

**United States Department of Labor
Employees' Compensation Appeals Board**

C.H., Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,
Fort Lauderdale, FL, Employer

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**Docket No. 12-1511
Issued: January 3, 2013**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 5, 2012 appellant filed a timely appeal from the March 28, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) regarding a wage-earning capacity determination. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly reduced appellant's compensation effective September 26, 2011 based on her ability to earn wages in the selected position of receptionist/clerk.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

OWCP accepted that on August 4, 1996 appellant, then a 38-year-old clerk, sustained a left shoulder sprain, left shoulder impingement/capsulitis and neck sprain. On November 24, 1997 she underwent authorized left shoulder arthroscopic surgery.

On May 16, 2000 appellant returned to work in a full-time modified clerk position. Effective October 23, 2009, the modified position was withdrawn due to the employing establishment National Reassessment Policy (NRP). After the appropriate analysis OWCP accepted that appellant sustained a recurrence of disability effective October 23, 2009 due to the withdrawal of modified-duty work. Appellant was paid compensation and placed on the periodic rolls.

In a report dated April 7, 2010, Dr. Martin E. Hale, an attending Board-certified orthopedic surgeon, stated that appellant could work eight hours a day with restrictions including lifting up to 10 pounds continuously and 20 pounds intermittently, as well as engaging in one hour pushing/pulling and four hours fine manipulation.

On June 8, 2010 OWCP referred appellant to vocational rehabilitation services based on Dr. Hale's medical opinion. A rehabilitation plan and a job search agreement were initiated on August 13, 2010. Appellant was provided with placement assistance, but no placement was made. In a report of March 30, 2011, James Sullivan, the vocational rehabilitation counselor, summarized job leads and searches. He noted that appellant had worked as a general clerk with the employing establishment and that she had some clerical skills. Mr. Sullivan stated that appellant could obtain employment as a clerk.

On April 11, 2011 following 180 days of placement assistance without a successful placement, the file was closed to rehabilitation services. A labor market survey was prepared for the positions of receptionist/clerk and general clerk. In a report dated April 11, 2011, OWCP's vocational rehabilitation specialist determined that the positions involved light and sedentary work, respectively. The vocational rehabilitation specialist determined that both positions were medically and vocationally suitable in light of appellant's work experience with the employing establishment. The vocational rehabilitation specialist determined that the receptionist/clerk position was available full time in the Fort Lauderdale area with wages of \$9.97 a hour, and the general clerk position with wages of \$8.45 a hour, based on data obtained from the Florida Office of Employment Services.

The Dictionary of Occupational Titles (DOT) job description for the receptionist/clerk position stated requirements of sedentary strength level with occasional lifting to 10 pounds. Work duties included receiving callers, telephone work and some typing. The general clerk required light strength level with lifting 20 pounds occasionally and 10 pounds frequently. Duties included computer data entry and telephone work.

On August 8, 2011 OWCP issued a notice of proposed reduction of compensation. It determined that appellant was able to earn wages of \$398.80 a week (*i.e.* \$9.97 a hour) as a full-time receptionist/clerk. Appellant was advised that if she disagreed with the proposed reduction she could submit additional evidence within 30 days.

In a letter dated August 21, 2011, appellant argued that given her age and the current unemployment rate she was unable to find suitable work.

In a September 26, 2011 decision, OWCP reduced appellant's compensation effective September 26, 2011 based on her ability to earn wages as a receptionist/clerk. It found that the selected position was medically suitable with regards to prescribed work restrictions and also education and training.

Appellant disagreed with the decision and requested an oral hearing. Prior to the hearing the claimant submitted a report by Dr. Hale dated October 6, 2011. Dr. Hale stated that appellant could work full time with restrictions of lifting 10 pounds continuously and 20 pounds intermittently.

During a telephonic hearing held on January 23, 2012, appellant testified that she was able to work as a receptionist/clerk, but she stated that such work was not available to her based on her current age, as well as high unemployment rate in South Florida. She testified that she followed the job leads provided by OWCP but did not receive any call backs from prospective employers. Appellant indicated that she had also applied on her own to the employing establishment for work but that no offer had been extended to her. She argued that her former modified duty with the employing establishment involved some typing and filing, but that such work was generally unrelated to the receptionist/clerk position which was mainly office work.

After the hearing, appellant submitted additional written evidence including an article about high unemployment, administrative documents from the employing establishment and a copy of the October 23, 2009 NRP notice issued to her. In an undated statement received February 23, 2012, she argued that OWCP's September 26, 2011 wage-earning capacity determination was erroneous because she lacked the experience and skills to perform the duties of the selected position.

In a March 28, 2012 decision, OWCP's hearing representative affirmed OWCP's September 26, 2011 decision.

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.² OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.³

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 or her 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 or her wage-earning

² *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

³ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

capacity is determined with due regards to the nature of his injury, his or her degree of physical impairment, his or her usual employment, his or her age, his or her qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his or her wage-earning capacity in his disabled condition.⁴ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.⁵ 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.⁶ 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.⁷

OWCP procedure instructs that in cases where a claimant has undergone vocational rehabilitation, the vocational rehabilitation counselor will submit a final report to the vocational rehabilitation specialist summarizing why vocational rehabilitation was unsuccessful and listing two or three jobs which are medically and vocationally suitable for the claimant. Where no vocational rehabilitation services were provided, the vocational rehabilitation specialist will have provided this report. Included will be the corresponding job numbers from DOT (or OWCP specified equivalent) and pay ranges in the relevant geographical area.⁸ 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.⁹

ANALYSIS

OWCP accepted that on August 4, 1996 appellant sustained a left shoulder sprain, left shoulder impingement/capsulitis and neck sprain. Appellant was placed on the periodic rolls after her modified position was withdrawn. OWCP then reduced her compensation effective September 26, 2011 based on her ability to earn wages in the selected position of receptionist/clerk.

OWCP received information from appellant's attending Board-certified orthopedic surgeon, Dr. Hale, who found that appellant was not totally disabled for work and had a partial capacity to perform work for eight hours a day subject to specified work restrictions. Dr. Hale stated that appellant could work eight hours a day with restrictions including lifting up to 10

⁴ See *Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

⁵ *Albert L. Poe*, 37 ECAB 684, 690 (1986), *David Smith*, 34 ECAB 409, 411 (1982).

⁶ *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).

⁷ See *Leo A. Chartier*, 32 ECAB 652, 657 (1981).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8 (October 2009).

⁹ 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).

pounds continuously and 20 pounds intermittently. Appellant participated in vocational rehabilitation efforts but she was unsuccessful in finding employment. Her vocational rehabilitation counselor then determined that appellant was able to perform the position of receptionist/clerk and that state employment services showed the position was available in sufficient numbers so as to make it reasonably available within her commuting area. OWCP properly relied on the opinion of the rehabilitation counselor that appellant was vocationally capable of performing the receptionist/clerk position and a review of the evidence reveals that she is physically capable of performing the position.¹⁰ The restrictions imposed by Dr. Hale allowed appellant to physically perform the limited duties of the position.¹¹ Appellant did not submit any evidence or argument showing that she could not vocationally or physically perform the receptionist/clerk position. On appeal, she expressed her personal view that she was unable to find work due to her age. However, this is not probative evidence that the selected position is not medically suitable or that suitable work is not available in the commuting area.¹²

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 receptionist/clerk represented her wage-earning capacity.¹³ The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of receptionist/clerk and that such a position was reasonably available within the general labor market of her commuting area. Therefore, OWCP properly reduced appellant's compensation effective September 26, 2011 based on her capacity to earn wages as a receptionist/clerk.

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 reduced appellant's compensation effective September 26, 2011 based on her ability to earn wages in the selected position of receptionist/clerk.

¹⁰ Moreover, these findings were verified by OWCP's vocational rehabilitation specialist.

¹¹ The job description for the receptionist/clerk position stated requirements of sedentary strength level with occasional lifting to 10 pounds.

¹² See *supra* note 7.

¹³ See *Clayton Varner*, 37 ECAB 248, 256 (1985).

ORDER

IT IS HEREBY ORDERED THAT the March 28, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 3, 2013
Washington, DC

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

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

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