



## **FACTUAL HISTORY**

OWCP accepted that on August 22, 2007 appellant, then a 59-year-old maintenance worker in a full-time temporary position,<sup>2</sup> sustained rotator cuff tendinitis of the left shoulder with a complete rupture of the supraspinatus tendon when he lifted a trash bag out of a truck. He underwent left rotator cuff repair and subacromial decompression on February 15, 2008 and open left rotator cuff repair on December 12, 2008.<sup>3</sup>

Appellant had intermittent work absences from September 2007 through January 2008. He was off work due to surgery and recovery from February 15 through May 2008 when he returned to the employing establishment to complete an ancient ruins preservation internship. Appellant again stopped work. He received wage-loss compensation on the supplemental rolls.

In a July 9, 2009 memorandum, OWCP noted that, while on compensation, appellant had enrolled in college on his own and was close to completing a bachelor's degree. As appellant's college attendance indicated that he was no longer totally disabled for work, OWCP referred him for vocational rehabilitation on July 20, 2009.

In an August 13, 2009 report, Dr. Lionel Weeks, an attending Board-certified orthopedic surgeon, opined that appellant attained maximum medical improvement. He found appellant able to perform full-time limited duty. Dr. Weeks noted permanent work restrictions, limiting lifting with the left arm to 50 pounds at waist height, 20 pounds at shoulder height and 5 pounds overhead.

Following vocational aptitude testing and a transferable skills analysis, the vocational rehabilitation counselor selected general clerk, Department of Labor, *Dictionary of Occupational Titles* (DOT) #209.562-010, as a position commensurate with appellant's physical abilities and education. A September 20, 2009 labor market analysis showed that general clerk positions were reasonably available in appellant's commuting area.

In a September 24, 2009 memorandum, the vocational rehabilitation counselor stated that appellant was not interested in returning to work as he was earning a bachelor's degree in anthropology and wished to pursue a career in archaeology. OWCP closed the vocational rehabilitation effort on December 2, 2009. The vocational counselor reported that general clerk positions remained available in appellant's commuting area with entry-level wages of \$428.40 a week.

By notice dated December 24, 2009, OWCP proposed reducing appellant's wage-loss compensation based on his ability to earn \$428.40 a week in the selected position of general clerk. The position was classified as light, with frequent lifting up to 10 pounds and frequent reaching, handling and fingering. Duties included: filing, typing, computer data entry,

---

<sup>2</sup> Appellant's temporary appointment expired on December 8, 2007.

<sup>3</sup> Under File No. xxxxxx889, OWCP accepted an October 20, 2005 right shoulder sprain, rotator cuff tear and right elbow contusion. Appellant underwent right shoulder arthroscopy on January 3, 2006. On October 8, 2009 OWCP doubled File No. xxxxxx889 with File No. xxxxxx090 under Master File No. xxxxxx889.

photocopying and writing. OWCP found the position to be suitable. It afforded appellant 30 days to submit additional evidence or argument. Appellant did not respond to the notice of proposed reduction of compensation.

By decision dated January 28, 2010, OWCP reduced appellant's compensation effective January 31, 2010 under sections 8106 and 8115 of the Act, based on his ability to earn \$428.40 a week in the selected position of general clerk. It found appellant did not submit evidence establishing that he was medically unable to perform the job. Appellant remained entitled to medical benefits for treatment of the accepted injuries.

Counsel requested a telephonic hearing, held on May 7, 2010. At the hearing, appellant explained that he did not wish to work as a general clerk because he was completing a bachelor's degree in anthropology and wished to work as an archaeologist. Counsel contended that OWCP should have reduced appellant's compensation based on his potential earnings as an archaeologist and not the selected position of general clerk.<sup>4</sup>

By decision dated and finalized July 14, 2010, OWCP's hearing representative affirmed the January 28, 2010 decision, finding that the position of general clerk reasonably represented appellant's wage-earning capacity. The hearing representative found that appellant's preference to work as an archaeologist did not establish that the general clerk position was not suitable work.

### **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.<sup>5</sup> Under section 8115(a), 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 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 and circumstances which may affect wage-earning capacity in his or her disabled condition.<sup>6</sup>

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, *DOT* or otherwise available in the open

---

<sup>4</sup> Pursuant to a schedule award claim for left upper extremity impairment, OWCP obtained a second opinion from Dr. James K. Weaver, a Board-certified orthopedic surgeon. In a June 2, 2010 report, Dr. Weaver found a seven percent impairment of the left upper extremity according to the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. He did not offer additional work restrictions. There is no final decision of record regarding the schedule award.

<sup>5</sup> *David W. Green*, 43 ECAB 883 (1992).

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

market, that fits the 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 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*,<sup>7</sup> will result in the percentage of the employee's loss of wage-earning capacity.<sup>8</sup>

### ANALYSIS

OWCP accepted that appellant sustained rotator cuff tendinitis of the left shoulder with a complete rupture of the supraspinatus tendon, requiring two surgeries. Dr. Weeks, an attending Board-certified orthopedic surgeon, found that appellant had reached maximum medical improvement as of August 13, 2009. He noted permanent restrictions limiting lifting to 50 pounds at waist height, 20 pounds at shoulder height and 5 pounds overhead. Based on Dr. Weeks' restrictions and a transferable skills analysis, a vocational rehabilitation counselor identified the position of general clerk as a reemployment goal.

The general clerk position was classified as light, with frequent lifting up to 10 pounds. These physical requirements are within the restrictions set forth by Dr. Weeks. The vocational counselor found the job requirements commensurate with appellant's education and experience. The counselor then determined the prevailing wage rate of these positions and their reasonable availability in the open labor market. Based on these calculations, OWCP issued a January 28, 2010 decision reducing appellant's compensation based on his ability to earn \$428.40 a week as a general clerk.

The Board finds that OWCP considered the proper factors, such as availability of clerk positions and appellant's physical limitations, in determining that the general clerk position represented his wage-earning capacity. Dr. Weeks opined that appellant was medically capable of full-time light-duty work at the physical demand level required by the general clerk position.

The vocational rehabilitation counselor found that general clerk positions were reasonably available in appellant's commuting area. Also, OWCP followed the established procedures under the *Shadrick* decision in calculating appellant's employment-related loss of wage-earning capacity. Appellant does not contest OWCP's calculations.

Appellant acknowledged that he was medically and vocationally able to perform the duties of a general clerk. He contended only that OWCP should have based his wage-earning capacity on his potential earnings as an archaeologist. The vocational counselor and OWCP's vocational specialist were both aware of appellant's interest in archaeology and college coursework in anthropology. They considered the appropriate factors and determined that the selected position of general clerk represented appellant's wage-earning capacity. The position was reasonably available, within appellant's medical restrictions and commensurate with his education and experience.

---

<sup>7</sup> 5 ECAB 376 (1953).

<sup>8</sup> *James A. Birt*, 51 ECAB 291 (2000); *Francisco Bermudez*, 51 ECAB 506 (2000).

The Board finds that OWCP properly found that appellant was medically and vocationally capable of working eight hours a day as a general clerk. Thus, OWCP's January 28, 2010 decision reducing appellant's compensation based on his ability to earn wages in the selected position of general clerk is proper under the law and facts of this case.<sup>9</sup>

On appeal, counsel asserts that OWCP's wage-earning capacity determination was "contrary to fact and law." As stated, OWCP considered the proper factors in determining that the selected position of general clerk was suitable work. Appellant may request modification of the wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

### **CONCLUSION**

The Board finds that OWCP properly determined that the selected position of general clerk reasonably represented appellant's wage-earning capacity.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated July 14, 2010 is affirmed.

Issued: July 1, 2011  
Washington, DC

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

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

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

---

<sup>9</sup> *E.T.*, Docket No. 10-559 (issued March 28, 2011).