



## **FACTUAL HISTORY**

On December 12, 2005 appellant, then a 47-year-old mail processor, filed an occupational disease claim alleging that he sustained carpal tunnel syndrome causally related to factors of his federal employment. OWCP accepted the claim for bilateral carpal tunnel syndrome.<sup>3</sup> It paid appellant compensation for total disability beginning October 3, 2005. Appellant underwent a right carpal tunnel release on March 8, 2006 and a left carpal tunnel release on November 14, 2008.

On March 19, 2009 Dr. Walter Andrew Semkiw, Board-certified in occupational medicine, advised that appellant could return to work with no use of the left hand and no lifting over five pounds.

On April 1, 2009 OWCP referred appellant for vocational rehabilitation. In a report dated May 1, 2009, the rehabilitation counselor discussed appellant's prior work history as a telecommunications clerk, billing office clerk and customer service representative and mail processing clerk.

By letter dated July 29, 2009, OWCP referred appellant to Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon, for a second opinion examination. On July 10, 2009 Dr. Swartz diagnosed residual bilateral carpal tunnel syndrome and a resolved shoulder strain. He found that appellant could return to work with restrictions on performing repetitive movements of the wrists and elbows for four hours a day, reaching overhead with the left shoulder for two hours a day and pushing, pulling and lifting 10 to 15 pounds for four hours a day.

OWCP requested that Dr. Semkiw review the reports of Dr. Swartz. On August 6, 2009 Dr. Semkiw advised that appellant could work with no lifting over 15 pounds and with a "[m]aximum of [four] hours of lifting, pushing, pulling or repetitive use of [the] hands [a] day."<sup>4</sup>

In a report dated December 4, 2009, the rehabilitation counselor noted that appellant had limited computer skills but had experience as a cashier. She found that he could work in a sedentary occupation and suggested the positions of receptionist and order clerk/customer service.

An OWCP rehabilitation specialist approved a training plan for the position of receptionist or order clerk. The plan provided for a six-month training course in general office basics with microcomputer applications. Appellant graduated from the training program on August 13, 2010. OWCP approved placement services until November 28, 2010.

In a report dated September 20, 2010, Dr. Semkiw added as a work restriction that appellant should not use a keyboard extensively.

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<sup>3</sup> OWCP also accepted that appellant sustained right shoulder strain under File No. xxxxxx678.

<sup>4</sup> Dr. Semkiw provided the same work restrictions in a November 19, 2009 report.

In a closing report dated December 21, 2010, the rehabilitation counselor related that after training appellant had “excellent customer service and obtained general office skills, including basic computer application knowledge, which are required for entry-level receptionist and order clerk positions.” An OWCP rehabilitation specialist, however, noted that those positions required repetitive use of the hand and thus were not suitable.

On March 1, 2011 the rehabilitation counselor conducted a labor market survey and identified the position of information clerk as suitable. A job classification from the Department of Labor’s *Dictionary of Occupational Titles* (DOT) indicated that the position was sedentary and required occasional lifting up to 10 pounds and occasional reaching and handling but no fingering. The job required specific vocational preparation of six to eight months. The rehabilitation counselor advised that appellant met the vocational preparation requirements through his six months of training in computer and office skills and his training internship. She contacted the state employment agency and determined that the position was reasonably available within his commuting area with a weekly wage of \$400.00.

On March 23, 2011 an OWCP rehabilitation specialist found that the position of information clerk was vocationally suitable for appellant based on his training. He further determined that the position was reasonably available in appellant’s commuting area.

By letter dated April 27, 2011, OWCP notified appellant that it proposed to reduce his compensation based on its finding that he had the capacity to work as an information clerk. In a letter dated May 22, 2011, appellant described his difficulty obtaining employment.

By decision dated June 2, 2011, OWCP reduced appellant’s compensation effective June 5, 2011 on the grounds that he could earn \$400.00 a week in the selected position of information clerk. It calculated his new loss of wage-earning capacity in accordance with the principles set forth in *Albert C. Shadrick*.<sup>5</sup>

On June 16, 2011 appellant, through his attorney, requested a telephone hearing before an OWCP hearing representative. At the telephonic hearing, held on October 14, 2011, he related that he had worked as a front desk clerk earning \$13.50 an hour since July 2, 2011.

By decision dated January 12, 2012, OWCP’s hearing representative affirmed the June 2, 2011 decision. She found, however, that OWCP should determine whether appellant had rehabilitated through his vocational rehabilitation such that his loss of wage-earning capacity should be changed.

### **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>6</sup> Under section 8115(a), wage-earning capacity is determined by the actual

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<sup>5</sup> 5 ECAB 376 (1953); codified by regulations at 20 C.F.R. § 10.403.

<sup>6</sup> *T.O.*, 58 ECAB 377 (2007).

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 or circumstances which may affect wage-earning capacity in his or her disabled condition.<sup>7</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.<sup>8</sup> 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>9</sup> will result in the percentage of the employee's loss of wage-earning capacity.

### ANALYSIS

Appellant received compensation for total disability beginning October 3, 2005 due to his accepted bilateral carpal tunnel syndrome. On July 10, 2009 Dr. Swartz, an OWCP referral physician, opined that he could return to work with limitations on repetitive wrist and elbow movement of no more than four hours a day, reaching overhead with the left shoulder no more than two hours a day and pushing, pulling and lifting 10 to 15 pounds for up to four hours a day. In a report dated August 6, 2009, Dr. Semkiw, appellant's attending physician, agreed with Dr. Swartz' work restrictions. On September 20, 2010 he also found that appellant should not use a keyboard extensively. OWCP properly referred appellant for vocational rehabilitation as the medical evidence established that he was no longer totally disabled due to residuals of his employment injury.<sup>10</sup>

OWCP further found that appellant had the capacity to perform the duties of an information clerk. The position is classified as sedentary and required occasional lifting up to 10 pounds and occasional reaching and handling, which were within the restrictions set forth by Dr. Semkiw and Dr. Swartz. The medical evidence, consequently, establishes that he has the requisite physical ability to earn wages as an information clerk.

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

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<sup>7</sup> *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

<sup>8</sup> *Mary E. Marshall*, 56 ECAB 420 (2005); *James A. Birt*, 51 ECAB 291 (2000).

<sup>9</sup> *See supra* note 5.

<sup>10</sup> *See N.J.*, 59 ECAB 171 (2007).

and educational background.<sup>11</sup> The rehabilitation counselor determined that appellant had the skills necessary to perform the position of information clerk based on his six months of training in office skills and computers. She further found that the position was reasonably available within the appropriate geographical area at a wage of \$400.00 a week. An OWCP rehabilitation specialist, in a report dated March 23, 2011, approved the information clerk position based on appellant's training and concurred that it was reasonably available. As he 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.<sup>12</sup> 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 he had the capacity to perform the position of information clerk.<sup>13</sup> OWCP further properly determined his loss of wage-earning capacity in accordance with the formula developed in *Shadrick* and codified at 20 C.F.R. § 10.403.<sup>14</sup> OWCP, therefore, properly found that the position of information clerk reflected his loss of wage-earning capacity effective June 5, 2011.

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

### CONCLUSION

The Board finds that OWCP properly reduced appellant's compensation effective June 5, 2011 based on its finding that he had the capacity to work in the selected position of information clerk.

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<sup>11</sup> *Id.*

<sup>12</sup> *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).

<sup>13</sup> See *N.J.*, *supra* note 10.

<sup>14</sup> OWCP divided appellant's employment capacity to earn wages of \$400.00 a week by his current pay rate of the position held when injured of \$1,001.14 a week to find a 40 percent wage-earning capacity. It multiplied the pay rate at the disability recurred, \$1,010.00 by the 40 percent wage-earning capacity percentage. The resulting amount of \$404.00 was subtracted from appellant's recurrent pay rate of \$1,010.00 which provided a loss of wage-earning capacity of \$606.00 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 \$1,912.00 every four weeks before deductions for health and life insurance premiums.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 12, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 15, 2012  
Washington, DC

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

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

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