

**United States Department of Labor  
Employees' Compensation Appeals Board**

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<b>A.B., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 10-1166</b>
	)	<b>Issued: March 8, 2011</b>
<b>DEPARTMENT OF JUSTICE,</b>	)	
<b>METROPOLITAN CORRECTIONAL</b>	)	
<b>CENTER, San Diego, CA, Employer</b>	)	
_____	)	

*Appearances:*  
Alan J. Shapiro, Esq., for the appellant  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On March 24, 2010 appellant filed a timely appeal from a February 18, 2010 merit decision of the Office of Workers' Compensation Programs regarding a wage-earning capacity determination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

**ISSUE**

The issue is whether the Office properly determined that the selected position of complaint clerk properly represented appellant's wage-earning capacity as of August 30, 2009.

On appeal, counsel asserts that the Office's February 18, 2010 decision is contrary to fact and law.

**FACTUAL HISTORY**

The Office accepted that on May 11, 1993 appellant, then a 32-year-old correctional officer, sustained an acute lumbosacral sprain, herniated lumbar discs and a psychological

condition while locking a combative inmate into his cell. Appellant stopped work that day. Following a brief return to work in August 1993, she stopped work and did not return. Appellant received wage-loss compensation on the daily rolls from August 30, 1993. On September 16, 1994 she underwent L4-5 and L5-S1 hemilaminectomies and discectomies with rod and screw fixation. Appellant underwent additional lumbar surgeries in 1995 and 1997 to replace and revise fixation hardware. The Office authorized all three procedures. It placed appellant on the periodic rolls effective December 7, 1997. She continued under treatment for lumbar pain and depression.<sup>1</sup>

In January 1999, appellant enrolled herself in college-level American Sign Language classes but did not complete a degree. The Office referred her for vocational rehabilitation in April 2000. A vocational rehabilitation counselor performed a transferable skills analysis, noting that appellant had a high school diploma, completed courses in travel, hospitality skills and cosmetology, and operated a beauty salon for approximately six years during the 1980s. The Office approved a two-year college program in computer science with the goal of obtaining work as a programmer. Appellant withdrew from training in April 2003 to relocate from San Diego to Hemet, California. She earned certificates in programming languages but did not complete her degree. The Office placed the vocational rehabilitation effort in interrupted status.

From June 2003 through 2005, appellant was followed for failed back surgery syndrome by Dr. William L. Wilson, an attending Board-certified anesthesiologist. Dr. Tyrone Hardy, an attending Board-certified neurosurgeon, treated her from September 2003 to January 2004 for paraspinal muscle spasms and bilateral carpal tunnel syndrome. Lynn DeBoskey, Ph.D., an attending licensed clinical psychologist, submitted reports from January to June 2004 noting continued depression and a June 2004 suicide attempt requiring hospitalization. Dr. Gopal Madabhushi, an attending Board-certified anesthesiologist, began treating appellant in September 2005 for post-laminectomy syndrome, lumbar myofascial pain syndrome and right-sided S1 joint arthropathy.

In an August 20, 2008 report, Dr. Wilson diagnosed myofascial pain due to the May 11, 1993 injuries. He completed a work capacity evaluation (Form OWCP-5) finding appellant could work eight hours a day with restrictions. Dr. Wilson limited standing, sitting and walking to 40 to 45 minutes continuously, with occasional bending, stooping and twisting. Appellant could lift, push and pull up to 20 pounds and drive to and from work for 45 minutes. Dr. Wilson noted that appellant must be able to change positions at will.

As Dr. Wilson indicated that appellant could work, the Office reinstated the vocational rehabilitation effort on September 18, 2008. In an October 4 and 22, 2008 reports, a vocational rehabilitation counselor noted that appellant graduated high school, earned a cosmetology certificate, owned and operated a beauty salon for approximately six years in the 1980s and completed a training program for hotel front desk clerk and auditor. The counselor found that

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<sup>1</sup> Dr. Peter M. Seymour, an attending psychiatrist, diagnosed major depression with suicidal ideation. He treated appellant through May 2002. Dr. Gary deVoss, an attending licensed clinical psychologist, treated appellant in 2001 and 2002 for fluctuating mood. Dr. William L. Wilson, an attending Board-certified anesthesiologist specializing in pain management, submitted reports from October 2000 to February 2003 diagnosing chronic pain from sacroiliac joint dysfunction and thoracic outlet syndrome.

appellant could qualify for entry level clerical work without additional training. The counselor identified the position of customer complaint clerk, Department of Labor's, *Dictionary of Occupational Titles* (DOT) No. 241.367-014, a sedentary job with occasional lifting up to 10 pounds. The counselor also provided information for the position of administrative assistant, DOT No. 169.167-010.

The Office authorized a 90-day direct placement plan on November 10, 2008, with extensions through April 2009. From December 2008 through April 2009, the vocational rehabilitation counselor provided job leads for 84 customer service representative and 97 administrative positions. Appellant followed up each job lead and provided detailed search logs. In March 2009, appellant started online classes in grant writing as she had not found work.

April 4 and 24, 2009 labor market surveys showed that customer complaint clerk positions were reasonably available in appellant's commuting area, with wages of \$595.00 a week. The vocational counselor noted that the 2008-2009 edition of the Department of Labor's, *Occupational Outlook Handbook* retitled "customer complaint clerk" as "customer service representative," with identical physical demands and equivalent clerical duties.

On April 9, 2009 Dr. Wilson implanted a permanent spinal cord stimulator, allowing appellant to significantly reduce prescribed narcotic medication. This improved her alertness and functioning. In a June 15, 2009 report, Dr. Wilson noted that appellant was able to walk her dog and started a business making and selling gift boxes for adults and babies on line.

By notice dated July 17, 2009, the Office proposed reducing appellant's wage-loss compensation based on her ability to earn \$595.00 a week in the selected position of customer complaint clerk. It afforded appellant 30 days to submit additional evidence or argument. Appellant retained counsel on August 6, 2009 but did not submit any evidence or argument.

By decision dated August 18, 2009, the Office reduced appellant's compensation effective August 30, 2009 under sections 8106 and 8115 of the Act, based on her ability to earn \$595.00 a week in the selected position of customer complaint clerk. It found that appellant did not submit evidence to establish that she was medically unable to work as a customer complaint clerk. The Office noted that appellant remained entitled to medical benefits for treatment of the accepted conditions.

In a September 8, 2009 memorandum, an Office rehabilitation specialist commented that appellant was diligent and highly motivated during her job search. Customer complaint clerk positions remained reasonably available in appellant's commuting area.

In a September 8, 2009 letter, counsel requested a telephonic hearing, held December 9, 2009. During the hearing, he argued that the position of customer complaint clerk was not available in the open labor market. Appellant asserted that she could not work due to physical limitations. She had worked briefly as a bus driver in February 2004 but could not continue due to back pain.

In September 24 and October 29, 2009 reports, Dr. Wilson noted increased lumbar pain and suicidal ideation. Appellant remained a suicide risk because of three previous attempts. Dr. Wilson obtained a physical capacity evaluation demonstrating a sedentary work level with

lifting up to 10 pounds. He stated on December 4, 2009 that appellant's lumbar pain disorder continued to be related to the accepted injuries. In a January 18, 2010 report, Dr. Wilson noted that appellant could increase her activities as she had good pain relief but that prescribed medications caused slight sleepiness.

Dr. DeBoskey noted increased suicidal ideation in September 25 and October 9, 2009 reports, with pain and mood disorders related to the accepted injuries. Appellant no longer had suicidal ideation as of January 14, 2010.

By decision dated and finalized February 18, 2010, an Office hearing representative affirmed the August 19, 2009 decision, finding that the Office met its burden of proof to reduce appellant's compensation. The customer complaint clerk position was reasonably available and within Dr. Wilson's work restrictions.

### **LEGAL PRECEDENT**

Under section 8115(a) of the Federal Employees' Compensation Act,<sup>2</sup> wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. Generally, wages actually earned are the best measure of a wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.<sup>3</sup> The formula for determining loss of wage-earning capacity based on actual earnings, developed in the Board's decision in *Albert C. Shadrick*,<sup>4</sup> has been codified by regulation at 20 C.F.R. § 10.403. Office procedures provide that a determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity should be made after an employee has been working in a given position for more than 60 days.<sup>5</sup> The amount of any compensation paid is based on the wage-earning capacity determination and it remains undisturbed until properly modified.<sup>6</sup>

### **ANALYSIS**

The Office accepted that appellant sustained an acute lumbosacral sprain, herniated lumbar discs necessitating three lumbar fusion surgeries and a psychological reaction. A vocational rehabilitation effort in computer programming from April 2000 through April 2003 did not result in employment. Appellant continued under medical and psychiatric treatment through August 2008. The Office resumed vocational rehabilitation in September 2008. Following a 120-day job placement plan, the Office issued an August 18, 2009 decision reducing

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<sup>2</sup> 5 U.S.C. §§ 8101-8193, 8115(a).

<sup>3</sup> *Hayden C. Ross*, 55 ECAB 455 (2004).

<sup>4</sup> *Albert C. Shadrick*, 5 ECAB 376 (1953).

<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993).

<sup>6</sup> See *Sharon C. Clement*, 55 ECAB 552 (2004).

appellant's wage-loss compensation effective August 30, 2009, based on the selected position of customer complaint clerk, retitled as "customer service representative." The Board finds that this reduction was proper under the law and facts of the case.

The Office found the selected customer complaint clerk position to be suitable work based on restrictions submitted by Dr. Wilson, an attending Board-certified anesthesiologist. As of August 20, 2008, Dr. Wilson found appellant able to work full time with lifting limited to 20 pounds and frequent changes of position. Based on these limitations, the Office developed a vocational rehabilitation plan, resulting in the selection of the customer complaint clerk position, a sedentary job with occasional lifting up to 10 pounds. The physical demands of the selected position were clearly within the limitations provided by Dr. Wilson. The medical evidence also established that the customer complaint clerk position was appropriate for appellant's mental health status. Dr. DeBoskey, an attending licensed clinical psychologist, noted fluctuating mood in reports from September 25 to January 14, 2010. However, he did not opine that appellant was unable to work as a customer complaint clerk. Therefore, the Office properly found that appellant was mentally and physically able to perform the selected position.

The Office also demonstrated that customer complaint clerk positions were readily available in appellant's commuting area. From December 2008 to April 2009, a vocational rehabilitation counselor provided appellant 84 job contacts for customer service representative positions. April 2009 labor market surveys showed that these positions had an average salary of \$595.00 a week.

The Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, education and work experience in determining that the position of customer complaint clerk represented her wage-earning capacity.<sup>7</sup> The vocational rehabilitation counselors assigned to appellant's case noted her diverse education, including a high school diploma, and professional courses in travel, hospitality skills, cosmetology, sign language and computer programming. In addition to her experience as a federal corrections officer, she operated a beauty salon for six years during the 1980s, worked briefly in February 2004 as a bus driver and in June 2009 started an online gift box business.

The weight of the evidence of record establishes that appellant had the requisite physical ability, skills and experience to perform the position of customer complaint clerk and that such positions were reasonably available within her commuting area. Therefore, the Office properly reduced appellant's compensation effective August 30, 2009 based on her capacity to earn wages as a customer complaint clerk.

On appeal, appellant contends that the Office's February 18, 2010 decision is contrary to fact and law. As noted, however, the Office properly found that the selected position was medically and vocationally appropriate and reasonably available in the open labor market.

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<sup>7</sup> *N.J.*, 59 ECAB 171 (2007).

**CONCLUSION**

The Board finds that the selected position of complaint clerk properly represented appellant's wage-earning capacity as of August 30, 2009.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated February 18, 2010 is affirmed.

Issued: March 8, 2011  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

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

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