

treating Board-certified orthopedic surgeon, performed an open reduction internal fixation of left lateral malleolus fracture. On December 19, 2008 OWCP accepted appellant's claim for left ankle lateral malleolus fracture with posterior malleolus fracture, open. On July 9, 2009 appellant underwent surgery for the removal of hardware from her left ankle. Appellant returned to work on September 21, 2009 for limited hours and with restrictions. However, she was sent home as no work was available.

On September 30, 2009 Dr. Jeng released appellant to return to work for 8 hours per day with restrictions that prohibited walking, kneeling and climbing; allowed bending, stooping, pushing and pulling for 30 minutes a day; allowed sitting, standing, lifting and twisting for 1 hour a day; and allowed reaching, and operating a motor vehicle at work for 2 hours a day. Again, the employing establishment sent appellant home because no work was available within her restrictions. On March 24, 2010 OWCP accepted left ankle osteochondral lesion.

In a report dated December 22, 2009, Dr. Robert Allen Smith, a second opinion physician and Board-certified orthopedic surgeon, stated that, based on his current clinical examination, it did not appear that appellant had any objective findings that would support residual impairment due to the accepted condition. He noted that the fracture of the lateral malleolus had healed completely and stabilizing hardware had been surgically removed. Appellant's current clinical examination was relatively benign showing no atrophy, good range of motion and satisfactory strength about the ankle. He noted no ongoing pathology that would prevent her from returning to regular-duty work.

In a February 2, 2010 report, Dr. Jeng stated that appellant had pain globally around the ankle. Appellant had a central tibial osteochondritis dessicans lesion as well as some fluid on the posterior tibial tendon based on her magnetic resonance imaging scan. Dr. Jeng noted that he would continue with conservative care with the ankle brace that seemed to keep her comfortable at work.

On March 30, 2010 OWCP referred appellant to a vocational rehabilitation counselor, who reviewed appellant's work history, skill development, education and training. On April 12, 2010 the counselor had a telephone conference with appellant. In an April 14, 2010 note, she noted that appellant's résumé revealed that she had good skills and probably did not need additional training in order to obtain employment. The counselor noted appellant's lengthy history of working with temporary help firms which she noted gave appellant a lot of varied experience in payroll and basic bookkeeping. On October 28, 2010 she closed the case. The counselor indicated that appellant had a good administrative background and did not need additional training. Appellant had limited success in securing interviews and that she reported illnesses that slowed her job search. She indicated that, although appellant followed up on some of the job leads provided, the counselor did not have any information about whether she attended any interview.

The counselor determined in a November 10, 2010 report that appellant could obtain work as an accounts receivable clerk at wages of \$400.00 per week. She noted that this position was sedentary and available in sufficient numbers so as to make it reasonably available to the claimant within her commuting area. In response to whether appellant's experience, education and training met the position requirements, the counselor responded, "[Appellant] has worked in

payroll and accounting positions in the past, and has more than a year of experience in these jobs.” The duties of this position included compiling and sorting documents, substantiating business transactions, verifying and posting details of business transactions using a calculator or computer. The employee would compute and record charges, refunds, cost of lost or damaged goods, freight charges, rental and similar items. Appellant’s résumé noted that she was trained on MS Office 2003 and 2007, Lotus and a 10-key adding machine. Her work history included working as a letter carrier since 2006; working as an insurance agent from September 2005 to March 2006; an accounts payable clerk for Kelly Services 2003 to 2005; computer operator, customer service, payroll clerk and receptionist for Priority One Staffing Services from 2003 to 2006; commercial operations associate image keyer /trainer for Bank One from 2001 to 2002; a key operator for Census 2000 -- Computer Science Corporation in 2000, a training coordinator for integrated health services in 1999, a gift records specialist for Associated Catholic Charities from 1997 to 1998; and a unit computer operator for Johns Hopkins Hospital from 1992 to 1996. Appellant’s post-high school education included attendance at Gordon Phillips Beauty School from August 1996 to 1997 where she received a diploma, and attendance at the PSI Institute of Baltimore from September 1987 to January 1988 where she received a diploma for data entry.

On December 20, 2010 OWCP issued a notice of proposed reduction of compensation based on appellant’s ability to earn wages as an accounts receivable clerk at \$400.00 per week.

Appellant responded to the proposed reduction and noted that no agency wanted to hire her because her injury made her a liability and because her previous employment experience was outdated. She noted that she asked her vocational rehabilitation counselor on numerous occasions to set up some training to update and enhance her skills because her skills were outdated and that employing companies were looking for skills that she did not have. Appellant noted that she had not attended college and that the majority of work was agency work which only required her to pass a typing test and did not require programming skills to obtain employment.

In a second notice of proposed reduction issued on March 16, 2011, OWCP found that the position of accounts receivable clerk was medically and vocationally suitable for and fairly and reasonably represented appellant’s wage-earning capacity. By decision dated May 19, 2011, it finalized its reduction of wage-earning capacity determination based on the constructed position of accounts receivable clerk effective June 5, 2011.

On May 24, 2011 appellant requested an oral hearing before an OWCP hearing representative. At the hearing held on October 13, 2011, she testified that all contact with the vocational rehabilitation counselor was through telephone conversations and e-mails. Appellant had asked for training to update her skills as they were outdated, but was not given the opportunity. She had not used a computer for her employment or updated her skills since 2004. Appellant noted that she had performed payroll and accounting duties in the past for an agency. She applied for various positions including data entry, office assistant and even accounting, but did not have the appropriate skills. Appellant noted that she had registered for online job search, applied for positions found in the newspaper and tried word-of-mouth search.

By decision dated December 27, 2011, OWCP affirmed the May 19, 2011 loss of wage-earning capacity determination.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from an injury sustained while in the performance of duty. Disability, which may be partial or total, refers to an employee's incapacity to earn the wages that he or she had been receiving at the time of injury.²

Compensation for partial disability is payable as a percentage of the difference between the employee's pay at the time of injury and the employee's wage-earning capacity.³ According to section 8115(a) of FECA, the wage-earning capacity of an employee is generally determined by actual earnings. However, if actual earnings do not fairly and reasonably represent wage-earning capacity or if the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his or her usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances that may affect wage-earning capacity in his or her disabled condition.⁴

When OWCP makes a medical determination of partial disability and 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 DOT or otherwise available in the open labor market, that fits the 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. Finally, application of the principles set forth in *Albert C. Shadrick*⁵ will result in the percentage of the employee's loss of wage-earning capacity. The job selected for determining wage-earning capacity must be one that is reasonably available in the general labor market in the commuting area where the employee lives. OWCP may not select a makeshift or odd-lot position or one not reasonably available on the open labor market.⁶

ANALYSIS

OWCP accepted appellant's claim for left ankle lateral malleolus fracture, open posterior malleolus fracture and left ankle osteochondral lesion. Appellant's physician, Dr. Jeng, released her to limited work, but the employing establishment could not provide work within her restrictions. Accordingly, OWCP referred appellant to vocational rehabilitation. The counselor determined that appellant's wage-earning capacity was represented by the position of accounts

² *G.G.*, Docket No. 11-1081 (issued June 1, 2012).

³ *See* 20 C.F.R. § 10.404(b)-(c).

⁴ *N.J.*, 59 ECAB 376 (1953).

⁵ 5 ECAB 376 (1953).

⁶ *H.N.*, Docket No. 09-1628 (issued August 19, 2010).

receivable clerk. OWCP reduced her compensation benefits effective June 5, 2011. It has the burden to justify termination or modification of compensation benefits.⁷

When OWCP finds that a constructed position represents appellant's wage-earning capacity, it must find that this position was available in the open labor market, fits the employee's capabilities with regard to his or her physical limitations, education, age and experience.⁸ There is no significant dispute that the position of accounts receivable clerk was within appellant's medical restrictions. The second opinion physician, Dr. Smith, advised that appellant had no pathology that would prevent her from returning to her regular-duty work. Appellant's treating physician, Dr. Jeng, opined that appellant could return to work in a sedentary position. Accordingly, the medical evidence establishes that appellant could work in the sedentary position of accounts receivable clerk.

However, in assessing appellant's ability to perform the selected position, OWCP must consider not only physical limitations, but also education, age and prior experience. While in accordance with established procedures for determining wage-earning capacity OWCP relies upon a wage-earning capacity specialist for selection of an appropriate position, the Board has held that it is the responsibility of OWCP to obtain confirmation of the specific requirements for the position and that appellant has the necessary vocational skills to perform the requirements of the position.⁹ The vocational rehabilitation counselor indicated that appellant was prepared for this position because she "has two years of college and an extensive background in payroll and accounting jobs." However, pursuant to appellant's résumé, her only continuing education after high school consisted of obtaining a diploma from a beauty school in 1997 and receiving a diploma in data entry after attending the PSI Institute of Baltimore from September 1987 through January 1988. There is no evidence that appellant attended college. Furthermore, the vocational rehabilitation counselor based her decision that appellant could perform the accounts receivable clerk position on appellant's "extensive background in payroll and accounting jobs." Appellant has had short assignments, generally with temporary employment agencies, doing data entry, payroll and other temporary work. The most recent position she held as an accounts payable clerk was for Kelly Services, where her responsibilities varied from assignment to assignment. Appellant has not done any work in data entry or accounts payable since September 2005. Furthermore, as previously noted, her diploma for a four-month program in data entry was awarded in January 1988, over 20 years before the vocational rehabilitation counselor found that appellant was capable for working as an accounts receivable clerk. Appellant's allegations that she did not have the proper training to perform the duties of the position appear to have some merit. There is no specific discussion by the counselor as to how appellant's past experience specifically relates to the position and as to how she is properly trained for this position.

The burden of proof is on OWCP to establish that appellant has the wage-earning capacity of an accounts receivable clerk. This requires it to establish how she met the specific vocational preparation for the selected position. Because OWCP did not meet that burden, the

⁷ *J.W.*, Docket No. 09-1800 (issued June 21, 2010)

⁸ *G.G.*, Docket No. 11-1081 (issued June 1, 2012).

⁹ *Karl W. Dunn*, Docket No. 95-625 (issued February 20, 1997).

Board will reverse the December 28, 2011 decision affirming the reduction of appellant's compensation for wage loss.

CONCLUSION

The Board finds that OWCP improperly determined appellant's loss of wage-earning capacity based upon the constructed position of accounts receivable clerk.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 27, 2011 is reversed.

Issued: October 1, 2012
Washington, DC

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

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

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