

license, no current computer skills and no recent professional office experience. Appellant also contends that the medical evidence was not appropriately developed and that OWCP did not discuss the mechanism of the initial injury in finding that the medical assistant position was suitable.

FACTUAL HISTORY

This case was previously before the Board.² On May 10, 1988 appellant, then a 49-year-old staff nurse, filed an occupational disease claim for a low back condition sustained while turning a patient in bed. Appellant stopped work on May 9, 1988 and returned to work in October 1989 for one day. OWCP accepted her claim for low back strain, dysthemia and psychological factors affecting physical condition. By decision dated June 17, 1993, the Board affirmed OWCP's June 5, 1992 decision, finding that her request for reconsideration of the termination of appellant's compensation benefits for her orthopedic condition was untimely filed and did not demonstrate clear evidence of error. The facts and circumstances of the case are incorporated herein by reference.

By letter dated June 2, 2008, OWCP referred appellant to Dr. E. Richard Dorsey, a Board-certified psychiatrist, for a second opinion. In a July 2, 2008 report, Dr. Dorsey diagnosed a depressive disorder, not otherwise specified. He noted that appellant had an occupational back injury with some continuing pain and disability and related life circumstance problems. Appellant also had nonoccupational asthma, cystitis, breast cancer, diabetes mellitus, headache, diarrhea and status post knee surgery. These nonoccupational physical health problems impaired her function and related life circumstance. Dr. Dorsey advised that appellant had no significant mental impairment with respect to her activities of daily living. Based primarily on her subjective complaints, appellant had a slight impairment with her ability to give and take supervision, cooperate with others, work under deadlines or otherwise discharge the duties of her usual and customary occupation as a registered nurse. Dr. Dorsey noted that she probably could not mentally handle the pace, volume, pressure or complexity of duties as a surgical intensive care unit nurse, but was mentally capable of working in a lower pressure nursing situation, such as an outpatient clinic. He also opined that appellant did not require vocational rehabilitation from a psychiatric standpoint but could participate in such program. Appellant continued to experience symptoms of depression, which were precipitated by the occupational injury and which, according to her history and most records, continued without any period of complete resolution.

In a December 2, 2008 report, Dr. Christopher Cheng, a treating Board-certified family practitioner, listed appellant's medical conditions as chronic cystitis, intermittent asthma, obesity, cancer of breast, essential hypertension, hyperlipidemia, diabetes mellitus type (uncomplicated), osteoporosis, depression (stable) and status post total knee replacements in December 2004.

By letter dated December 9, 2008, OWCP informed appellant that it had been advised that she impeded the rehabilitation efforts of her assigned vocational counselor. The senior

² 44 ECAB 765 (1993).

claims examiner was advised by the counselor that appellant refused to meet or participate in any program to return to work following on initial meeting. She advised appellant that if she did not provide good reason for not participating in vocational rehabilitation effort, her compensation would be reduced to zero pursuant to section 8113(b) of FECA.

In a December 10, 2008 report, appellant's vocational counselor noted that appellant was capable of obtaining work as a medical assistant or as a receptionist. She found 11 employers with positions within a 30-mile radius of appellant's home. The vocational counselor noted that five openings were identified for medical assistants/technicians and three openings were identified for receptionist/customer service positions. The employers did not have current openings but employed both medical assistants and receptionists within the past year. The vocational counselor noted that the salary was dependent on experience, but wages ranged from \$10.00 per hour to \$18.00 per hour.

By letter dated December 22, 2008, OWCP informed appellant that it determined that the job duties of medical assistant or receptionist were within her work limitations and that OWCP would provide 90 days of placement services so that she could reach the goal of reemployment. At the end of the rehabilitation period, it would reduce her compensation based on her ability to work in the aforementioned positions. The duties of a medical assistant included performing any combination of duties under the direction of a physician to assist in examination and treatment of patients. These duties include, interviewing patients, measuring vital signs and recording information on patient's charts, preparing treatment rooms for examination, draping patients with covering and positioning instruments and equipments; cleaning and sterilizing instruments, completing inventories, ordering medical materials; and keeping records.

In a December 17, 2008 report, Dr. Cheng noted that appellant had multiple medical problems as listed in his prior report. He advised that she had chronic pelvic pain for one year now and that this condition made her unable to work.

In a progress report, the vocational counselor, discussed her interactions with appellant from December 23, 2008 through January 15, 2009. She noted that appellant attended one appointment, missed two appointments and refused to accept job leads during this period. Appellant was insulted that she would be expected to apply for medical assistant or receptionist positions and that she did not feel she could handle any work due to her physical condition.

On March 10, 2009 OWCP proposed reducing appellant's compensation for wage loss, finding that she had the capacity to earn wages as a medical assistant. In an April 3, 2009 decision, it finalized the reduction of her compensation. The decision did not affect appellant's medical benefits.

On April 30, 2009 appellant requested reconsideration.

In an April 28, 2009 report, Dr. Cheng reiterated that appellant had chronic pelvic pain for one year and that this condition has made her unable to work. Appellant had been seen by multiple specialists and had cystoscopy done twice and given antibiotics but continued to have lower abdominal pain almost everyday. Dr. Cheng noted other conditions that contributed to her inability to work and that she should be classified as disabled. As to appellant's depression she

stayed awake most of the night and remained restless despite taking medication. Dr. Cheng noted that she suffered from osteoporosis and noted a history of hurting her back trying to lift a patient many years ago while working as a nurse. X-ray studies showed degenerative joint disease of the lumbosacral spine and a compression fracture of L4. Dr. Cheng noted that appellant had osteoarthritis of the knees for which she had bilateral knee replacements in December 2004 and continued to have pain on and off. Appellant also had side effects from the tamoxifen used to treat her breast cancer. Dr. Cheng further noted that she also had asthma, hyperlipidemia, essential hypertension and diabetes.

In a May 4, 2009 report, Dr. Jory F. Goodman, a treating Board-certified psychiatrist and neurologist, stated that to a reasonable medical certainty appellant suffered from severe and chronic major depression compounded by psychological factors affecting her medical illness. He noted her failure to understand OWCP's process, the failure of her caregivers to counsel her or adhere to the process and her further decompensation. Dr. Goodman noted that with proper ongoing care and supervision modest improvement could be achieved in appellant's mood and quality of life but he did not believe that she would ever achieve the capability of returning to gainful employment in any capacity.

By decision dated July 15, 2009, OWCP denied modification of its April 3, 2009 decision.

On April 9, 2010 appellant, through her attorney, requested reconsideration, contending that OWCP did not meet its burden and that she remained totally disabled. Appellant's attorney contended that the position of medical assistant was not suitable, as appellant was trained as a nurse in 1964 and her nursing license had long since expired. Appellant had no recent office experience and was 70 years old. She also argued that OWCP did not establish that the position of medical assistant was reasonably available.

By decision dated September 2, 2010, OWCP denied modification of the April 3, 2009 wage-earning capacity determination.

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 in such benefits.³

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 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

³ *Carla Letcher*, 46 ECAB 452 (1995).

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.⁴

When OWCP makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to OWCP's 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 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.⁵ 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.⁶

In determining an employee's wage-earning capacity based on a position deemed suitable but not actually held, OWCP must consider the degree of physical impairment, including impairments resulting from both injury-related and preexisting conditions, but not impairments resulting from post injury or subsequently acquired conditions.⁷ Any incapacity to perform the duties of the selected position resulting from subsequently acquired conditions is immaterial to the loss of wage-earning capacity.⁸

ANALYSIS

OWCP accepted appellant's claim for a low back strain, dysthemia and psychological factors affecting a physical condition. It paid compensation and medical benefits. On April 3, 2009 OWCP reduced appellant's compensation to reflect that she had the capacity to earn wages as a medical assistant. This determination was upheld in decisions dated July 15, 2009 and September 2, 2010. As OWCP reduced appellant's wage-loss compensation on the grounds that she had the capacity to earn wages in the constructed position of medical assistant, it had the burden to establish that this position was suitable.⁹

The Board finds that the medical evidence is not sufficient to establish that appellant had the ability to perform the position of medical assistant. Dr. Dorsey, the second opinion physician opined that, based primarily on her subjective complaints, she had a slight impairment and ability to give and take supervision, cooperate with others, work under deadlines and otherwise discharge duties of her usual and customary occupation of a registered nurse. He opined that appellant could probably not mentally handle the pace, volume, pressure and complexity of duties of a surgical nurse, she was "certainly mentally capable of working in a lower pressure

⁴ See *Wilson L Clow, Jr.*, 44 ECAB 157 (1992); see also 5 U.S.C. § 8115(a).

⁵ See *Dennis D. Owen*, 44 ECAB 475 (1993).

⁶ 5 ECAB 376 (1953); see also 20 C.F.R. § 10.430.

⁷ *H.C.*, Docket No. 10-2016 (issued June 20, 2011).

⁸ *Id.*

⁹ *Id.*

nursing situation, such as an outpatient clinic, independent of any physical disability the relevant special examiners may identify. Dr. Dorsey found that, from an emotional point-of-view, she was capable of working as a nurse in a low pressure field. However, although he opined that appellant was capable of working in a less stressful position from an emotional standpoint, he specifically noted that his opinion did not concern her physical condition. In addition to being accepted for certain emotional conditions, appellant's claim was accepted for low back strain. There is also evidence that she had preexisting medical conditions, such as asthma. Dr. Cheng noted that appellant had multiple ailments which included asthma, essential hypertension, diabetes and chronic cystitis. There is no medical opinion addressing whether appellant was capable of performing the duties of a medical assistant that considered her accepted low back strain or her preexisting medical conditions.

OWCP's burden is not satisfied by establishing that the selected position is medically suitable. As noted, in determining an employee's wage-earning capacity based on a position deemed suitable but not actually held, OWCP must also determine whether the position is vocationally suitable, taking into account her education, age and prior experience.¹⁰ OWCP relied upon the vocational rehabilitation counselor's opinion to determine that these elements had been met. Because the rehabilitation specialist is an expert in the field of vocational rehabilitation, OWCP may rely on his or her opinion as to whether a job was reasonably available.¹¹ Assistance from a vocational rehabilitation counselor does not, however, relieve the claims examiner or hearing representative of his responsibility to properly evaluate all of the relevant evidence in reaching a final determination. OWCP never evaluated the evidence as to whether the medical assistant position was available to appellant with regard to nonmedical factors such as her age and qualifications. Appellant was 70 years old at the time that OWCP found that she was capable of working as a medical assistant. She had not worked for over 20 years. Although appellant had training as a nurse, that training was received in India in 1964. There is little evidence with regard to her computer skills. These important factors affect appellant's ability to reasonably compete for a position as a medical assistant, but OWCP did not address these factors.

CONCLUSION

The Board finds that OWCP did not establish that appellant's wage-earning capacity was represented by the constructed position of medical assistant.

¹⁰ 20 C.F.R. § 10.403.

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8.b(2) (October 2009).

ORDER

IT IS HEREBY ORDERED THAT the September 2, 2010 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 7, 2011
Washington, DC

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

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

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