

FACTUAL HISTORY

Appellant, then a 51-year-old flat sorter clerk, has an accepted disease claim based on repetitive loading, pulling and lifting mail tubs. On February 9, 2006 OWCP accepted his claim for unspecified disorder of the left shoulder bursae tendons. It also accepted sprain of the left shoulder and left rotator cuff tear. On August 4, 2006 Dr. Larry Kjeldgaard, an osteopathic surgeon, performed an arthroscopy of the left shoulder, subacromial decompression and insertion of pain pump catheter. On September 1, 2006 he performed a left total shoulder bipolar replacement arthroplasty with insertion of interarticular pain pump. On March 24, 2007 appellant returned to work at the employing establishment in a limited-duty position.

By decision dated March 5, 2008, OWCP determined that appellant's actual wages fairly and reasonably represented his LWEC and reduced his monetary benefits to zero. On June 11, 2008 it issued a schedule award for a 22 percent loss of use of the left arm extremity.

On February 27, 2010 OWCP withdrew appellant's limited duty and on March 4, 2010 appellant filed a notice of recurrence. On the claim form, the employing establishment noted that he fell under the National Reassessment Program (NRP) and that it was unable to accommodate his medical restrictions.

On April 12, 2010 OWCP accepted appellant's recurrence of disability as of February 27, 2010. In a May 10, 2010 decision, it determined that the March 5, 2008 LWEC was modified as the position he held was a "make work" position. OWCP returned appellant to the compensation rolls in receipt of total disability.

In a May 12, 2010 report, Dr. Christopher Mann, an osteopath, stated that appellant could not do continuous lifting or carrying, but could lift 10 to 20 pounds intermittently. Appellant could not use his left arm at all. Dr. Mann noted that he could perform intermittent sitting of one to four hours a day; intermittent standing, bending and stooping one to three hours a day; intermittent walking, kneeling and twisting for one to two hours a day; intermittent pushing and pulling with right arm only for one to two hours a day; simple grasping with right arm only for one to four hours a day; and fine manipulation and reaching above shoulder for one to two hours a day. He also prohibited operating machinery.

On May 14, 2010 OWCP referred appellant for vocational rehabilitation. In a June 9, 2010 initial vocational assessment report, the counselor evaluated appellant's educational and work history, his medical and disability-related information and transferable skills. He noted that, in addition to working for the employing establishment, appellant had worked as a construction worker from 1984 to 1985 and from 1974 to 1978 as a machine operator for the Marine Corps at a Naval weapons station and nuclear station, monitoring the facility to ensure only authorized personnel entered to the facilities.

On August 2, 2010 the vocational rehabilitation counselor listed jobs that were suitable for appellant, including that of surveillance system monitor, referencing the Department of Labor's *Dictionary of Occupational Titles* (DOT) 379.367-010. The duties of this position were listed as observing television screens that transmit, in sequence, views of transportation facility sites; pushing hold button to maintain surveillance of location where an incident is developing;

telephoning police or other designated agency to notify authorities of the location of the disruptive activity; and adjusting monitor controls when required. This job was listed as sedentary with no climbing, stooping, kneeling, reaching, handling or fingering. The strength level was listed as sedentary, which involved occasional lifting of up to 10 pounds. The counselor noted that the position required a short demonstration of about 30 days. He noted that appellant had a work history as a mail processor for 25 years and previously monitored the employing establishment facility after his injury in modified duty. The counselor also noted that appellant had experience working with people and was able to operate office machines with his right upper extremity. This position description was updated by the vocational counselor on October 12, 2011. The vocational counselor noted that nine employers in appellant's commuting area were hiring. He found that appellant was capable of earning \$313.60 a week based on the SkillTran Program on that date.

On December 6, 2011 OWCP proposed reducing appellant's monetary compensation based on his capacity to earn wages as a surveillance system monitor at the rate of \$313.60 a week, which it determined was the entry-level wage for this position.

The rehabilitation counselor submitted an updated employment survey dated January 31, 2012. He found that appellant could earn up to \$314.00 a week as a surveillance system monitor. The rehabilitation counselor based on the Bureau of Labor Statistics statewide search figures of May 17, 2011. This salary was based on the average wages for the lowest 10 percent of positions performing surveillance system monitor work. The rehabilitation counselor noted that six employers in the commuting area informed him that they were hiring and three were not hiring.

By decision dated February 10, 2012, OWCP reduced appellant's monetary compensation finding that he was able to work as a surveillance system monitor earning \$313.60 a week. This resulted in a 30 percent wage-earning capacity.

On March 8, 2012 appellant requested review of the written record by an OWCP hearing representative.

In a June 4, 2012 report, Dr. Mann noted that appellant had permanent left shoulder restrictions of 20 pounds lifting, 4 hours grasping with the left shoulder and no overhead reaching.

By decision dated August 15, 2012, OWCP's hearing representative affirmed the decision of February 10, 2012.

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 proving that the disability has ceased or lessened in order to justify termination or modification of compensation

benefits.² Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.³

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 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, his or her degree of physical impairment, his or her usual employment, his or her age, his or her qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his or her wage-earning capacity in her disabled condition.⁴

OWCP procedure instructs that, in cases where a claimant has undergone vocational rehabilitation, the vocational counselor will submit a final report to the vocation rehabilitation specialist summarizing why vocational rehabilitation was unsuccessful and listing two or three jobs which are medically and vocationally suitable for the claimant. Where no vocational rehabilitation services are provided, the vocational rehabilitation specialist will have provided this report. Included will be the corresponding job numbers from DOT (or OWCP specified equivalent) and pay ranges in the relevant geographical area.⁵ 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 *Shadrick*⁶ decision will result in the percentage of the employee's LWEC.

In determining an employee's wage-earning capacity based on a position defined suitable but not actually held, OWCP must consider the degree of physical impairment, including impairments resulting from both injury-related and preexisting conditions, but not impairments resulting from post-injury or subsequently acquired conditions. Any incapacity to perform the duties of the selected positions resulting from subsequently acquired conditions is immaterial to the LWEC that can be attributed to the accepted employment injury and for which appellant may receive compensation.⁷ Additionally, 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.⁸

² *Betty F. Wade*, 37 ECAB 556 (1986); *Ella M. Gardner*, 36 ECAB 238 (1984).

³ *See Del K. Rykert*, 40 ECAB 284 (1988).

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

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8 (October 2009).

⁶ *Albert C. Shadrick*, 5 ECAB 376 (1953); codified at 20 C.F.R. § 10.403(d)-(e).

⁷ *James Henderson, Jr.*, 51 ECAB 268 (2000).

⁸ *Albert L. Poe*, 37 ECAB 684 (1986); *David Smith*, 34 ECAB 409 (1982).

ANALYSIS

OWCP accepted appellant's claim for an unspecified disorder of the left shoulder bursae tendons, sprain of the left shoulder and a left rotator cuff. On March 24, 2007 appellant returned to work with the employing establishment in a limited-duty position. In a March 5, 2008 decision, OWCP determined that appellant's actual wages fairly and reasonably represented his wage-earning capacity and reduced his compensation benefits to zero. On February 27, 2010 the employing establishment withdrew appellant's limited duty under NRP as it could not accommodate his physical restrictions available. On April 12, 2010 OWCP accepted appellant's claim for a recurrence of disability as of February 27, 2010. Appellant received compensation on the periodic rolls for total disability. FECA Bulletin 09-05 provides that under NRP, when placement with the previous employer is not a reasonable option, other disability management efforts must be pursued with actions leading to a vocational referral. Once work tolerance limitations are received that represent the weight of the medial evidence, a referral to vocational rehabilitation should be made.⁹ FECA Pursuant to Bulletin 09-05, when an individual is impacted by NRP and returned to the periodic rolls, if total disability is not medically established but a partial capacity for work is defined through physical work restrictions, a constructed LWEC will be issued.

On May 12, 2010 Dr. Mann advised that appellant was not totally disabled. Appellant could lift and carry 10 to 20 pounds intermittently. He was restricted to intermittent sitting of one to four hours a day; intermittent standing, bending and stooping one to three hours a day; intermittent walking, kneeling for one to two hours a day; simple grasping with right arm only for one to four hours a day; and fine manipulation and reaching above the shoulder for one to two hours a day. In a June 4, 2012 update, Dr. Mann noted that appellant had permanent restrictions on the left shoulder of up to 20 pounds lifting, four hours grasping and no overhead reaching.

On October 12, 2011 the rehabilitation counselor identified the surveillance system monitor position as a position that conformed to appellant's restrictions, employment history, education and skills. The position was listed as sedentary and did not require lifting over 10 pounds with no stooping or climbing. The counselor noted that appellant met the requirements of specific vocational preparation. Further, the job was available in sufficient numbers so as to make it reasonably available to claimant in his commuting area. He documented openings in the area in multiple reports. The average weekly wage was determined to be \$313.60 based on review of statewide labor statistics.

The Board finds that OWCP considered the proper factors, such as vocational training and availability the surveillance system monitor position, to determine that the position represented appellant's wage-earning capacity. The position was within the restrictions as set forth by Dr. Mann. OWCP followed the established procedures under the *Shadrick*¹⁰ decision in calculating appellant's LWEC. The Board finds that OWCP properly determined that appellant was medically and vocationally capable of working in the position of surveillance system

⁹ *Id.* at I.A.8.

¹⁰ *Supra* at n.6.

monitor. It properly adjusted appellant's monetary compensation to reflect his capacity to earn wages in the constructed position.

On appeal, appellant's counsel contends that the employers selected by the vocational counselor were not actually available. The vocational counselor found that numerous positions as a surveillance monitor were available. OWCP is not obligated to actually secure a job for the claimant; it must only present evidence that the selected position is performed in sufficient numbers in the geographical area so as to be reasonably available.¹¹ The Board gives great weight to the vocational specialist's expert opinion. Appellant's counsel's argument that the position was not within appellant's work restrictions is without merit. The position is sedentary and Dr. Mann's reports document that appellant could perform work with his right hand and not exceed the restrictions set for his left shoulder. He also contends that the surveillance position would require appellant to do more than monitor video cameras and was subject to greater physical demands. Counsel also contended that the majority of workers doing surveillance-type security work require greater skills and experience than listed by the vocational counselor. He did not submit any evidence to support his contentions. As to the wages of the position, the counselor determined that appellant could earn \$313.60 a week based on SkillTran. The wage information was supported by the Bureau of Labor Statistics for the State of Texas which, as noted by the counselor, was \$314.00 a week. The counselor noted that for appellant's commuting area, wages were higher, with the bottom 10 percent of the surveillance monitor positions paying \$347.00 per week. Accordingly, the Board finds that the record supports the determination that appellant has the capacity to earn \$313.60 a week as found.

Appellant may request a 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 determined that appellant's LWEC was represented by the constructed position of surveillance-system monitor.

¹¹ C.G., Docket No. 13-808 (issued July 2, 2013).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 15, 2012 is affirmed.

Issued: August 28, 2013
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