



## **FACTUAL HISTORY**

On September 30, 2006 appellant, then a 28-year-old border patrol agent, sustained injury in a vehicular accident at work. OWCP accepted that she sustained contusions of her face (except the eyes), scalp, neck, hip and shoulder region; contusions of multiple sites, not elsewhere classified; closed fracture of multiple cervical vertebrae without spinal cord injury; multiple, closed pelvic fractures with disruption of pelvic floor; lung contusion without open wound into thorax; closed skull fracture with laceration; disorder of bursae and tendons in shoulder region, unspecified; sprains of her shoulder, upper arm and rotator cuff; and post-traumatic stress disorder due to her work injuries. She stopped work and received OWCP compensation for periods of disability.

In a November 13, 2008 report, Dr. Jaime Arbona, a Board-certified psychiatrist serving as OWCP's referral physician, determined that appellant could work for the employing establishment in a job that did not require continuous driving in the field, attending emergency calls or engaging in extraneous exercise. Appellant's attending psychiatrist had determined that she was totally disabled from a psychiatric standpoint.

In several reports and work restriction forms from 2008 and 2009, Dr. Helson Pacheco-Serrant, an attending Board-certified neurosurgeon, indicated that appellant was totally disabled. During this period, Dr. Carlos Viesca, an attending Board-certified pain management physician, stated that he agreed with Dr. Pacheco-Serrant's assessment that appellant was totally disabled. In mid 2008, Dr. Pawankumar Jain, a Board-certified neurologist serving as OWCP's referral physician, indicated that appellant could perform limited duty for eight hours per day with restrictions.

In a July 22, 2009 report, Dr. Grant McKeever, a Board-certified orthopedic surgeon serving as an impartial medical specialist regarding appellant's physical condition, found that she could return to work for eight hours per day with restrictions including lifting, pushing or pulling up to 30 pounds for up to three hours per day for each activity. Appellant could perform light to medium work per the Department of Labor's definition, but could not reach above her shoulders or engage in such actions as bending and stooping. In a November 12, 2009 report, Dr. Andrew Brylowski, a Board-certified psychiatrist serving as an impartial medical specialist regarding appellant's psychiatric condition, determined that she could return to work for eight hours per day in a job with light physical labor duties that did not involve potential physical altercation, carrying a weapon or engaging in exquisite physical/mental dexterity and fitness.

The employing establishment could not accommodate appellant's work restrictions and therefore she was referred to OWCP's vocational rehabilitation program on December 28, 2009. Appellant completed the rehabilitation program and advised her rehabilitation counselor, Kathy Mundy, that she was pursuing her Masters Degree in an attempt to get a teaching position.

Ms. Mundy worked with appellant to secure employment as an elementary school teacher, case worker or teacher's aide. Appellant was not successful in her job search and OWCP's rehabilitation specialist conducted a labor market survey which showed that the elementary school teacher position was reasonably available in her commuting area at an average salary of \$917.88 per week. The elementary school teacher position involved such duties as

preparing course objectives and outlines for course of study, teaching and grading coursework and counseling students when necessary. It required occasionally lifting up to 20 pounds and frequently lifting up to 10 pounds.

In a June 10, 2010 letter, OWCP advised appellant that it proposed to reduce her compensation based on its determination that she had the capacity to earn wages in the constructed position of elementary school teacher. It provided her 30 days to submit evidence and argument contesting the proposed action.

Appellant objected to the proposed reduction of her compensation arguing that she was not physically or emotionally capable of working as an elementary school teacher. She asserted that the fact that she was unsuccessful in her job search showed that she could not work as an elementary school teacher. Appellant submitted additional reports of attending physicians, including Dr. Viesca, asserting that they showed she could not physically work as an elementary school teacher.

In a July 19, 2010 decision, OWCP reduced appellant's compensation effective July 31, 2010 based on her capacity to earn wages in the constructed position of elementary school teacher. It indicated that the evidence and argument she submitted, including the opinion of Dr. Viesca, did not show that she was unable to work as an elementary school teacher.

### **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> Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>3</sup>

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 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 injury, her degree of physical impairment, her usual employment, her age, her qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect her wage-earning capacity in her disabled condition.<sup>4</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>5</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>6</sup> The fact that an employee has been unsuccessful

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

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

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

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

<sup>6</sup> *Id.*

in obtaining work in the selected position does not establish that the work is not reasonably available in her commuting area.<sup>7</sup>

Section 8123(a) of FECA 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> When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.<sup>9</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>10</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 or 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 labor market, that fits that employee’s capabilities with regard to his 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. 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.<sup>11</sup>

### ANALYSIS

In the present case, OWCP accepted multiple physical conditions and the psychiatric condition of post-traumatic stress disorder. It properly determined that there were conflicts in the medical opinions regarding both the effect of appellant’s physical condition on her ability to work and the effect of her psychiatric condition on her ability to work. OWCP properly referred appellant to Dr. McKeever, a Board-certified orthopedic surgeon serving as an impartial medical specialist regarding her physical condition, and to Dr. Andrew Brylowski, a Board-certified psychiatrist serving as an impartial medical specialist regarding her psychiatric condition.<sup>12</sup>

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<sup>7</sup> See *Leo A. Chartier*, 32 ECAB 652, 657 (1981).

<sup>8</sup> 5 U.S.C. § 8123(a).

<sup>9</sup> *William C. Bush*, 40 ECAB 1064, 1975 (1989).

<sup>10</sup> *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

<sup>11</sup> 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).

<sup>12</sup> See *supra* notes 8 and 9.

In a July 22, 2009 report, Dr. McKeever found that appellant could return to work for eight hours a day with restrictions including lifting, pushing or pulling up to 30 pounds for up to three hours a day for each activity. Appellant could perform light to medium work per the Department of Labor's definition but could not reach above her shoulder or engage in such actions as bending and stooping. In a November 12, 2009 report, Dr. Brylowski determined that she could return to work for eight hours a day in a job with light physical labor duties that did not involve potential physical altercation, carrying a weapon or engaging in exquisite physical/mental dexterity and fitness.

Appellant's vocational rehabilitation counselor determined that appellant was able to perform the position of elementary school teacher and 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 elementary school teacher position. The duties of the elementary school teacher position are in the light work category and they are well within the work restrictions recommended by Dr. McKeever and Dr. Brylowski. Appellant did not submit any evidence or argument showing that she could not vocationally, physically or psychologically perform the elementary school teacher position.<sup>13</sup> On appeal, she alleged that the fact she did not find employment in connection with her participation in vocational rehabilitation showed that she could not work as an elementary school teacher.<sup>14</sup> However, the Board has held that 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 her commuting area.<sup>15</sup>

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 elementary school teacher represented appellant's wage-earning capacity.<sup>16</sup> The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of elementary school teacher and that such a position was reasonably available within the general labor market of her commuting area. The report from Dr. Viesca did not negate her ability to do the light-duty job. Therefore, OWCP properly reduced appellant's compensation effective July 31, 2010 based on her capacity to earn wages as an elementary school teacher.

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

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<sup>13</sup> The medical reports submitted by appellant, including reports of Dr. Viesca, an attending Board-certified pain management physician, did not outweigh the opinions of the impartial medical specialists.

<sup>14</sup> Appellant also asserted that the job market was particularly difficult in El Paso.

<sup>15</sup> See *supra* note 7.

<sup>16</sup> See *Clayton Varner*, 37 ECAB 248, 256 (1985).

**CONCLUSION**

The Board finds that OWCP properly reduced appellant's compensation effective July 31, 2010 based on her capacity to earn wages in the constructed position of elementary school teacher.

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 19, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 25, 2011  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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