United States Department of Labor
Employees' Compensation Appeals Board

L.C., Appellant	)	
and	)	**Docket No. 13-938**
	)	**Issued: August 20, 2013**
U.S. POSTAL SERVICE, POST OFFICE, San Francisco, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 11, 2013 appellant filed a timely appeal from a December 20, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) adjusting her compensation based on a loss of wage-earning capacity determination. Pursuant to the Federal Employees' Compensation Act[1] (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 effective June 3, 2012 based on her capacity to earn wages in the selected position of surveillance system monitor.

FACTUAL HISTORY

On March 13, 1995 appellant, then a 43-year-old distribution clerk working in the nixie unit, filed an occupational disease claim alleging pain in her right arm, shoulders, neck and back

[1] 5 U.S.C. § 8101 *et seq.*

causally related to factors of her federal employment. OWCP accepted the claim for neck sprain, right shoulder sprain, right rotator cuff syndrome, right lateral and medial epicondylitis and tenosynovitis of the right hand and wrist. Appellant performed limited-duty until September 29, 2009, when the employing establishment could no longer accommodate her restrictions. OWCP paid her compensation for total disability beginning September 30, 2009.

In a report dated October 26, 2009, Dr. Robert J. Harrison, Board-certified in internal and preventive medicine, related that appellant had continued objective findings of her September 8, 1992 work injury, including"neck pain and rightness with repetitive use as well as chronic hand pain aggravated by grasping and gripping." He found that she could participate in vocational rehabilitation with restrictions on lifting, reaching overhead and working machinery.

On December 10, 2009 OWCP referred appellant for vocational rehabilitation. In a report dated February 8, 2010, a rehabilitation counselor noted that appellant could read and understand English at a sixth grade level.

In a duty status report dated April 1, 2010, Dr. Harrison found that appellant could lift up to five pounds for eight hours a day, push and pull up to five pounds for two hours a day and stand and walk for four hours a day. Appellant could not perform fine manipulation, reach above her shoulder, drive a vehicle or operate machinery.

On April 20, 2010 OWCP ceased rehabilitation efforts pending a second opinion examination. On December 27, 2010it referred appellant to Dr. Ramon Jimenez, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated February 25, 2011, Dr. Jimenez reviewed the history of injury and discussed appellant's complaints of continuing pain in her neck and right upper extremity. He diagnosed right rotator cuff syndrome, right shoulder sprain, cervical sprain and right lateral epicondylitis of the elbow. Dr. Jimenez found continued neck and shoulder problems due to appellant's work injury. In a work restriction evaluation completed February 4, 2011, he determined that she could work eight hours a day with restrictions on walking four hours a day, reaching above the shoulder and bending for two hours a day, performing repetitive wrist and elbow movements two hours a day and pushing, pulling and lifting up to 10 pounds for four hours a day. On April 23, 2011 Dr. Jimenez clarified that appellant could perform repetitive wrist and elbow movements for three hours a day.

In a work restriction evaluation dated May 2, 2011, Dr. Harrison found that appellant could lift, push and carry up to five pounds for eight hours a day and stand and walk for two hours per day with no reaching over the shoulder or operating a vehicle or machinery.

On June 1, 2011 OWCP referred appellant for vocational rehabilitation. It advised her that the report of Dr. Jimenez constituted the weight of the medical evidence and established that she was capable of modified employment.

In a vocational report dated July 1, 2011, the rehabilitation counselor discussed appellant's work history as a seamstress, waitress/cashier and mail processing clerk.The counselor noted that a January 13, 2010 vocational evaluation revealed that she could read at

the sixth grade level and had a third grade knowledge of vocabulary. The rehabilitation counselor recommended a course in English as a second language and computer skills training.

On August 29, 2011 the rehabilitation counselor conducted a labor market survey for the position of surveillance system monitor. The Department of Labor's *Dictionary of Occupational Titles*, identified the position as sedentary requiring occasional lifting under 10 pounds and no reaching, strength, climbing or fingering. The specific vocational preparation for the position was a short demonstration of 30 days. The rehabilitation counselor found that appellant was qualified for the position based on her past work history and as she would receive a guard card. The counselor further found that the job was reasonably available within her commuting area based on state occupational employment projections at a weekly wage of $460.00

In an August 30, 2011 report, the rehabilitation counselor noted that appellant did not want to work as a security monitor. The counselor indicated that appellant lived in the United States for 30 years but still has a very heavy accent.

On September 30, 2011 the rehabilitation counselor reported that on September 28, 2011 appellant received guard card training but failed the test as she refused "to review and correct the incorrect answers, which is standard for all students, as very few get the answer correct the first time." She informed appellant that her refusal constituted obstruction and scheduled her for another training class on October 4, 2011.[2]

In a memorandum of conference dated November 1, 2011, OWCP noted that appellant had received the state guard card needed for obtaining employment and had begun job placement.[3] At the conference her daughter participated as an interpreter.

On November 14, 2011 OWCP approved job placement services from October 5, 2011 to January 2, 2012. On January 3 and February 6, 2012, it approved 30-day extensions for job placement services.

In a closure memorandum dated March 23, 2012, an OWCP rehabilitation specialist noted that appellant had received training as a security guard on September 28 and October 4, 2011 and job placement services from October 5, 2011 to March 8, 2012. He identified the position of surveillance system monitor as medically and vocationally suitable and reasonably available within her commuting area at wages of $10.00 to $14.00 per hour. The rehabilitation specialist stated, "The injured worker did not obtain employment because she was not motivated to obtain employment. One potential employer that interviewed the claimant reported that the claimant appeared disinterested in the position she was applying for and disinterested in the interview process."

On March 30, 2012 the employing establishment provided appellant's current annual pay rate on the date of injury, including night differential, as $40,683.00 and her current annual pay

[2]On October 4, 2011 OWCP approved appellant's request to have an interpreter assist her with guard card testing.

[3] The record contains a copy of appellant's guard registration.

rate on the date of her recurrence of disability, including night differential, as $52,526.00 per year.

On April 19, 2012 OWCP advised appellant of its proposed reduction of her monetary compensation based on its finding that she had the capacity to earn wages as a surveillance system monitor. It provided her 30 days from the date of the letter to submit evidence or argument challenging the proposed action.

In an April 25, 2012 statement, appellant's union representative disagreed with her pay rate, noting that she was at a Level 6, Step 0 and that a weekly rate of $825.55 "does not correspond to any pay rate in the scales…."He argued that she did not understand her guard certification test andchanged her answers as instructed. The union representative noted that appellant received a form stating that she had passed her instruction in the Power to Arrest two days after she failed the test in September 2012.[4]

In an undated statement received by OWCP on May 8, 2012, appellant related that she did not understand sufficient English to pass the security guard test on her first attempt. The rehabilitation counselor told appellant that she had to retake the test or she would lose her compensation benefits. On appellant's second attempt, a trainer gave her back her test and told her to change the wrong answers. She stated, "I still do not know what was right or wrong with my answers because I never understood many of the words."

By decision dated May 31, 2012, OWCP reduced appellant's compensation effective June 3, 2012 based on its finding that she had the capacity to work in the selected position of surveillance system monitor. It appliedthe *Shadrick* formula[5] and noted that her weekly pay rate when disability recurred was $1,054.55 and that the current weekly pay rate for job and step when injured was $825.55. OWCP found that appellant was capable of earning $460.00 a week, that the adjusted wage-earning capacity a week was $590.55, that the percentage of new wage-earning capacity was 56 percent and that the loss in wage-earning capacity amount a week was $464.00, leaving appellant with a compensation rate of $348.00 or $365.25 a week when increased by applicable cost-of-living adjustments. This resulted in a new compensation rate every four weeks of $1,461.00, less health benefits premium of $239.48 and basic life insurance premiums of $16.50, for a net compensation every four weeks of $1,205.02 beginning on June 3, 2012.

On June 4, 2012 appellant requested an oral hearing. An interpreter and her representative were present at the hearing, held on October 11, 2012. The hearing representative discussed appellant's contentions that she received assistance with the guard test and that she did not know the answers. Appellant's representative questioned the pay rate in the loss of wage-earning capacity determination and indicated that he was not familiar with the formula OWCP used to determine wage-earning capacity. Appellant related that she initially did not pass the training but on the second attempt the trainer told her the answers which she believed was

[4] The record contains a certificate stating that appellant satisfactorily completed an eight-hour Powers to Arrest & Weapons of Mass Destruction course on September 30, 2012.

[5] *See Albert C. Shadrick*, 5 ECAB 376 (1953), codified by regulation at 20 C.F.R. § 10.403.

cheating. She indicated that a rehabilitation counselor originally was going to send her to class to help her learn English but instead sent her to security training. Appellant's representative questioned OWCP's determination that she could earn $10.00 per hour working as a security monitor.

In an October 25, 2012 work restriction evaluation, Dr. Harrison diagnosed lumbar strain and rotator cuff pain and found that appellant could work lifting, carrying, pushing and pulling up to five pounds intermittently.

By decision dated December 20, 2012, the hearing representative affirmed the May 31, 2012 wage-earning capacity determination. She found that appellant was capable of work as a surveillance systems monitor and that OWCP properly determined her loss of wage-earning capacity using the *Shadrick* formula.[6] The hearing representative noted that appellant's representative challenged the use of the formula rather than alleging error in OWCP's pay rate calculation. She further found that appellant had sufficient English skills to perform the selected position based on her prior work history and her participation at the hearing.

On appeal, appellant challenged OWCP's use of a pay rate of $825.55 per week as it was the amount that she earned on September 9, 1992, the date of injury. She noted that she worked until December 2009, at which point she received a salary of $52,526.00. Appellant argued that her pay rate should be on her salary of $52,526.00 a year instead of her date-of-injury salary of $40,683.00 a year.

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.[7] Under section 8115(a), 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 regard 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.[8]

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.[9] Once this selection is made, a

[6] *Id.*

[7] *T.O.*, 58 ECAB 377 (2007).

[8] *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

[9] *Mary E. Marshall*, 56 ECAB 420 (2005); *James A. Birt*, 51 ECAB 291 (2000).

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*[10] will result in the percentage of the employee's loss of wage-earning capacity.

ANALYSIS

OWCP accepted that appellant sustained neck sprain, right shoulder sprain, right rotator cuff syndrome, right lateral and medial epicondylitis and tenosynovitis of the right hand and wrist causally related to factors of her federal employment. Appellantreceived compensation for total disability beginning September 2009. On October 26, 2009 Dr. Harrison found that she could participate in vocational rehabilitation. On April 1, 2010 he provided work restrictions of lifting, pushing and pulling up to five pounds and standing and walking for four hours per day. Dr. Harrison did not, however, support his opinion with medical rationale and thus it is of diminished probative value.[11]

On February 25, 2011 Dr. Jimenez, an OWCP referral physician, diagnosed right rotator cuff syndrome, right shoulder sprain, cervical sprain and right lateral epicondylitis. He advised that appellant could work eight hours per day with restrictions on walking four hours per day, reaching above the shoulder and bending for two hours per day, performing repetitive wrist and elbow movements two hours per day and pushing, pulling and lifting up to 10 pounds for four hours per day. On April 23, 2011 Dr. Jimenez asserted that she could perform repetitive wrist and elbow movements for three hours a day. His opinion, which is based on a proper factual and medical background and supported by medical rationale, constitutes the weight of the evidence and establishes that appellant was no longer totally disabled due to residuals of her employment injury.[12]

OWCP properly found that appellant had the physical capacity to perform the duties of a surveillance system monitor. The position is classified as sedentary work requiring occasional lifting under 10 pounds and no reaching, climbing or fingering, which is within the restrictions set forth by Dr. Jimenez. Following its proposed reduction of her compensation, appellant submitted an October 25, 2012 work restriction evaluation from Dr. Harrison, who found that she could intermittently lift, carry, push and pull up to five pounds. He did not, however, provide any rationale for his opinion and as such it is of little probative value.[13] The weight of the medical evidence, consequently, establishes that appellant has the requisite physical ability to earn wages as a surveillance system monitor.

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[10] *See supra* note 5.

[11] *See R.F.*, 58 ECAB 128 (2006) (a medical report is of limited probative value on a given medical question if it is unsupported by medical rationale).

[12] *See N.J.*, 59 ECAB 171 (2007).

[13] *See Sandra D. Pruitt*, 57 ECAB 126 (2005) (the issue of whether a claimant's disability is related to an accepted condition is a medical question which must be established by a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disability is causally related to employment factors and supports that conclusion with sound medical reasoning).

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 and educational background.[14] The rehabilitation counselor determined that appellant had the skills necessary to perform the position of surveillance system monitor based on her prior work history and her obtaining of a guard card. She further found that the position was reasonably available within the appropriate geographical area at a wage of $460.00 per week. In a closure report dated March 23, 2012, an OWCP rehabilitation specialist found that the position of surveillance system monitor was suitable for appellant both medically and geographically and reasonably available at wages ranging from $10.00 to $14.00 per hour. As the rehabilitation specialist 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.[15] 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 she had the capacity to perform the position of surveillance system monitor.[16] While appellant argued that she did possess the English skills necessary to pass the guard test or perform the position, vocational testing revealed that she could read at a sixth grade level and the hearing representative found that she adequately communicated during hearing with little help from the translator.

On appeal, appellant argues that OWCP incorrectly determined her loss of wage-earning capacity. She contends that it should be based on her 2009 recurrent pay rate rather than her date-of-injury pay rate. The formula for determining loss of wage-earning capacity, developed in the case of *Albert C. Shadrick*, has been codified at section 104.3 of OWCP's regulations.[17] Under the *Shadrick* formula, OWCP first calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's actual earnings by the current or updated, pay rate for the position held at the time of injury. The employee's wage-earning capacity in dollars is computed by first multiplying the pay rate for compensation purposes, defined in 20 C.F.R. § 10.5(a) as the pay rate at the time of injury, the time disability begins or the time disability recurs, whichever is greater, by the percentage of wage-earning capacity. The resulting dollar amount is then subtracted from the pay rate for compensation purposes to obtain loss of wage-earning capacity.[18]

The Board finds that OWCP properly determined appellant's loss of wage-earning capacity using the *Shadrick* formula. OWCP divided her capacity to earn wages of $460.00 a week by her current pay rate for the position held when injured of $825.55 per week to find a 56 percent wage-earning capacity. It multiplied the pay rate at the time of injury of $1,054.55 per week by the 56 percent wage-earning capacity percentage. The resulting amount of $590.55 was

[14] *Id.*

[15] *Dorothy Jett*, 52 ECAB 246 (2001); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(b)(2) (December 1993).

[16] *See N.J.*, *supra* note 12.

[17] *See supra* note 5.

[18] *Albert C. Shadrick*, *supra* note 5; 20 C.F.R. § 10.403(e).

subtracted from appellant's pay rate when disability recurred of $1,054.55, which provided a loss of wage-earning capacity of $464.00 per week. OWCP then multiplied this amount by the appropriate compensation rate of three-fourths which yielded $348.00 or $365.25 per week after cost-of-living adjustments. It found that net compensation every four weeks after deductions for health benefits and life insurance was $1,205.02.

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 OWCP properly reduced appellant's compensation effective June 3, 2012 based on her capacity to earn wages in the selected position of surveillance system monitor.

ORDER

IT IS HEREBY ORDERED THATthe December 20, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 20, 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