

compensation for total disability on the periodic rolls. On September 29, 2005 Dr. Claude D. Gelinas, an attending Board-certified orthopedic surgeon, performed authorized surgery for a lumbar fusion, discectomy and laminectomy at L5-S1.

On November 6, 2006 Dr. Gelinas indicated that appellant could perform limited-duty work for eight hours a day. Appellant's work restrictions included lifting up to 10 pounds at his discretion and engaging in occasional twisting, bending and stooping. On January 21, 2008 Dr. Gelinas stated that lumbar x-rays taken on that date showed that it was more than likely that the fusion at L5-S1 was solid. Some early narrowing was noted at the L4-5 level with no instability.

In March 2008, OWCP requested updated medical limitations regarding appellant's ability to work. In a May 19, 2008 form report, Dr. Gelinas advised that appellant could work for eight hours a day with restrictions including lifting, pushing or pulling up to 20 pounds for eight hours per day. Appellant could walk, stand or sit for eight hours per day.²

In early March 2011, appellant was referred to an OWCP vocational rehabilitation program.

On March 29, 2011 Dr. Miguel Pupiales, an attending Board-certified anesthesiologist specializing in pain management, noted that appellant reported that he was still having low back pain with spasms, particularly when he sat for a prolonged period. On examination appellant exhibited lumbar muscle spasms upon palpation and diagnosed lumbago, lumbar disc degeneration and postlaminectomy syndrome. Dr. Pupiales stated that, in the course of an eight-hour day, appellant could stand or walk for one hour at a time and sit or drive for one and a half hours at a time. Appellant could bend and twist occasionally, reach up to shoulder level and climb stairs at his own pace, but he could not engage in squatting, crawling or climbing ladders. Dr. Pupiales indicated that appellant could lift a maximum of up to 20 pounds and could frequently lift and carry up to 10 pounds.

On April 26, 2011 OWCP accepted lumbago, sciatica, degeneration of a lumbar disc and displacement of a lumbar disc without myelopathy as a result of the June 28, 2003 work injury.

In a May 24, 2011 report, Dr. William Watson, a Board-certified orthopedic surgeon serving as an OWCP referral physician, reported the findings of his examination of appellant. He diagnosed status post fusion, laminectomy, decompression and discectomy at L5-S1 and continued evidence of S1 and L5-S1 radiculopathy on the left side.³ Dr. Watson noted paraspinal muscle spasm with tenderness in the left buttocks and weakness in several low back muscles enervated by the L5 and S1 nerves. He found that appellant could perform sedentary-type activity which was outlined by Dr. Pupiales. Dr. Watson completed a work restriction form on May 24, 2011, listing that appellant could work eight hours per day with restrictions. He

² On May 12, 2008 Dr. Gelinas stated that recent magnetic resonance imaging testing showed that the surgical fusion was completely solid at L5-S1 without any evidence of junctional breakdown.

³ Dr. Watson recommended that appellant undergo additional electrodiagnostic studies as part of his maintenance treatment.

noted that appellant could sit for one and a half hours at a time, walk for one hour at a time, and stand for one and a half hours at a time. Appellant was limited to occasionally pushing up to 20 pounds and pulling up to 10 pounds.⁴ Dr. Watson indicated that appellant could not engage in climbing.

Appellant was unsuccessful in finding employment through his vocational rehabilitation program. On November 23, 2011 his vocational rehabilitation counselor determined that he was vocationally and physically capable of working in the constructed position of telemarketer.⁵ The position involved soliciting orders for merchandise or services over the telephone and keying information into a computer. The physical requirements of the position including frequently applying 10 pounds of force, occasionally applying 20 pounds of force and occasionally engaging in reaching, handling and fingering.⁶ The vocational rehabilitation counselor indicated that state employment services showed that the position of telemarketer was reasonably available in appellant's commuting area at a wage of \$327.00 per week.⁷

In an April 12, 2012 letter, OWCP advised appellant that it proposed to reduce his wage-loss compensation based on his ability to earn wages in the constructed position of telemarketer. It noted that the medical evidence, including the opinion of Dr. Watson, established that he was physically capable of working as a telemarketer. OWCP noted that appellant's vocational rehabilitation counselor had provided an opinion that he was vocationally capable of performing the position. Appellant was provided 30 days from the date of the letter to submit evidence and argument challenging the proposed action.

In an April 30, 2012 letter, appellant asserted that he was in constant pain and that he could not sit for the period of time required by the position of telemarketer. He requested that OWCP help him to attend school in order to prepare him for reentering the workforce.

By decision dated May 31, 2012, OWCP reduced appellant's compensation effective June 3, 2012 based on his ability to earn wages in the constructed position of telemarketer. It found that he had not submitted sufficient evidence to establish that he was not physically or vocationally able to work as a telemarketer.

Appellant requested a hearing with an OWCP hearing representative. He submitted June 25 and October 25, 2012 progress reports from Dr. Pupiales, who discussed the treatment of his back condition. Dr. Pupiales did not discuss appellant's ability to work.

At the October 12, 2012 hearing with an OWCP hearing representative, appellant testified that he was in constant pain and could not sit or stand for more than an hour. Appellant asserted that his physician told him that he could not work as a telemarketer because he could not sit for long periods of time.

⁴ Dr. Watson did not specifically provide any limits on lifting.

⁵ The counselor discussed former jobs appellant held which required him to interact with the public.

⁶ The position did not require climbing, stooping, kneeling or crawling.

⁷ The counselor also referenced a labor market survey and direct employer contacts.

In a January 2, 2013 decision, OWCP's hearing representative affirmed OWCP's May 31, 2012 decision, noting that appellant was vocationally and physically capable of working as a telemarketer.

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.⁸ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁹

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 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 his or her 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 his or her disabled condition.¹⁰ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.¹¹ 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.¹² 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.¹³

In determining wage-earning capacity based on a constructed position, consideration is given to the residuals of the employment injury and the effects of conditions which preexisted the employment injury.¹⁴ In determining wage-earning capacity based on a constructed position, consideration is not given to conditions which arise subsequent to the employment injury.¹⁵

⁸ *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

⁹ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

¹⁰ *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C § 8115(a).

¹¹ *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

¹² *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).

¹³ *See Leo A. Chartier*, 32 ECAB 652, 657 (1981).

¹⁴ *See Jess D. Todd*, 34 ECAB 798, 804 (1983).

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(d) (December 1995).

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 or her 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 *Shadrick* decision will result in the percentage of the employee's loss of wage-earning capacity.¹⁶

ANALYSIS

OWCP accepted that appellant sustained a lumbar sprain/strain, lumbago, sciatica, degeneration of a lumbar disc and displacement of a lumbar disc without myelopathy due to a June 28, 2003 work injury. In September 2005, appellant underwent authorized surgery for a lumbar fusion, discectomy and laminectomy at L5-S1. He received compensation for total disability on the periodic rolls.

Dr. Gelinas, an attending Board-certified orthopedic surgeon, found that appellant was not totally disabled for work, but had a partial capacity to perform work for eight hours per day subject to specified work restrictions. Appellant was referred to a vocational rehabilitation program and his vocational rehabilitation counselor determined in late 2011 that he was able to perform the position of telemarketer. Contact with the state employment services showed the position was available in sufficient numbers so as to make it reasonably available within his commuting area.¹⁷ OWCP properly relied on the opinion of the rehabilitation counselor that appellant was vocationally capable of performing the constructed position of telemarketer.

The Board notes that the medical evidence reveals that appellant is physically capable of performing the position of telemarketer. On March 29, 2011 Dr. Pupiales, an attending Board-certified anesthesiologist specializing in pain management, indicated that, in the course of an eight-hour day, appellant could stand or walk for one hour at a time and sit or drive for one and a half hours at a time. Appellant could bend and twist occasionally, reach up to shoulder level and climb stairs at his own pace, but he could not engage in squatting, crawling or climbing ladders. Dr. Pupiales indicated that appellant could lift a maximum of up to 20 pounds and could frequently lift and carry up to 10 pounds. In a May 24, 2011 report, Dr. Watson, a Board-certified orthopedic surgeon serving as an OWCP referral physician, indicated that appellant could work eight hours per day with restrictions. He noted that appellant could sit for one and a half hours at a time, walk for one hour at a time, and stand for one and a half hours at a time.

¹⁶ 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).

¹⁷ The position involved soliciting order for merchandise or services over the telephone and keying information into a computer. The physical requirements of the position including occasionally applying 20 pounds of force, frequently applying 10 pounds of force and occasionally engaging in reaching, handling and fingering.

Appellant was limited to occasionally pushing up to 20 pounds and pulling up to 10 pounds.¹⁸ Dr. Watson indicated that appellant could not engage in climbing. The Board finds that the work restrictions would allow appellant to perform the physical requirements of the position of telemarketer. There is no indication that appellant would not be able to alternate between sitting and standing in order to perform the duties of the position of telemarketer. Although the physicians of record noted that appellant still experienced back pain, there is no medical evidence stating that this symptom would prevent him from working as a telemarketer.¹⁹ Appellant did not submit any evidence or argument showing that he could not vocationally or physically perform the telemarketer position.

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 telemarketer represented appellant's wage-earning capacity.²⁰ The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of telemarketer and that such a position was reasonably available within the general labor market of appellant's commuting area. Therefore, OWCP properly reduced appellant's compensation effective June 3, 2012 based on his capacity to earn wages as a telemarketer.

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 June 3, 2012 based on his ability to earn wages in the constructed position of telemarketer.

¹⁸ Dr. Watson did not specifically provide any limits on lifting.

¹⁹ The position of telemarketer did not require such activities as squatting, crawling or climbing.

²⁰ See *Clayton Varner*, 37 ECAB 248, 256 (1985).

ORDER

IT IS HEREBY ORDERED THAT the January 2, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 25, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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