

**United States Department of Labor
Employees' Compensation Appeals Board**

R.M., Appellant

and

**DEPARTMENT OF THE NAVY, NAVAL
WEAPON STATION, Yorktown, VA, Employer**

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**Docket No. 12-326
Issued: July 17, 2012**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On December 9, 2011 appellant filed a timely appeal of the November 2, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) concerning a wage-earning capacity determination. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly reduced appellant's compensation effective November 20, 2011 based on its determination that the constructed position of cashier represented his wage-earning capacity.

On appeal, appellant contends that the medical opinion of an OWCP referral physician upon which OWCP relied on in reducing his compensation is not entitled to the weight of the medical opinion evidence.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case was before the Board on a prior appeal with respect to a schedule award claim. In a January 16, 2001 decision, the Board affirmed an OWCP decision dated July 6, 1999, which found that appellant did not have more than 11 percent permanent impairment of the left lower extremity, for which he already received a schedule award.² The facts as relevant to the present issue are set forth.

OWCP accepted that on January 3, 1994 appellant, then a 39-year-old motor vehicle operator, sustained an unspecified ganglion cyst, contusion and lipoma of the left knee while in the performance of duty. On April 7, 1994 he underwent lipoma left knee surgery. On January 18, 2002 appellant underwent left knee surgery for exploration of the peroneal nerve.

On July 9, 2004 OWCP referred appellant to a vocational rehabilitation counselor who identified the positions of courier/deliverer and cashier as being within his medical restrictions, vocational skills and commuting area. The Department of Labor, *Dictionary of Occupational Titles*, (DOT) job description for cashier/clerk stated that the cashier/clerk position involved such duties as receiving payment for goods and services and operating a cash register and electronic data processing equipment. The physical requirements of the position were characterized as sedentary with no lifting more than 10 pounds. The vocational rehabilitation counselor identified the specific vocational preparation required as a level five (six months up to and including one year of training). He stated that employers would train appellant and that he had some clerical experience. The rehabilitation counselor determined that the position was performed in sufficient numbers in his commuting area to make the position reasonably available.

Appellant's vocational rehabilitation case was closed on October 24, 2005 as vocational services did not result in his successful return to work.

On April 11, 2007 OWCP inquired about whether the constructed positions of courier/deliverer and cashier were still available in appellant's commuting area. It questioned whether a courier/driver position had too many physical demands for a knee injury based on the results of a functional capacity evaluation, which showed that he had difficulty operating foot controls/pedals, pivoting, twisting and climbing stairs.

On April 18, 2007 a vocational rehabilitation specialist stated that a labor market survey performed in appellant's commuting area for full-time courier/deliverer and cashier positions revealed that these positions were reasonably available at the pay rates indicated on the initial labor market survey. He recommended that OWCP consider the positions and develop a current constructed loss of wage-earning capacity rating for full-time employment.

By letter dated July 3, 2007, OWCP referred appellant, together with a statement of accepted facts and the case record, to Dr. Baljit S. Sidhu, a Board-certified orthopedic surgeon, for a second opinion regarding his capacity to perform the duties of the constructed cashier position as set forth in an accompanying job description. In a July 18, 2007 medical report, Dr. Sidhu reviewed the cashier position description and advised that appellant could perform the

² Docket No. 99-2504 (issued January 16, 2001).

work duties of the position with restrictions. In a work capacity evaluation dated July 19, 2007, he advised that appellant was unable to perform his regular work duties due to chronic pain. Dr. Sidhu listed appellant's physical restrictions and stated that he could work four hours a day.

By letter dated July 31, 2007, OWCP requested that Dr. Shawke A. Soueidn, an attending physician,³ review and respond to Dr. Sidhu's findings. Dr. Soueidn was afforded 30 days to respond. He did not respond.

In a May 13, 2010 letter, OWCP requested that Dr. Soueidn review a description of the constructed cashier position and determine whether appellant could perform the duties of this position. He did not respond.

By letter dated August 30, 2010, OWCP referred appellant, together with a statement of accepted facts, the case record and a copy of the position description to Dr. Edward W. Gold, a Board-certified orthopedic surgeon, for a second opinion. In a September 22, 2010 report, Dr. Gold obtained a history of the January 3, 1994 accepted injury and appellant's medical treatment. On physical examination, he reported essentially normal findings with the exception of diffuse discomfort and tenderness to palpation around the knee, leg ankle and foot and sensation that was diffusely and subjectively diminished below the knee. Dr. Gold further reported that the left ankle showed decreased dorsiflexion and plantar flexion. He reviewed September 9, 2010 x-rays of the left foot which showed no significant bone abnormalities. Dr. Gold advised that appellant was status post two left knee surgeries. He had chronic pain and possible reflex sympathetic dystrophy in the left lower extremity. Dr. Gold opined that appellant was capable of performing light duty with restrictions which included no lifting more than 15 pounds and no kneeling, squatting or prolonged standing and walking. He could work as a cashier or in any other occupation within these limitations. In a work capacity evaluation dated September 22, 2010, Dr. Gold stated that appellant could work eight hours a day with no walking or standing more than one hour. Also, he could not push or pull more than 15 pounds.

By letter dated November 4, 2010, OWCP advised appellant that it proposed to reduce his compensation based on his capacity to perform the duties of a cashier at the rate of \$280.00 per week. It found that the physical requirements of the position did not exceed his work tolerance limitations and that the position was medically and vocationally suitable and fairly and reasonably represented his wage-earning capacity. OWCP determined that appellant's salary, effective December 1, 2001, the date his disability began, was \$435.60 per week; that the current adjusted pay rate for his job was \$752.82 per week effective July 13, 2010; and that he was capable of earning \$280.00 per week as a cashier. It then determined that he had a 37 percent wage-earning capacity, which resulted in an adjusted wage-earning capacity of \$161.17 per week. OWCP concluded that, based upon a 66 2/3 percent rate, his new compensation rate was \$182.95, increased by the cost of living to \$225.25 per week and that his net compensation for each four-week period would be \$901.00. Appellant was provided 30 days to submit additional evidence or argument regarding his wage-earning capacity. He did not respond.

By letter dated June 15, 2011, OWCP advised appellant about an adjustment to his compensation benefits for the period June 5 through July 2, 2011. It stated that when he was

³ The Board notes that the professional qualifications of Dr. Soueidn are not contained in the case record.

advised in November 2010 that his compensation would be adjusted based on his ability to work, it used a 66 percent compensation rate rather than a 75 percent rate, which would become effective June 5, 2011. Thus, appellant would receive \$1,028.00 in monthly compensation rather than \$901.00.

In a July 6, 2011 decision, OWCP finalized the wage-earning capacity determination effective August 28, 2011. It reiterated that appellant's salary, effective December 1, 2001, the date his disability began, was \$435.60 per week; that the current adjusted pay rate for his job was \$752.82 per week effective July 13, 2010; that he was capable of earning \$280.00 per week as a cashier; and that he had a 37 percent wage-earning capacity, which resulted in an adjusted wage-earning capacity of \$161.17 per week. OWCP concluded that, based upon a 75 percent rate, his new compensation rate was \$205.82, increased by the cost of living to \$257.00 per week and that his net compensation for each four-week period would be \$1,028.00.

On November 2, 2011 OWCP reissued the July 6, 2011 decision and reduced appellant's wages effective November 20, 2011 based on his capacity to earn wages as a cashier.

LEGAL PRECEDENT

Section 8115 of FECA⁴ provides that 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 wage-earning capacity or the employee has no actual earnings, his wage-earning capacity 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.⁵

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 for selection of a position, listed in the DOT or otherwise available in the open market, that fits that employee's capabilities with regard 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 *Albert C. Shadrick*⁶ will result in the percentage of the employee's loss of wage-earning capacity.⁷

ANALYSIS

OWCP accepted appellant's claim for a ganglion cyst, contusion and lipoma of the left knee. On April 18, 2007 a vocational rehabilitation specialist advised OWCP that a previously

⁴ 5 U.S.C. § 8115.

⁵ *N.J.*, 59 ECAB 171 (2007).

⁶ 5 ECAB 376 (1953).

⁷ *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

identified cashier position was within appellant's medical restrictions and vocational skills was still available in his commuting area. Dr. Gold, an OWCP referral physician, opined that appellant could perform the duties of the constructed cashier position. The Board finds that the selected position of cashier was medically and vocationally suitable.

Appellant's vocational rehabilitation counselor identified the specific vocational preparation required as a level five. He stated that employers would train appellant and that he had some clerical experience. The rehabilitation counselor determined that the position was performed in sufficient numbers in appellant's commuting area to make the position reasonably available. The cashier position involved such duties as receiving payment for goods and services and operating a cash register and electronic data processing equipment. The Board finds that OWCP properly relied on the opinion of the rehabilitation counselor that appellant was vocationally capable of performing the cashier position.

On September 22, 2010 Dr. Gold reviewed the requirements of this position along with the case record and stated that appellant was capable of performing full-time light-duty work with restrictions of pushing, pulling and lifting no more than 15 pounds and walking and standing for no more than one hour. The physical requirements of the cashier position were characterized as sedentary with no lifting more than 10 pounds. The Board finds that the medical evidence, including the work restriction recommendation of Dr. Gold, shows that appellant was physically capable of performing the duties of the cashier position.

OWCP considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment, age and employment qualifications, in determining that the position of cashier represented his wage-earning capacity.⁸ The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of cashier and that such a position was reasonably available within the general labor market of his commuting area. The Board finds, therefore, that OWCP properly determined that the position of cashier reflected appellant's wage-earning capacity and used the *Shadrick* formula to properly reduce his compensation effective November 20, 2011.

CONCLUSION

The Board finds that OWCP properly reduced appellant's compensation effective November 20, 2011 based on its determination that the constructed position of cashier represented his wage-earning capacity.

⁸ See *Clayton Varner*, 37 ECAB 248, 256 (1985).

ORDER

IT IS HEREBY ORDERED THAT the November 2, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 17, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board