

FACTUAL HISTORY

On August 7, 2007 appellant, a maintenance worker, filed a claim² for his right shoulder condition which he attributed to lifting heavy boxes, equipment and building materials. He noted that his right shoulder had previously been injured three times and stated that his right shoulder condition worsened on July 19, 2007.³ Appellant stopped work on September 26, 2007. OWCP accepted the claim for an aggravation of bilateral rotator cuff tendinitis. It authorized right shoulder surgery, which appellant underwent on January 31, 2008. OWCP paid wage-loss compensation. A November 21, 2007 report indicates that appellant has conditions involving the cervical spine and bilateral carpal tunnel, which were not accepted by OWCP. An August 19, 2008 report indicates that he was considering carpal tunnel release on the right side.

Appellant received treatment from Dr. Darin T. Leetun, a Board-certified orthopedic surgeon. On August 26, 2009 Dr. Leetun reviewed a September 11, 2008 second opinion evaluation performed by Dr. Toby Carlson, a Board-certified orthopedic surgeon, agreed that appellant had permanent restrictions of no lifting, pushing or pulling greater than 20 pounds and no reaching above the shoulder with either arm. He further stated that if appellant's right shoulder pain persisted, he should undergo a magnetic resonance imaging scan study. If the study showed signs of abnormality in the cuff, surgical intervention would be an option. Dr. Leetun also noted that appellant had a nonaccepted condition of carpal tunnel syndrome which could be dealt with surgically. In an August 26, 2009 work capacity evaluation, he noted that appellant had permanent restrictions of no lifting, pushing or pulling greater than 20 pounds with either arm, no reaching above the shoulder and climbing limited to two hours a day.

On January 14, 2010 appellant was referred to vocational rehabilitation services as the employing establishment was unable to provide modified-duty work within his restrictions. On or about January 3, 2010 he moved from Michigan to Mississippi. OWCP transferred rehabilitation services to Mississippi.

On May 19, 2010 appellant signed a job search plan indicating that he would pursue employment for the next 90 days in the identified positions of parts clerk, Department of Labor's *Dictionary of Occupational Titles* (DOT 279.257-062) and Cashier (DOT 211.462-010). The rehabilitation counselor identified these positions as being vocationally appropriate as they were unskilled jobs requiring a minimum High School Diploma/GED level education, both jobs fell within the light-duty category that appellant's work restrictions suggested, and both jobs were reasonably available in appellant's locale of Columbus, Mississippi. On March 23, 2011 OWCP closed vocational rehabilitation services as appellant did not reasonably participate in the job search and no job was obtained even though two potential positions were identified which were available within his commuting area.

² Appellant originally filed a recurrence claim. On October 9, 2007 OWCP advised him that his claim was converted into a new occupational disease claim as he had identified contributing employment factors occurring over a long period of time.

³ Under claim File No. xxxxxx803, appellant has an accepted left shoulder strain for an April 29, 2003 traumatic injury. He underwent authorized left shoulder surgery on December 11, 2003 and returned to full duty approximately February 2004.

On April 6, 2011 the rehabilitation counselor provided an updated job classification (Form CA-66) for the identified position of parts clerk. The job description noted that the position involved selling automotive, appliance, electrical, and other parts and equipment in repair facility or parts store. The duties included: ascertaining make, year, model and type of part needed, inspect work, damaged or defective part to determine replacement required or advises customer of part needed according to description of malfunction. Discuss use and features of various parts, based on knowledge of machine or equipment. Read catalog, microfiche viewer or computer for replacement part stock number and price. Advise customer on substitution or modification of part when replacement is not available. Examine returned part to determine if defective and exchanges part or refunds money. Fill customer orders from stock and mark store parts in storeroom according to prearranged system. Receive and fill telephone orders for parts and perform other salesperson type duties. The form indicated that the position was light (requiring frequent lifting less than 10 pounds and occasional lifting up to 20 pounds), with frequent reaching, handling and fingering.⁴ The rehabilitation counselor found that appellant had the specific vocational preparation of more than six months for the position based on his past work experiences, GED and credits in mechanic trade and drafting. The position was found to be reasonably available in appellant's area, based on May 2008 statistical information from the state. Weekly wages were reported as \$491.60.

By letter dated May 17, 2011, OWCP advised appellant of a proposed reduction in wage-loss compensation on the grounds that he had the capacity to earn wages of \$491.60 a week as a parts clerk. It stated that the weight of the medical evidence was represented by Dr. Leetun.

In a May 25, 2011 letter, appellant contended that OWCP had not taken into consideration his other disabilities in its determination.

In a June 13, 2011 letter, appellant's attorney stated that the May 17, 2011 proposal failed to mention any physician who found the job requirements of a parts clerk compatible with appellant's physical restrictions.

By decision dated August 2, 2011, OWCP reduced appellant's compensation effective July 31, 2011 on the grounds that he had the capacity to earn weekly wages of \$491.60 as a parts clerk. It found the contentions raised by him and his attorney were unsubstantiated.

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 in such benefits.⁵

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

⁴ The form defined frequent as an activity or condition which existed from 1/3 to 2/3 of the time.

⁵ *Carla Letcher*, 46 ECAB 452 (1995).

capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, his degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.⁶

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 regards 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.⁷ 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.⁸

OWCP's procedures state that unless the medical evidence is clear and unequivocal that the selected position is medically suitable, OWCP should seek advice from an appropriate physician for an opinion as to whether the claimant can perform the position.⁹

ANALYSIS

OWCP selected the position of parts clerk and found this represented appellant's wage-earning capacity pursuant to 5 U.S.C. § 8115. On appeal, appellant's counsel argues that OWCP's decision is contrary to fact and law.

As noted, the position selected must be both vocationally and medically suitable. The Board notes that the rehabilitation counselor is a specialist in the vocational field and explained her findings. It was reasonable for the rehabilitation counselor to find appellant could perform the skills required in the position selected given his educational level and work experience. Furthermore, appellant has not contested the vocational suitability of the position. Accordingly, the facts support that he is vocationally qualified for the position.

The selected position must, however, also be medically suitable based on the claimant's specific medical condition. 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 injuries related and preexisting

⁶ See *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); see also 5 U.S.C. § 8115(a).

⁷ See *Dennis D. Owen*, 44 ECAB 475 (1993).

⁸ 5 ECAB 376 (1953); see also 20 C.F.R. § 10.303.

⁹ *D.C.*, Docket No. 11-51 (issued August 8, 2011); *J.V.*, Docket No. 10-886 (issued November 17, 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(d) (December 1995).

conditions.¹⁰ It is not clear that the selected position was within work restrictions provided by Dr. Leetun. For example, the August 26, 2009 work capacity evaluation limited appellant to no reaching above the shoulder. The job classification form states that the selected position of parts clerk requires frequent reaching, handling and fingering from 1/3 to 2/3 of the time or approximately 2.66 to 3.0 hours a day. In addition, the record reflects that appellant had documented cervical and bilateral carpal tunnel conditions. As noted, OWCP may only consider impairments resulting from preexisting conditions in the medical record. It is not clear from the record if the documented cervical and bilateral carpal tunnel conditions preexisted the work injury. OWCP did not discuss these conditions or establish that they arose subsequent to the accepted injuries.

OWCP's procedures state that unless the medical evidence is clear and unequivocal, OWCP should seek the advice of a physician regarding the medical suitability of the position. Here, OWCP did not seek any further medical opinion regarding appellant's ability to perform the duties of the selected position. The Board finds that the medical evidence is not clear and unequivocal in this case.¹¹ Therefore, OWCP did not meet its burden in this case.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to reduce appellant's compensation on the grounds he had the capacity to earn wages in the selected position of parts clerk.

¹⁰ See *N.J.*, 59 ECAB 171 (2007).

¹¹ *D.C.*, *supra* note 9.

ORDER

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

Issued: May 21, 2012
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board