



## **FACTUAL HISTORY**

OWCP accepted that on August 9, 1993 appellant, then a 36-year-old letter carrier, sustained lumbar and right arm injuries when stairs collapsed under him while he was delivering mail. It also accepted that on January 23, 1995 he sustained an aggravation of lumbar disc disease while fleeing a dog attack.<sup>3</sup> OWCP authorized L4-5 and L5-S1 microdiscectomies performed on June 6, 1995 and bilateral L4-5 and L5-S1 laminectomies with foraminotomy and disc excisions performed on July 13, 1997. It later accepted that appellant sustained a herniated cervical disc and an aggravation of lumbar disc disease on December 14, 1999 when his chair collapsed and he fell to the floor.<sup>4</sup> Appellant stopped work on December 14, 1999 and did not return. He received wage-loss compensation for total disability beginning on December 14, 1999.

Dr. Dilbagh Singh Chattha, an attending neurologist, submitted periodic reports from September 2000 to November 3, 2005 diagnosing cervical and lumbar radiculitis and post-traumatic head syndrome. Dr. A.K. Bhattacharyya, an attending Board-certified neurologist, submitted reports from September 2007 to August 2010 finding appellant totally disabled for work due to cervical and lumbar radiculopathy and bilateral knee pain.

On June 21, 2010 OWCP obtained a second opinion from Dr. Thomas J. Mampalam, a Board-certified orthopedic surgeon. After examining appellant and reviewing the medical record and a statement of accepted facts, Dr. Mampalam found that appellant was totally and permanently disabled for work due to cervical and lumbar disc protrusions. In a July 19, 2010 letter, the employing establishment's inspector general's office requested that he review investigative surveillance videos obtained from September 21, 2009 through April 24, 2010, showing appellant pulling 90 pounds of recyclables, removing and replacing the tires on his car, pushing a full-sized sedan with two adults in the car and cutting tree branches. The employing establishment asked Dr. Mampalam if the video changed his opinion. In a June 19, 2010 supplemental report, Dr. Mampalam stated that appellant's subjective complaints were not consistent with the activities depicted in the surveillance recordings. He opined that appellant could return to work with restrictions against heavy lifting and repeated bending and stooping to prevent further injury.

In an August 18, 2010 letter, the employing establishment's inspection service asked Dr. Bhattacharyya to review the investigative surveillance footage. Dr. Bhattacharyya responded by August 18, 2010 letter, stating that appellant could return to work with prophylactic modifications or limitations.

On September 27, 2010 OWCP referred appellant for vocational rehabilitation services as Dr. Bhattacharyya opined that he was no longer totally disabled for work. A vocational rehabilitation counselor met with appellant on September 30, 2010.

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<sup>3</sup> OWCP accepted the January 23, 1995 injury claim under File No. xxxxxx451.

<sup>4</sup> OWCP accepted the December 14, 1999 injuries under File No. xxxxxx861. In an October 27, 2000 report, Dr. Desmond Erasmus, a Board-certified neurosurgeon and second opinion physician, opined that the December 14, 1999 incident caused a C6-7 disc protrusion with ventral compression of the thecal sac.

On October 18, 2010 appellant underwent a functional capacity evaluation demonstrating his ability to work eight hours a day at the sedentary demand level. He participated in an October 25, 2010 vocational evaluation. The examiner noted that appellant had completed a bachelor's degree in his native country, but had limited English and numeracy skills and his speech was difficult to understand.

In a November 16, 2010 work capacity evaluation (Form OWCP 5(c)), Dr. Bhattacharyya found appellant able to work eight hours a day with restrictions. He limited reaching above the shoulder, squatting and kneeling to two hours, lifting, pushing and pulling to 25 pounds and directed a 5-minute break after each 15 minutes of walking. Dr. Bhattacharyya advised that appellant could sit, reach and drive for up to eight hours but that he could not climb. He noted that appellant had reached maximum medical improvement.

In a November 19, 2010 report, the counselor noted appellant's interest in the security field. A December 7, 2010 labor market survey showed that 10 employers within appellant's commuting area had open identification clerk positions with starting wages of \$11.00 or \$12.00 an hour. A December 15, 2010 labor market survey showed 10 employers within his commuting area with surveillance monitor job openings.

On December 22, 2010 OWCP approved a training program with vocational goals of Identification Clerk (U.S. Department of Labor's *Dictionary of Occupational Titles* #205.362-022) and Surveillance System Monitor (#379.367-010). Both positions were at the sedentary physical demand level and required specific vocational preparation between 30 and 90 days, commensurate with appellant's education and aptitudes. Appellant signed the plan on December 29, 2010. The counselor scheduled him to attend a security guard training class on January 3, 2011 that would provide him with a mandatory basic credential.

On December 30, 2010 appellant advised OWCP that he had to travel to his native country to attend to an ill relative and would return by February 3, 2011. The vocational rehabilitation counselor rescheduled the security guard training after appellant's scheduled return. Appellant's return was delayed until March 3, 2011 as he missed his flight.

On March 3, 2011 OWCP obtained salary information from the employing establishment showing that the pay rate for appellant's date-of-injury position as of December 14, 1999 was \$383.34 a week, with a current pay rate of \$1,067.89.

By decision dated March 8, 2011, OWCP adjusted appellant's compensation under 5 U.S.C. §§ 8104 and 8113(b) based on his failure to cooperate with vocational rehabilitation without good cause. It found that he failed to return messages from the vocational rehabilitation counselor or attend scheduled training. OWCP reduced appellant's compensation to reflect his prospective wages of \$440.00 as an identification clerk. It reinstated total disability compensation effective April 5, 2011 after he submitted March 21 and April 5, 2011 letters stating that he would cooperate fully with vocational rehabilitation. From April 12 to August 11, 2011, the vocational rehabilitation counselor forwarded appellant 77 job contacts for identification clerk positions located in his commuting area. Appellant applied for several positions but was not hired.

By notice dated October 28, 2011, OWCP advised appellant that it proposed to reduce his compensation under 5 U.S.C. §§ 8106 and 8115 based on his projected earnings of \$440.00 a week in the selected position of identification clerk. It afforded him 30 days to submit evidence or argument against the proposed reduction of compensation.

In a November 16, 2011 letter, appellant asserted that he remained totally disabled for work due to the accepted injuries.

By decision dated November 30, 2011, OWCP reduced appellant's compensation under 5 U.S.C. §§ 8106 and 8115 based on his projected earnings of \$440.00 a week in the selected position of identification clerk. It noted that Dr. Bhattacharya found appellant able to perform full time limited duty as of November 16, 2010, commensurate with the physical demands of the identification clerk position.

### **LEGAL PRECEDENT**

Once OWCP has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of benefits.<sup>5</sup> Under section 8115(a), wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent his or her wage-earning capacity or if the employee has no actual earnings, his or her wage-earning capacity is determined with due regards to the nature of the injury, the degree of physical impairment, his or her usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect wage-earning capacity in his or her disabled condition.<sup>6</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 fits the employee's capabilities with regard to his or her 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>7</sup> will result in the percentage of the employee's loss of wage-earning capacity.<sup>8</sup>

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<sup>5</sup> *David W. Green*, 43 ECAB 883 (1992).

<sup>6</sup> *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

<sup>7</sup> 5 ECAB 376 (1953).

<sup>8</sup> *Francisco Bermudez*, 51 ECAB 506 (2000); *James A. Birt*, 51 ECAB 291 (2000).

## ANALYSIS

OWCP accepted that appellant sustained a herniated cervical disc and multiple herniated lumbar discs in 1993, 1995 and 1999 occupational incidents. He stopped work on December 14, 1999 and did not return. Dr. Chattha, an attending neurologist and Dr. Bhattacharyya, an attending Board-certified neurologist, found appellant totally disabled for work from September 2000 to August 2010.

Dr. Mampalam, a Board-certified orthopedic surgeon and second opinion physician, opined on June 19, 2010 that appellant could perform full-time light duty. Dr. Bhattacharya, an attending Board-certified neurologist, stated in an August 18, 2010 letter that appellant could perform full-time limited duty.

As the medical evidence indicated that appellant could perform light duty, OWCP referred him for vocational rehabilitation on September 27, 2010. Appellant completed a functional capacity evaluation and vocational assessment. Dr. Bhattacharyya provided work limitations on November 16, 2010, finding appellant able to work eight hours a day with lifting limited to 25 pounds, reaching above the shoulder, squatting and kneeling restricted to two hours and a 5-minute break after each 15 minutes of walking. A vocational rehabilitation counselor identified the position of identification clerk as within appellant's physical limitations and vocational aptitudes. The identification clerk position was classified as light, with frequent lifting up to 10 pounds. These physical requirements are within the restrictions set forth by Dr. Bhattacharyya. The vocational rehabilitation counselor then determined the prevailing wage rate of these positions and their reasonable availability in the open labor market. Based on these calculations, OWCP issued a November 29, 2011 decision reducing appellant's compensation based on his ability to earn \$440.00 a week as an identification clerk.

The Board finds that OWCP considered the proper factors, such as availability of identification clerk positions and appellant's physical limitations, in determining that the job represented his wage-earning capacity. OWCP properly considered the medical evidence, including the functional capacity evaluation and Dr. Bhattacharya's reports, in determining that the identification clerk position was medically suitable work. Also, it followed the established procedures under the *Shadrick* decision in calculating appellant's employment-related loss of wage-earning capacity. Appellant does not contest OWCP's calculations.

Appellant did not submit probative medical evidence indicating that he was not capable of working eight hours a day. The Board finds that OWCP properly found that he was medically and vocationally capable of working eight hours day as an identification clerk. Thus, OWCP's November 29, 2011 decision reducing appellant's compensation based on his ability to earn wages in the selected position of cashier is proper under the law and facts of this case.<sup>9</sup>

On appeal, appellant asserts that he remains totally disabled for work due to the accepted injuries. However, as stated above, Dr. Mampalam and Dr. Bhattacharyya both found appellant able to perform full-time limited duty as of August 18, 2010.

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<sup>9</sup> *E.T.*, Docket No. 10-559 (issued March 28, 2011).

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

**CONCLUSION**

The Board finds that OWCP properly determined that the selected position of identification clerk represented appellant's wage-earning capacity.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated November 30, 2011 is affirmed.

Issued: July 23, 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