

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

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**R.M., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Louisville, KY, Employer**

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**Docket No. 12-228  
Issued: October 2, 2012**

*Appearances:*

*Alan J. Shapiro, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On November 22, 2011 appellant, through her attorney, filed a timely appeal of a July 29, and October 12, 2011 merit decisions regarding a loss of wage-earning capacity determination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3 the Board will consider the merits of the case.

**ISSUES**

The issues are: (1) whether OWCP properly determined that the position of cashier 2 represented appellant's wage-earning capacity; and (2) whether appellant established that modification of the loss of wage-earning determination was warranted.

**FACTUAL HISTORY**

On March 28, 2000 appellant, then a 43-year-old clerk, filed a traumatic injury claim alleging that she injured her left leg and experienced sciatica in the performance of duty. On July 18, 2000 she underwent a right L5-S1 discectomy during which a small nick was seen at the shoulder junction of the S1 nerve root. OWCP accepted appellant's claim for herniated lumbar disc on January 9, 2004 and entered her on the periodic rolls on February 16, 2005.

Appellant's attending physician, Dr. Stephen C. Payne, a Board-certified family practitioner, opined that appellant was totally disabled due to her accepted employment injury. OWCP referred her for a second opinion evaluation on February 2, 2007 to Dr. John Wayne Bacon, a Board-certified orthopedic surgeon. In a February 23, 2007 report, Dr. Bacon found appellant could work eight hours a day with restrictions. OWCP referred her for vocational rehabilitation services on September 6, 2007. The vocational rehabilitation counselor determined that appellant could return to work as a weight tester or surveillance system monitor. In a letter dated May 23, 2008, OWCP proposed to reduce appellant's compensation benefits based on her capacity to earn wages as a weight tester earning \$293.20 a week.

By decision dated June 25, 2008, OWCP finalized the wage-earning capacity determination.

Appellant requested an oral hearing and by decision dated December 23, 2008, OWCP's hearing representative reversed the June 25, 2008 decision.

On September 30, 2008 Dr. John J. Guarnaschelli, a Board-certified neurosurgeon, reviewed a magnetic resonance imaging (MRI) scan and found significant straight leg raising and sensory disturbances, bowel and bladder dysfunction and a numb foot. He opined that appellant was disabled in terms of the activities of daily living and opined that it would be extremely difficult for her to return to work. On November 24, 2008 Dr. Guarnaschelli stated that her accepted employment injury was the cause of her symptoms, but that age-related changes had occurred as well.

OWCP referred appellant for a second opinion evaluation to Dr. H. James Wiesman, a Board-certified orthopedic surgeon. In a March 30, 2009 report, Dr. Wiesman reviewed a history of injury and medical treatment and found that appellant had decreased sensation in the right lower extremity in a nondermatome pattern with no obvious atrophy of the muscles of the right or left lower extremities. He found limited range of motion of the lumbar spine and paravertebral spasm. Dr. Wiesman examined appellant's February 17, 2008 MRI scan and found soft tissue over the ventral epidural space extending into the right lateral recess which likely represented a disc protrusion. He diagnosed displaced intervertebral lumbar disc and failed back surgery laminectomy with nerve root irritation. Dr. Wiesman completed a work capacity evaluation and determined that appellant could not currently work eight hours a day. He stated that with rehabilitation sedentary work may be possible. Dr. Wiesman provided appellant's work restrictions.

By decision dated April 28, 2009, OWCP suspended appellant's compensation benefits as she refused to cooperate with a functional capacity evaluation (FCE).

On April 23, 2009 Dr. Guarnashchelli opined that obtaining a FCE would risk injuring appellant. Appellant requested an oral hearing and by decision dated November 13, 2009, OWCP's hearing representative reversed the April 28, 2009 decision suspending compensation benefits.

OWCP referred appellant for a second opinion evaluation. In a report dated April 29, 2010, Dr. Larry M. Parker, a Board-certified orthopedic surgeon, reviewed a history of injury

and set forth findings on physical examination. Appellant had a slightly positive straight leg raising on the right, with slight diminution of the Achilles reflex on the right side. Dr. Parker reviewed the May 17, 2008 MRI scan and concluded that she had objective findings to support lumbar radiculitis in the right lower extremity. He found that appellant could work a sedentary or light position. Dr. Parker completed a work capacity evaluation on May 11, 2010 and indicated that she could work eight hours a day with restrictions. He indicated that appellant could walk and stand for four to eight hours a day. Dr. Parker opined that she could lift up to 20 pounds. He recommended 5- to 10-minute breaks every hour.

OWCP referred appellant for vocational rehabilitation services on May 13, 2010. Appellant appeared at the initial meeting and stated that she had no skills and no one would hire her. She disagreed with Dr. Parker's work restrictions. In a report dated August 2, 2010, the vocational rehabilitation counselor determined that entry level work would be appropriate based on appellant's skills. She completed a transferable skills analysis for appellant. The vocational rehabilitation counselor determined that appellant's work at the employing establishment was a light semi-skilled position and had level 3 reasoning, mathematics and language abilities. She stated that appellant did not have sufficient transferable work skills to consider a position above entry level. Appellant did not agree with the position of cashier and declined to sign the individualized placement plan. The vocational rehabilitation counselor noted that typical cashier jobs would allow an option to sit, including movie theater cashier, parking lot cashier or cafeteria cashier. She advised appellant of free computer classes available at the public library.

The vocational rehabilitation counselor conducted a labor market survey based on appellant's lack of transferable skills and considered entry level positions within her light-duty physical requirements of lifting up to 20 pounds and the need to change positions for 5 to 10 minutes each hour. She provided labor market survey information to support that the position of cashier 2 was reasonably available to appellant within her commuting area. The vocational rehabilitation counselor indicated that there were 11,380 cashier positions available. She provided appellant with 20 job openings as a cashier which did not require any specific education or vocational preparation.

In a letter dated August 17, 2010, OWCP informed appellant that the position of cashier was within her physical restrictions. It stated that she would receive 90 days of assistance to find employment.

Appellant participated in a telephone conference on September 15, 2010 and noted that she had not been looking for work. The vocational rehabilitation counselor provided appellant with a list of job openings on October 1, 11 and 29 2010. She determined that the position of cashier 2 was within appellant's work restrictions and vocational ability. This was defined as a light position requiring lifting, carrying, pushing and pulling up to 20 pounds occasionally and up to 10 pounds frequently. The position required walking and standing frequently as well as pushing or pulling. On November 8, 2010 the vocational rehabilitation counselor stated that the position of cashier 2 was reasonably available to appellant with an expected entry level wage of \$7.25 an hour. The position description required up to 30 days of specific vocational preparation or level 2 and the general educational requirements were reasoning level 3, mathematics level 2 and language level 2.

On November 16, 2010 OWCP proposed to reduce appellant's compensation benefits based on her capacity to earn wages as a cashier 2. Counsel disagreed on November 24, 2010 the grounds that the job description was not in keeping with Dr. Parker's physical restrictions.

By decision dated December 20, 2010, OWCP determined that the position of cashier 2 represented appellant's wage-earning capacity. It reduced her wage-loss compensation effective that date.

Appellant, through counsel, requested an oral hearing before an OWCP hearing representative that was held on April 19, 2011. She stated that she had never worked as a cashier and had no experience in how to operate a computer or cashier machine. Appellant informed the vocational rehabilitation counselor that she had no other interests and received no vocational training. Counsel argued that the position of cashier would not allow her to sit for 5 to 10 minutes as required by Dr. Parker. Appellant stated that she did not follow any of the jobs recommended by the vocational rehabilitation counselor, but did report to the employment office.

By decision dated July 29, 2011, OWCP's hearing representative affirmed the December 20, 2010 decision finding that the cashier 2 position properly reflected appellant's wage-earning capacity and was within her physical abilities.

Counsel requested reconsideration on September 28, 2011 and stated, "This request for reconsideration is regarding LWEC [loss of wage-earning capacity] and is based on the decision of *M.V. and Department of Homeland Security, Transportation Securing Administration, et al.* Docket 10-1642, June 15, 2011." He requested that OWCP review all necessary documents before making a decision and opined that the decision should be vacated and the previous decision overturned. This decision found that as the vocational rehabilitation counselor trained the claimant as an entry-level budget analyst, the record should have demonstrated how many of the positions available were entry level and therefore suitable to the claimant's vocational training.

By decision dated October 12, 2011, OWCP declined to reopen appellant's claim for consideration of the merits. It reviewed the case provided by counsel and opined that as appellant was provided with multiple job opening and opportunities to engage in the rehabilitation process, the cited case was not applicable to the facts of her claim.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8115 of FECA<sup>1</sup> provides that wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent her wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity or the employee has no actual earnings, her wage-earning capacity is determined with due regards to the nature of her injury, the degree of physical impairment, her usual employment, her age, her

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<sup>1</sup> 5 U.S.C. §§ 8101-8193, 8115.

qualifications for other employment, the availability of suitable employment, and other factors or circumstances which may affect her wage-earning capacity in her disabled condition.<sup>2</sup>

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 Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open market, that fits that employee's capabilities with regards to her 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*<sup>3</sup> will result in the percentage of the employee's loss of wage-earning capacity. The base statutory rate compensation paid under FECA is 66 2/3 percent of the injured employee's monthly pay.<sup>4</sup>

### ANALYSIS -- ISSUE 1

OWCP accepted appellant's claim for herniated lumbar disc. It referred her for a second opinion evaluation. In a report dated April 29, 2001, Dr. Parker, provided a history of injury and findings on physical examination. He stated that appellant had a slightly positive straight leg raising on the right, with slight diminution of the Achilles reflex on the right side. Dr. Parker reviewed the May 17, 2008 MRI scan and concluded that she had lumbar radiculitis in the right lower extremity. He found that appellant could work at a sedentary or light position. Dr. Parker completed a work capacity evaluation on May 11, 2010 and noted that she could work eight hours a day within restrictions. Appellant could walk and stand for four to eight hours a day, lift up to 20 pounds, with a 5- to 10-minute break every hour.

OWCP referred appellant for vocational counseling. The vocational rehabilitation counselor noted that appellant had no transferable skills and considered entry level positions. She identified the position of cashier 2 as within appellant's medical restrictions and vocational skills and as reasonably available within her commuting area. The vocational rehabilitation counselor determined that the position was performed in sufficient numbers in appellant's commuting area to make the position reasonably available. The Board finds that OWCP properly relied on the opinion of the vocational rehabilitation counselor that appellant was vocationally capable of performing the information clerk position.

The position of cashier 2 is designated as light duty with occasional lifting up to 20 pounds. It requires standing or walking. The Board finds that the medical evidence establishes that the physical demands of the position of cashier 2 were within appellant's work restrictions as established by Dr. Parker.

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<sup>2</sup> *N.J.*, 59 ECAB 171 (2007).

<sup>3</sup> 5 ECAB 376 (1953).

<sup>4</sup> *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

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 2 represented her loss of wage-earning capacity. The weight of the evidence in the record establishes that appellant had the requisite physical ability, skill and experience to perform the position of cashier 2 and that such a position was reasonably available within the general labor market of her commuting area. The Board finds, therefore, that OWCP properly determined that the position of cashier 2 reflected appellant's loss of wage-earning capacity effective December 20, 2010 and used the *Shadrick* formula to properly reduce his compensation effective December 20, 2010.

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

### **LEGAL PRECEDENT -- ISSUE 2**

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages.<sup>5</sup> Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn and not on actual wages lost.<sup>6</sup> Compensation payments are based on the wage-earning capacity determination, which remains undisturbed until properly modified.<sup>7</sup>

Modification of a standing wage-earning capacity determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was erroneous.<sup>8</sup> OWCP's procedure manual provides that, if a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In this instance, the claims examiner will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity.<sup>9</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>10</sup>

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<sup>5</sup> 5 U.S.C. § 8115(a); *K.R.*, Docket No. 09-415 (issued February 24, 2010); *Lee R. Sires*, 23 ECAB 12, 14 (1971) (the Board held that actual wages earned must be accepted as the measure of a wage-earning capacity in the absence of evidence showing they do not fairly and reasonably represent the employee's wage-earning capacity).

<sup>6</sup> *K.R.*, *supra* note 5; *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984); *Roy Matthew Lyon*, 27 ECAB 186, 190 (1975).

<sup>7</sup> *See Sharon C. Clement*, 55 ECAB 552, 557 (2004).

<sup>8</sup> *Sue A. Sedgwick*, 45 ECAB 211, 215-16 (1993); *Elmer Strong*, 17 ECAB 226, 228 (1965).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995). *See also* FECA Transmittal 10-01 (issued October 5, 2009).

<sup>10</sup> *Selden H. Swartz*, 55 ECAB 272, 278 (2004).

## ANALYSIS -- ISSUE 2

Appellant requested reconsideration of OWCP's hearing representative's finding on July 29, 2011 that the position of cashier 2 represented her loss of wage-earning capacity and submitted Board case law in support of her contends that the original loss of wage-earning capacity determination was erroneous. OWCP declined to modify the loss of wage-earning capacity determination by decision dated October 12, 2011.<sup>11</sup>

The case cited by counsel involved the selection of a constructed position of entry level budget analyst with average annual openings of six per year for all budget analysts. The employee argued that when he applied for budget analyst positions, the educational requirement was generally a Master's degree in finance and that such positions generally required three to five years of experience. The Board found that as the labor market evidence did not establish how many positions were available a year at entry level or suitable to the employee's training. The finding that the constructed position was reasonably available was not established.<sup>12</sup> The Board finds that the findings of *M.V.* are not applicable in this case.

The vocational rehabilitation counselor identified the position of cashier 2 as suitable for appellant and noted that the specific level of vocational preparation was a short demonstration of up to 30 days. The general educational development was reasoning level 3, mathematics level 2 and language level 2. Appellant's educational development exceeds that required by the position. The vocational rehabilitation counselor provided appellant with 20 job openings which did not require additional education or vocational preparation. Appellant did not apply for the recommended jobs. The labor market survey of record establishes that there were over 10,000 positions available within her commuting area. The Board finds the position of cashier 2 was readily available, did not require additional educational training and the vocational rehabilitation counselor clearly demonstrated that appellant did not require any additional vocational preparation in order to secure this position. Appellant has not offered sufficient evidence to rebut the findings of the vocational rehabilitation counselor. The Board finds that she has not met her burden of proof to establish that the wage-earning capacity determination was erroneous. The Board finds that OWCP properly denied modification of the loss of wage-earning capacity determination.

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

## CONCLUSION

The Board finds that OWCP met its burden of proof to reduce appellant's compensation benefits based on her earnings in the constructed position of cashier 2. The Board further finds

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<sup>11</sup> The Board notes that OWCP incorrectly stated that the merits of appellant's case had not been reviewed as this was a request for modification of a loss of wage-earning capacity determination and entitled to merit review on that basis.

<sup>12</sup> *M.V.*, Docket No. 10-1642 (issued June 15, 2011).

that appellant did not meet her burden of proof to modify the wage-earning capacity determination.

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 12 and July 29, 2011 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 2, 2012  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board