



On appeal, appellant's counsel contends that the constructed position is not within appellant's work restrictions. Appellant also argues that procedural errors were made by OWCP's hearing representative in her decision.

### **FACTUAL HISTORY**

On June 4, 2007 appellant, then a 54-year-old meat inspector, filed an occupational disease claim alleging that he developed bilateral carpal tunnel syndrome as a result of his work duties.<sup>2</sup> OWCP accepted the claim for bilateral carpal tunnel syndrome and authorized left wrist endoscopic carpal tunnel release surgery, which occurred on October 9, 2007, and right wrist endoscopic carpal tunnel release surgery, which occurred on December 14, 2007. By letter dated June 24, 2008, it placed appellant on the periodic rolls for temporary total disability.<sup>3</sup>

A functional capacity evaluation was performed on June 3, 2008 and a report was issued that day detailing appellant's work restrictions.

In a July 14, 2008 work capacity evaluation form (Form OWCP-5c), Dr. Arthur E. Thiel, a treating Board-certified orthopedic surgeon with a subspecialty certification in hand surgery, indicated that appellant was capable of working an eight-hour day with restrictions. The only restriction noted by him was that appellant was not to perform any repetitive activity.

On July 31, 2008 OWCP referred appellant for vocational rehabilitation services.

The vocational rehabilitation specialist identified the positions of salesperson, parts; service parts driver; taxi cab driver; cashier II and house officer with a weekly salary of as within appellant's work restrictions and reasonably available in sufficient numbers in appellant's commuting area. The physical requirements listed in the Department of Labor, *Dictionary of Occupational Titles (DOT)* for salesperson, parts with *DOT #279.357.062* included frequent reaching, handling and finger; light strength; no climbing, balancing, kneeling or crawling; and occasional stooping and crouching.

In a June 1, 2009 status report, Dennis Dexter, a rehabilitation specialist, noted vocational rehabilitation services were unsuccessful. He indicated the following positions were suitable for appellant: salesperson, parts with a weekly salary of \$372.00; service parts driver with a weekly salary of \$393.00; taxi cab driver with a weekly salary of \$459.00; cashier two with a weekly salary of \$349.00 and house officer with a weekly salary of \$449.00. The positions of house officer, cashier two and salesperson, parts were listed as light physical work while the position of

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<sup>2</sup> OWCP assigned claim File No. xxxxxx951. On November 9, 2007 it combined claim File No. xxxxxx991 with claim File No. xxxxxx738 with the former number as the master file number. Under claim File No xxxxxx738 appellant filed an occupational disease claim on April 17, 2006 alleging that his ganglion cyst was employment related. OWCP denied this claim by decision dated June 15, 2006, which was affirmed by OWCP's hearing representative on August 23, 2006. On May 3, 2007 the Board affirmed OWCP's decisions denying his claim in File No. xxxxxx738. See Docket No. 07-404 (issued May 3, 2007).

<sup>3</sup> On April 14, 2009 the Office of Personnel Management (OPM) approved appellant's application for disability retirement. Appellant was retired from the employing establishment on disability effective April 25, 2009.

service parts driver was listed as medium physical work and the taxi cab driver was listed as sedentary. All of these positions were reasonably available in appellant's commuting area.

On October 16, 2009 OWCP proposed to reduce appellant's compensation for wage loss, noting that the medical and factual evidence established that he was no longer totally disabled but had the capacity to earn wages as a salesperson, parts with a weekly salary of \$372.00.

Appellant disagreed with the proposal to reduce his wages in the constructed position of salesperson, parts as he alleged the physical restrictions for the position were outside the restrictions set by his treating physician. In support of his contention, he submitted a November 4, 2009 Form OWCP-5c from Dr. Thiel, who indicated that appellant was precluded from performing any work involving rapid repetitive bilateral motion. Dr. Thiel noted that appellant was capable of working an eight-hour day with restrictions. The restriction noted by Dr. Thiel included up to one hour of reaching above the shoulder, pushing, pulling, lifting, squatting, kneeling, climbing, twisting and stooping and up to 10 times the same motion a hour for his wrist and elbows.

By decision dated November 24, 2009, OWCP adjusted appellant's compensation benefits effective that day based upon its determination that the position of salesperson, parts represented his wage-earning capacity. It noted that his weekly pay rate when injured was \$893.80 and that the current pay rate for job and step when injured was \$952.54. OWCP found appellant was capable of earning \$372.00 a week, that the adjusted wage-earning capacity a week was \$348.58, that the percentage of new wage-earning capacity was 39 percent, that the loss in wage-earning capacity amount a week was \$545.22, leaving him with a compensation rate of \$408.92. It calculated that this resulted in a new compensation rate every four weeks of \$1,635.66 beginning on November 22, 2009.

On December 1, 2009 appellant requested an oral hearing before OWCP's hearing representative, which was held on March 10, 2010.

In a January 13, 2010 duty status report (Form CA-17), Dr. Thiel indicated that appellant was capable of working with restrictions. The restrictions noted by Dr. Thiel include no repetitious activity requiring holding and manipulating small objects; two to three hours of intermittent fine manipulation; no ladders; and lifting up to 35 pounds. He also noted pushing/pulling and simple grasping with weakness on the form.

On January 27, 2010 OWCP received a December 23, 2009 report from Dr. Thiel. A review of the functional capacity evaluation test revealed that appellant had difficulty with rapid manipulation and gripping, grasping and placing small devices in appropriate positions. Based on these results, Dr. Thiel concluded that appellant was unable to perform a job requiring repetitious gripping and grasping.

On March 16, 2009 OWCP received Dr. Thiel's June 12, 2009 report. In this report, Dr. Thiel reviewed the functional capacity evaluation and concluded that appellant was capable of performing work which was nonrepetitious. He opined that appellant could not return to his date-of-injury job and recommended finding a job within the restrictions found in the functional capacity evaluation.

By decision dated June 1, 2010, OWCP's hearing representative affirmed the November 24, 2009 decision reducing appellant's wage-loss compensation.

### **LEGAL PRECEDENT**

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.<sup>4</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 his wage-earning capacity. If the actual earnings do not fairly and reasonably represent the employee's wage-earning capacity or if the employee has no actual wages, the wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the employee's usual employment, age, 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>5</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's, *DOT* or otherwise available in the open market, that fit the employee's capabilities with regards to his 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>6</sup> and codified by regulations at 20 C.F.R. § 10.403<sup>7</sup> should be applied.

### **ANALYSIS**

OWCP accepted appellant's claim for bilateral carpal tunnel syndrome and placed him on the periodic rolls for temporary total disability. It reduced his compensation effective November 24, 2009 based on its finding that he had the capacity to earn wages in the selected position of salesperson, parts.

The Board finds that OWCP failed to establish that appellant was capable of performing the duties of the selected full-time position. On July 14, 2008 Dr. Thiel, an attending Board-certified orthopedic surgeon with a subspecialty certification in hand surgery, concluded that appellant was capable of working an eight-hour day with a restriction of no repetitive work. He found that appellant was precluded from performing any repetitive work or job requiring repetitious grasping and gripping. Dr. Thiel indicated that appellant was unable to perform any work involving rapid repetitive bilateral motion, which he restricted to no more than 10 times the

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<sup>4</sup> *T.F.*, 58 ECAB 128 (2006); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *H.N.*, Docket No. 09-1628 (issued August 19, 2010).

<sup>5</sup> 5 U.S.C. § 8115(a); *see N.J.*, 59 ECAB 171 (2007); *T.O.*, 58 ECAB 377 (2007); *Dorothy Lams*, 47 ECAB 584 (1996).

<sup>6</sup> 5 ECAB 376 (1953).

<sup>7</sup> 20 C.F.R. § 10.403.

same motion a hour for the wrist and elbows. The vocational rehabilitation expert found that the position of parts salesperson was suitable to appellant's medical restrictions as it classified as light. According to the Department of Labor, *DOT* the physical requirements for the position of salesperson, parts includes frequent reaching, handling and fingering. The Department of Labor, *DOT* provides that an activity is frequent if it is performed from one-third to two-thirds of the time. Dr. Thiel's restrictions included no rapid repetitive bilateral motion work at no more than 10 times the same motion in one hour pertain to appellant's wrists and elbows. The restrictions set by Dr. Thiel do not conform to the physical requirements identified for the selected position. The record does not delineate whether the activities of frequent handling, reaching and fingering complies with the work restriction of no repetitive work or rapid bilateral motion. OWCP's procedures state that, unless the medical evidence is clear and unequivocal that the selected position is medically suitable, it should send a job description to an appropriate physician for an opinion regarding whether the claimant can perform the position.<sup>8</sup> The medical evidence of record does not clearly and unequivocally establish that appellant can perform the duties of the selected position. As OWCP did seek clarification from Dr. Thiel, it did not meet its burden of proof to reduce appellant's compensation.

### **CONCLUSION**

The Board finds that OWCP did not meet its burden of proof in reducing appellant's wage-loss compensation benefits effective November 24, 2009.

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<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(d) (December 2009); *see also John D. Jackson*, 55 ECAB 465 (2004); *William H. Woods*, 51 ECAB 619 (2000).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated June 1, 2010 is reversed.

Issued: November 4, 2011  
Washington, DC

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

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

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