

FACTUAL HISTORY

On May 3, 2000 appellant, a 29-year-old distribution clerk, filed a claim of traumatic injury to her left wrist that day while folding and banding newspapers in the performance of duty. On June 12, 2000 OWCP accepted her claim for left wrist tendinitis, left shoulder strain and bursitis and left forearm strain.²

On August 26, 2002 appellant stopped work and underwent left shoulder surgery on August 28, 2002 for a subacromial decompression, thermal capsulorhaphy and installation of a pain pump. She returned to work at limited duty on November 20, 2002. Appellant stopped work again in August 2003. On March 15, 2006 she had surgery for a tenovagionotomy of the first dorsal compartment and de Quervain's release. OWCP placed appellant on the periodic rolls. On June 13, 2007 appellant underwent a left shoulder subacromial decompression, partial distal clavicle resection and reinsertion of pain pump.

On August 19, 2008 OWCP confirmed with appellant's employer that her work restrictions could not be accommodated. It referred her to vocational rehabilitation. On October 16 and 28, 2008 appellant underwent vocational aptitude testing by William Miller, Ph.D., a clinical psychologist, who noted her educational history as a high school graduate with some college and a paralegal certificate. On testing, she scored within average range with reading above a 12th grade level. While appellant expressed interest in teaching, particularly at the elementary school level, Dr. Miller noted that testing supported her present ability to perform as a teacher's aide or in food service.³ She was subsequently enrolled in a 16-week vocational skills and Dragon Dictate training program from December 1, 2008 to February 18, 2009 in order to enhance her skills in hands-free clerical work. Appellant completed the program rated at 130+ in productivity, typing at 38 words per minute with 97 percent accuracy and having successfully completed training in Windows XP/Internet, Word 2003, Excel 2003 and Outlook 2003.

On July 8, 2009 the vocational counselor determined the positions of reception clerk, Department of Labor's *Dictionary of Occupational Titles* No. 237.367-038, was suitable for appellant. The vocational counselor contacted Ohio Employment Services to determine that the job was being performed in sufficient numbers in appellant's commuting area such that it was reasonably available to her at a weekly wage of \$476.00. The duties of a reception clerk included: receiving callers at an establishment and directing them to their destination; receiving incoming telephone calls and obtaining names and arranging appointments; typing memos, reports or other documents and performing a variety of clerical duties. The position was primarily performed indoors without exposure to weather with sedentary physical demands.

Appellant was referred for 12 sessions of counseling by Dr. Weinstein with concurrent job placement services from July 16 to October 16, 2009. The record reflects that as of

² The record reflects that appellant is right-hand dominant and has preexisting nonemployment-related conditions of depression and bipolar disorder.

³ Vocational rehabilitation reports of record noted that work at an elementary level or in child care was found not suitable for appellant based on her preexisting emotional conditions and her accepted left wrist condition.

September 11, 2009 the case was placed in an interrupted status as she declined job placement assistance for her return to employment. Appellant was not interested in work as a receptionist or administrative clerk and planned on enrolling at a local community college in the child development area.⁴

By letter dated September 25, 2009, OWCP informed appellant that, based on information from the vocational rehabilitation agency, it appeared that she had discontinued good faith participation in an OWCP-approved job placement program, as she was refusing to work in job placement. Appellant was given 30 days to contact OWCP and resume a good faith effort, and was instructed that, if she did not cooperate, action would be taken to reduce her compensation to reflect the wage-earning capacity that she would have in the job that the rehabilitation counselor found to be within her restrictions and abilities. She continued her independent studies and advised OWCP that efforts to find employment at local day care centers were unsuccessful.

On March 10, 2010 the vocational counselor stopped the vocational rehabilitation program, noting that appellant had not obtained employment in the child care area; a field deemed unsuitable based on her medical conditions and work restrictions. The case was referred back to the claims examiner for appropriate action.

By letter dated March 12, 2010, OWCP asked Dr. Daniel A. Breitenbach, an attending internist, to address whether appellant was physically capable of performing the work of reception clerk. It enclosed the job classification for a receptionist. In a response dated March 18, 2010, Dr. Breitenbach stated that appellant still suffered from tendinitis of the left wrist despite having surgery and that she also had ongoing tendinitis of the left shoulder, despite surgery. He found that she was capable of performing the job as a reception clerk as long as she was restricted from using her left arm or hand.

In an April 12, 2010 notice, OWCP advised appellant that it proposed reducing her wage-loss benefits as the medical evidence established that she was no longer totally disabled. It found that she had the capacity to earn wages as a full-time reception clerk at the rate of \$476.00 a week. In an attached memorandum, OWCP noted that appellant was unsuccessful in obtaining employment in the field of child care, an employment option that had specifically been ruled out in her case based on her preexisting emotional problems and her accepted left upper extremity condition. As appellant elected not to continue with a job search in the approved vocational field, it was found that after training she had the capacity for employment as a reception clerk, within the work restrictions set forth by her attending physician. An open labor market survey of her commuting area found that such jobs were reasonably available and medically and vocationally suitable.

By decision dated May 19, 2010, OWCP reduced appellant's benefits effective May 17, 2010 to find she had a 50 percent wage-earning capacity as a reception clerk.⁵

⁴ The record reveals appellant completed the first semester of four courses with three B's and an A.

⁵ OWCP initially issued a wage-earning capacity decision on May 17, 2010 that was corrected based on an amended computation under the *Shadrick* formula.

By letter dated May 25, 2010, appellant, through her attorney, requested a telephonic hearing that was held on September 9, 2010. She noted her disagreement with the determination that she could work as a receptionist. Appellant learned the Dragon Dictation system and other programs. She currently attended classes and took notes by hand and used a voice recorder for lectures and a rolling bag to carry books. Appellant noted that she had not looked for a receptionist position but had unsuccessfully applied to work at day care centers. She testified that she was halfway through a two-year degree program in early childhood education and still experienced pain in her nondominant arm.

Appellant submitted a magnetic resonance imaging scan report by Dr. Michael J. Paley, a Board-certified radiologist, who found supraspinatus tendinopathy with no frank rotator cuff tear. In an October 18, 2010 report, Dr. Breitenbach reiterated that she should not use her left hand to lift items as much as one pound. Appellant was not to type with that hand and had prior surgery for tendinitis in the wrist. Due to residuals of tendinitis in her left wrist, she was not to use that hand in any work activities.

By decision dated December 13, 2010, OWCP's hearing representative affirmed the May 19, 2010 decision.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to support termination or modification of compensation benefits.⁶

Section 8115(a) of FECA⁷ provides 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. Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.⁸

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.⁹ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.¹⁰ The job selected for determining wage-earning

⁶ *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Garner*, 36 ECAB 238, 241 (1984). See *Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8101.

⁷ 5 U.S.C. § 8115.

⁸ *Hubert F. Myatt*, 32 ECAB 1994 (1981); *Lee R. Sires*, 23 ECAB 12 (1971).

⁹ See *Pope D. Cox*, *supra* note 6; 5 U.S.C. § 8115(a).

¹⁰ *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.¹¹ In determining an employee's wage-earning capacity, OWCP may not select a makeshift or odd-lot position or one not reasonably available on the open labor market.¹²

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 (DOT)* or otherwise available in the open labor market, that fits that employee's capabilities with regards to her physical limitation, 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.¹³ 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.¹⁴

Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn and not on actual wages lost.¹⁵ Compensation payments are based on the wage-earning capacity determination, which remains undisturbed until properly modified.¹⁶

ANALYSIS

Appellant sustained a left shoulder strain and bursitis, forearm strain and wrist tendinitis in the performance of duty. She underwent surgery on August 28, 2002, March 15, 2006 and June 13, 2007 and was placed on the periodic rolls in receipt of compensation. Appellant's attending physicians supported her capacity to return to full-time work with limitations on the use of her left (nondominant) arm. As her employer could not accommodate her work restrictions, she was referred to vocational rehabilitation.

Appellant underwent vocational aptitude testing by Dr. Miller, a clinical psychologist, who noted her educational history as a high school graduate who had completed some college and a paralegal training program in which she was certified. On testing, she expressed an interest in teaching at the elementary school level or in child care, but the record reflects that such work was found not appropriate based on her preexisting depression and bipolar disorder and the residuals of her work-related injury, which limited use of her left arm as it pertained to lifting or carrying items. In order to facilitate her ability to perform the duties of a reception

¹¹ *Id.*

¹² *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

¹³ *Karen L. Lonon-Jones*, 50 ECAB 293, 297 (1999).

¹⁴ *Id.* See *Shadrick*, 5 ECAB 376 (1953).

¹⁵ *D.G.*, Docket No. 11-360 (issued October 25, 2011); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984); *Roy Matthew Lyon*, 27 ECAB 186, 190 (1975).

¹⁶ See *Sharon C. Clement*, 55 ECAB 552, 557 (2004).

clerk, appellant was referred to a training program from December 1, 2008 to February 18, 2009. She successfully completed the program in using Dragon Dictate and other software programs related to working in an office setting.

On July 8, 2009 the vocational rehabilitation counselor determined that the position of reception clerk, listed in the Department of Labor's *Dictionary of Occupational Titles* DOT No. 237.367-038, was suitable for appellant based on her education and physical limitations. The Ohio State Employment Services was contacted and it was verified that such positions were being performed in appellant's commuting area to be found reasonably available at a weekly wage of \$476.00.

Appellant was referred for further counseling with Dr. Miller and concurrent job placement service, but she reiterated her preference for work in the child-development area. She subsequently enrolled in a local community college and commenced independent studies. Appellant was notified by OWCP on September 25, 2009 that she had discontinued good faith participation in the approved job placement program. Through the fall 2009, she attempted to find employment with local day care centers but was unsuccessful. On March 10, 2010 the vocational counselor stopped the rehabilitation program; noting that the field of child care had been found unsuitable based on appellant's medical conditions and work restrictions.

OWCP contacted Dr. Breitenbach, an attending physician, for an opinion on appellant's physical capacity to perform the duties of a receptionist clerk. Dr. Breitenbach responded that appellant still had tendinitis of the left wrist and shoulder, but was capable of performing the job of reception clerk as long as she was restricted from the use of her nondominant left arm or hand.

The Board finds that the May 19, 2010 wage-earning capacity determination of OWCP properly reduced appellant's wage-loss benefits based on her ability to perform the duties of a reception clerk. The weight of the factual and medical evidence of record establishes that appellant has the educational background and training to successfully perform work in an office setting as a receptionist clerk and possesses the physical capacity to perform the sedentary duties of the selected position with limitations on use of her left arm. OWCP took into consideration her preexisting emotional conditions in the selection of the reception clerk position. Furthermore, the vocational counselor obtained information concerning the wage rate and job availability in appellant's commuting area from the State of Ohio. Thereafter, the principles of *Albert C. Shadrick* were applied to find that appellant had a 50 percent wage-earning capacity.

At the hearing below, appellant noted that she learned Dragon Dictate and attended classes where she took notes by hand, used a voice recorder for lectures and a rolling bag to carry books. While she reiterated her preference to work in the area of elementary education or early childhood development, the vocational counselor determined that such work was unsuitable based on her emotional condition and limitations in use of the left arm. The Board has recognized that the rehabilitation counselors are experts in the field of vocational rehabilitation and a claims examiner may rely on his or her opinion as to whether a job is reasonably available and vocationally suitable to the claimant.¹⁷

¹⁷ See *Lawrence D. Price*, 54 ECAB 590 (2003).

CONCLUSION

The Board finds that OWCP properly determined that appellant has the capacity to earn wages in the constructed position of reception clerk.

ORDER

IT IS HEREBY ORDERED THAT the December 13, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 12, 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