

FACTUAL HISTORY

On February 16, 1990 appellant, then a 35-year-old rigger, filed a traumatic injury claim alleging that he sustained low back pain in the performance of duty on that date. He stopped work on February 16, 1990 and returned to modified employment on March 6, 1990. OWCP accepted the claim for lumbosacral strain and lumbar disc displacement.

On April 1, 1996 the employing establishment separated appellant due to a reduction-in-force.³ On July 28, 1998 appellant underwent an authorized lumbar laminotomy on the left at L5-S1 and a lateral recess decompression and discectomy.

In a decision dated November 29, 1999, OWCP reduced appellant's compensation effective April 16, 1999 based on its finding that his actual earnings as a courier in private employment fairly and reasonably represented his wage-earning capacity.

On July 7, 2009 appellant underwent an authorized bilateral lumbar laminectomy at L5-S1. OWCP paid him compensation for total disability beginning that date.

In a work restriction dated June 4, 2010, Dr. Santi Rao, a Board-certified orthopedic surgeon, found that appellant could work full time sitting for eight hours per day, walking and standing up to four hours per day, reaching above the shoulders, bending, squatting and stooping one to two hours per day and pushing, pulling and lifting no more than 10 to 15 pounds.⁴ He advised that appellant could not twist and required 15- to 30-minute breaks every two to three hours. Dr. Rao indicated that appellant was capable of performing his "usual occupation" as a real estate salesman.

On September 10, 2010 OWCP referred appellant for vocational rehabilitation. In an initial evaluation dated September 20, 2010, the rehabilitation counselor noted that appellant had some community college credits. In a previous attempt at vocational rehabilitation in 1996 and 1997, appellant took a computer repair course. He sold real estate from 2005 through 2008 but his license was no longer valid. Appellant worked as a courier performing record keeping, customer service and deliveries from 2003 through 2004. He had basic computer knowledge.

OWCP approved a business training program for appellant from January 31 through July 18, 2011.

In a report dated June 29, 2011, Dr. Rao diagnosed low back pain after a lumbar fusion. He related that appellant could return to work full time after his rehabilitation program concluded with restrictions of no repetitive bending, twisting, climbing and lifting, pushing or pulling over 20 pounds. Dr. Rao further found that appellant should limit overhead work, sit for no more than

³ By decision dated May 20, 1996, OWCP reduced appellant's compensation based on its finding that his actual earnings as a modified rigger fairly and reasonably represented his wage-earning capacity. In a decision dated March 5, 1997, an OWCP hearing representative reversed the May 20, 1996 decision after finding that the offered position was makeshift.

⁴ A physician's assistant signed the work restriction evaluation for Dr. Rao.

one hour without changing position for 5 minutes and stand and walk for no more than one hour before changing position for 10 minutes. He noted that appellant took medication for anxiety.

Appellant completed the training program on July 18, 2011. OWCP approved placement services from July 19 through October 19, 2011.

On September 20, 2011 the rehabilitation counselor notified OWCP that appellant had accepted a part-time position as a clerk at a storage facility. In a September 21, 2011 response, OWCP advised the rehabilitation counselor to continue to assist appellant to find appropriate full-time employment.⁵

In a November 10, 2011 job classification, the rehabilitation counselor identified the position of insurance clerk as within appellant's capabilities. The job was sedentary with occasional lifting under 10 pounds. The rehabilitation counselor indicated that appellant met the specific vocational preparation through vocational training, his community college classes and his work as a real estate agent. He found that the job was performed in reasonable numbers based on his own labor market research.

In a final report dated November 14, 2011, the rehabilitation counselor indicated that 10 employers responded to his labor market research and that 3 employers had current openings, 4 employers anticipated hiring in the next year and 3 employers had hired in the past year. He noted that wages ranged from \$360.00 to \$480.00 weekly. The rehabilitation counselor found that the position was reasonably available within appellant's commuting area.

In a report dated December 5, 2011, an OWCP rehabilitation specialist determined that appellant's actual earnings as a part-time clerk did not fairly and reasonably represent his wage-earning capacity based on his ability to work full time. He found that the position of insurance clerk was medically and vocationally suitable and that a labor market survey indicated that the position was reasonably available at wages of \$8.00 to \$16.00 per hour.

On December 21, 2011 appellant notified OWCP that he was terminated from his private employment on December 17, 2011.

By letter dated December 23, 2011, OWCP advised appellant that it proposed to reduce his compensation based on its finding that he had the capacity to earn wages of \$400.00 per week as an insurance clerk. In a decision dated February 15, 2012, it reduced his compensation effective February 18, 2012 after determining that he could work as an insurance clerk. OWCP applied the formula set forth in *Albert C. Shadrick*⁶ to calculate appellant's loss of wage-earning capacity.

On March 8, 2012 appellant requested an oral hearing. At the telephonic hearing, held on May 21, 2012, he related that he was terminated from his part-time job because he was unable to multitask or work quickly. Appellant noted that he was previously hospitalized for a psychiatric

⁵ In a rehabilitation action report dated October 26, 2011, the rehabilitation counselor related that appellant had not asked his employer to increase his hours and was satisfied working part time.

⁶ 5 ECAB 376 (1953); codified by regulations at 20 C.F.R. § 10.403.

condition. He maintained that his typing skills were insufficient to perform a clerical position and that he had difficulty with prolonged sitting.

In a statement dated June 7, 2012, appellant asserted that he was unable to earn \$400.00 per week. He indicated that he had a mental condition. Appellant submitted his notice of termination from the storage company for failure to meet its needs.

In a report dated June 19, 2012, Dr. Rao diagnosed low back pain and provided unchanged work restrictions.

By decision dated July 23, 2012, an OWCP hearing representative affirmed the February 15, 2012 decision. He found that the position of insurance clerk was within appellant's work restrictions, vocationally suitable and reasonably available.

On appeal, appellant argues that his back pain prevented him from working full time. He also related that he had difficulty working quickly doing paperwork or performing tasks on the computer and had a history of mental problems.

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 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.

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).

¹⁰ *Supra* note 6.

ANALYSIS

OWCP accepted that appellant sustained lumbosacral strain and lumbar disc displacement as a result of a February 16, 1990 employment injury. Appellant worked modified duty until April 1, 1996, when he was terminated due to a reduction-in-force. He underwent back surgery in July 1998 and 2009. OWCP paid appellant compensation for total disability beginning July 7, 2009. On June 4, 2010 Dr. Rao found that appellant could work full time with restrictions. The Board finds that OWCP properly referred appellant for vocational rehabilitation as Dr. Rao's opinion establishes that he was no longer totally disabled due to residuals of his employment injury.¹¹

OWCP also properly found that appellant had the capacity to perform the duties of an insurance clerk. In a report dated June 29, 2011, Dr. Rao found that appellant could work full time lifting, pushing and pulling up to 20 pounds with no repetitive bending, twisting or climbing. He further found that appellant should change his position for 5 minutes after sitting for one hour and change his position for 10 minutes after standing or walking for one hour. The position of insurance clerk is classified as sedentary work requiring occasional lifting of under 10 pounds, which is within the restrictions set forth by Dr. Rao. Following OWCP's proposed reduction of his compensation, appellant submitted a June 19, 2012 report from Dr. Rao, which contained the same work restrictions. The medical evidence, consequently, establishes that he has the requisite physical ability to earn wages as an insurance clerk.

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.¹² The rehabilitation counselor determined that appellant had the skills necessary to perform the position of insurance clerk based on his vocational training, community college classes and prior real estate work. He further found that the position was reasonably available within the appropriate geographical area at a wage of \$360.00 to \$480.00 per week. An OWCP rehabilitation specialist reviewed and concurred with the rehabilitation counselor's findings. 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.¹³ 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 he had the capacity to perform the position of insurance clerk.¹⁴ OWCP further properly determined his loss of wage-earning capacity in

¹¹ See *N.J.*, 59 ECAB 171 (2007).

¹² *Id.*

¹³ *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).

¹⁴ See *N.J.*, *supra* note 11.

accordance with the formula developed in *Shadrick* and codified at 20 C.F.R. § 10.403.¹⁵ It, therefore, properly found that the position of insurance clerk reflected appellant's loss of wage-earning capacity effective February 18, 2012.

On appeal, appellant argues that his back pain prevented him from working full time and noted that he also had a history of mental illness. He did not, however, submit any medical evidence indicating that he could not work eight hours per day.¹⁶ Appellant also did not submit any evidence showing that he had physical restrictions as a result of a mental condition and did not explain why such condition would prevent him from performing the duties of the selected position.¹⁷

Appellant further asserted that he could not work quickly on the computer or completing paperwork. An OWCP rehabilitation specialist, however, reviewed the evidence and determined that he had the vocational capacity to work as an insurance clerk. As noted, OWCP may rely of the opinion of the rehabilitation specialist in determining whether the job is vocationally suitable.¹⁸

Appellant may request modification of the loss of wage-earning capacity determination, supported by new evidence of argument, at any time before OWCP.

CONCLUSION

The Board finds that OWCP properly reduced appellant's compensation effective February 18, 2012 based on its finding that he had the capacity to work as an insurance clerk.

¹⁵ See *supra* note 6. OWCP divided appellant's employment capacity to earn wages of \$400.00 a week by his current pay rate for his date-of-injury position, \$1,342.92 per week, to find a 30 percent wage-earning capacity. It multiplied the pay rate at the time disability recurred of \$791.20 by the 30 percent wage-earning capacity percentage. The resulting amount of \$237.36 was subtracted from appellant's recurrent pay rate of \$791.20, which provided a loss of wage-earning capacity of \$553.84 per week. OWCP then multiplied this amount by the appropriate compensation rate of three-fourths, which yielded \$415.38 every four weeks before cost-of-living adjustments.

¹⁶ See *T.O.*, 58 ECAB 377 (2007).

¹⁷ See *Darletha Coleman*, 55 ECAB 143 (2003). In determining an employee's wage-earning capacity based on a position deemed suitable, but not actually held, OWCP must consider the degree of physical impairment, including impairments result from both injury-related and preexisting conditions, but not impairments resulting from post injury or subsequently acquired conditions. See *John D. Jackson*, 55 ECAB 465 (2004).

¹⁸ See *supra* note 13.

ORDER

IT IS HEREBY ORDERED THAT the July 23, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 21, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board