



intervertebral disc disease, cervicalgia, herniated lumbar disc and aggravation of degenerative lumbar intervertebral disc disease. Appellant also had separate claims accepted by OWCP for right and left shoulder impingement. He has not worked since March 2004. OWCP commenced payment of temporary total disability compensation.

In order to determine appellant's current condition, OWCP referred him for a second opinion examination with Dr. Noel Rogers, Board-certified in orthopedic surgery. In an April 14, 2008 report, Dr. Rogers stated that it was not reasonable to expect appellant to return to work, even sedentary work. He provided the following restrictions: sitting not exceeding one to two hours; walking, standing, twisting, bending, stooping, pushing, pulling and lifting not exceeding one hour, more than five pounds; reaching not exceeding one half hour; and no squatting, kneeling, climbing or reaching above the shoulder.

In a work capacity evaluation dated October 3, 2008, Dr. Sampath Charya, Board-certified in neurology and appellant's treating physician, outlined the following work restrictions: sitting not exceeding three to four hours; walking and standing not exceeding one to two hours; occasional reaching above the shoulder, occasional twisting, bending, stooping; pushing, pulling, squatting, kneeling, climbing and lifting not exceeding one hour, more than 10 to 15 pounds; with 15 to 20 breaks every two hours.

OWCP found that there was a conflict in the medical evidence between Dr. Charya, appellant's treating physician, and Dr. Rogers, the second opinion physician, regarding his work capacity.<sup>2</sup> It referred appellant to Dr. Robert Elkins, Board-certified in orthopedic surgery, for a referee medical examination to resolve the conflict in the medical evidence. In an October 7, 2009 report, Dr. Elkins opined that appellant was capable of full-time sedentary work. In an October 8, 2009 work capacity evaluation, he outlined the following restrictions: walking, standing, twisting, bending, stooping not exceeding one hour; reaching not exceeding four hours; reaching above the shoulder not exceeding one hour; pushing, pulling and lifting not exceeding one hour, more than 10 pounds; and no squatting, kneeling or climbing.

On January 6, 2010 the employing establishment indicated that it had no full-time sedentary work available for appellant within his work restrictions. On January 12, 2010 OWCP referred him for vocational rehabilitation in order to locate suitable work within Dr. Elkin's work restrictions.

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<sup>2</sup> OWCP also noted that appellant had restrictions from his accepted shoulder impingement conditions.

In a vocational rehabilitation report dated January 29, 2010, a vocational rehabilitation counselor recommended two positions for appellant listed in the Department of Labor's *Dictionary of Occupational Titles*, one of which was "customer service representative" DOT #239.362-014.<sup>3</sup> The job was described as sedentary and required appellant to do lifting, carrying, pushing or pulling up to 10 pounds occasionally, with no climbing, kneeling, stooping, balancing, crouching or crawling. The position required frequent reaching and handling. The other job listed was a cashier position, DOT # 211.362.010.

By letter dated March 10, 2010, OWCP asked Dr. Elkins to review the jobs selected by appellant's vocational counselor.

In an April 6, 2010 addendum report, Dr. Elkins stated that appellant could do the cashier job but not the customer service representative position. In an April 13, 2010 addendum report, he stated that the customer service job would be acceptable, but only if it did not require overhead reaching. Dr. Elkins noted that the job description for customer service representative did not indicate whether overhead reaching was one of the job requirements; it merely listed frequent reaching.

By notice of proposed reduction dated April 21, 2010, OWCP advised appellant of its proposal to reduce his compensation because the factual and medical evidence established that he was no longer totally disabled and that he had the capacity to earn wages as a customer service representative at the weekly rate of \$320.00 in accordance with the factors outlined in 5 U.S.C. § 8115.<sup>4</sup> It calculated that his compensation rate should be adjusted to \$1,398.18 using the *Shadrick*<sup>5</sup> formula. OWCP found that appellant's current adjusted compensation rate, every four-week period, was \$392.75. It stated that the case had been referred to a vocational rehabilitation counselor, who had located a position as a customer service representative which he found to be suitable for appellant given his work restrictions and was available in his commuting area. OWCP allowed appellant 30 days in which to submit any contrary evidence. It stated that the case had been referred to a vocational rehabilitation counselor, who had located a position as a customer service representative which he found to be suitable for appellant given

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<sup>3</sup> The job description stated:

"Interviews applicants and records interview information into computer for water, gas, electric, telephone, or cable television system service: Talks with customers by phone or in person and receives orders for installation, turn-on, discontinuance, or change in service. Fills out contract forms, determines charges for service requested, collects deposits, prepares change of address records, and issues discontinuance orders, using computer. May solicit sale of new or additional services. May adjust complaints concerning billing or service rendered, referring complaints of service failures, such as low voltage or low pressure, to designated departments for investigation. May visit customers at their place of residence to investigate conditions preventing completion of service-connection orders and to obtain contract and deposit when service is being used without contract. May discuss cable television equipment operation with customer over telephone to explain equipment usage and to troubleshoot equipment problems."

<sup>4</sup> 5 U.S.C. § 8115.

<sup>5</sup> *Albert C. Shadrick*, 5 ECAB 376 (1953); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.2 (April 1995).

his work restrictions and was available in his commuting area. OWCP allowed appellant 30 days in which to submit any contrary evidence. Appellant did not submit any additional evidence.

By decision dated May 27, 2010, OWCP advised appellant that it was reducing his compensation, effective June 6, 2010, because the weight of the medical evidence showed that he was no longer totally disabled for work due to effects of his November 26, 2001 employment injury and that the evidence of record showed that the position of customer service representative represented his wage-earning capacity.

### **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>6</sup>

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injuries and the degree of physical impairment, his or her usual employment, the employee's age and vocational qualifications and the availability of suitable employment.<sup>7</sup> Accordingly, the evidence must establish that jobs in the position selected for determining wage-earning capacity are reasonably available in the general labor market in the commuting area in which the employee lives. In determining an employee's wage-earning capacity, OWCP may not select a makeshift or odd lot position or one not reasonably available on the open labor market.<sup>8</sup>

Section 8123(a) of the Act provides in 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>9</sup> In situations where there are 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 on a proper factual background, must be given special weight.<sup>10</sup>

### **ANALYSIS**

Based upon the opinion of appellant's treating physician, Dr. Charya, that appellant could return to work with restrictions, and the second opinion physician, Dr. Rogers, that appellant could not return to work, OWCP properly found a conflict in the medical opinion evidence

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<sup>6</sup> *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

<sup>7</sup> *Samuel J. Chavez*, 44 ECAB 431 (1993); *Hattie Drummond*, 39 ECAB 904 (1988); see 5 U.S.C. § 8115(a); A. Larson, *The Law of Workmen's Compensation* § 57.22 (1989).

<sup>8</sup> *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

<sup>9</sup> 5 U.S.C. § 8123(a).

<sup>10</sup> *John E. Cannon*, 55 ECAB 585 (2004).

regarding appellant's ability to return to work and referred him to Dr. Elkins' for an impartial medical evaluation. On appeal, appellant's attorney argues that Dr. Elkins' opinion does not provide a sufficient basis to reduce appellant's compensation.

The Board finds that OWCP did not meet its burden to reduce appellant's disability compensation. There is insufficient medical evidence to support a finding that the selected position of customer service representative was within appellant's physical limitations. As the Board explained in *Mary A. Henson*,<sup>11</sup> OWCP must clarify whether the sedentary position selected is consistent with the employee's work tolerance restrictions. In an October 8, 2009 work capacity evaluation, Dr. Elkins outlined appellant's restrictions including that he could not perform reaching duties exceeding four hours a day and reaching above the shoulder exceeding one hour a day. He stated in his April 13, 2010 addendum report that the customer service job would be acceptable only if it did not require overhead reaching. As Dr. Elkins indicated, however, the position description does not indicate whether or not overhead reaching is required. In addition, according to the position description, this job would require appellant to engage in frequent reaching. Dr. Elkins had also placed a four-hour-a-day restriction on ordinary reaching. Therefore, OWCP did not establish that the duties of the customer service representative position were within the restrictions imposed by Dr. Elkin. It is OWCP's burden of proof to justify reduction of compensation by identifying a suitable position. OWCP did not meet its burden of proof in this case to reduce appellant's compensation benefits. The Board will reverse the May 27, 2010 decision.

### **CONCLUSION**

The Board finds that OWCP has failed to meet its burden of proof in reducing appellant's compensation.

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<sup>11</sup> 36 ECAB 565 (1985).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 27, 2010 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 6, 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