



Achilles tendinitis. On August 7, 2000 appellant underwent gastric resection and retrocalcaneal exostectomy of the right foot, which was performed by Dr. Nicholas Heath, an attending podiatrist. She has not returned to work.

On April 1, 2005 the Office found a conflict in the medical opinion evidence between Dr. Heath and Dr. Barry Lichter, an Office referral physician. Dr. Heath opined that appellant was totally disabled for work and that she required the use of a scooter. Dr. Lichter opined that appellant could perform her regular work duties as a mail processor eight hours per day without the use of a scooter. By letter dated May 10, 2005, the Office referred appellant, together with the case record, a statement of accepted facts and a list of questions to be addressed, to Dr. Donald D. Hubbard, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a July 11, 2005 medical report, Dr. Hubbard reviewed a history of appellant's August 17, 1992 employment injury and medical background. On physical and neurological examination, he reported essentially normal findings regarding her upper and lower extremities. Appellant sustained mild loss of range of motion of the hind foot and midfoot bilaterally. Based on his review of diagnostic test results and appellant's history, Dr. Hubbard concluded that she sustained bilateral Achilles tendinitis and was status postsurgical intervention due to the accepted condition. Appellant sustained deformity of the bilateral ankle and foot and was "status post bilateral gastrocnemius recession." She was also status post exostectomy of the right calcaneus for reactive spur formation. Appellant experienced chronic bilateral leg pain, loss of lower extremity function and permanent partial impairment of her bilateral lower extremities due to the diagnosed conditions. Dr. Hubbard opined that the diagnosed conditions were causally related to the accepted August 17, 1992 employment injury. He stated that appellant further sustained bilateral knee osteoarthritis, right greater than the left and bilateral foot bunions and, she was status post left bunionectomy by history. Dr. Hubbard requested additional information including a description of her mail processor position, to determine whether she could perform her regular duties. He stated that the use of a scooter by appellant in her mail processor position was not necessary without considerable ergonomic change to her worksite.

In a supplemental report dated October 15, 2005, Dr. Hubbard reviewed the physical requirements of appellant's mail processor position. He opined that she was unable to perform the duties of the position due to her employment-related conditions. Dr. Hubbard recommended vocational rehabilitation services and a functional capacity evaluation. In a work capacity evaluation (Form OWCP-5c), he stated that appellant was unable to work eight hours per day. Dr. Hubbard opined that she had reached maximum medical improvement. He restricted her from walking more than one hour per day, standing more than two hours per day and, pushing and pulling more than 30 pounds and lifting more than 25 pounds for more than one hour per day. Appellant was also restricted from squatting, kneeling and climbing.

By letter dated December 12, 2005, the Office requested that Dr. Hubbard address the number of hours that appellant could work per day. In a December 27, 2005 report, Dr. Hubbard advised that appellant could work eight hours per day. He mistakenly and inadvertently checked the wrong box on the OWCP-5c form in response to question 1b. Dr. Hubbard meant to indicate that appellant could work eight hours per day within his restrictions.

On January 13, 2006 the Office referred appellant to a vocational rehabilitation counselor. On August 28, 2006 the vocational rehabilitation counselor identified the position of wholesale/retail marker as being within her physical limitations, vocational skills and geographical area.

In a September 6, 2006 notice, the Office advised appellant that it proposed to reduce her compensation because the medical and factual evidence of record established that she was no longer totally disabled. It found that she had the capacity to earn the wages of a retail marker. Applying the formula developed in *Albert C. Shadrick*,<sup>1</sup> the Office determined that appellant's compensation would be reduced to \$1,637.00 every four weeks. By decision dated October 11, 2006, it finalized the reduction of appellant's compensation benefits.

On May 14, 2007 appellant, through counsel, requested reconsideration. By decision dated August 10, 2007, the Office set aside the October 11, 2006 decision. It found that the position of retail marker exceeded her restrictions. The Office found that she was entitled to retroactive compensation for total disability.

On July 3, 2007 a vocational rehabilitation counselor reviewed appellant's case record. She identified the position of small products assembler as being within appellant's physical limitations, vocational skills and geographical area. The small products assembler position, as noted in the Department of Labor, *Dictionary of Occupational Titles* (DOT), was classified as a light-strength position. The position involved assemblage of various materials such as, plastic, wood, metal, rubber or paperboard, to produce small products such as, roller skates, toys, shoe lasts, musical instrument parts or loudspeakers. It required the positioning of parts in specified relationship to each other, using hand, tweezers or tongs. The position further required bolting, screwing, clipping, cementing or fastening parts together by hand, using hand tools, portable powered tools or bench machines. It also required fastening, force fitting or light cutting operations, using machines such as arbor presses, punch presses, taps, spot-welding or riveters. The physical requirements included light strength and, constant reaching, handling, fingering, near acuity, depth perception and accommodation. No climbing, balancing, stooping, kneeling, crouching, crawling, feeling, talking, hearing, taste/smelling, far acuity, color vision and field of vision were required. The vocational rehabilitation counselor found that appellant's transferable skills and prior work experience qualified her for the selected position. She stated that the selected position was available on a full-time basis and in appellant's commuting area based on a labor market survey. In a June 30, 2007 job analysis for the selected the position, the vocational rehabilitation counselor stated that lifting up to 20 pounds occasionally and 10 pounds occasionally to frequently were required. The position generally involved sitting with standing occasionally. The ability to vary sitting and standing as needed was permitted. The position required seldom walking short distances.

In an August 10, 2007 notice, the Office advised appellant that it proposed to reduce her compensation because the medical and factual evidence of record established that she was no longer totally disabled. It found that she had the capacity to earn the wages of a small products assembler. The Office applied the *Shadrick* formula and determined that appellant's

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<sup>1</sup> 5 ECAB 376 (1953).

compensation would be reduced to \$848.00 every four weeks. Appellant's salary effective February 25, 1993, the date her disability began, was \$743.66 per week; the current adjusted pay rate for her job on the date of injury was \$704.08 per week effective August 10, 2007 and she was currently capable of earning \$517.20 per week, the pay rate of a small products assembler. The Office determined that appellant had a 73 percent wage-earning capacity, which resulted in an adjusted wage-earning capacity of \$542.87 per week. It determined that she had a loss of wage-earning capacity of \$200.79 per week. The Office concluded that, based upon a three-fourths compensation rate, appellant's compensation would be \$150.59 per week, increased by applicable cost-of-living adjustments to \$212.00 per week. Appellant was provided 30 days to submit additional evidence or argument in support of any objection to the proposed reduction.

On September 4, 2007 appellant's attorney contended that the small products assembler position was not suitable. It required stooping and crouching occasionally and standing at least for two and two-thirds hours, which exceeded her work restrictions.

In an August 24, 2007 treatment note, Dr. Heath stated that appellant sustained bilateral calcaneal spurs and equinus. He recommended that she work in a position that only required her to sit. Dr. Heath opined that anything that required standing for more than one hour would be detrimental to appellant's condition and would worsen it. He stated that standing would cause pressure to the Achilles and the attachment of the calcaneus. The large bone spurs would only enlarge with continued pressure. In a September 5, 2007 OWCP-5c form, Dr. Heath advised that appellant was unable to perform her regular work duties and that she could not work eight hours per day. She was permanently restricted from walking, standing and, pushing, pulling and lifting more than 25 pounds for more than one hour per day. Appellant was also restricted from squatting, kneeling and climbing. In a September 6, 2007 report, Dr. Heath reiterated that appellant could only work in a sedentary position that did not require her to stand more than one hour per day. He stated that she could not stand more than 15 minutes at a time. Dr. Heath opined that appellant had reached maximum medical improvement.

By decision dated November 27, 2007, the Office finalized the reduction of appellant's compensation benefits effective that date.

### **LEGAL PRECEDENT**

Once the Office has made a determination that an employee 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.<sup>2</sup>

Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent 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, her wage-earning capacity is determined with due regard to the nature of her injuries and the degree of physical impairment, her usual employment, the employee's age and vocational qualifications

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<sup>2</sup> *William H. Woods*, 51 ECAB 619 (2000); *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

and the availability of suitable employment.<sup>3</sup> Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.<sup>4</sup> 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.<sup>5</sup>

After the Office makes a medical determination of partial disability and of special work restrictions, it may refer the employee's case to an Office wage-earning capacity specialist for selection of a position listed in the DOT or otherwise available in the open market, that fits the employee's capabilities with regard to her physical limitations, education, age and prior experience. Once this selection is made, determination of wage rate and availability in the open labor market should be made through contact with the state employment services or other applicable services.<sup>6</sup> Finally, application of the principles set forth in *Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.<sup>7</sup> This has been codified by the regulations in 20 C.F.R. § 10.403(c).

Section 8123(a) of the Act provides in pertinent part: "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."<sup>8</sup> In situations where 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.<sup>9</sup>

### ANALYSIS

Appellant received compensation for total disability due to her accepted aggravation of bilateral Achilles tendinitis. She stopped work on August 7, 2000 following surgery to the right foot. In a November 27, 2007 decision, the Office found that appellant was physically capable of performing the duties of small products assembler based on the medical opinion of Dr. Hubbard. The Board finds that the Office properly determined that appellant was physically capable of performing the duties of the selected position.

A conflict in the medical opinion arose between Dr. Heath, an attending physician, and Dr. Lichter, an Office referral physician, regarding appellant's capacity for work. Dr. Heath

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<sup>3</sup> *Samuel J. Chavez*, 44 ECAB 431 (1993).

<sup>4</sup> *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

<sup>5</sup> *Id.* The commuting area is to be determined by the employee's ability to get to and from the worksite. See *Glen L. Sinclair*, 36 ECAB 664, 669 (1985).

<sup>6</sup> *Karen L. Lonon-Jones*, 50 ECAB 293, 297 (1999).

<sup>7</sup> See *William H. Woods*, *supra* note 2; *Albert C. Shadrick*, *supra* note 1.

<sup>8</sup> 5 U.S.C. § 8123(a).

<sup>9</sup> *Gloria J. Godfrey*, 52 ECAB 486 (2001).

opined that appellant was totally disabled for work and she required the use of a scooter. Dr. Lichter opined that appellant could perform her regular work duties as a mail processor eight hours per day without using a scooter.

The Office referred appellant to Dr. Hubbard, selected as the impartial medical specialist. In a July 11, 2005 report, Dr. Hubbard reported essentially normal findings on physical and neurological examination. He stated that appellant sustained mild loss of range of motion of the hind foot and midfoot bilaterally. Based on his review of diagnostic test results and appellant's history, Dr. Hubbard stated that she sustained bilateral Achilles tendinitis and was status postsurgical intervention precipitated by the tendinitis. He also stated that she sustained deformity of the bilateral ankle and foot and, was status post bilateral gastrocnemius recession. Dr. Hubbard related that appellant was also status post exostectomy of the right calcaneus for reactive spur formation. Due to chronic bilateral leg pain, loss of lower extremity function and permanent partial impairment of her bilateral lower extremities she was found to have restrictions on her work activities. Dr. Hubbard stated that appellant sustained bilateral knee osteoarthritis, right greater than the left and bilateral foot bunions and, she was status post left bunionectomy by history.

In an October 15, 2005 supplemental report, Dr. Hubbard opined that, based on his review of a description of the mail processor position, her date-of-injury position, appellant was unable to perform the duties of her regular position due to her employment-related conditions. He advised that she had reached maximum medical improvement. Dr. Hubbard restricted appellant from walking more than one hour, standing more than two hours and, pushing and pulling more than 30 pounds and lifting more than 25 pounds for more than one hour. He also restricted her from squatting, kneeling and climbing. On December 27, 2005 Dr. Hubbard clarified his opinion regarding appellant's capacity for work by specifying that she could work eight hours per day within the restrictions he set forth.

The Board finds that Dr. Hubbard's opinion is well rationalized and based on a proper factual background. Dr. Hubbard is entitled to the special weight accorded an impartial medical specialist and his opinion establishes that appellant was capable of working full time as long as the position did not involve walking more than one hour per day, standing more than two hours per day, pushing and pulling more than 30 pounds and lifting more than 25 pounds for more than one hour per day and, squatting, kneeling and climbing.

The selected small products assembler position required assemblage of various materials such as, plastic, wood, metal, rubber or paperboard, to produce small products such as, roller skates, toys, shoe lasts, musical instrument parts or loudspeakers. It further required the positioning of parts in specified relationship to each other, using hand, tweezers, or tongs. The position also required bolting, screwing, clipping, cementing or fastening parts together by hand, using hand tools, portable powered tools or bench machines. It required fastening, force fitting, or light cutting operations, using machines such as arbor presses, punch presses, taps, spot-welding or riveters.

The vocational rehabilitation counselor stated that appellant's transferable skills and prior work experience qualified her for the selected position. In light of the above, the Board finds that appellant is capable of performing the duties of the selected position.

The physical requirements of the small products assembler position involved light strength, constant reaching, handling, fingering, near acuity, depth perception and accommodation, lifting up to 20 pounds occasionally and 10 pounds occasionally to frequently, sitting with occasional standing with ability to either position as needed and, seldom walking short distances. No climbing, balancing, stooping, kneeling, crouching, crawling, feeling, talking, hearing, taste/smelling, far acuity, color vision and field of vision were required. Based on the evidence of record, the Board finds that the selected position was within appellant's work restrictions set forth by Dr. Hubbard and was appropriate for a wage-earning capacity determination.

Dr. Heath's subsequent treatment notes and work restrictions found that appellant was unable to walk, stand and, push, pull and lift more than 25 pounds for more than one hour per day. The Board notes that he was part of the conflict in the medical opinion regarding appellant's work capacity which required her to be referred to Dr. Hubbard.<sup>10</sup> Dr. Heath advised that she could not perform her regular duties but did not provide any opinion with respect to appellant's ability to perform the selected position. He did not provide any findings and rationale to support that appellant was unable to perform the small products assemble position. The Board finds that his report is insufficient to overcome the special weight of the medical evidence accorded the impartial medical specialist Dr. Hubbard.

The vocational rehabilitation counselor confirmed that the selected position is available on a full-time basis and in appellant's commuting area based on a labor market survey.

The Board finds that the Office properly determined appellant's loss of wage-earning capacity in accordance with the formula developed in *Shadrick*<sup>11</sup> and codified at section 10.403 of the Office's regulations.<sup>12</sup> In this regard, the Office indicated that appellant's salary on February 25, 1993, the date her disability began, was \$743.66 per week; that the current adjusted pay rate for her job on the date of injury was \$704.08 per week and that she was currently capable of earning \$517.20 per week, the pay rate of a small products assembler. It determined that appellant had a 73 percent wage-earning capacity, which resulted in an adjusted wage-earning capacity of \$542.87 per week. The Office determined that appellant had a loss of wage-earning capacity of \$200.79 per week. It concluded that, based upon a three-fourths compensation rate, appellant's new compensation rate was \$150.59 per week, increased by applicable cost-of-living adjustments to \$212.00 per week and that her net compensation for each four-week period would be \$848.00. The Board finds that the Office's application of the *Shadrick* formula was proper and, therefore, it properly found that the position of small products assembler reflected appellant's wage-earning capacity effective November 27, 2007.<sup>13</sup>

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<sup>10</sup> Submitting a report from a physician who was on one side of a medical conflict that an impartial specialist resolved is, generally, insufficient to overcome the weight accorded to the report of the impartial medical examiner or to create a new conflict. *Jaja K. Asaramo*, 55 ECAB 200 (2004).

<sup>11</sup> See *Albert C. Shadrick*, *supra* note 1.

<sup>12</sup> 20 C.F.R. § 10.403.

<sup>13</sup> *Elsie L. Price*, 54 ECAB 734 (2003); *Stanley B. Plotkin*, 51 ECAB 700 (2000).

**CONCLUSION**

The Board finds that the Office properly reduced appellant's compensation effective November 27, 2007 based on its determination that the constructed position of small products assembler represented her wage-earning capacity.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 27, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 5, 2009  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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