

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

J.C., Appellant

and

**U.S. POSTAL SERVICE, GENERAL MAIL
FACILITY, Little Rock, AR, Employer**

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**Docket No. 12-949
Issued: October 15, 2012**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 19, 2012 appellant filed a timely appeal from a December 13, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly reduced appellant's compensation on the grounds that the selected position of receptionist represented his wage-earning capacity.

FACTUAL HISTORY

On February 13, 1989 appellant, then a 30-year-old flat sorting machine operator, filed an occupational disease claim (Form CA-2) alleging that he sustained a right arm injury as a result of his federal employment. OWCP accepted the claim for a permanent aggravation of a

¹ 5 U.S.C. § 8101 *et seq.*

preexisting right elbow arthritic condition. By decision dated June 22, 1995, OWCP found that appellant's actual earnings in a modified distribution clerk position fairly and reasonably represented his wage-earning capacity.

On August 16, 2010 appellant filed a recurrence of total disability claim stating that his light-duty position would be terminated due to the National Reassessment Process (NRP). He indicated that his pay would cease as of September 15, 2010. In a report dated September 8, 2010, Dr. Jay Lipke, an orthopedic surgeon, diagnosed work-related post-traumatic osteoarthritis of the right elbow. He completed a duty status report (Form CA-17) providing appellant's current work restrictions. The restrictions included a 10-pound lifting restriction and two to four hours a day intermittent pushing and pulling.

In a decision dated December 3, 2010, OWCP stated that based on the evidence the June 22, 1995 wage-earning capacity determination was modified. It found that appellant's employment-related condition had materially changed and he was entitled to compensation for wage loss as of September 15, 2010.

By letter dated January 14, 2011, OWCP advised appellant that he was being referred for vocational rehabilitation services. In a letter dated March 31, 2011, a rehabilitation counselor requested that Dr. Lipke review the job descriptions for the positions of receptionist, hotel clerk, automobile rental clerk and stock clerk. The counselor requested that Dr. Lipke review the positions and address whether appellant could perform the job duties. In a response received on April 29, 2011, Dr. Lipke stated "yes he can" with respect to whether appellant could perform the job duties of the enclosed job descriptions. He advised that appellant's current work restrictions were permanent in nature.

The record contains a job classification form (CA-66) dated April 27, 2011 for the position of receptionist (Department of Labor's *Dictionary of Occupational Titles* No. 237.367-038). The position was described as sedentary with a strength level that included occasional lifting of up to 10 pounds. The rehabilitation counselor stated that the weekly wages were \$314.21 and the job was reasonably available in appellant's commuting area based on state labor market information. By report dated September 26, 2011, the counselor stated that labor market research completed that day found that the position of receptionist was readily available in appellant's local labor market.

By letter dated November 1, 2011, OWCP advised appellant that it proposed to reduce his monetary compensation. It found that he had the capacity to earn wages of \$314.21 a week as a receptionist. Appellant was advised that, if he disagreed with this proposal, he had 30 days to submit evidence or argument.

In a letter dated November 17, 2011, appellant disagreed with the proposal to reduce his compensation. He contended that he could work part time at the employing establishment with his current work restrictions. Appellant stated that he had asked the employing establishment for light duty but his requests were denied.

By decision dated December 13, 2011, OWCP reduced appellant's compensation on the grounds that he had the capacity to earn wages of \$314.21 per week as a receptionist. It found

that his current pay rate for the date-of-injury job was \$933.58 per week and his wage-earning capacity was 34 percent.

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. When an individual sustains an employment-related injury that prevents return to the employment held at the time of injury, but that does not render the employee totally disabled for all gainful employment, the employee is considered partially disabled and is entitled to compensation for his loss of wage-earning capacity as provided for under 5 U.S.C. § 8115.²

Under 5 U.S.C. § 8115(a), wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning 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.³

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.⁴ 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.⁵

ANALYSIS

In the present case, appellant did not have any actual earnings as of September 15, 2010. Based on the evidence of record, OWCP modified the 1995 wage-earning capacity determination and reinstated full monetary benefits and referred him for vocational rehabilitation.

OWCP selected the position of receptionist as representing appellant's wage-earning capacity. In accord with established procedures, the rehabilitation counselor found that the

² 5 U.S.C. § 8115.

³ See *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); see also 5 U.S.C. § 8115(a).

⁴ See *Dennis D. Owen*, 44 ECAB 475 (1993); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity*, Chapter 2.814.8 (October 2009).

⁵ 5 ECAB 376 (1953); see also 20 C.F.R. § 10.403.

position was vocationally suitable based on appellant's employment history and educational qualifications. In addition, the counselor also found that the position was reasonably available in appellant's commuting area based on state market information.

Dr. Lipke, the attending physician, reviewed the job description and found that appellant could perform the job duties. There is no other probative medical evidence on the issue and the weight of medical opinion rested with Dr. Lipke. The Board finds that the evidence of record supports a finding that the selected position was medically suitable.

According to the rehabilitation counselor, the reported wages for an entry-level position as a receptionist were \$314.21 per week. No contrary evidence was provided. In accord with OWCP procedures, appellant was provided with a prereduction notice advising him of the proposed reduction in compensation.⁶ He responded with a November 17, 2011 letter stating that he had tried to find a position with the employing establishment, but was told that none was available. When a claimant does respond to a notification of proposed reduction, OWCP should consider the claimant's response.⁷ In the December 13, 2011 decision, it did consider appellant's response, noting that job offers and assignments are issues that may be raised with the employing establishment. Appellant's stated preference to work with his former federal employer does not preclude a determination regarding his wage-earning capacity.

The Board finds that the selected position was medically and vocationally suitable, and that OWCP followed its procedures with respect to determining his wage-earning capacity based on a selected position in the labor market. As noted, the formula used to compute appellant's loss of wage-earning capacity is based on the *Shadrick* case and OWCP regulations. The current pay rate for the date-of-injury position is compared with the current pay rate for the selected position and a percentage is determined.⁸ In this case, OWCP found that appellant's current pay rate for the date-of-injury position was \$933.58 per week, and the pay rate for the selected position was \$314.21 per week. It found that he had a 66 percent loss of wage-earning capacity and his monetary compensation was accordingly adjusted.

Based on the evidence of record, the Board finds that OWCP properly applied 5 U.S.C. § 8115 and determined appellant's wage-earning capacity based on the selected position of receptionist. 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 the evidence of record supports OWCP's determination that the selected position of receptionist represented appellant's wage-earning capacity.

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Wage-Earning Capacity*, Chapter 2.814.8(e)(1) (October 2009).

⁷ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.8 (March 1997).

⁸ See 20 C.F.R. § 10.403.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 13, 2011 is affirmed.

Issued: October 15, 2012
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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