

accepted the claim for a herniated disc with sciatica. On February 11, 2005 appellant underwent a right lumbar laminotomy and facetectomy at L3-4 and L4-5.

On March 28, 2005 appellant returned to modified employment. He stopped work on October 23, 2009 after the employing establishment withdrew his limited duty under the National Reassessment Process. OWCP paid appellant compensation for temporary total disability.²

On January 11, 2010 OWCP referred appellant to Dr. Daryl Miller, a Board-certified orthopedic surgeon, for a second opinion examination.

In a work restriction evaluation dated January 20, 2010, Dr. Steven Y. Chun, an attending Board-certified anesthesiologist, advised that appellant could work six hours a day with restrictions on sitting up to six hours, walking and standing for one hour and lifting, pushing and pulling up to 15 pounds.³

In a report dated January 21, 2010, Dr. Miller diagnosed lumbosacral neuritis and lumbar disc displacement. He found that appellant continued to have residuals of his 2004 employment injury. Dr. Miller opined that he could perform full-time sedentary work lifting no more than 15 pounds and with no “repetitive rotational movements.”

OWCP determined that a conflict in medical opinion arose between Dr. Chun and Dr. Miller regarding appellant’s work capacity. On March 11, 2010 it referred him to Dr. William F. Bennett, a Board-certified orthopedic surgeon, for an impartial medical examination. In a report dated April 14, 2010, Dr. Bennett discussed appellant’s history of a work injury and subsequent return to work in a modified capacity. On examination he found paraspinal muscle spasm on the right with reduced range of motion of the spine. Dr. Bennett diagnosed lumbosacral neuritis and resolved lumbar disc displacement. He opined that appellant’s herniated disc had resolved but that he continued to have evidence of lumbosacral neuritis. Dr. Bennett concluded that he could perform sedentary employment. He stated:

“In general, [appellant] may be required to vary his position from sitting to standing to walking periodically, every 30 [to] 60 minutes. He will not be able to stoop, squat, bend forward, bend sideways or lift over 15 pounds. [Appellant] is allowed to use his hands, wrists, elbow and shoulders in any fashion with the exception of lifting greater than 15 [pounds] overhead.”

Dr. Bennett opined that appellant could undergo vocational rehabilitation.⁴ In an April 14, 2010 work restriction evaluation, he found that appellant could sit for six to eight hours

² By decision dated November 22, 2006, OWCP granted appellant a schedule award for a three percent permanent impairment of the right leg. In a decision dated May 13, 2009, it granted him an award for an additional four percent impairment of the right leg.

³ In response to OWCP’s request for additional information, Dr. Chun related that appellant had positive findings on magnetic resonance imaging (MRI) scan study of a herniated lumbar disc.

⁴ Dr. Bennett noted that appellant desired to continue to work in his present position at the employing establishment; however, he was not physically able to do so.

a day, walk and stand for one hour a day, push, pull and lift up to 15 pounds but not twist, bend, squat, kneel, climb or operate a motor vehicle at work. Dr. Bennett indicated that he required breaks every 2 hours for 10 to 15 minutes. He found that appellant could drive a motor vehicle to and from work if the time was under one hour.

On April 16, 2010 OWCP referred appellant for vocational rehabilitation.⁵ In a May 30, 2010 report, the rehabilitation counselor discussed his work history as a mail carrier and electrician and noted that he had performed some clerical work at the employing establishment. The counselor provided various options for retraining, including office training, unskilled work or training in customer assistance.

By letter dated July 16, 2010, the rehabilitation counselor recommended that OWCP approve training for appellant at a technical institute studying customer assistance technology in order to learn office skills. On July 27, 2010 the rehabilitation counselor identified the occupational requirements for the position of customer service representative and provided a job description from the Department of Labor's *Dictionary of Occupational Titles*. OWCP approved a 450-hour training program in customer assistance technology for appellant at a technical institute.

A September 30, 2010 functional capacity evaluation (FCE), performed at the request of Dr. Chun, determined that appellant could perform sedentary work for four to six hours a day.

Appellant completed the customer assistance technology training program on December 10, 2010. On December 22, 2010 OWCP authorized 90 days of job placement assistance.

In a report dated December 22, 2010, Dr. Chun diagnosed lumbar disc displacement and lumbosacral neuritis. He found that appellant continued to have disability from his work injury but could perform a part-time sedentary job with a 15-minute break every two hours in accordance with the results of the FCE.

In a closure report dated June 4, 2011, the rehabilitation counselor noted that appellant had searched for jobs but was unsuccessful in obtaining employment. He found that appellant was qualified to work in positions such as a customer service representative or receptionist based on his education.

In a report dated June 6, 2011, an OWCP rehabilitation specialist determined that the position of customer service representative was vocationally suitable and within appellant's work restrictions. He found the position was available within sufficient numbers in the appropriate geographical area based on a state occupational employment statistics report for the first quarter of 2011. The rehabilitation specialist found that appellant could earn a minimum of \$9.00 per hour based on state wage data.

On June 9, 2011 OWCP notified appellant that it proposed to reduce his compensation based on its finding that he had the capacity to work as a customer service representative earning

⁵ Dr. Chun continued to submit progress reports advising that appellant could continue in his current work status.

\$360.00 per week. It provided him 30 days to submit additional evidence of argument regarding its proposed reduction of his compensation.

In an office visit note dated June 8, 2011, received by OWCP on June 13, 2011, Dr. Chun diagnosed lumbosacral neuritis, lumbago and brachial neuritis.

In a July 2, 2011 response to the proposed reduction of compensation, appellant's attorney challenged OWCP's finding that he could work full time, arguing that the impartial medical examiner failed to consider the FCE.

By decision dated July 12, 2011, OWCP reduced appellant's compensation effective that date on the grounds that he had the capacity to earn wages of \$360.00 per week in the selected position of customer service representative. It calculated his new wage-earning capacity in accordance with the principles set forth in *Albert C. Shadrick*.⁶

On July 19, 2011 appellant, through his attorney, requested a telephone hearing before an OWCP hearing representative.⁷

At the telephone hearing, held on November 15, 2011, appellant's attorney argued that the FCE established that he could only work part time. Counsel further contended that the position was not vocationally suitable given his age and lack of prior relevant work experience. The attorney asserted that the impartial medical examiner's opinion was entitled to less weight as he had not reviewed the FCE. He noted that appellant needed to change positions every hour and take breaks every two hours. Appellant related that he had difficulty attending the training program due to the length of the course each day and his need for medication. He maintained that the vocational rehabilitation counselor indicated that given his age, lack of experience and the job market it would be difficult for him to find employment.

By decision dated March 1, 2012, an OWCP hearing representative affirmed the July 18, 2011 wage-earning capacity determination.

On appeal appellant's attorney argues that OWCP based its reduction of compensation on an impartial medical examiner's report that did not consider the FCE and was 17 months old. He argued that weight should be given to Dr. Chun's finding that appellant could work only six hours per day as it was more contemporaneous and after review of the FCE. Counsel noted that he looked for a job for a long time but was not successful.

LEGAL PRECEDENT

Once OWCP has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of benefits.⁸ Under section 8115(a), wage-earning capacity is determined by the actual

⁶ 5 ECAB 376 (1953); codified by regulations at 20 C.F.R. § 10.403.

⁷ Dr. Chun submitted progress reports from August 2011 through February 2012.

⁸ *T.O.*, 58 ECAB 377 (2007).

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 his or her 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 or circumstances which may affect wage-earning capacity in his or her disabled condition.⁹

When OWCP makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an OWCP wage-earning capacity specialist for selection of a position listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open market, that fits the employee's capabilities with regard to his or her physical limitations, education, age and prior experience.¹⁰ 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*¹¹ will result in the percentage of the employee's loss of wage-earning capacity.

Section 8123(a) provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.¹² The implementing regulations states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹³

When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹⁴

ANALYSIS

OWCP accepted that appellant sustained a herniated disc with sciatica due to an August 9, 2004 employment injury. Appellant underwent a right lumbar laminotomy and facetectomy at L3-4 and L4-5. On March 28, 2005 he returned to modified employment but

⁹ *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

¹⁰ *Mary E. Marshall*, 56 ECAB 420 (2005); *James A. Birt*, 51 ECAB 291 (2000).

¹¹ *Supra* note 6.

¹² 5 U.S.C. § 8123(a).

¹³ 20 C.F.R. § 10.321.

¹⁴ *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

stopped work on October 23, 2009 after the employing establishment withdrew his limited-duty position. OWCP paid appellant disability compensation.

OWCP properly determined that a conflict existed between Dr. Chun, appellant's attending physician who found that he could work six hours a day with restrictions and Dr. Miller, an OWCP referral physician who found that he could perform full-time sedentary employment. It referred him to Dr. Bennett for an impartial medical examination.

In a report dated April 14, 2010, Dr. Bennett reviewed the history of injury and listed findings on examination of paraspinal muscle spasm and loss of range of motion. He diagnosed lumbosacral neuritis and resolved lumbar disc displacement. Dr. Bennett determined that appellant could perform full-time sedentary employment changing his position from sitting to either standing or walking ever 30 to 60 minutes. He listed further restrictions of no stooping, squatting, bending or lifting over 15 pounds. In a work restriction evaluation, Dr. Bennett found that appellant could sit six to eight hours with breaks, stand and walk for one hour, and push, pull and lift up to 15 pounds.

When a case is referred to an impartial medical examiner for the purpose of resolving a conflict, the opinion of such specialist, is sufficiently well rationalized and based on a prior factual and medical background, must be given special weight.¹⁵ Dr. Bennett provided a detailed report finding that appellant was not totally disabled and could work with restrictions. He relied upon his physical examination of appellant, a review of the medical evidence of record and the history of injury in reaching his conclusions. The Board finds that Dr. Bennett provided a detailed and well-rationalized report based on a proper factual background; consequently, his opinion is entitled to the special weight accorded an impartial medical examiner.¹⁶ OWCP referred appellant for vocational rehabilitation as the medical evidence established that he was no longer totally disabled due to residuals of his employment injury.¹⁷

OWCP properly found that appellant had the capacity to perform the duties of a full-time customer service representative. The position is classified as sedentary and required sitting with brief periods of standing or walking and occasional lifting, pushing and pulling up to 10 pounds, all of which are within the restrictions set forth by the impartial medical examiner. Subsequent to Dr. Bennett's impartial medical examination, Dr. Chun referred appellant for an FCE performed that reiterated that he could only work part-time in a sedentary capacity. In a report dated December 22, 2010, he remained partially disabled due to his employment injury but could work in a part-time sedentary job with a 15-minute break every two hours as found by the FCE. A medical report from a physician on one side of a conflict resolved by an impartial medical examiner, however, is generally insufficient to overcome the weight accorded the report of an impartial medical examiner or create a new conflict.¹⁸ The remaining evidence from Dr. Chun consists of progress reports that do not address disability or causation, and thus are of little

¹⁵ See *Gary R. Sieber*, 46 ECAB 215 (1994).

¹⁶ See *Jaja K. Asaramo*, 55 ECAB 200 (2004).

¹⁷ See *N.J.*, 59 ECAB 171 (2007).

¹⁸ *Jaja K. Asaramo*, *supra* note 16; *Michael Hughes*, 52 ECAB 387 (2001).

probative value. The weight of the medical evidence, as represented by the report of the impartial medical examiner, supports a finding that appellant has the physical duties to perform the selected position of customer service representative.

In assessing the claimant's ability to perform the selected position, OWCP must consider not only physical limitations but also take into account work experience, age, mental capacity and educational background.¹⁹ The rehabilitation counselor determined that appellant had the skills necessary to perform the position of customer care representative based on his education and training. OWCP's rehabilitation specialist found that the position was reasonably available within the appropriate geographical area at a wage of a minimum of \$9.00 per hour, or \$360.00 per week. As the rehabilitation specialist is an expert in the field of vocational rehabilitation, OWCP may rely of his or her opinion in determining whether the job is vocationally suitable and reasonably available.²⁰ The Board finds that OWCP considered the proper factors, including the availability of suitable employment, appellant's physical limitations and employment qualifications in determining that he had the capacity to perform the position of customer service representative.²¹ OWCP further properly determined his loss of wage-earning capacity in accordance with the formula developed in *Shadrick* and codified at 20 C.F.R. § 10.403.²² OWCP, therefore, properly found that the position of customer service representative reflected his loss of wage-earning capacity effective July 12, 2011.

On appeal appellant's attorney argued that the impartial medical examiner report is insufficient to constitute the weight of the evidence as he did not consider the FCE and as his report was 17 months old at the time of OWCP's reduction of benefits. He contends that Dr. Chun's more contemporary report should be the weight of the evidence. As discussed, however, Dr. Bennett's report was well rationalized and based on an accurate factual history. It constitutes the weight of the evidence as to the issue of appellant's capacity for sedentary duty. Dr. Bennett's report is reasonably current and thus sufficient for OWCP to use as the basis for the loss of wage-earning capacity determination.²³

¹⁹ *Id.*

²⁰ *Dorothy Jett*, 52 ECAB 246 (2001); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(b)(2) (October 2009).

²¹ *See N.J.*, *supra* note 17.

²² *See supra* note 6. OWCP divided appellant's employment capacity to earn wages of \$360.00 a week by his current pay rate of the position held when injured of \$1,226.35 per week to find a 29 percent wage-earning capacity. OWCP multiplied the pay rate at the disability recurred of \$1,138.50 by the 29 percent wage-earning capacity percentage. The resulting amount of \$330.17 was subtracted from appellant's date-of-injury pay rate of \$1,138.50 which provided a loss of wage-earning capacity of \$808.33 per week. OWCP then multiplied this amount by the appropriate compensation rate of three-fourths which yielded \$606.25 or \$2,466 every four weeks before deductions of premiums for health and life insurance.

²³ *See Keith Hanselman*, 42 ECAB 680 (1991) (a report almost two years old was found invalid for determining a loss of wage-earning capacity).

Counsel also argued that appellant unsuccessfully searched for a suitable job. The fact that an employee has been unsuccessfully in obtaining work in the selected position, however, does not establish that the work is not reasonably available in the commuting area.²⁴

Appellant may request modification of the wage-earning capacity determination, supported by new evidence of argument, at any time before OWCP.

CONCLUSION

The Board finds that OWCP properly reduced appellant's compensation effective July 12, 2011 based on its finding that he had the capacity to earn wages in the selected position of customer service representative.

ORDER

IT IS HEREBY ORDERED THAT the March 1, 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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

²⁴ See *Rosa M. Garcia*, 49 ECAB 272 (1998); *Leo A. Chartier*, 32 ECAB 652 (1991).