

equipment. OWCP accepted the claim for a sprain of the right knee and leg and a tear of the right medial meniscus of the knee. Appellant worked limited duty following her injury.

On February 19, 2009 appellant underwent arthroscopic surgery to repair a right medial meniscal tear and anterior cruciate ligament rupture. She returned to modified work on April 21, 2009, but subsequently stopped work in November 2009 because the employing establishment did not have work available.

In a report dated November 6, 2009, Dr. Thomas J. Phillips, a Board-certified orthopedic surgeon, diagnosed a tear of the anterior cruciate ligament, chondromalacia and internal derangement of the right knee. He found that appellant had reached maximum medical improvement and could work with restrictions of standing and walking up to six hours, limited lifting, pulling and pushing up to 25 pounds and limited stooping, bending, kneeling and squatting.

OWCP paid appellant compensation beginning December 20, 2009. On January 15, 2010 it referred her to a rehabilitation counselor for vocational rehabilitation.

In an initial report dated February 20, 2010, the rehabilitation counselor noted that appellant had graduated from high school and completed one year of college but did not have computer skills. She recommended a six-month program in computer skills so that appellant could work as a receptionist or customer complaint clerk. OWCP approved a computer training program from March 31 to September 17, 2010.

In a report dated August 27, 2010, Dr. Zenia Cortes, a Board-certified orthopedic surgeon, diagnosed status post right partial medial meniscectomy and anterior cruciate ligament allograft, osteoarthritis of the right knee and anterior knee pain syndrome. She found that appellant could work with no "lifting, pushing and pulling over 25 pounds, limited standing and walking over six hours, and limited stooping, bending, kneeling and squatting."

On September 10, 2010 appellant completed training in office management systems. OWCP approved placement services.

In a January 14, 2011 progress report, Dr. Cortes advised that appellant could work lifting, pushing and pulling up to 25 pounds, standing and walking up to six hours and limited kneeling, bending and squatting.²

On March 19, 2011 the rehabilitation counselor completed a labor market survey and identified the position of receptionist as suitable. A job description from the Department of Labor's *Dictionary of Occupational Titles* indicated that the position was sedentary with lifting up to 10 pounds occasionally and no stooping or kneeling. The job required specific vocational preparation of six months to one year. The rehabilitation counselor advised that appellant met the vocational preparation for the position through her six-month computer training program. She contacted the state employment service and determined that the position was reasonably available within the appropriate commuting area with weekly wages of \$450.00 a week.

² Dr. Cortes submitted similar progress reports from March to May 2011.

In a May 10, 2011 closure report, OWCP's rehabilitation specialist found that the positions of receptionist and customer complaint clerk were within appellant's medical and vocational limitations. She further found that the positions were available in sufficient numbers within her geographical area at a salary ranging from \$360.00 to \$560.00 an hour.

On June 16, 2011 OWCP notified appellant that it proposed to reduce her compensation based on its finding that she had the capacity to work as a receptionist earning wages of \$400.00 a week. It provided her 30 days to submit additional evidence or argument regarding its proposed reduction of her compensation.

In a treatment note dated June 3, 2011, received by OWCP on July 15, 2011, Dr. Cortes evaluated appellant's knee and found that she could resume modified work.

By decision dated July 20, 2011, OWCP reduced appellant's compensation effective July 21, 2011 on the grounds that she had the capacity to earn wages of \$400.00 in the selected position of receptionist. It calculated her new wage-earning capacity in accordance with the principles set forth in *Albert C. Shadrick*.³

On August 1, 2011 appellant, through her attorney, requested a telephone hearing before an OWCP hearing representative.

On August 5, 2011 OWCP referred appellant to Dr. Richard P. Pollis, a Board-certified orthopedic surgeon, for a second opinion regarding whether she sustained right knee osteoarthritis causally related to the accepted work injury. In a report dated September 2, 2011, Dr. Pollis diagnosed post-traumatic degenerative arthritis and an anterior cruciate ligament tear due to her August 30, 2006 employment injury.

On September 22, 2011 OWCP informed appellant that it had expanded acceptance of her claim to include right knee osteoarthritis.

At the hearing, held on November 8, 2011 appellant's attorney argued that OWCP's acceptance of an additional knee condition showed a material worsening. He maintained that she was totally disabled.

In progress reports dated November 11 and December 9, 2011, Dr. Cortes diagnosed a tear of the right medial meniscus, chondromalacia patella, an anterior cruciate ligament tear and right knee osteoarthritis. She found that appellant could return to work with the restrictions set at the time she reached maximum medical improvement.

By decision dated January 25, 2012, OWCP's hearing representative affirmed OWCP's July 20, 2011 decision.

³ 5 ECAB 376 (1953); codified by regulations at 20 C.F.R. § 10.403.

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.⁴ 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 regard 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 or circumstances which may affect wage-earning capacity in his or her 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 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.⁶ 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*⁷ will result in the percentage of the employee's loss of wage-earning capacity.

ANALYSIS

OWCP accepted that appellant sustained a right knee and leg sprain and a tear of the medial meniscus of the right knee. She underwent surgery in February 2009 to repair a medial meniscal tear and rupture of the anterior cruciate ligament of the right knee. OWCP paid appellant compensation for total disability beginning December 2009 as the employing establishment did not have work available within her restrictions.

On November 6, 2009 Dr. Phillips diagnosed a tear of the anterior cruciate ligament, chondromalacia and internal derangement of the right knee. He found that appellant was at maximum medical improvement. Dr. Phillips released her to resume work with no standing or walking over six hours, limited lifting, pushing or pulling over 25 pounds and limited stooping, bending, kneeling and squatting. OWCP properly referred appellant for vocational rehabilitation as the medical evidence established that she was no longer totally disabled due to residuals of her employment injury.⁸

⁴ *T.O.*, 58 ECAB 377 (2007).

⁵ *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

⁶ *Mary E. Marshall*, 56 ECAB 420 (2005); *James A. Birt*, 51 ECAB 291 (2000).

⁷ *Supra* note 3.

⁸ *See N.J.*, 59 ECAB 171 (2007).

OWCP further properly found that appellant had the capacity to perform the duties of a receptionist. In reports dated August 2010 through December 9, 2011, Dr. Cortes diagnosed status post right knee meniscectomy and repair of an anterior cruciate ligament tear, osteoarthritis of the right knee and anterior knee pain syndrome. She concurred with the work restrictions found by Dr. Phillips at the time appellant reached maximum medical improvement. Based on Dr. Cortes' diagnosis of right knee osteoarthritis, OWCP developed the medical evidence by referring appellant to Dr. Pollis. It accepted right knee osteoarthritis as employment related based on his opinion. Dr. Pollis, however, addressed only causal relationship and thus his opinion is not relevant in determining disability. Dr. Cortes considered appellant's right knee osteoarthritis in finding that she could work within the restrictions set forth by Dr. Phillips. The position of receptionist is classified as sedentary and required occasional lifting up to 10 pounds, which is within the restrictions set forth by Dr. Phillips and Dr. Cortes. The medical evidence, consequently, establishes that she has the requisite physical ability to earn wages as a receptionist.

In assessing the claimant's ability to perform the selected position, OWCP must consider not only physical limitations but also take into account work experience, age, mental capacity and educational background.⁹ The rehabilitation counselor determined that appellant had the skills necessary to perform the position of receptionist based on her six-month training program in office management systems and computers. She further found that the position was reasonably available within the appropriate geographical area at a wage of \$450.00 a week. An OWCP rehabilitation specialist, in a report dated May 10, 2011, approved the receptionist position based on appellant's training and concurred that it was reasonably available at wages ranging from \$360.00 to \$560.00 a week. As the rehabilitation specialist is an expert in the field of vocational rehabilitation, OWCP may rely of his or her opinion in determining whether the job is vocationally suitable and reasonably available.¹⁰ The Board finds that OWCP considered the proper factors, including the availability of suitable employment, appellant's physical limitations and employment qualifications in determining that she had the capacity to perform the position of receptionist.¹¹ OWCP further properly determined her loss of wage-earning capacity in accordance with the formula developed in *Shadrick* and codified at 20 C.F.R. § 10.403.¹² The Board finds, therefore, that OWCP properly found that the position of receptionist reflected her wage-earning capacity effective July 21, 2011.

⁹ *Id.*

¹⁰ *Dorothy Jett*, 52 ECAB 246 (2001); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(b)(2) (October 2009).

¹¹ *See N.J.*, *supra* note 8.

¹² *See supra* note 7. OWCP divided appellant's employment capacity to earn wages of \$400.00 a week by her current pay rate of the position held when injured of \$1,067.88 a week to find a 37 percent wage-earning capacity. It multiplied the pay rate when the disability began, \$1,032.38 by the 37 percent wage-earning capacity percentage. The resulting amount of \$381.98 was subtracted from appellant's date of disability pay rate of \$1,032.38 which provided a loss of wage-earning capacity of \$650.40 a week. OWCP then multiplied this amount by the appropriate compensation rate of three-fourths and adjusted for cost of living which yielded a compensation amount of \$1,824.00 every four weeks before deductions for health and life insurance premiums.

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 reduced appellant's compensation based on its finding that she had the capacity to earn wages in the selected position of receptionist.

ORDER

IT IS HEREBY ORDERED THAT the January 25, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 16, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board