

FACTUAL HISTORY

OWCP accepted that, on May 15, 2003 appellant, then a 36-year-old flat sorting machine operator, sustained a lumbar region sprain, thoracic region sprain, closed dislocation of a lumbar vertebra and closed dislocation of a thoracic vertebra. Appellant received compensation for periods of disability.

On December 15, 2003 Dr. Christopher Mann, an attending osteopath, released appellant to full-time work with restrictions. Appellant returned to work in a modified position until the employing establishment could not accommodate her work restrictions.

In May 2010, appellant was referred for participation in an OWCP-sponsored vocational rehabilitation program. She was assigned to work with her vocational rehabilitation counselor, Shelly Eike. In July 2010 Ms. Eike had appellant take vocational tests to help assess her work skills.² During this period, Dr. Mann indicated that appellant could perform full-time work with restrictions, including no lifting more than 25 pounds.

In August 2010, Ms. Eike identified several positions as being physically and vocationally suitable for appellant including the position of electronics tester. A labor market survey revealed that the position was reasonably available in appellant's commuting area and that the average wage for the position was \$657.00 a week.³

The electronics tester position involved testing the function of electronics assemblies, components and parts according to established procedures using computerized or standard test equipment. The position required connecting electronics assemblies and testing units and reading instruments indicating resistance, capacitance, continuity and wave pattern or defect, such as short circuit or current leakage. The physical requirements of the job were characterized as light with no lifting more than 20 pounds.

In an October 15, 2010 report, Dr. Mann stated that appellant was partially disabled as a result of her employment injury. Appellant could work on a full-time basis with permanent restrictions of no lifting more than 25 pounds and no operation of "[m]achinery/[a]utomation."

Appellant was provided 90 days of assistance from Ms. Eike in obtaining employment, but these efforts did not result in job placement.⁴

In a November 16, 2010 letter, OWCP advised appellant that it proposed to reduce her compensation based on her capacity to earn wages as an electronics tester. It provided her 30 days from the date of the letter to submit evidence or argument challenging the proposed action. Appellant did not submit any evidence or argument challenging the proposed reduction of her compensation within the allotted period.

² Ms. Eike noted that appellant worked from 1990 to 1992 for a private employer as a computer tester and that she reported that it was her favorite job.

³ The position had an estimated \$3,590.00 opening in appellant's commuting area.

⁴ Appellant had at least two interviews with potential employers, but they did not lead to a job offer.

In a January 4, 2011 decision, OWCP adjusted appellant's compensation effective January 16, 2011 based on her capacity to earn wages as an electronics tester.⁵

LEGAL PRECEDENT

Once OWCP 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.⁶ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁷

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 her wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity or if the employee has no actual earnings, her wage-earning capacity is determined with due regard to the nature of her injury, her degree of physical impairment, her usual employment, her age, her qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect her wage-earning capacity in her disabled condition.⁸ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.⁹ The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.¹⁰ The fact that an employee has been unsuccessful in obtaining work in the selected position does not establish that the work is not reasonably available in her commuting area.¹¹

When OWCP 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 by OWCP or 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 that 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 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

⁵ OWCP based this adjustment on a *Shadrick* formula calculation it carried out based on the wages of the electronics tester position and other factors. *See infra* note 12.

⁶ *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

⁷ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁸ *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

⁹ *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

¹⁰ *Id.* The commuting area is to be determined by the employee's ability to get to and from the work site. *See Glen L. Sinclair*, 36 ECAB 664, 669 (1985).

¹¹ *See Leo A. Chartier*, 32 ECAB 652, 657 (1981).

the *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.¹²

ANALYSIS

In the present case, OWCP received information from appellant's attending osteopath, Dr. Mann, who found that appellant was not totally disabled for work and had a partial capacity to perform work for eight hours a day subject to specified work restrictions.¹³ In an October 15, 2010 report, Dr. Mann stated that appellant could work on a full-time basis with permanent restrictions of no lifting more than 25 pounds and no operation of "[m]achinery/[a]utomation."¹⁴

Appellant's vocational rehabilitation counselor then determined that appellant was able to perform the position of electronics tester and that state employment services showed the position was available in sufficient numbers so as to make it reasonably available within appellant's commuting area. The electronics tester position involved testing the function of electronics assemblies, components and parts according to established procedures using computerized or standard test equipment. OWCP properly relied on the opinion of the rehabilitation counselor that appellant was vocationally capable of performing the electronics tester position.

The physical requirements of the electronics tester position were characterized as light with no lifting more than 20 pounds. The Board finds that the medical evidence of record, including the work restriction recommendations of Dr. Mann, show that appellant was physically capable of performing the electronics tester position.

Despite being provided an opportunity, appellant did not submit any evidence or argument showing that she could not vocationally or physically perform the electronics tester position. OWCP considered the proper factors, such as availability of suitable employment and her physical limitations, usual employment, age and employment qualifications, in determining that the position of electronics tester represented her wage-earning capacity.¹⁵ The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of electronics tester and that such a position was reasonably available within the general labor market of her commuting area. Therefore, OWCP properly reduced appellant's compensation effective January 16, 2011 based on her capacity to earn wages as an electronics tester.

Appellant may request modification of the wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

¹² See *Dennis D. Owen*, 44 ECAB 475, 479-80 (1993); *Wilson L. Clow, Jr.*, 44 ECAB 157, 171-75 (1992); *Albert C. Shadrick*, 5 ECAB 376 (1953).

¹³ OWCP accepted that, on May 15, 2003 appellant sustained a lumbar region sprain, thoracic region sprain, closed dislocation of a lumbar vertebra and closed dislocation of a thoracic vertebra.

¹⁴ The restriction from operating "[m]achinery/[a]utomation" appears to refer to heavy machinery such as the type of automated letter sorting machinery that appellant formerly operated.

¹⁵ See *Clayton Varner*, 37 ECAB 248, 256 (1985).

CONCLUSION

The Board finds that OWCP properly reduced appellant's compensation effective January 16, 2011 based on her capacity to earn wages as an electronics tester.

ORDER

IT IS HEREBY ORDERED THAT the January 4, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 27, 2012
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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