



his claim for an old bucket-handle tear of the left medial meniscus, a sprain and strain of a lumbosacral joint ligament, bulging discs at the L2-3, L4-5 and L5-S1 levels and facet hypertrophy of the lumbar spine. Appellant received compensation for temporary total disability on the periodic rolls.

After his surgeon found that he was at maximum medical improvement and would likely require permanent restrictions, OWCP referred appellant to a vocational rehabilitation counselor (RC) to assess his skills and abilities. The RC performed a transferable skills analysis to identify job goals that would be compatible with appellant's education and vocational abilities. She found that with appellant's history of heavy work such as maintenance and repair, warehouse work, forklift operation and construction, he had no transferable skills to sedentary work. Looking at similar work fields, the RC identified two sedentary positions: semiconductor assembler and phonograph cartridge assembler. She identified 22 light-duty occupations for which appellant would be qualified, including many different types of assemblers and testers, routing clerk, coil winder, checker, culler and basket mender. But apart from electronics assembler, these occupations did not exist in the local labor market. The RC concluded that appellant might be best suited, with his restrictions and work background, for work as a security guard.

In a May 10, 2005 OWCP-3 status report, OWCP's rehabilitation specialist (RS) noted that the RC had completed a transferable skills analysis in an effort to identify job goals compatible with appellant's education and vocational capabilities. The RS advised that appellant had a high school diploma and had the ability to prepare for employment as a security guard, which would require very short-term training to obtain the requisite license. Such jobs, he found, were readily available with an expected entry-level wage of \$7.50 per hour, based on the RC's review of local labor market conditions.

The RS added that appellant had the ability to work as an automobile self-serve station attendant, a parking lot attendant, a deliverer car rental, a sales clerk (retail trade), a cashier II and a sales attendant, all of which were classified as light-work activities. OWCP's RS stated that such positions were readily available in appellant's commuting area with an expected wage of \$7.00 per hour. The RS approved active job placement efforts.

The RC developed an individual placement plan with the goal of placing appellant in an entry-level position or one requiring a short period of training. She identified three positions consistent with his education, restrictions and work experience: security guard, driver<sup>2</sup> and electronics assembler. The RC offered job descriptions and labor market surveys for each.

On August 8, 2005 appellant's vocational rehabilitation case was closed. The employing establishment was unable to accommodate him with alternative employment, and he was not active in his self-directed job search efforts.

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<sup>2</sup> OWCP's RS did not approve the job goal of driver, which was classified as a medium work activity and therefore exceeded appellant's medical restrictions for light-work activity.

On August 9, 2005 OWCP proposed to reduce appellant's compensation for wage loss on the grounds that he had the capacity to earn wages in the selected position of cashier II at the rate of \$280.00 per week. It explained:

"The [RC] assigned to assist you reported that, based upon your experience, education and medical restrictions, and a labor market survey, you are employable as a [c]ashier II. In our letter of May 10, [20]05, our office advised you that this position is suitable to your restrictions and that you would receive 90 days of placement assistance to help you locate work in such a position."

OWCP initially tried to enroll appellant in training for the position of security guard, but he failed to attend. "However, you were also provided with other positions such as [c]ashier II, which is considered suitable and available within your commuting area." OWCP stated that the RC worked with appellant for at least 90 days to secure employment in the position of cashier II, but appellant did not obtain such employment. Nonetheless, the RC had documented that enough such positions were reasonably available in appellant's commuting area with an entry-level pay of \$280.00 per week.

In a decision dated September 12, 2005, OWCP reduced appellant's compensation for wage loss on the grounds that he was capable of earning wages as a cashier II in the open labor market.

Appellant submitted an August 14, 2008 statement from the RC assigned to his case:

"I am a vocational rehabilitation counselor. My name is Ellen D. Fernandez, Med., CRC, CVE, a vocational consultant. I was engaged by the United States Department of Labor to provide vocational rehabilitation assistance and counseling in regard to [appellant]. As part of my service in regard to [appellant], I performed a transferable skills analysis. The transferable skills analysis did not indicate that a [c]ashier II, DOT number 462-010 position would be suitable employment for [him]. Therefore, it was not my opinion back in 2005, nor is it now that a [c]ashier II position is suitable employment for [appellant]. Utilizing the LifeStep system, I have prepared a demand characteristics comparison report for [appellant] analyzing the job of [c]ashier II, 211.462-010. The result of the transferable skills analysis is that the [c]ashier II occupation shares no similar skill with that of [appellant] and therefore it would not be a suitable position for him.

"These statements here have been stated within a reasonable degree of certainty within my profession."

In a decision dated November 5, 2010, OWCP denied modification of its September 12, 2005 determination of wage-earning capacity. It stated that its own RS had the authority to identify additional occupations that were vocationally suitable, and that, based on appellant's medical restrictions, his previous work experiences and a labor market survey at the time vocational rehabilitation was closed, the position of cashier II was selected. OWCP noted that this position required only up to one month of on-the-job training. It found that the RC's statement gave no reason why transferable skills would be necessary to obtain a job that was

unskilled work. Appellant had a high school diploma and had performed semi-skilled work in the past. The RC also identified other jobs that were considered unskilled work. OWCP found that the RC's statement was immaterial, as the transferable skill analysis and vocational assessment were performed almost two years after appellant's involvement with OWCP's vocational rehabilitation services. As appellant did not meet one of the criteria for modifying the September 12, 2005 determination of wage-earning capacity, OWCP denied modification.

On appeal, appellant's representative argues that the RC's August 14, 2008 statement presented clear evidence of error in OWCP's September 12, 2005 determination of wage-earning capacity, which was based on an incorrect, if not fraudulent, interpretation of her opinion. The representative noted that OWCP was now attempting to rely on its RS, yet there was no discussion of his report at the time of the wage-earning capacity determination.

### **LEGAL PRECEDENT**

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of his duty.<sup>3</sup> "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.<sup>4</sup>

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. If the actual earnings of the employee do not fairly and reasonably represent his wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity as appears reasonable under the circumstances is determined with due regard to the nature of his injury, the degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment, and other factors or circumstances which may affect his wage-earning capacity in his disabled condition.<sup>5</sup>

Once the loss of wage-earning capacity is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous. The burden of proof is on the party attempting to show modification of the award.<sup>6</sup>

The Vocational Rehabilitation Program is comprised of an RS, who is located in the district office, and the RC, who is a certified counselor and works on a contractual basis in the district office's servicing area. The claims examiner, with recommendations from the RS, is

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<sup>3</sup> 5 U.S.C. § 8102(a).

<sup>4</sup> 20 C.F.R. § 10.5(f).

<sup>5</sup> 5 U.S.C. § 8115(a)

<sup>6</sup> *Daniel J. Boesen*, 38 ECAB 556 (1987).

responsible for the management and overall direction of the case, even during the rehabilitation period.<sup>7</sup>

The RS's responsibilities include, but are not limited to, the following: ensuring that there is a sufficient number of counselors to service the district office's needs; monitoring the RC's performance in correlation to both the contract specifications and the quality of service provided; assigning RCs to particular cases; reviewing RC reports for completeness and timeliness prior to authorizing payment of bills; communicating with the claims examiner regarding the cases assigned for vocational rehabilitation services; relaying important or time sensitive information to the claims examiner so that action can be taken if needed; providing guidance to the claims examiner on how to recognize when vocational services are necessary to assist the claimant with returning to work; serving as a vocational resource to the claims examiner and providing solutions for return-to-work barriers in cases.<sup>8</sup>

The RC's responsibilities include, but are not limited to, the following: evaluating the claimant's vocational abilities and transferable skills; facilitating employment placement including with the previous employer; arranging for vocational testing and training; overseeing Occupational Rehabilitation Plans; conducting labor market surveys; formulating a vocational reemployment plan; assisting the claimant with job-seeking skills such as resume building and interview techniques; arranging for specialized ergonomic job modification services; and making recommendations to the RS and claims examiner if a particular barrier is hindering the return-to-work effort.<sup>9</sup>

If efforts to return the claimant to work with the employer are not successful, then the RC will need to develop a plan for the claimant's return to work with a new employer. During this phase of rehabilitation, the RC will identify jobs that are medically and vocationally suitable and reasonably available in the claimant's commuting area.<sup>10</sup>

The RC's documentation should support that the targeted positions are vocationally suitable. If job placement will occur immediately after plan approval, then the claimant must be capable of performing the identified jobs at the time of plan development. Vocational suitability can be established through a transferable skills analysis and vocational testing. If the proposed reemployment plan calls for training, then the evidence should establish that the claimant will have the vocational skills for the targeted jobs following training. In both cases, the claimant's skills and training are compared to the specific vocational preparation requirements as described in the *Dictionary of Occupational Titles*, or OWCP-determined equivalent.<sup>11</sup>

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<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Vocational Rehabilitation Services*, Chapter 2.8132c (February 2011).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at Chapter 2.813.7

<sup>11</sup> *Id.* at Chapter 2.813.7.a(2).

For rehabilitation efforts to be successful, the claims examiner, RS, RC and claimant must have frequent and clear communication. Communication pertaining to any issues relevant to rehabilitation should flow between all parties as needed. Rehabilitation is a team effort that includes the claimant, claims examiner, RS and RC. It is essential for all members of this team to remain informed of the progress of the case throughout the course of rehabilitation. The claims examiner and RC are encouraged to discuss issues as needed, but they must remember to include the RS in, or inform the RS of, the discussion. An important limitation to keep in mind is that it is the responsibility of the RS, not the claims examiner, to direct RCs to change vocational rehabilitation statuses, and to approve or terminate services.<sup>12</sup>

If the claimant does not locate employment at the end of the vocational rehabilitation process, or if the claimant's actual earnings are not representative of his or her capacity to earn wages, further determination must be made based on the claimant's ability to work in a selected position.<sup>13</sup> In cases where the claimant has undergone vocational rehabilitation, the RC will submit a final report to the RS summarizing why vocational rehabilitation was unsuccessful and listing two or three jobs which are medically and vocationally suitable for the claimant. Where no vocational rehabilitation services were provided, the RS will have provided this report. Included will be the corresponding job numbers from the *Dictionary of Occupational Titles* (or OWCP-specified equivalent) and pay ranges in the relevant geographical area. The report should describe how requirements for Specific Vocational Preparation were achieved. The RC will also include the *Dictionary of Occupational Titles*' description (or OWCP-specified equivalent) of the duties and physical requirements of each job. The positions listed may be those in which placement was attempted.

The RS will indicate to the claims examiner, using the OWCP-3, that a rating may be based on this report. Because the RS is an expert in the field of vocational rehabilitation, the claims examiner may rely on his or her opinion as to whether the job is reasonably available and vocationally suitable.<sup>14</sup>

### ANALYSIS

From the beginning, the RC assigned to assess appellant's skills and abilities concluded that sedentary work was unsuitable. In accordance with her duties, she performed a transferable skills analysis to identify job goals that would be compatible with appellant's education and vocational abilities. She found that with appellant's history of such heavy work as maintenance and repair, warehouse work, forklift operating and construction, he had no transferable skills to sedentary work. It was for this reason that she did not include positions such as cashier II in appellant's individual placement plan.

The RC's August 14, 2008 statement reiterated that in 2005 it was her opinion that the position of cashier II was not suitable employment for appellant. She had prepared a current

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<sup>12</sup> *Id.* at Chapter 2.813.14.a.

<sup>13</sup> *Id.* at Chapter 2.813.19.d.

<sup>14</sup> *Id.* at Chapter 2.814.8.b (October 2009).

demand characteristics comparison report specifically analyzing the job of cashier II, a comparison showing that appellant shared no similar skill with the selected position. Her opinion thus remained the same as it was in 2005, after OWCP had assigned her to assess appellant's skills and abilities. The RC believed that appellant, with his restrictions and work background, might be best suited for work as a security guard and that remained the focus of her job placement efforts.

Contrary to the assertions in OWCP's August 9, 2005 notice of proposed reduction, the RC did not report that appellant was employable in the position of cashier II; appellant did not receive 90 days of placement assistance to help him secure employment as a cashier II; OWCP did not advise appellant that his compensation would be reduced at the end of rehabilitation services based upon the salary of a cashier II; the RC did not perform a labor market survey for the position of cashier II and did not document that enough positions were reasonably available in appellant's commuting area with an entry-level pay of \$280.00 per week.

The Board finds that appellant has not shown that OWCP's September 12, 2005 wage-earning capacity determination was, in fact, erroneous. The RS did report on May 10, 2005, prior to active job placement efforts, that appellant had the ability to perform light-work activities such as cashier II. The RS stated in an OWCP-3 status report that such and similar positions were readily available in appellant's commuting area with an entry-level pay of \$280.00 per week.

The RC may disagree, but as OWCP procedures explain, because the RS is an expert in the field of vocational rehabilitation, the claims examiner may rely on his or her opinion as to whether the job is reasonably available and vocationally suitable. There is no precedent to support the argument, implicitly raised by appellant's representative, that a conflict between the RC and RS on the vocational suitability of a selected position requires a finding of error where OWCP relied on its expert.<sup>15</sup> At best, the RC's August 14, 2008 statement highlights a lack of clear communication and teamwork encouraged by OWCP procedures. But that falls short of the burden appellant must meet to establish modification of a loss of wage-earning capacity determination. A lack of communication does not show that OWCP's decision was, in fact, erroneous.

OWCP's notice of proposed reduction does contain a number of misstatements about the RC's findings and efforts with respect to the selected position. But these inaccuracies are immaterial to whether the selected position was, in fact, vocationally suitable. OWCP's expert in the field of vocational rehabilitation found that it was, and OWCP reasonably relied on that finding, the RC's disagreement notwithstanding.

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<sup>15</sup> Cf. *Richard A. Raymer*, Docket No. 96-1265 (issued November 19, 1998) (finding that as the RS's report was the only relevant vocational rehabilitation evidence of record at the time of OWCP's decision, it constituted the weight of the evidence and justified the reduction of the claimant's monetary compensation); *M.B.*, Docket No. 08-2366 (issued September 28, 2009) (although the Board will generally give great weight to OWCP's RC, the Board reversed a denial of modification where, prior to the loss of wage-earning capacity determination, the claimant's own vocational expert disagreed with and sufficiently rebutted the RC's availability finding); *R.C.*, Docket No. 11-333 (issued October 4, 2011) (the Board was unwilling to defer to the RS's technical expertise where the RS accepted the RC's largely unsubstantiated availability finding).

The Board finds that appellant has not met his burden to demonstrate that OWCP's September 12, 2005 determination of wage-earning capacity was, in fact, erroneous.<sup>16</sup> Accordingly, the Board will affirm OWCP's November 5, 2010 decision denying modification.

**CONCLUSION**

The Board finds that appellant has not met his burden to show that OWCP's September 12, 2005 wage-earning capacity determination was, in fact, erroneous.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 5, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 10, 2012  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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<sup>16</sup> Appellant does not argue the other two grounds for modifying the determination.