



## **FACTUAL HISTORY**

On February 22, 2007 appellant, then a 54-year old store worker, injured his right arm and shoulder while picking up a 40-pound bag of dog food at work. He did not stop work but continued with restrictions. The Office accepted the claim for right shoulder sprain and sprains of the right rib/chest, infraspinatus, suprascapularis and rotator cuff areas.

On September 27, 2007 appellant stopped work and underwent authorized right shoulder arthroscopy, repair of a rotator cuff tear and repair of the biceps tendon. Surgery was performed by Dr. Jan E. Saunders, a Board-certified orthopedic surgeon and osteopath. On December 21, 2007 Dr. Saunders released him to return to work for eight hours a day with permanent right arm restrictions on reaching above the shoulder, pushing/pulling and lifting over three pounds. On January 25, 2008 the employing establishment advised the Office that it could not accommodate appellant's physical restrictions.

In a February 1, 2008 report, Dr. Saunders examined appellant's right shoulder and determined that he had full forward flexion and abduction to 180 degrees, external rotation lacking by about five degrees and full internal rotation. Strength testing revealed mild supraspinatus weakness while the subscapularis was normal. Dr. Saunders determined that appellant was neurologically intact, had no muscle atrophy and had reached maximum medical improvement. He explained that, because of the "massive rotator cuff tear that is beyond repair," he would have future problems. Dr. Saunders provided permanent work restrictions which included no overhead activity, and no pushing, pulling or lifting with the right arm greater than one to three pounds.

On April 13, 2008 the employing establishment removed appellant from the employment rolls due to his physical inability to perform the essential duties of his position. The Office placed appellant on the periodic compensation rolls in receipt of wage-loss compensation.

On May 14, 2008 the Office referred appellant for vocational rehabilitation services. In a June 19, 2008 report, the vocational rehabilitation counselor noted that appellant insisted that he was not ready to return to work because he was disabled. Appellant wanted to return to his government position but was advised that it was no longer available and he had been referred for placement with another employer. The rehabilitation counselor noted that appellant had previously worked as a stock clerk, janitor and physical education teacher. Appellant had a Bachelor of Science in education, completed in 1975, and a Master of Arts in organizational management (business). It was determined that appellant would benefit from computer skills training since his limitations were at a sedentary level. The rehabilitation counselor noted that appellant would need a modified keyboard (one handed) as he had a deformity of his upper left arm. On February 3, 2009 appellant agreed to undergo computer skills training to help him obtain employment in the private sector. He completed training on May 28, 2009.

In a March 3, 2009 report, Dr. Robert Nowinski, a Board-certified orthopedic surgeon and osteopath, noted that appellant had no pain, full motion and full strength. Appellant related that his "only discomfort was with repetitive work-related activities in which he fatigues somewhat early." Dr. Nowinski noted that as appellant was currently approved for disability, he pursued that option instead of returning to work.

In an April 28, 2009 report, Dr. Saunders noted that appellant would continue with strengthening, range of motion, stretching and icing. He advised that appellant did not need anything but would have pain in the shoulder at times.

On August 31, 2009 the vocation rehabilitation counselor identified the position of telephone solicitor, DOT No. 299.357-014 with an average weekly salary of \$378.00 a week as conforming to appellant's education and work restrictions. The duties included soliciting orders for merchandise or services over the telephone, calling prospective customers to explain types of service or merchandise offered, quoting prices and trying to persuade customers to buy. The shipping checker duties were also set forth. The position was identified as sedentary, required a general education diploma and found to be reasonably available in appellant's commuting area. The counselor opined that appellant had previously worked in semi-skilled positions and had received Office sponsored training. The vocational rehabilitation counselor verified that there were 2190 telephone solicitor positions in appellant's commuting area.

On September 21, 2009 the Office obtained confirmation from the employing establishment that on September 27, 2007 appellant was a level WG4/step 5 earning \$40,091.27 a year and worked as a store worker. The employing establishment advised that his current annual salary would be \$42,908.72.00.

On September 22, 2009 the Office issued a notice of proposed reduction of benefits finding that appellant was capable of earning wages as telephone solicitor at the rate of \$378.00 per week. It determined that he had a 44 percent wage-earning capacity. The Office afforded him 30 days in which to respond.

In an October 28, 2009 decision, the Office reduced appellant's wage-loss compensation, finding that he was no longer totally disabled and had the capacity to earn wages as a telephone solicitor.

By letter dated November 3, 2009, appellant's attorney requested a hearing, which was held on February 1, 2010.

Appellant submitted an October 27, 2009 treatment note from Dr. Saunders who noted that appellant had questioned his ability for work. Dr. Saunders noted that appellant was employable. He stated: "[Appellant] will have a headset. He just may not be as fast or as dexterous with, his previous history effecting his left side more than his right. [Appellant's] gross motor is good; it may be a little harder to do fine." Dr. Saunders informed appellant that he was "able to be employed" but might "not be as fast or as efficient." In an October 29, 2009 treatment note, he stated that appellant's right shoulder was doing well overall. Appellant reported some soreness with repetitive activities and indicated that he wanted to discuss why he could not work as a telemarketer as he needed documentation. In a December 8, 2009 treatment note, Dr. Saunders noted that appellant felt he could not do typing with his right hand; but the physician reiterated that appellant was "employable." He also recommended a functional capacity evaluation.

Appellant underwent a functional capacity evaluation on January 22, 2010. On February 16, 2010 Dr. Saunders reviewed the test results and determined that appellant could

occasionally push, pull, carry and lift. He had trouble with fine dexterity. Dr. Saunders again indicted that appellant might be able to use a voice-activated system. He explained that appellant's hand skills were limited by neuromotor deficits and his ability to complete psychometric questionnaires was limited. Appellant required assistance for completing paperwork because of his hand. He had complaints of increased shoulder pain but had good motion. Dr. Saunders opined that appellant's skills were limited secondary to his shoulder and his preexisting upper extremity disability.

By decision dated March 19, 2010, the Office hearing representative affirmed the Office's October 28, 2009 wage-earning capacity determination.

### **LEGAL PRECEDENT**

Once the Office 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>1</sup>

Section 8115(a) of the Federal Employees' Compensation Act,<sup>2</sup> provides in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings if his actual 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 they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.<sup>3</sup> If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, his degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his wage-earning capacity in his 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 one reasonably available in the general labor market in the commuting area in which the employee lives.<sup>6</sup> In determining an employee's wage-earning capacity, the Office may not select a makeshift or odd lot position or one not reasonably available on the open labor market.<sup>7</sup>

When the Office 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

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<sup>1</sup> *Betty F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

<sup>2</sup> 5 U.S.C. § 8115.

<sup>3</sup> *Hubert F. Myatt*, 32 ECAB 1994 (1981); *Lee R. Sires*, 23 ECAB 12 (1971).

<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.*

<sup>7</sup> *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

by the Office or to an Office 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 limitation, 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.<sup>8</sup> Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.<sup>9</sup>

### ANALYSIS

The Office accepted appellant's claim for right shoulder sprain including sprains of the right rib/chest, infraspinatus, suprascapularis and rotator cuff areas. It authorized right shoulder surgery and paid appropriate wage-loss compensation.

The medical evidence includes a December 21, 2007 report from appellant's treating physician, Dr. Saunders, who released him to return to work for eight hours a day with permanent right arm restrictions of no reaching above shoulder, no pushing/pulling and no lifting over three pounds. On February 1, 2008 Dr. Saunders advised that appellant had reached maximum medical improvement. He noted that because of the massive rotator cuff tear that was beyond repair appellant would have future problems. Dr. Saunders repeated the recommended permanent work restrictions which included no overhead activity, and no pushing, pulling or lifting with the right arm greater than one to three pounds. His April 28, 2009 report generally recommended additional strengthening exercises but noted that appellant did not need anything. The medical evidence from appellant's attending physician established his capacity to perform modified sedentary duty.

The employing establishment advised the Office that it was unable to accommodate appellant's restrictions. The Office referred appellant for vocational rehabilitation counseling. The vocational rehabilitation counselor reviewed appellant's educational training including a computer skills class and the medical restrictions. He identified the position of telephone solicitor, DOT No. 299.357-014 with an average weekly salary of \$378.00, as within appellant's capability to perform. The position was identified as sedentary, requiring a high school diploma and reasonably available in appellant's commuting area on a full-time basis. The rehabilitation counselor noted that appellant was qualified to perform the position based his previous worked in semi-skilled positions and Office sponsored training. The Board notes that the Office's rehabilitation counselor is an expert in the field and his report establishes the vocational suitability of the telephone solicitor position.<sup>10</sup> The Board finds that the medical suitability of this position is established by Dr. Saunders' reports setting forth appellant's work restriction. The work restrictions recommended by the attending physician are consistent with the sedentary physical requirements of the telephone solicitor position.

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<sup>8</sup> *Karen L. Lonon-Jones*, 50 ECAB 293, 297 (1999).

<sup>9</sup> *Id.* See *Shadrick*, 5 ECAB 376 (1953).

<sup>10</sup> See *Lawrence D. Price*, 54 ECAB 590 (2003).

Dr. Saunders commented upon appellant's assertions that he could not work. On October 27, 2009 he referenced appellant's concerns but found that appellant was "employable" though he might not be as fast or as efficient as others. On December 8, 2009 Dr. Saunders again related appellant's assertions that he could not work but reiterated that he was employable and suggested a functional capacity evaluation. Following review of this evaluation, on February 16, 2010 he again found that appellant had the physical capacity to perform the selected position. Appellant was limited secondary to his shoulder and his preexisting upper extremity disability. The medical evidence of record establishes appellant's capacity to perform the duties of a telephone solicitor.

On March 3, 2009 Dr. Nowinski noted that appellant related discomfort with "repetitive work-related activities" and suggested that appellant pursue disability. He did not offer any specific work restrictions or address the issue of his capacity to perform the duties of telephone solicitor.

The Board finds that the Office considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment and age and employment qualifications, in determining that the position of telephone solicitor represented his wage-earning capacity.<sup>11</sup> The evidence establishes that appellant is no longer totally disabled from all work and is able to perform the duties of the selected position. The Office also properly determined appellant's wage-earning capacity in accordance with the formula developed in *Albert C. Shadrick*,<sup>12</sup> to reduce his compensation effective October 28, 2009. It applied the formula using appellant's salary when disability began, his current adjusted pay rate for the job held when injured, and the earnings he was currently capable of earning as a telephone solicitor in determining that he had a 44 percent wage-earning capacity.

The Board finds that the Office met its burden of proof to establish that the constructed position of telephone solicitor represented appellant's wage-earning capacity as of October 28, 2009.

### **CONCLUSION**

The Board finds that the Office met its burden of proof to reduce appellant's wage-loss compensation based on its determination that the position of telephone solicitor represents his wage-earning capacity.

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<sup>11</sup> *James M. Frasher*, 53 ECAB 794 (2002).

<sup>12</sup> *Supra* note 9; *see also* 20 C.F.R. § 10.403.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 19, 2010 decision of the Office of Workers' Compensation Programs 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