

Appellant participated in an OWCP-sponsored vocational rehabilitation plan in March 2010 after OWCP received several reports from Dr. Charles M. Bosley, an attending Board-certified orthopedic surgeon, who found that appellant could engage in work which did not require repetitive stooping/bending, heavy lifting or prolonged standing.

In September 2010, rehabilitation services were interrupted in order to obtain a second opinion examination to clarify appellant's work restrictions. On November 30, 2010 Dr. Harlan Bleecker, a Board-certified orthopedic surgeon, stated that appellant was partially disabled due to this work-related lumbar strain. Appellant was able to engage in work which did not require pushing, pulling, or lifting more than 25 pounds or repetitive bending/twisting.

In a January 19, 2011 report, Dr. Donald Stevenson, an attending Board-certified orthopedic surgeon, noted that physical examination revealed moderately diminished back flexion and a negative sciatic stretch test. He found that appellant could work with a lifting limitation of 25 pounds and no frequent bending, twisting or stooping.

Appellant restarted his vocational rehabilitation efforts in March 2011 and attempted placement with an employer. In a July 6, 2011 form report, Dr. Stevenson advised that appellant could work for eight hours per day with restrictions, including lifting up to 25 pounds for up to four hours per day and twisting, bending, stooping or climbing for up to four hours per day.

On August 4, 2011 appellant's vocational rehabilitation counselor conducted a labor market survey for the position of customer complaint clerk (listed in the Department of Labor's *Dictionary of Occupational Titles*). It revealed that the position was reasonably available in appellant's commuting area with an average weekly wage of \$532.80. Working as a customer complaint clerk involved investigating complaints about merchandise, service, billing or credit rating. The position required occasional lifting of up to 20 pounds and did not require stooping, climbing, kneeling or crouching.² A job placement plan was authorized for the period August 15 to November 13, 2011, but rehabilitation services were terminated on August 24, 2011 due to appellant's failure to sign the plan and his refusal to participate in placement efforts.

In a December 15, 2011 letter, OWCP advised appellant that it proposed to reduce his wage-loss compensation because the evidence established that he was only partially disabled and had the capacity to earn wages as a customer complaint clerk at the rate of \$532.80 per week. It found that the position of customer complaint clerk was medically and vocationally suitable and reasonably available within his commuting area. Therefore, the position was representative of his wage-earning capacity. OWCP provided appellant 30 days from the date of the letter to submit evidence or argument challenging the proposed action. Appellant did not submit any evidence or argument within the allotted period.

In a February 2, 2012 decision, OWCP reduced appellant's compensation effective February 12, 2012 based on his capacity to earn wages as a customer complaint clerk.

In a May 9, 2012 form report, Dr. Stevenson noted that appellant had intermittent low back pain and occasional leg pain. He diagnosed lumbar spondylosis and lumbar strain and

² The term "occasional" was defined as taking up as much as one-third of the work time.

indicated that appellant could work for eight hours per day if he lifted no more than 25 pounds and limited bending, stooping, squatting and climbing.

Appellant requested a telephone hearing with an OWCP hearing representative. During the May 15, 2012 hearing, he asserted that he was not capable of working as a customer complaint clerk due to physical and mental disability. Appellant testified that his back was still bothering him and he had to medicate all the time, a circumstance which caused problems with his concentration and his ability to communicate. He expressed his interest in becoming an internet marketing consultant, a job which would allow him to work from home and not be locked into a set schedule. Appellant's counsel repeated appellant's belief that he could not physically or psychologically perform the customer complaint clerk position.

In a July 30, 2012 decision, the hearing representative affirmed the February 2, 2012 decision reducing appellant's compensation. She noted that appellant asserted at the hearing that his emotional condition and medication usage prevented him from working as a customer complaint clerk, but found that he had not submitted medical evidence to support his assertion.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.³ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁴

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 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.⁵ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.⁶ The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.⁷ The fact that an employee has been unsuccessful in obtaining work in the selected position does not establish that the work is not reasonably available in his commuting area.⁸ In determining wage-earning capacity based on a constructed position,

³ *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

⁴ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁵ *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

⁶ *Albert L. Poe*, 37 ECAB 684, 690 (1986), *David Smith*, 34 ECAB 409, 411 (1982).

⁷ *Id.* The commuting area is to be determined by the employee's ability to get to and from the work site. *See Glen L. Sinclair*, 36 ECAB 664, 669 (1985).

⁸ *See Leo A. Chartier*, 32 ECAB 652, 657 (1981).

consideration is given to the residuals of the employment injury and the effects of conditions which preexisted the employment injury.⁹

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 or 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 labor market, that fits that employee's capabilities with regard to his 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 the *Albert C. Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.¹⁰

ANALYSIS

OWCP accepted that on August 5, 2005 appellant sustained a lumbar strain due to loading letter trays into a mail sorting machine. Appellant stopped work on April 7, 2009 and began receiving total disability compensation on the periodic rolls.

Dr. Stevenson, an attending Board-certified orthopedic surgeon, found that appellant was not totally disabled for work and had a capacity to perform work on a full-time basis subject to specified work restrictions. In a July 6, 2011 report, Dr. Stevenson noted that appellant could work for eight hours per day with restrictions, including lifting up to 25 pounds for up to four hours per day and twisting, bending, stooping or climbing for up to four hours per day. Appellant's vocational rehabilitation counselor determined that appellant was able to perform the position of customer complaint clerk and that state employment services showed the position was available in sufficient numbers so as to make it reasonably available within appellant's commuting area. The position required occasional lifting of up to 20 pounds and did not require stooping, climbing, kneeling or crouching. OWCP properly relied on the opinion of the rehabilitation counselor that appellant was vocationally capable of performing the customer complaint clerk position and a review of the evidence reveals that appellant is physically capable of performing the position.

Appellant asserted at a May 2012 hearing that his emotional condition and medication usage prevented him from working as a customer complaint clerk. The Board notes that he did not submit any medical evidence to support this assertion.¹¹ Appellant did not submit any evidence or argument showing that he could not vocationally or physically perform the customer complaint clerk position.

⁹ See *Jess D. Todd*, 34 ECAB 798, 804 (1983).

¹⁰ See *Dennis D. Owen*, 44 ECAB 475, 479-80 (1993); *Wilson L. Clow, Jr.*, 44 ECAB 157, 171-75 (1992); *Albert C. Shadrick*, 5 ECAB 376 (1953).

¹¹ Around the time of the hearing, appellant submitted a May 9, 2012 report in which Dr. Stevenson indicated that he could work for eight hours per day if he lifted no more than 25 pounds and limited bending, stooping, squatting and climbing. These restrictions were within the requirements of the customer complaint clerk position. Appellant expressed his interest in becoming an internet marketing consultant, but he did not show that the customer complaint clerk position was unsuitable.

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 customer complaint clerk represented appellant's wage-earning capacity.¹² The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of customer complaint clerk and that such a position was reasonably available within the general labor market of his commuting area. Therefore, OWCP properly reduced appellant's compensation effective February 12, 2012 based on his capacity to earn wages as a customer complaint clerk.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP properly reduced appellant's compensation effective February 12, 2012 based on his capacity to earn wages as a customer complaint clerk.

ORDER

IT IS HEREBY ORDERED THAT the July 30, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 12, 2013
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

¹² See *Clayton Varner*, 37 ECAB 248, 256 (1985).