

accepted her claim for a single-episode anxiety reaction. Appellant returned to limited duty for four hours a day on February 3, 2003. OWCP paid compensation for temporary total disability on the periodic rolls.

A conflict in medical opinion arose on the extent of appellant's disability for work. Her clinical psychologist, Dr. William C. Pickering, reported that she continued to be partially disabled as a result of the injury. OWCP's referral psychiatrist, Dr. Albert Shnaider, found that appellant's acute stress reaction was in remission with no current injury-related factors of disability. To resolve this conflict, OWCP referred appellant, together with the case record and a statement of accepted facts, to Dr. Irving H. Berkovitz, a Board-certified psychiatrist and clinical professor at the UCLA School of Medicine. On October 23, 2003 Dr. Berkovitz found that appellant could work eight hours a day, as long as the work was not outdoors where a dog could be encountered.

On September 16, 2007 Dr. Pickering believed that appellant could work again. He recommended that she work 20 hours per week for six months and then increase her hours to 40.

On September 24, 2007 appellant found part-time work as the assistant to the controller for a company in Whittier, CA, the duties of which included filing, recording checks, preparing the banking, wiring transactions and overall accounts receivable and payable for the company. Her duties also included processing incoming mail and distributing it to correct departments, answering telephones, assisting the billing department with invoicing and special office projects as needed.

On June 11, 2008 Dr. Pickering released appellant to full-time work. On August 18, 2008 Dr. E. Richard Dorsey, an OWCP referral psychiatrist, agreed that appellant was capable of working 40 hours a week. Appellant was to avoid contact with dogs and avoid above-average pace, volume and pressure for the job classification of clerical office worker. OWCP provided Dr. Dorsey with a description of the duties of an accounting clerk.² It was his opinion that appellant was mentally capable of performing such a job, which he thought probably overlapped the duties of her current clerical office position.

Based on the medically determinable residuals of the injury, and taking into consideration all significant preexisting impairments and pertinent nonmedical factors, an OWCP rehabilitation counselor found that appellant was able to earn \$639.20 a week as an accounting clerk. She explained that appellant previously completed self-procured training to obtain a certificate in accounting from an adult education facility. The rehabilitation counselor also had been

² "The duties of an accounting clerk involve performing any combination of following calculating, posting, and verifying duties to obtain financial data for use in maintaining accounting records: Compiles and sorts documents, such as invoices and checks, substantiating business transactions. Verifies and posts details of business transactions, such as funds received and disbursed, and totals accounts, using calculator or computer. Computes and records charges, refunds, cost of lost or damaged goods, freight charges, rentals, and similar items. May type vouchers, invoices, checks, account statements, reports, and other records, using typewriter or computer. May reconcile bank statements. May be designated according to type of accounting performed, such as: accounts-payable clerk (clerical); accounts-receivables clerk (clerical); bill recapitulation clerk (utilities); rent and miscellaneous remittance clerk (insurance); tax-record clerk (utilities)."

employed as a part-time accounting assistant since September 2007.³ The hours and work environment were consistent with the limitations placed by Dr. Dorsey. The mid-range pay, \$639.20 per week according to labor market surveys in May and June 2009, was appropriate for appellant's background and current work experience. Further, the rehabilitation counselor found that the job was being performed in sufficient numbers so as to make it reasonably available to appellant within her commuting area. Of eight employers contacted, five had current openings, three hired within the last week, and one reported an average of two openings per month.

In a decision dated July 15, 2009, OWCP reduced appellant's wage-loss compensation to reflect her capacity to earn wages as an accounting clerk. It found that her actual earnings in part-time work did not fairly and reasonably represent her wage-earning capacity, as she was capable of working full time.

On May 5, 2010 Dr. Pickering noted that appellant was currently discontent with her part-time position: "Within the past few months, they have been taking away work, giving her work, and putting her in the stockroom to go over old files for shredding. They sometimes distribute work to others. [She] feels that her work is of little importance, and that she is a sort of 'excrescence' or appendage." Dr. Pickering stated that appellant had been crying, unhappy, depressed and anxious. He ordered her to stay off work until her condition improved. Dr. Pickering added that appellant had been willing to work at her current place of employment.

In a decision dated May 18, 2010, an OWCP hearing representative affirmed the determination of appellant's wage-earning capacity.

On appeal, appellant argues that she worked part time as a clerk, not as an accounting clerk. Her main concern is that "they made a decision based on doctor Bedrin's examination but the record will show that there never was a conflict in [my] claim as required by OWCP regulation." Appellant also argues OWCP used an incorrect formula to reduce her payment and used old records and never attempted to find out what her condition was. She adds that OWCP disregarded the information presented by her doctor.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of her duty.⁴ "Disability" means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.⁵

In determining compensation for partial disability, the wage-earning capacity of an employee is determined by her actual earnings, if her actual earnings fairly and reasonably represent her wage-earning capacity. If the actual earnings of the employee do not fairly and

³ Although appellant was employed as the assistant to the controller, or chief accounting officer, the title of her position does not appear to have been accounting assistant.

⁴ 5 U.S.C. § 8102(a).

⁵ 20 C.F.R. § 10.5(f).

reasonably represent her wage-earning capacity or if the employee has no actual earnings, her wage-earning capacity as appears reasonable under the circumstances is determined with due regard to the nature of her injury, the degree of physical impairment, her usual employment, her age, her qualifications for other employment, the availability of suitable employment, and other factors or circumstances which may affect her wage-earning capacity in her disabled condition.⁶

When OWCP makes a medical determination of partial disability and of the 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 *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits the employee's capabilities in light of her physical limitations, 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. 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.⁷

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.⁸

ANALYSIS

In 2003 an impartial medical specialist, Dr. Berkovitz, found that appellant could work eight hours a day, as long as the work was not outdoors where a dog could be encountered.⁹ In 2007 the attending psychologist, Dr. Pickering, recommended that appellant work 20 hours per week for six months and then increase her hours to 40, or full time. Appellant began part-time work as an assistant to a controller in Whittier, CA. In 2008 Dr. Pickering released her to full-time work. Shortly thereafter, Dr. Dorsey, an OWCP referral psychiatrist, agreed that appellant was capable of working 40 hours a week with limitations.

The clear weight of the medical evidence established that appellant was not totally disabled for work as a result of her June 15, 2002 employment injury. Appellant was working part time. The wage-earning capacity of an employee is determined by her actual earnings, but only if her actual earnings fairly and reasonably represent her wage-earning capacity. OWCP found that appellant's wages in a part-time position did not fairly and reasonably represent her wage-earning capacity, as she was capable of working a full 40 hours per week. The medical evidence supports OWCP's finding.

⁶ 5 U.S.C. § 8115(a).

⁷ *Hattie Drummond*, 39 ECAB 904 (1988); see *Albert C. Shadrick*, 5 ECAB 376 (1953).

⁸ *Harold S. McGough*, 36 ECAB 332 (1984).

⁹ See 5 U.S.C. § 8123(a) (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).

To determine appellant's entitlement to compensation for partial disability, OWCP properly referred her to a wage-earning capacity specialist for the selection of a position listed in the Department of Labor's *Dictionary of Occupational Titles* that fit her capabilities in light of her physical limitations, education, age and prior experience. The rehabilitation counselor found that appellant could work as an accounting clerk. She was vocationally qualified for the position: she had previously completed training in that field, and she had been working as a controller's assistant since September 2007. The hours and work environment were consistent with her limitations. Dr. Dorsey found that appellant was mentally capable of performing the specific duties of an accounting clerk, which, he observed, probably overlapped the duties of her current clerical position. It was a position that avoided contact with dogs, limited her work to 40 hours a week, and did not indicate an above-average pace, volume or pressure for the job classification of a clerical office worker.

Based on labor market surveys, the rehabilitation counselor found that the midrange pay of \$639.20 a week was appropriate for appellant's background and current work experience. She determined that the position was being performed in sufficient numbers so as to make it reasonably available to appellant within her commuting area.

The Board finds that OWCP properly determined that appellant's wage-earning capacity as an accounting clerk appears reasonable under the circumstances. OWCP gave due regard to such statutory factors as the nature of her injury, her usual employment, her qualifications for other employment and the availability of suitable employment and OWCP properly compared the prevailing wage rate of the selected position with the current pay rate of the position appellant held on the date of injury, in accordance with the principles set forth in *Albert C. Shadrick*. The Board has reviewed these calculations and finds them to be correct.

The case of *T.O.*,¹⁰ is similar. After his employment injury, the employee returned to work as a part-time file clerk. OWCP determined, as it did here, that his actual earnings did not fairly and reasonably represent his wage-earning capacity because the medical evidence established that he was capable of full-time work. It therefore reduced his compensation for wage loss to reflect his capacity to earn wages in the selected full-time position of general clerk, which the Board found proper under the law and the facts of the case.

The Board finds that OWCP has met its burden to justify the reduction of appellant's compensation for wage loss. The Board will affirm OWCP's May 18, 2010 decision.

On appeal, appellant asserts that the title of her part-time position was not accounting assistant. The title of the position is not determinative; the rehabilitation counselor understood the nature of the position and the essential duties that appellant performed.

Appellant's main concern is that OWCP based its decision on an examination by a Dr. Bedrin. She states there never was a conflict in her case. The record shows that a conflict in medical opinion did arise and that OWCP referred appellant to Dr. Berkovitz to resolve it. Dr. Berkovitz was a Board-certified psychiatrist and clinical professor at the UCLA School of Medicine. Moreover, OWCP did not rely on any one doctor's examination when it determined

¹⁰ 58 ECAB 377 (2007).

that appellant was no longer totally disabled for work as a result of her accepted employment injury. Dr. Berkovitz, Dr. Pickering and Dr. Dorsey all found that she could work 40 hours a week with limitations.

Appellant argues that OWCP used an incorrect formula to reduce her payment, but she did not explain. OWCP followed standard procedure and used the same formula it uses in every determination of wage-earning capacity. As noted, the Board finds the calculations to be correct.

As for the allegation that OWCP used old records and never attempted to find out what her condition was, appellant again did not fully explain her contention. On May 5, 2010 more than eight months after OWCP determined her capacity to earn wages as an accounting clerk, Dr. Pickering noted that appellant had become dissatisfied with her part-time job. Appellant felt that her work was of little importance. This recent dissatisfaction had no bearing on her capacity to earn wages elsewhere in the open labor market. Regardless of what appellant's current employer had her doing, she still had the capacity to work in the accounting field as a clerk. That did not change. Dr. Pickering took appellant off work temporarily because of complaints with her current employer, but he did not report that the June 15, 2002 incident had now, eight years later, rendered her totally disabled for all work.¹¹ The Board finds that this most recent report from Dr. Pickering on appellant's current condition had no bearing on OWCP's finding that she was capable of earning full-time wages as an accounting clerk in the open labor market.

Appellant may request modification of OWCP's July 15, 2009 wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

CONCLUSION

The Board finds that OWCP properly determined that appellant had the capacity to earn wages as an accounting clerk in the open labor market.

¹¹ Compensation for loss of wage-earning capacity is based upon loss of the *capacity* to earn, not on actual wages lost. *Roy Matthew Lyon*, 27 ECAB 186 (1975).

ORDER

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

Issued: September 23, 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