

FACTUAL HISTORY

On October 22, 2005 appellant, then a 47-year-old mail handler, filed an occupational disease claim that was accepted for right lateral epicondylitis. On July 30, 2007 she filed a traumatic injury claim for a left elbow condition. The claim was initially accepted for left lateral epicondylitis and later expanded to include left elbow tenosynovitis and right shoulder strain. Appellant also filed a traumatic injury claim on December 22, 2007, accepted for left shoulder impingement syndrome and left shoulder rotator cuff tear. These three files were combined,² and OWCP listed all the accepted conditions as bilateral/lateral epicondylitis; bilateral closed dislocation of elbow; bilateral lesion of ulnar nerve; bilateral rotator cuff sprain; bilateral wrist sprain; and left closed dislocation of shoulder, and left other affections of shoulder region.

In an April 19, 2007 decision, OWCP determined that appellant's actual earnings as a modified mail handler fairly and reasonably represented her wage-earning capacity with zero loss.³ After an April 14, 2010 cubital tunnel release with ulnar nerve transposition and medial epicondylar release of the left elbow, she returned to modified duty on April 29, 2010. Appellant stopped work on July 13, 2010, received wage-loss compensation for total disability and was placed on the periodic compensation rolls in September 2010. She did not return to work. Appellant retired on disability effective January 24, 2011.

In March 2011 OWCP determined that a conflict in medical evidence had been created between the opinions of Dr. Harold H. Alexander, a Board-certified orthopedic surgeon, who provided a second opinion evaluation for OWCP, and appellant's attending physicians Dr. Brian E. Morgan, Board-certified in orthopedic surgery, and Dr. David W. Kunz, a Board-certified family physician, regarding appellant's work limitations. OWCP referred appellant to Dr. Jeffrey Wener, a Board-certified orthopedic surgeon, for an impartial evaluation. In reports dated April 21 and 27, 2011, Dr. Wener advised that appellant could work eight hours daily with permanent restrictions.

OWCP determined that the weight of the medical evidence established that appellant could perform light duty, full-time work, and in June 2011 referred her for vocational rehabilitation services. Appellant had a psychological-vocational evaluation on June 28, 2011 that demonstrated performance in the average/low average range in language arts and mathematics. A rehabilitation plan was developed and appellant began short-term computer training to upgrade skills.

² The 2005 occupational disease claim was adjudicated by OWCP under file number xxxxxx861. The July 2007 claim was adjudicated by OWCP under file number xxxxxx069 and the December 2007 claim under file number xxxxxx009. OWCP combined the three claims, with the xxxxxx069 claim becoming the master file.

³ On April 26, 2007 appellant was granted a schedule award for one percent impairment of the right arm, and on January 27, 2009 a schedule award for six percent impairment of the left arm. On June 30, 2009 she was granted a schedule award for an additional two percent impairment of the right arm. In a December 13, 2010 decision, the Board found the case was not in posture for decision regarding the degree of impairment of appellant's right arm. Docket No. 10-1008. In a February 7, 2011 decision, OWCP reiterated that she had three percent total right arm impairment. In a June 16, 2011 decision, it denied modification of the February 7, 2011 schedule award decision. In a July 10, 2013 decision, OWCP determined that appellant was not entitled to a schedule award for the left upper extremity greater than the six percent previously awarded.

In reports dated October 13 and November 10, 2011, Dr. Morgan noted appellant's complaint that her left elbow continued to hurt following surgery and that she also had right shoulder pain. He provided physical examination findings and advised that she could return to restricted duty with a 20-pound weight restriction and no reaching or working above shoulder level.

Sheryl West, a rehabilitation counselor, indicated that placement services would begin in mid-April 2012 following appellant's training. Appellant completed the computer training in March 2012 and began job placement. Dr. Morgan continued to submit reports in which he found her restrictions were unchanged. On May 5, 2012 Ms. West stated that appellant believed her "additional medical challenges" hampered job placement.

On May 14, 2012 Dr. Morgan performed arthroscopic repair of the rotator cuff tear with distal clavicle excision of the left shoulder. Rehabilitation services were suspended. Dr. Morgan provided updates on appellant's postoperative condition. On August 16, 2012 he reported that she could return to work with no use of the left arm, no reaching or working above the shoulder level, and that she had a 10-pound lifting restriction.

Appellant elected FECA benefits, effective October 17, 2012. Rehabilitation services were closed on November 28, 2012, due to unresolved medical issues.

On April 9, 2013 Dr. Morgan noted permanent work restrictions of no lifting, pushing, or pulling greater than 10 pounds and no outstretched reaching or working above shoulder level.

In June 2013 OWCP referred appellant to Feryal Jubran, a rehabilitation counselor, for vocational rehabilitation services. In a June 24, 2013 report, Ms. Jubran related that appellant had been approved for social security disability on January 25, 2011, and received monthly benefits from social security and FECA benefits. Appellant reported additional health issues including grand mal seizures, sleep apnea, hypertension, depression, congestive heart failure, and carpal tunnel syndrome. On July 1, 2013 Ms. Jubran identified the positions of receptionist and customer service receptionist, as described in the Department of Labor's *Dictionary of Occupational Titles*, as within appellant's physical limitations. She advised that the positions were reasonably available in the local labor market at entry level weekly wages of \$460.00 and \$480.00 respectively.

By report dated April 22, 2013, submitted on July 10, 2013, Dr. Marc I. Unterman, a Board-certified cardiologist, provided physical examination findings. He diagnosed chest discomfort, shortness of breath, hypertensive heart disease, hypertension, and multiple orthopedic injuries and surgeries. Dr. Unterman advised that appellant's hypertension was controlled with medication and recommended a return visit in six months.

A conference was held on August 2, 2013 between appellant and Nancy Sprague, an OWCP rehabilitation specialist. Appellant was informed that Dr. Unterman needed to provide current objective findings and medical reasoning explaining why appellant could not perform sedentary work. On August 30, 2013 Dr. Morgan stated that appellant had the same work restrictions and advised that she had a seven percent impairment of the right upper extremity. On October 8, 2013 he reported that appellant now complained of left wrist swelling, stating that

this was not related to her work since she had not worked for several years. Dr. Morgan advised that there was no change in appellant's restrictions. On an attached form report, he indicated that she could not perform repetitive duties.

By letter dated February 19, 2014, OWCP proposed to reduce appellant's compensation benefits based on her capacity to earn wages as a receptionist. It found that, based on the opinion of Dr. Morgan, she could return to full-time work, and that the receptionist position was within the permanent restrictions identified by him. OWCP further noted that the labor market survey prepared by the rehabilitation counselor indicated that the position was reasonably available in the local labor market and that the entry-level wage was \$460.00. It informed appellant that she could submit additional evidence or argument within 30 days either in writing or electronically.

Appellant did not respond to the proposed reduction.⁴ By decision dated April 2, 2014, OWCP reduced appellant's compensation benefits, effective April 6, 2014, based on her capacity to earn wages as a receptionist,⁵ which yielded a 50 percent loss of wage-earning capacity.

On May 20, 2014 appellant requested reconsideration, stating that she was medically disabled from any type of work. She submitted duplicates of evidence previously of record. In undated correspondence, the Office of Personnel Management (OPM) found appellant disabled for her position as a mail handler due to a meniscus tear of the right knee, left and right rotator cuff degeneration, and right and left elbow lateral epicondylar releases. In an August 14, 2013 report, Dr. Unterman found appellant permanently disabled from even sedentary work because she had multiple orthopedic problems, atherosclerotic and hypertensive heart disease, dyspnea on exertion with severe shortness of breath, pulmonary disease, and diabetes mellitus. In reports dated May 5 and 15, 2014, Dr. Alain Czaykowski, Board-certified in general and hand surgery, noted appellant's complaint of left hand and wrist pain and her history of multiple other conditions. Physical examination findings including tenderness of the dorsal aspect of the first dorsal compartment and a very positive Finkelstein's test. He diagnosed de Quervain's disease, advised that she was expected to improve, that she did not have a permanently disabling condition, and recommended conservative management.

In reports dated May 16, 2014, Dr. Morgan indicated that appellant's left wrist condition was not work-related because she had not worked in quite some time. Appellant's present workers' compensation work restrictions were found to be unchanged, but he recommended a job that did not require any repetitive motions, but that these recommendations were not part of her workers' compensation claim.

⁴ Appellant telephoned OWCP on several occasions to inquire about the proposed reduction and was told to submit additional evidence in writing.

⁵ The Department of Labor's *Dictionary of Occupational Titles* description of the receptionist position states: Receives callers at establishment, determines nature of business and directs callers to destination: Obtains caller's name and arranges for appointment. Directs caller to destination and records name, time of call, nature and business and person called. May operate PBX telephone console to receive incoming messages. May type memos, correspondence, reports and other documents. May work in office of medical practitioner or in other health care facility and be designated outpatient receptionist (medical ser.) or receptionist, doctor's office (medical ser.). May issue visitors pass when required. May make future appointments and answer inquiries.

In a merit decision dated July 17, 2014, OWCP denied modification of the April 2, 2014 decision.

Appellant again requested reconsideration on July 28, 2014 and submitted additional evidence. In an April 16, 2014 treatment note, Dr. Unterman noted appellant's complaint of shortness of breath with any type activity or exertion. He stated that she had multiple orthopedic problems and that she could not work. On July 21, 2014 Dr. Czaykowski noted that appellant's cardiologist advised that she could not work. In a treatment note dated July 24, 2014, Dr. Morgan stated that appellant was having significant left hand pain. He diagnosed radial styloid tenosynovitis and advised that appellant should avoid repetitive motions with her left hand and thumb due to this condition, which was not employment related. On July 25, 2014 Dr. Unterman reported that appellant had been under his care for the evaluation and treatment of cardiovascular disease, that she was totally and permanently disabled, and that she was unable to do sedentary work from a cardiac standpoint.

In a merit decision dated August 25, 2014, OWCP denied modification of the April 2, 2014 decision.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.⁶ An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.⁷

Section 8115 of FECA and OWCP regulations provide 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, the wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the employee's usual employment, age, qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect his or her wage-earning capacity in the disabled condition.⁸

OWCP must initially determine a claimant's medical condition and work restrictions before selecting an appropriate position that reflects his or her wage-earning capacity. The medical evidence upon which OWCP relies must provide a detailed description of the condition.⁹

⁶ *James M. Frasher*, 53 ECAB 794 (2002).

⁷ 20 C.F.R. §§ 10.402, 10.403; *John D. Jackson*, 55 ECAB 465 (2004).

⁸ 5 U.S.C. § 8115; 20 C.F.R. § 10.520; *John D. Jackson*, *id.*

⁹ *William H. Woods*, 51 ECAB 619 (2000).

Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.¹⁰

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's *Dictionary of Occupational Titles* or otherwise available in the open market, that fits that 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.¹¹ Finally, application of the principles set forth in *Albert C. Shadrick*,¹² as codified in section 10.403 of OWCP's regulations,¹³ will result in the percentage of the employee's loss of wage-earning capacity.¹⁴

In determining an employee's wage-earning capacity based on a position deemed suitable, but not actually held, OWCP must consider the degree of physical impairment, including impairments resulting from both injury-related and preexisting conditions, but not impairments resulting from postinjury or subsequently acquired conditions. Any incapacity to perform the duties of the selected position resulting from subsequently acquired conditions is immaterial to the loss of wage-earning capacity that can be attributed to the accepted employment injury and for which appellant may receive compensation.¹⁵

ANALYSIS -- ISSUE 1

The Board finds that OWCP met its burden of proof in reducing appellant's compensation on April 2, 2014 based on her capacity to earn wages in the constructed position of receptionist.

The medical evidence, as characterized by reports from Dr. Morgan, an attending orthopedic surgeon, established that appellant was no longer disabled from all work. Following his May 14, 2012 repair of a left rotator cuff tear, in an April 9, 2013 report, Dr. Morgan found that appellant had permanent work restrictions of no lifting, pushing, or pulling greater than 10 pounds and no outstretched reaching or working above shoulder level. OWCP then referred appellant to Ms. Jubran, the vocational rehabilitation counselor, in June 2013.¹⁶ Prior to the left shoulder surgery in May 2012, appellant was referred to vocational rehabilitation and was

¹⁰ *John D. Jackson, supra* note 7.

¹¹ *Supra* note 6.

¹² 5 ECAB 376 (1953).

¹³ 20 C.F.R. § 10.403.

¹⁴ *Supra* note 6.

¹⁵ *John D. Jackson, supra* note 7.

¹⁶ 5 U.S.C. § 8104(a); see *Ruth E. Leavy*, 55 ECAB 294 (2004).

provided computer training, which she completed in March 2012. In July 2013 Ms. Jubran identified two positions within appellant's capabilities: receptionist and customer service receptionist. She determined that the positions were reasonably available in the local labor market with entry-level weekly wages of \$460.00 and \$480.00 respectively. OWCP determined that appellant had the capacity to earn wages as a receptionist, based on the opinion of Dr. Morgan.

The physical demands of the receptionist position, classified as requiring sedentary strength,¹⁷ are within the restrictions provided by Dr. Morgan. Ms. Jubran, the rehabilitation counselor, advised that the position was reasonably available in the local labor market with entry-level weekly wages of \$460.00.

While appellant submitted an April 22, 2013 report from Dr. Unterman, an attending cardiologist, who diagnosed chest discomfort, shortness of breath, hypertensive heart disease, hypertension, and multiple orthopedic injuries and surgery, these conditions had not been present when appellant filed her 2005 claim. Impairments resulting from subsequently acquired conditions are immaterial to a wage-earning capacity determination.¹⁸

The Board finds that 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 receptionist position represented her wage-earning capacity.¹⁹ The evidence of record establishes that she had the requisite physical ability, skill, and experience to perform the position and that such a position was reasonably available within the general labor market of her commuting area. OWCP therefore properly determined that the position of receptionist reflected appellant's wage-earning capacity and, using the *Shadrick* formula,²⁰ properly reduced her compensation effective April 6, 2014.²¹

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

LEGAL PRECEDENT -- ISSUE 2

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.²² Section 10.511 of OWCP regulations provide

¹⁷ *Supra* note 4. The Department of Labor's *Dictionary of Occupational Titles* indicates that sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met.

¹⁸ *John D. Jackson, supra* note 7.

¹⁹ *Supra* note 6.

²⁰ 20 C.F.R. § 10.403.

²¹ *James Smith*, 53 ECAB 188 (2001).

²² *Katherine T. Kreger*, 55 ECAB 633 (2004).

that, if a formal loss of wage-earning capacity decision has been issued, the rating is left in place until that determination is modified by OWCP. Modification is only warranted where the party seeking modification establishes 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.²³ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.²⁴ In addition, Chapter 2.1501 of OWCP procedures contains provisions regarding the modification of a formal loss of wage-earning capacity.²⁵

ANALYSIS -- ISSUE 2

OWCP properly reduced appellant's wage-loss compensation on April 2, 2014, based on her capacity to earn wages as a receptionist. On May 20 and July 28, 2014 appellant requested reconsideration, stating that she was medically disabled from all work. In support of her argument, she submitted medical reports from Dr. Unterman, a cardiologist, who advised that appellant was disabled from even sedentary work due to multiple problems including atherosclerotic and hypertensive heart disease, and from Dr. Czaykowski, a hand surgeon, who described multiple orthopedic conditions. Appellant also submitted evidence indicating that OPM found her disabled from the mail handler position. Dr. Morgan also provided treatment notes, noting significant left hand pain which he opined was newly acquired and not employment related.

In merit decisions dated July 17 and August 25, 2014, OWCP reviewed the case under section 8128 of FECA and section 10.609 of OWCP regulations, and denied modification of the prior decision.

As noted above, OWCP had issued a formal decision of appellant's wage-earning capacity, effective April 6, 2014, prior to the time she requested reconsideration on May 20 and July 28, 2014. Board precedent and OWCP's procedures direct the claims examiner to consider the criteria for modification when a claimant requests resumption of compensation for total wage loss.²⁶ While appellant used the term reconsideration in her requests, the Board finds that OWCP should have adjudicated the issue of modification of the wage-earning capacity determination.²⁷ The Board will therefore remand the case to OWCP for proper adjudication, to be followed by an appropriate merit decision to preserve appellant's appeal rights on this issue.

²³ 20 C.F.R. § 10.511.

²⁴ *Stanley B. Plotkin*, 51 ECAB 700 (2000).

²⁵ Federal (FECA) Procedure Manual, Chapter 2 -- Claims, *Modification of Loss of Wage-Earning Capacity*, Chapter 2.1501 (June 2013).

²⁶ *Supra* note 22; *Sharon C. Clement*, 55 ECAB 552 (2004); *id.* at Chapter 2.1501.2.b (June 2013).

²⁷ *F.B.*, Docket No. 09-99 (issued July 21, 2010).

CONCLUSION

The Board finds that OWCP met its burden to justify reduction of appellant's wage-loss compensation on the grounds that she had the capacity to earn wages in the constructed position of receptionist. The Board further finds that OWCP should have adjudicated appellant's May 20 and July 28, 2014 applications under the modification of wage-earning capacity standard.

ORDER

IT IS HEREBY ORDERED THAT the April 2, 2014 decision of the Office of Workers' Compensation Programs is affirmed. OWCP decisions dated August 25 and July 17, 2014 are set aside and the case remanded for further proceedings consistent with this order of the Board.

Issued: March 19, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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