



injury causally related to his federal employment.<sup>2</sup> OWCP accepted the claims for right shoulder sprain and torn rotator cuff. Appellant received compensation for wage loss in June 1995 and returned to work in April 1996. On December 4, 1996 he filed a claim for compensation (Form CA-7) commencing October 2, 1996. Appellant underwent right shoulder arthroscopic surgery on February 19, 1999.

In a report dated October 6, 1999, Dr. Carlos Prietto, an attending physician, indicated that appellant had a bilateral shoulder condition and could work with restrictions. Appellant was limited to 10 pounds lifting, pushing and pulling. In a report dated May 16, 2000, Dr. Prietto stated that appellant “should have the following work restrictions: He should be limited to repetitious chest or overhead activities of weights no greater than five pounds. Furthermore, he should be limited to lifting repetitively weights no greater than 20 pounds.”

The record indicates that appellant was referred for vocational rehabilitation. A rehabilitation counselor completed a Form OWCP-66 on July 26, 2000 for the selected position of mail clerk Department of Labor’s *Dictionary of Occupational Titles*, No. 209.687-026, and on August 11, 2000 completed an OWCP-66 for the position of office helper/clerk *DOT* No. 239.567-010.

By decision dated November 21, 2000, OWCP found that the selected position of mail clerk represented appellant’s wage-earning capacity. In a decision dated March 26, 1991, an OWCP hearing representative reversed the November 28, 2000 decision. The hearing representative found that it was not clear whether the selected position was within Dr. Prietto’s work restrictions.

With respect to the position of office helper/clerk, *DOT* No. 239.567-010, a Form OWCP-66 was completed on August 11, 2000 by a rehabilitation specialist. It stated that the strength level of the position was “Light,” which was described as occasional lifting of 20 pounds, with up to 10 pounds of lifting “frequently” and “constantly.” No information was provided as to lifting above chest level.

In an April 27, 2001 report, a rehabilitation counselor stated that he had worked with Dr. Prietto in the past. The counselor reviewed a handwritten note dated May 16, 2000 from Dr. Prietto and concluded that the use of the word repetitively referred to an activity in excess of occasionally. He asserted, “Neither the occupation of mail clerk nor office clerk requires lifting (or force) of five pounds at or above chest level for durations more than occasionally.” The rehabilitation counselor further stated that a survey of 10 current job openings for the position of office clerk was conducted to determine whether the position could be performed within the restriction of no more than incidental lifting of five pounds at or above chest level. The counselor stated that approximately one third of the responses were “no,” one third “I have no idea” and one third “yes.”

By letter dated August 15, 2001, OWCP advised appellant that it proposed to reduce his wage-loss compensation. In a decision dated September 26, 2001, it determined the selected

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<sup>2</sup> Appellant submitted a July 2, 1995 statement indicating that he was hurt on February 20, 1995 when he pushed an OTR.

position of office clerk represented his wage-earning capacity. OWCP stated that, based on the April 27, 2001 report from the rehabilitation counselor, the position did not require more than occasional lifting above chest level of more than five pounds. In a decision dated November 8, 2002, an OWCP hearing representative affirmed the September 26, 2001 OWCP decision.

In a letter dated June 17, 2010, appellant's representative requested modification of the wage-earning capacity determination. Appellant argued that the September 26, 2001 decision was in error, as the selected position was not within his existing work restrictions at the time it was issued.

By decision dated September 8, 2010, OWCP denied modification of the wage-earning capacity determination. It found that the September 26, 2001 decision properly found the selected position represented appellant's wage-earning capacity.

In a decision dated February 10, 2011, an OWCP hearing representative affirmed the denial of modification.

### **LEGAL PRECEDENT**

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.<sup>3</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>4</sup>

### **ANALYSIS**

Appellant seeks modification of the September 26, 2001 wage-earning capacity determination on the grounds that the original determination was erroneous. He argued that the selected position of office helper/clerk was not within the work restrictions set forth by his attending physician, Dr. Prietto.

The most current medical evidence as to appellant's work restrictions, prior to the September 26, 2001 decision, was Dr. Prietto's May 16, 2000 report. Dr. Prietto found that appellant was limited to five pounds of repetitive lifting at or above the chest level and 20 pounds of occasional lifting. The issue is whether the physical requirements of the selected position of office helper/clerk were within the stated restrictions.

The physical demands of a selected position are generally determined by the description of the selected position in the Department of Labor's *Dictionary of Occupational Titles*.<sup>5</sup> In this case the office helper/clerk position was described as a "Light" strength position, or 20 pounds of occasional lifting and frequent lifting of up to 10 pounds. The OWCP-66 form does not address

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<sup>3</sup> *Sue A. Sedgwick*, 45 ECAB 211 (1993).

<sup>4</sup> *Id.*

<sup>5</sup> *See J.V.*, Docket No. 10-886 (issued November 17, 2010).

the issue of whether the lifting would be above the chest level and if so, how often. But on its face the general provision of up to 10 pounds lifting does not conform to Dr. Prietto's general 5-pound restriction with only occasional lifting of up to 20 pounds. This does not establish the suitability of the positions physical limitation. Moreover, OWCP determined that the position was medically suitable based on the April 27, 2001 conclusion of the rehabilitation counselor, who concluded the selected position did not require repetitive lifting of more than five pounds above chest level. The basis for the counselor's conclusion, however, was a limited survey of 10 positions than in the labor market. The Board notes that the results of the survey were equivocal and are of limited probative value on the issue. One third of the employers indicated the position did conform to their work restrictions, another one third responded that the position was not within their reported work restrictions and the remainder provided no useful information. This evidence is of limited probative value and does not support that the selected position of office helper/clerk required repetitive lifting of five pounds or less at or above chest level.

OWCP procedures provide that unless the medical evidence is "clear and unequivocal" that the selected position is medically suitable OWCP should send a job description to an appropriate physician for an opinion as to whether the claimant can perform the position.<sup>6</sup> The existing medical evidence was not clear and unequivocal on the issue presented. Further, OWCP failed to secure additional medical evidence on the issue.

The burden of proof is on OWCP to establish that the selected position was medically suitable.<sup>7</sup> The Board finds OWCP did not meet its burden in the September 26, 2001 decision. Accordingly, the decision was erroneous and appellant has established a modification is warranted.

### CONCLUSION

The Board finds that appellant has established that the original September 26, 2001 wage-earning capacity determination was erroneous.

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<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(d) (December 1995). See also *John D. Jackson*, 55 ECAB 465 (2004); *A.M.*, Docket No. 11-1874 (issued April 17, 2012).

<sup>7</sup> OWCP has the burden of proof to establish the selected position represented appellant's wage-earning capacity. See *N.J.*, 59 ECAB 171, 175 (2007).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated February 10, 2011 is reversed.

Issued: June 22, 2012  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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