

FACTUAL HISTORY

OWCP accepted that on December 17, 2001 appellant, then a 36-year-old welder, sustained a right shoulder sprain and impingement syndrome of the right shoulder after slipping on a pressure hull inside a submarine at work. Appellant received OWCP compensation for periods of disability.²

On January 3, 2002 appellant was treated by Dr. Mark Sugimoto, an attending Board-certified family practitioner, who diagnosed right shoulder impingement, rotator cuff tendinitis and subacromial bursitis. He was released to light-duty work.

In a February 25, 2002 report, Dr. Michael McManus, an attending Board-certified occupational medicine physician, provided a diagnosis of a right shoulder strain and probable rotator cuff tendinitis. On June 20, 2002 Dr. Robert W. Leyen, an attending Board-certified orthopedic surgeon, performed right shoulder surgery, including a Neer acromioplasty with excision of the distal clavicle, for a diagnosed condition of acromioclavicular joint arthritis impingement syndrome. On January 22, 2004 Dr. Neil Roberts, an attending Board-certified orthopedic surgeon, performed arthroscopy, debridement and mini open rotator cuff tear surgery on appellant's right shoulder. The surgical procedures were authorized by OWCP.

In an August 2, 2005 report, Dr. Patrick N. Bays, a Board-certified orthopedic surgeon who served as an OWCP referral physician, opined that the conditions of right shoulder impingement syndrome/strain, post status right shoulder open decompression with partial claviclectomy status and post right shoulder arthroscopic decompression surgery were all causally related to the December 17, 2001 employment injury. He found that appellant was not totally disabled due to the accepted conditions.

In a March 11, 2008 report, Dr. Joan Sullivan, a Board-certified orthopedic surgeon who served as an OWCP referral physician, stated that appellant suffered from bilateral shoulder injuries as a result of his April 28, 1999 and December 17, 2001 work injuries. In a March 11, 2008 Form OWCP-5c, she advised that appellant could work eight hours per day but restricted him from reaching for more than two hours per day, reaching above the shoulders for more than one hour and pushing, pulling or lifting more than 25 pounds for more than four hours. Dr. Sullivan stated that these restrictions were permanent. After reviewing the report of a physical capacity evaluation conducted on March 12 and 13, 2008 by a physical therapist, she submitted an April 14, 2008 report in which she indicated that her March 11, 2008 work restrictions form would remain unchanged.

On June 18, 2008 appellant was referred for vocational rehabilitation services. In September 2008 a vocational rehabilitation counselor determined that, based upon his experience, education, medical restrictions and a labor market survey, appellant was employable as a customer service representative or user support analyst. Labor market surveys showed that these positions were reasonably available in appellant's commuting area. The position of customer service representative involved talking with customers by telephone or in person and

² OWCP previously accepted that on April 28, 1999 appellant sustained a left shoulder impingement syndrome and aggravation of left shoulder post-traumatic arthritis.

receiving orders for installation, turn-on, discontinuance, or change in service. The position was considered sedentary in nature but the physical requirements of the position included occasionally reaching, with the term occasionally defined as 1/3 of an 8-hour workday. The physical duties also required occasional lifting of up to 20 pounds and frequent lifting of up to 10 pounds.

OWCP provided Dr. Sullivan with descriptions of the positions of customer service representative and user support analyst. In an October 14, 2008 report, Dr. Sullivan stated that a physical therapist's recommendation that appellant only reach for two hours per day was in accordance with her March 11, 2008 work restrictions. She stated:

"In talking about reaching, though, I was referring more to him reaching to do activities that called for above-shoulder level work, either directly in front of him, behind him, or out to the side. Reaching directly in front of him, below shoulder-level work, should not be a cause of difficulty for him. The job description for a customer service representative, as well as user support analyst, are both positions for which I think he can accomplish the tasks and demands of the job and he is able to physically perform those duties as were outlined in the job description."

In a November 12, 2008 report, Dr. Roberts stated that he had a chance to review job descriptions for the positions of customer service representative and user support analyst and noted, "I do believe he could do these jobs, even involving the reaching."

As part of his rehabilitation program, appellant took a course at Olympic College in order to improve his computer skills. The primary goal was to have him work as a user support analyst, with a secondary goal to have him work as a customer service representative. Appellant's counselor indicated that appellant put forth good effort but was struggling with his coursework. Appellant eventually completed a less difficult computer training course at a technical institute in mid 2010. However, he was not successful in finding an appropriate job and his vocational rehabilitation file was closed in September 2010. Another labor market survey was performed in September 2010 which confirmed that the position of customer service representative was still available in appellant's commuting area at an entry pay level of \$425.03 per week. The physical requirements of the position remained the same. Appellant's counselor provided an opinion that appellant was vocationally able to work as a customer service representative.

In a November 30, 2010 letter, OWCP advised appellant that it proposed to reduce his compensation effective based on its determination that the position of customer service representative represented his wage-earning capacity. It provided appellant 30 days to submit evidence or argument challenging the proposed action.

Appellant submitted an October 21, 2010 report in which Dr. McManus stated that physical examination of his right shoulder revealed a tender anterior humeral head about the greater tuberosity and palpable crepitation with range of motion testing. Strength testing with abduction, forward flexion and external rotation showed 4/5 strength. Dr. McManus diagnosed right shoulder strain with impingement syndrome status post open acromioplasty and resection of distal clavicle with subsequent arthroscopic procedure for rotator cuff tear. He indicated that

appellant had permanent work restrictions per Dr. Sullivan and stated, “This provider agrees with Dr. Sullivan’s work restrictions and permanent work restrictions rewritten at this time.” On October 21, 2010 Dr. McManus completed a Form OWCP-5c in the same manner Dr. Sullivan did on March 11, 2008 thereby indicating that appellant could work eight hours per day with restrictions from reaching more than two hours per day, reaching above the shoulders for more than one hour or pushing, pulling or lifting more than 25 pounds for more than four hours.

In a February 17, 2011 decision, OWCP reduced appellant’s compensation effective February 12, 2011 based on its determination that the position of customer service representative represented his wage-earning capacity.

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 Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁴

Under section 8115(a) of FECA, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, his degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.⁵ Wage-earning capacity is a measure of the employee’s ability to earn wages in the open labor market under normal employment conditions.⁶ 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.⁷ 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 his commuting area.⁸

In determining wage-earning capacity based on a constructed position, consideration is given to the residuals of the employment injury and the effects of conditions which preexisted

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

⁴ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

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

⁶ *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

⁷ *Id.* The commuting area is to be determined by the employee’s ability to get to and from the work site. *See Glen L. Sinclair*, 36 ECAB 664, 669 (1985).

⁸ *See Leo A. Chartier*, 32 ECAB 652, 657 (1981).

the employment injury.⁹ In determining wage-earning capacity based on a constructed position, consideration is not given to conditions which arise subsequent to the employment injury.¹⁰

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, *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits that employee's capabilities with regard to his 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 the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.¹¹

ANALYSIS

OWCP accepted that on December 17, 2001 appellant sustained a right shoulder sprain and impingement syndrome of the right shoulder and approved right shoulder surgeries that were performed on June 20, 2002 and January 22, 2004. Appellant received OWCP compensation for periods of disability.

In March 2008 OWCP received a report from Dr. Sullivan, a Board-certified orthopedic surgeon who served as an OWCP referral physician, indicating that appellant could perform light-duty work on full-time basis. In a March 11, 2008 Form OWCP-5c, Dr. Sullivan stated that appellant could work eight hours per day but restricted him from reaching more than two hours per day, reaching above the shoulder for more than one hour and pushing, pulling or lifting more than 25 pounds for more than four hours. She stated that these restrictions were permanent.

In June 2008 appellant was referred to an OWCP-sponsored vocational rehabilitation program. Appellant's vocational rehabilitation counselor determined that appellant was able to perform the position of customer service representative and that state employment services showed the position was available in sufficient numbers so as to make it reasonably available within appellant's commuting area.¹² The position of customer service representative involved talking with customers by telephone or in person and receiving orders for installation, turn-on,

⁹ See *Jess D. Todd*, 34 ECAB 798, 804 (1983).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(d) (December 1995).

¹¹ See *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).

¹² Labor market surveys for the position were performed in September 2008 and September 2010. In an October 14, 2008 report, Dr. Sullivan suggested that appellant might be able to reach more than two hours per day if the reaching was below shoulder level and involved reaching towards his front (rather than to the side). Based on this assumption, Dr. Sullivan indicated that appellant could work as a customer service representative. In a November 12, 2008 report, Dr. Roberts, an attending Board-certified orthopedic surgeon, stated that appellant could perform the customer service representative position.

discontinuance, or change in service. The position was considered sedentary in nature but the physical requirements of the position included occasionally reaching, with the term occasionally defined as 1/3 of an 8-hour workday. The physical duties also required occasional lifting of up to 20 pounds and frequent lifting of up to 10 pounds.

The Board notes that OWCP properly relied on the opinion of the rehabilitation counselor that appellant was vocationally capable of performing the position of customer service representative.

The Board finds, however, that the medical evidence of record does not show that appellant was capable of physically performing the constructed customer service representative position around the time that his compensation was reduced in early 2011. Therefore, OWCP did not meet its burden of proof to reduce appellant's compensation effective February 12, 2011 based on its determination that the position of customer service representative represented his wage-earning capacity.

The only medical reports that contain an opinion on appellant's ability to work around the time that his compensation was reduced in early 2011 are the October 21, 2010 reports of Dr. McManus, an attending Board-certified occupational medicine physician. In an October 21, 2010 narrative report, Dr. McManus indicated that appellant had permanent work restrictions per Dr. Sullivan and stated, "This provider agrees with Dr. Sullivan's work restrictions and permanent work restrictions rewritten at this time."¹³ On October 21, 2010 he completed a Form OWCP-5c in the same manner Dr. Sullivan did on March 11, 2008 thereby indicating that appellant could work eight hours per day with restrictions from reaching more than two hours per day, reaching above the shoulders for more than one hour or pushing, pulling or lifting more than 25 pounds for more than four hours.

The Board notes that Dr. McManus clearly restricted appellant to reaching only two hours during an eight-hour workday, but the job description of the customer service representative position provides that appellant would be required to occasionally engage in reaching, with the term occasionally defined as 1/3 of an 8-hour workday. Reaching for 1/3 of an 8-hour workday means that appellant would have to engage in reaching for more than 2½ hours per 8-hour workday and this requirement would violate appellant's work restrictions. OWCP has not clearly established that appellant could physically perform the customer service representative position which it used to determine his wage-earning capacity and reduce his compensation in early 2011.¹⁴ The decision will be reversed.

¹³ Dr. McManus stated that physical examination of appellant's right shoulder revealed a tender anterior humeral head about the greater tuberosity and palpable crepitation with range of motion testing. Strength testing with abduction, forward flexion and external rotation showed 4/5 strength. He diagnosed right shoulder strain with impingement syndrome status post open acromioplasty and resection of distal clavicle with subsequent arthroscopic procedure for rotator cuff tear.

¹⁴ The Board notes that the 2008 reports of Dr. Sullivan and Dr. Roberts, which indicate that appellant would be able to work as a customer service representative, do not describe appellant's physical condition and ability to work around the time his compensation was reduced in early 2011.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to reduce appellant's compensation effective February 12, 2011 based on its determination that the position of customer service representative represented his wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the February 17, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 17, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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