 2009 and February 5, 2010 advising that appellant's condition had worsened as she had an exacerbation of cervical radiculopathy and radiculitis. He indicated that appellant's disability had increased, but did not specifically state that she was incapable of performing the duties of the selected position. Dr. Dubowitch suggested that appellant not return to work at the employing establishment in her regular position. The Board finds that Dr. Dubowitch did not provide an unequivocal medical opinion addressing why appellant could not perform the duties of the selected position. Dr. Dubowitch stated that he was "leaning toward" total disability and that appellant could not work at the employing establishment. These statements are not based on an accurate assessment of appellant's job abilities, as the question was not whether she could return to clerk work at the employing establishment, but whether she could perform the duties of the selected sedentary position of information clerk. Dr. Dubowitch did not explain why he felt that appellant's condition had changed such that her symptoms caused a permanent disability for work. The Board finds that this report is not sufficiently well reasoned to establish that appellant's condition had changed such that she could no longer perform the duties of the selected position of information clerk.

In a February 5, 2010 report, Dr. Dubowitch discussed whether or not appellant could return to her date-of-injury position. He indicated that appellant was working for the employing establishment performing repetitive activities of sorting, casing, and other motions referable to the upper extremities and cervical spine. At the time of the wage-earning capacity decision, appellant had not worked at the employing establishment for more than 15 months. Dr. Dubowitch's opinion is of diminished probative value as it is not based on an accurate factual background or on an accurate assessment of the duties that appellant was considered capable of performing. He did not specifically address the duties of the selected position and did not offer any explanation or reasoning why he felt that appellant could no longer perform the duties of this position, in contradiction of his July 1, 2009 report. The Board finds that this report is not sufficiently detailed and well reasoned to establish that appellant's condition had changed such that she could not perform the duties of the selected position.

Before the review of the written record by OWCP hearing representative, Dr. Dubowitch completed a form report indicating that appellant could perform no work activities. He diagnosed cervical radiculopathy, cubital and carpal tunnel syndromes and indicated with a checkmark "yes" that appellant's condition was aggravated by employment activity. The Board has held that an opinion on causal relationship which consists only of a physician checking "yes" to a medical form report question on whether the claimant's disability was related to the history given is of little probative value. Without any explanation or rationale for the conclusion reached, such report is insufficient to establish causal relationship.<sup>9</sup> As this form report does not contain a

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<sup>9</sup> *Lucrecia M. Nielson*, 41 ECAB 583, 594 (1991).

detailed history, does not explain how and why appellant's condition has changed and does not specifically address appellant's ability to perform the duties of the selected position, the Board finds that this report is not sufficient to establish that appellant could not perform the duties of an information clerk.

When placement services did not yield employment for appellant, OWCP, after providing appellant notice, reduced appellant's compensation effective April 11, 2010 based on her capacity to earn wages as an information clerk. The Board finds that OWCP considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment, age and employment qualifications, in determining that the position of information clerk represented her wage-earning capacity. The evidence of record establishes that she had the requisite physical ability, skill and experience to perform the position and that such a position was reasonably available within the general labor market of her commuting area. OWCP therefore properly determined that the position of information clerk reflected appellant's wage-earning capacity and used the *Shadrick* formula properly reduced her compensation.

As noted above, the Board finds that the medical evidence submitted by Dr. Dubowitch was not sufficiently detailed and well rationalized to establish that she could not perform the duties of the selected position contrary to the arguments of counsel.

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 appellant was capable of earning wages in the constructed position of information clerk and reduced her compensation benefits accordingly.

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 22, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 25, 2011  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

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

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