

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

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**R.G., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Dallas, TX, Employer**

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**Docket No. 13-10  
Issued: February 4, 2014**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On October 1, 2012 appellant filed a timely appeal of an April 4, 2012 Office of Workers' Compensation Programs' (OWCP) merit decision reducing her compensation benefits. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

**ISSUE**

The issue is whether OWCP met its burden of proof to reduce appellant's compensation benefits effective April 8, 2012 on the grounds that the position of information clerk represented her wage-earning capacity.

On appeal, appellant alleged that OWCP did not apply her recurrent pay rate or include her night differential pay, holiday pay and Sunday premium pay as required. She further contended that the loss of wage-earning capacity determination was erroneous.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On August 19, 1997 appellant, then a 39-year-old letter carrier, injured her shoulder lifting mail in the performance of duty on August 19, 1997. She worked Monday through Saturday from 6:00 a.m. through 2:30 p.m. On September 30, 1997 OWCP accepted appellant's claim for sprains of the neck and thoracic region. It also accepted calcifying tendinitis of both shoulders. Appellant filed a recurrence of disability claim on October 10, 1997. She received continuation of pay from August 25 through September 15, 1997 and October 6 through 26, 1997. Appellant accepted a light-duty position on October 13, 1998. The employing establishment stated that appellant's pay rate on August 19, 1997 was \$36,863.00 annually. It further noted that she did not earn any premium pay. OWCP determined that appellant's pay rate was \$708.90 per week.

By decision dated December 9, 1998, OWCP granted appellant a schedule award for seven percent impairment of her left arm.

Appellant filed a second recurrence of disability on April 4, 2002 alleging that she became totally disabled beginning March 27, 2002. She listed her rate of pay at the time of the recurrence as \$20.75 per hour. Appellant accepted limited-duty positions: on January 30, 2004, working Sundays from 3:00 p.m. to 11:30 p.m.; on June 3, 2004, working Monday through Friday, 8:25 a.m. through 5:25 p.m.; on June 24, 2005, working Monday through Friday, 1:00 p.m. through 10:00 p.m.; on April 25, 2007, working Monday through Friday, 1:50 p.m. through 10:00 p.m.; on September 21, 2009, working Tuesday through Saturday, 1:50 p.m. through 10:00 p.m.; and on January 15, 2010, working Tuesday through Saturday, 3:00 p.m. to 11:00 p.m.

Appellant filed a recurrence of disability on June 15, 2010 on the grounds that the employing establishment withdrew her position under the National Reassessment Process (NRP). She completed a claim for compensation on July 2, 2010, noting that she received leave without pay from June 19 through July 2, 2010 and that she was entitled to night differential. As of the date of injury on August 19, 1997, appellant earned \$708.90 per week. The employing establishment noted that when she stopped work on August 18, 2010 she earned \$1,044.35 per week at Grade 8 Step 0 and earned additional night differential pay of \$22.21 a week. Appellant worked a fixed schedule of 40 hours a week, but did not work in the position for 11 months prior to the injury.

OWCP authorized compensation based on appellant's date-of-injury pay rate of \$708.90 a week. In a letter dated August 10, 2010, appellant contended that her date-of-injury pay rate was \$721.58 per week. She further stated that she had never requested basic life insurance, and that her health insurance code was incorrect. Appellant also argued that she was entitled to compensation based on her recurrent pay rate.

OWCP entered appellant on the periodic rolls on August 18, 2010 based on a weekly pay rate of \$708.90. Appellant submitted a Form 50 which indicated on August 30, 1997 that her base salary was \$37,998.00. On July 5, 1997 her base salary was \$37,832.00. OWCP altered appellant's pay rate to reflect her earnings on the date of injury as \$727.54 a week with no night differential.

OWCP referred appellant for vocational rehabilitation services on October 1, 2010. In a note dated October 28, 2010, appellant's attending physician, Dr. Olayinka Ogunro, a Board-

certified orthopedic surgeon, reported negative findings to both shoulders, including no tenderness, negative Neer sign, negative Hawkins' test and a full range of motion. He diagnosed possible cervical disc disease and resolved bilateral shoulder tendinitis.

The vocational rehabilitation counselor determined that the position of information clerk was within appellant's physical restrictions and vocational abilities. He found that appellant met the specific vocational preparation as she had a high school diploma, a consistent work history, computer skills and work activities such as handling and reaching were only performed occasionally. The vocational rehabilitation counselor determined that the position was being performed in sufficient numbers so as to make it reasonably available to appellant within her commuting area based on a labor market survey. He listed the weekly wage as \$514.00.

On May 3, 2010 Dr. Ogunro completed a work restriction evaluation. He found that appellant could work eight hours a day with lifting limited to 25 pounds. Appellant could not reach above the shoulder, perform fine manipulation, pull or push, twist or climb. Dr. Ogunro limited appellant's kneeling, bending, stooping, simple grasping and operating machinery to two hours a day. Appellant returned to work on March 12, 2011 for two hours a day. On March 9, 2011 Dr. Ogunro diagnosed possible cervical disc disease and resolved bilateral shoulder tendinitis. He stated that he would refer appellant for evaluation of her neck and complete a functional capacity evaluation. Appellant underwent a functional capacity evaluation on March 18, 2011. The testing, however, was questionable giving possible symptom-magnification for three of seven tests administered. Appellant demonstrated the ability to function at a light physical capacity.

On April 2, 2011 Dr. Ogunro advised that appellant was capable of the selected sedentary work positions. On July 1, 2011 the vocational rehabilitation counselor proceeded to undertake job placement for 90 days for the positions of receptionist and information clerk.

In a report dated May 5, 2011, Dr. Mike Shah, Board-certified in physical medicine and rehabilitation, noted appellant's history of injury at work. He listed employment duties of excessive lifting, pushing and pulling. Dr. Shah reviewed a magnetic resonance imaging (MRI) scan of April 8, 2011 which demonstrated multilevel cervical degenerative disc disease, mild spinal canal stenosis at C3-7 and foraminal narrowing at multiple levels. On physical examination he found tightness of the left side of appellant's neck with diffuse trigger points, negative Spurlings' test and reduced upper extremity strength. Dr. Shah recommended additional electrodiagnostic testing. Appellant's electromyography (EMG) and nerve conduction report on July 11, 2011 were normal.

On October 27, 2011 OWCP's rehabilitation specialist noted that appellant did not secure employment within 90 days and that further placement efforts would cease.

The employing establishment stated that appellant's salary on the date of injury was \$37,832.00 per year and that she did not receive premium pay. The current salary for appellant's position was \$57,704.00 per year. The vocational rehabilitation counselor found that the position of information clerk was within appellant's specific vocational preparation as she had a high school education, a consistent work history, computer skills used in her prior work at the employing establishment, and handling and reaching were only required occasionally. He found that the job was being performed in sufficient numbers so as to make it reasonably available to appellant within her commuting area based on a labor market survey dated August 17, 2010

which demonstrated 30 job openings. The vocational rehabilitation counselor determined that the weekly wage was \$416.00.

In a letter dated March 2, 2012, OWCP proposed to reduce appellant's monetary benefits based on her capacity to earn wages as an information clerk. It allowed her 30 days for a response. In a letter dated March 30, 2012, appellant stated that she disagreed on the grounds that the employing establishment should provide her with a limited-duty position. She contended that the vocational rehabilitation counselor did not help her to find employment.

By decision dated April 4, 2012, OWCP reduced appellant's monetary compensation effective April 8, 2012. It found that she was capable of earning \$416.00 a week as an information clerk. OWCP noted that the position of information clerk was medically and vocationally suitable for her. The vocational rehabilitation counselor found that based upon her work experience, education, medical restrictions and a labor market survey that she was employable as an information clerk. OWCP determined that appellant's weekly pay rate when injured was \$727.54 effective August 19, 1997. The current pay rate for the job and step when injured was \$1,109.69 effective February 25, 2010. OWCP found that appellant was capable of earning \$416.00 per week. It determined that appellant's percentage of wage-earning capacity was 37 percent and the adjusted wage-earning capacity was \$269.19 resulting in a loss of wage-earning capacity of \$458.35 and a compensation rate of \$305.57. OWCP increased appellant's compensation rate by cost-of-living adjustments to total \$430.75 a week or \$1,723.00 every four weeks, less her health benefits premium to result in a net compensation every four weeks of \$1,582.14.

### **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.<sup>2</sup>

Section 8115 of FECA<sup>3</sup> provides that 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 the employee has no actual earnings, her wage-earning capacity is determined with due regard to the nature of her injury, the degree of physical impairment, her usual employment, her age, her qualifications for other employment, the availability of suitable employment, and other factors or circumstances which may affect her wage-earning capacity in her disabled condition.<sup>4</sup>

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 for selection of a position, listed in the Department of Labor, *Dictionary of Occupational Titles* or otherwise available in the open market, that fits that employee's capabilities with regard to 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

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<sup>2</sup> *P.M.*, Docket No. 12-1451 (issued February 19, 2013).

<sup>3</sup> 5 U.S.C. §§ 8101-8193, 8115.

<sup>4</sup> 20 C.F.R. § 10.520.

contact with the state employment service or other applicable service. Finally, application of the principles set forth in *Albert C. Shadrick*<sup>5</sup> will result in the percentage of the employee's loss of wage-earning capacity. The basic range of compensation paid under FECA is 66 2/3 percent of the injured employee's monthly pay.<sup>6</sup>

Pay rate for compensation purposes is defined by FECA and in OWCP regulations as the employee's pay at the time of injury, time disability began or when compensable disability recurred, if the recurrence began more than six months after the employee resumed regular full-time employment with the United States, whichever is greater.<sup>7</sup>

### ANALYSIS

OWCP accepted appellant's claim for sprain of the neck and sprain of the thoracic region as well as calcifying tendinitis of the bilateral shoulders. On April 2, 2011 Dr. Ogunro indicated that appellant was capable of the selected sedentary work positions including information clerk.

OWCP referred appellant for vocational rehabilitation counseling. The vocational rehabilitation counselor advised that appellant had a high school diploma a consistent work history, computer skills and could perform sedentary work with restrictions on reaching and handling. When appellant was unable to secure employment as part of her vocational rehabilitation, the vocational counselor identified the position of an information clerk, a job that appellant would be capable of performing and which was available in her area.<sup>8</sup> The vocational rehabilitation counselor identified the position and provided the required information concerning the position description, the availability of the position within appellant's commuting area and pay ranges within the geographical area, as confirmed by state officials. He determined that an information clerk was in accord with appellant's background, education and experience. The vocational rehabilitation counselor advised that an updated labor market survey revealed that the job market was favorable for an information clerk and that the position was readily available in sufficient numbers both full and part time in appellant's commuting area. The average weekly wage of an information clerk, was \$416.00 a week. The vocational rehabilitation counselor further noted that the position was consistent with the medical restrictions provided by Dr. Ogunro. The Board finds that the duties of an information clerk are appropriate as found by Dr. Ogunro.

The Board finds that OWCP met its burden of proof to reduce appellant's compensation based on her ability to earn wages as an information clerk. The medical evidence establishes that appellant is capable of performing the duties required for the selected position of information clerk and the vocational evidence establishes that the position is reasonably available and that it

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<sup>5</sup> 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.403(c)-(e).

<sup>6</sup> *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

<sup>7</sup> 5 U.S.C. § 8101(4); 20 C.F.R. § 10.5(s); *see John M. Richmond*, 53 ECAB 702 (2002).

<sup>8</sup> Where vocational rehabilitation is unsuccessful, the vocational rehabilitation counselor will prepare a final report, which lists two or three jobs which are medically and vocationally suitable for the employee and proceed with information from a labor market survey to determine the availability and wage rate of the position. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(b) (December 1995); *see also Dorothy Jett*, 52 ECAB 246 (2001).

is within her vocational abilities. OWCP considered the proper factors, such as availability of suitable employment and her physical limitations, usual employment and age and employment qualifications, in determining that the position of information clerk represented her wage-earning capacity. The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of information clerk and that such a position was reasonably available within the general labor market of her commuting area. OWCP properly determined that the position of information clerk reflected her loss of wage-earning capacity and properly reduced her compensation effective April 8, 2012.<sup>9</sup>

On appeal, appellant argued that OWCP did not apply her recurrent pay rate and did not include her night differential pay, holiday pay and Sunday premium pay as required in determining her loss of wage-earning capacity. The record reflects that on July 5, 1997 appellant's base salary was \$37,832.00 her pay rate increased on August 30, 1997 after her August 19, 1997 employment injury. The Board finds that OWCP properly determined that appellant's earnings at the date of injury, August 19, 1997, were \$727.54 per week with no night differential. At the time of her injury the record reflects that appellant was not working nights or Sundays.

Appellant's argument that she is entitled to a recurrent pay rate is also not appropriate based on the record. The record indicates that appellant did not return to regular full-time employment after her accepted August 19, 1997 employment injury. Appellant instead returned to modified light-duty work positions throughout the remainder of her career with the employing establishment. The Board has held that a return to modified duty does not constitute a return to regular full-time employment.<sup>10</sup>

The formula for determining loss of wage-earning capacity, developed in the case of *Albert C. Shadrick*, has been codified at section 10.403(c)-(e) of OWCP's regulations.<sup>11</sup> Under the *Shadrick* formula, OWCP first calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's actual earnings by the current or updated pay rate for the position held at the time of injury. The employee's wage-earning capacity in dollars is computed by first multiplying the pay rate for compensation purposes, defined in 20 C.F.R. § 10.5(a) as the pay rate at the time of injury, the time disability begins or the time disability recurs, whichever is greater, by the percentage of wage-earning capacity. The resulting dollar amount is then subtracted from the pay rate for compensation purposes to obtain loss of wage-earning capacity.

The Board finds that OWCP properly determined appellant's loss of wage-earning capacity using the *Shadrick* formula. OWCP divided her capacity to earn wages of \$416.00 a week by her current pay rate for the position held when injured of \$1,109.69 per week to find a 37 percent wage-earning capacity. It multiplied the pay rate at the time of injury of \$727.54 per week by the 37 percent wage-earning capacity percentage. The resulting amount of \$269.19 was subtracted from appellant's pay rate at the date of injury of \$727.54, which provided a loss of wage-earning capacity of \$458.35 per week. OWCP then multiplied this amount by the

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<sup>9</sup> 20 C.F.R. § 10.403(c)-(e).

<sup>10</sup> *G.G.*, Docket No. 13-770 (issued July 9, 2013); *B.W.*, Docket No. 11-1927 (issued May 3, 2012). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.5a(4) (September 2011).

<sup>11</sup> *Albert C. Shadrick*, 5 ECAB 376 (1953); 20 C.F.R. § 10.403(c)-(e).

appropriate compensation rate of 66 2/3 percent which yielded \$305.57 or \$430.75 per week after cost-of-living adjustments. It found that net compensation every four weeks after deductions for health benefits was \$1,723.00.

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

**CONCLUSION**

The Board finds that OWCP met its burden of proof to reduce appellant's compensation benefits based on her capacity to earn wages in the selected position of information clerk effective April 8, 2012.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 4, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 4, 2014  
Washington, DC

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

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

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