



## **FACTUAL HISTORY**

On August 27, 2008 appellant, then a 45-year-old air traffic control specialist, filed a traumatic injury claim alleging post-traumatic stress disorder in the performance of duty. OWCP accepted the claim for post-traumatic stress disorder. By letter dated December 16, 2008, appellant was placed on the periodic rolls for temporary total disability.

On February 1, 2009 work capacity evaluation form for psychiatric/psychological conditions OWCP-5a form Naomi T. Jacobs, Ph.D., a treating clinical psychologist, opined that appellant was unable to return to his date-of-injury job, but was capable of working four hours a day. On September 10, 2009 she reported that he continued to meet the criteria for post-traumatic stress disorder, but was capable of working a low stress job.

On a March 10, 2010 OWCP-5a form, Dr. Jacobs indicated that appellant was capable of working an eight-hour day in a low stress job. She stated that the job could not be associated with the former employing establishment.

On March 18, 2010 OWCP referred appellant for vocational rehabilitation.

In correspondence dated May 15, 2010, OWCP informed appellant that a plan had been developed by his rehabilitation counselor to return him to work as an order clerk or a similar position. It noted the weekly wages as \$380.00.

In a telephone conference held on July 7, 2010, the claims examiner informed appellant that OWCP would provide 90 days of placement services for the period March 30 to June 29, 2010. She advised him that if no job was found, that a reduction in his wage-loss compensation would be based on his ability to earn wages as an order clerk or similar position with weekly wages of \$380.00.

On July 29, 2010 OWCP closed vocational rehabilitation services for appellant. The vocational rehabilitation specialist identified the position of customer service representative as within appellant's work restrictions. He noted an entry level hourly rate of \$11.10 for the position of customer service representative. The duties of customer service representative included opening accounts, correcting records and explaining and processing investments and/or other financial services.

On January 12, 2011 OWCP referred appellant for a second opinion evaluation with Dr. Anjali Pathak, a Board-certified psychiatrist. In a January 27, 2011 report, Dr. Pathak opined that appellant had residuals of his accepted chronic post-traumatic stress disorder, chronic pain and lower back pain due to a nonemployment-related bulging disc. With respect to functional limitations from appellant's accepted post-traumatic stress disorder, he noted that there was significant improvement in appellant's symptoms and that he was able to function "[a]s long as he is not exposed to stimuli that remind him of his error." Dr. Pathak stated that appellant was unable to return to work at the employing establishment as this would trigger the post-traumatic stress disorder. He found that appellant was capable of work provided he did not have to make decisions about the lives of other people and was not in charge. Dr. Pathak concluded that appellant was capable of returning to a low stress job initially working part time and leading to

full time. In an attached work capacity evaluation form, he indicated that appellant was capable of working eight hours a day with restrictions. The restrictions included clear and predictable job responsibilities, no management and no making decisions regarding people's welfare.

On May 11, 2011 OWCP issued a notice proposing to reduce appellant's wage-loss benefits based on his ability to earn weekly wages of \$449.60 in the position of customer service representative.

In a letter dated June 6, 2011, appellant disagreed with the proposal to reduce his compensation based on his ability to earn weekly wages of \$449.60. He noted that correspondence from OWCP informed him that his compensation would be reduced based on his ability to earn weekly wages of \$380.00 as an order clerk. Appellant related that the position of order clerk had also been identified as suitable by his vocational rehabilitation counselor.

By decision dated June 20, 2011, OWCP finalized the reduction of appellant's compensation, effective July 3, 2011, finding that he was capable of performing the duties of customer service representative, Department of Labor's *Dictionary of Occupational Titles (DOT)* No. 239.262-014. It noted that his weekly pay rate when injured was \$2,624.83 and that the current pay rate for job and step when injured was \$2,808.79. OWCP found that appellant was capable of earning \$449.60 a week, that the adjusted wage-earning capacity a week was \$419.79, that the percentage of new wage-earning capacity was 75 percent, that the loss in wage-earning capacity amount a week was \$2,204.86, leaving appellant with a compensation rate of \$1,653.65 or \$1,738.75 a week when increased by applicable cost-of-living adjustments. This resulted in a new compensation rate every four weeks of \$6,955.00, less health benefits premium of \$398.40 and optional life insurance of \$118.50, for a net compensation every four weeks of \$6,400.60 beginning on July 3, 2011.

### **LEGAL PRECEDENT**

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.<sup>2</sup> An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.<sup>3</sup>

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 the employee's wage-earning capacity or if the employee has no actual wages, the wage-earning capacity is determined with due regards to the nature of the injury, the degree of physical impairment, the employee's usual employment, age, qualifications for other employment, the availability of

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<sup>2</sup> *H.N.*, Docket No. 09-1628 (issued August 19, 2010); *T.F.*, 58 ECAB 128 (2006); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

<sup>3</sup> 20 C.F.R. §§ 10.402, 10.403.

suitable employment and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.<sup>4</sup>

When OWCP makes a medical determination of partial disability and of 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 market, that fit the 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 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*<sup>5</sup> and codified by regulation at 20 C.F.R. § 10.403<sup>6</sup> should be applied. Subsection(d) of the regulations provide that the employee's wage-earning capacity in terms of percentage is obtained by dividing the employee's actual earnings or the pay rate of the position selected by OWCP, by the current pay rate for the job held at the time of the injury.<sup>7</sup>

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.<sup>8</sup> Any incapacity to perform the duties of the selected position resulting from subsequently acquired conditions is immaterial to the loss of wage-earning capacity that can be attributed to the accepted employment injury and for which appellant may receive compensation. Additionally, 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.<sup>9</sup>

### ANALYSIS

OWCP accepted that appellant sustained post-traumatic stress disorder due to work factors occurring August 27, 2008. Appellant was placed on the periodic rolls for temporary total disability by letter dated December 16, 2008. On September 10, 2009 Dr. Jacobs, appellant's treating psychologist, concluded that he was capable of working full time in a low stress job.

Based on Dr. Jacobs' opinion, OWCP referred appellant for vocational rehabilitation. It identified the selected position of customer service representative and referred him on

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<sup>4</sup> 5 U.S.C. § 8115(a); see *N.J.*, 59 ECAB 171 (2007); *T.O.*, 58 ECAB 377 (2007); *Dorothy Lams*, 47 ECAB 584 (1996).

<sup>5</sup> 5 ECAB 376 (1953).

<sup>6</sup> 20 C.F.R. § 10.403.

<sup>7</sup> *Id.* at § 10.403(d).

<sup>8</sup> *James Henderson, Jr.*, 51 ECAB 268 (2000).

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

January 12, 2011 for a second opinion evaluation with Dr. Pathak to determine his work capacity. OWCP concluded that the position of customer service representative was medically and vocationally appropriate based on Dr. Pathak's January 27, 2011 opinion. It reduced appellant's wage-loss compensation effective July 3, 2011 based on his ability to perform the selected customer service representative position.

The Board finds that the evidence establishes that appellant is capable of performing the duties required of a customer service representative for eight hours a day. Dr. Pathak found that appellant was capable of working in a low stress job provided that the position had clear and predictable job responsibilities and did not involve any management responsibilities or decisions regarding people's welfare. Moreover, appellant was not to be exposed to any stimuli reminding him of his error. The position of customer service representative identified by the rehabilitation specialist comports with Dr. Pathak's restrictions. OWCP considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment and age and employment qualifications, in determining that the position of customer service representative represented his wage-earning capacity.<sup>10</sup> The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of customer service representative and that such a position was reasonably available within the general labor market of his commuting area.

OWCP properly determined appellant's loss of wage-earning capacity in accordance with the formula developed in *Shadrick*<sup>11</sup> and codified at section 10.403 of OWCP's regulations.<sup>12</sup> It found that his salary on August 27, 2008 the date of injury, was \$2,624.83 a week; that the current adjusted pay rate for his job on the date of injury was \$2,808.79; and that he was currently capable of earning \$449.60 a week as customer service representative. OWCP then determined that appellant had a 75 percent wage-earning capacity, which resulted in an adjusted wage-earning capacity of \$419.97 a week. It concluded that, based upon a 75 percent rate, his new compensation rate was \$1,653.65, increased by cost-of-living adjustment to \$1,738.75 a week and that his net compensation for each four-week period would be \$6,400.60. The Board finds that OWCP correctly applied the *Shadrick* formula and therefore properly found that the position of customer service representative reflected appellant's wage-earning capacity.

### CONCLUSION

The Board finds that OWCP properly determined that the constructed position of customer service representative represented appellant's wage-earning capacity.

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<sup>10</sup> *James M. Frasher*, 53 ECAB 794 (2002).

<sup>11</sup> *Supra* note 5.

<sup>12</sup> *Supra* note 6.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated a June 20, 2011 is affirmed.

Issued: July 9, 2012  
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