

On appeal, counsel generally argued that the hearing representative's March 29, 2012 decision was contrary to fact and law.

FACTUAL HISTORY

Appellant, a 62-year-old former letter carrier, was injured in the performance of duty on March 11, 2003. OWCP accepted her claim for right hip and thigh sprain, lumbar sprain, lumbar spinal stenosis and lumbar intervertebral disc degeneration. Appellant has undergone multiple back surgeries, the most recent a June 9, 2009 spinal fusion, (L4-5) which OWCP authorized.³ Appellant's surgeon, Dr. Jerome C. Hall, a Board-certified orthopedic surgeon, released her to perform full-time, limited-duty work effective October 21, 2009. In addition to imposing a 10-pound lifting restriction, he precluded repetitive bending and stooping and prolonged standing or walking.

Because of the employing establishment's inability to accommodate appellant's work restrictions, OWCP referred her for vocational rehabilitation services on November 25, 2009.⁴ With appellant's cooperation, OWCP's rehabilitation counselor developed a plan for private sector placement as an insurance clerk.⁵ The position was sedentary in nature.⁶ Dr. Hall reviewed the physical requirements of the identified position and found that appellant was able to perform the described duties.

As part of the vocational rehabilitation plan, appellant attended a 32-week training program at Concorde Career College (CCC), whose insurance coding and billing specialist program commenced on March 15, 2010. She successfully completed the classroom training aspect of the program on October 12, 2010. Appellant then participated in a four-week externship with San Diego Imaging. She received her diploma from CCC on November 23, 2010.⁷ At the conclusion of her externship, appellant received an initial 90-days' job placement assistance beginning December 6, 2011. OWCP subsequently extended job

³ Appellant received wage-loss compensation for temporary total disability having been placed on the periodic compensation rolls effective December 21, 2008.

⁴ Appellant is bilingual (Spanish/English) and she previously earned an Associate's Degree in Business Administration. She also had two years experience as a data entry operator at a bank and five years service in the U.S. Navy as a data entry clerk.

⁵ Insurance Clerk (medical services): Verifies hospitalization insurance coverage, computes patient's benefits and compiles itemized hospital bills: Types insurance assignment form with data, such as names of insurance company and policy holder, policy number and physician's diagnosis. Telephones, writes or wires insurance company to verify patient's coverage and to obtain information concerning extent of benefits. Computes total hospital bill showing amounts to be paid by insurance company and by patient, using adding and calculating machines. Answers patient's questions regarding statements and insurance coverage. Telephones or writes companies with unpaid insurance claims to obtain settlement of claim. Prepares forms outlining hospital expenses for governmental, welfare and other agencies paying bill of specified patient. *Dictionary of Occupational Titles* (DOT), No. 214.362-022 (4th ed., Rev. 1991).

⁶ *Id.*

⁷ She graduated with a 4.0 grade point average (GPA).

placement assistance for an additional three months through June 14, 2011; but despite more than six months of job placement assistance, appellant did not secure gainful employment.

The rehabilitation counselor provided an updated labor market survey on July 11, 2011. She identified 11 contacts in the San Diego area, eight of which reportedly had full-time openings. The rehabilitation counselor also noted that there were two part-time openings, seven recent hires and seven anticipated hires. Based on the survey results, she concluded that the insurance clerk position was being performed in sufficient number so as to consider it reasonably available within appellant's commuting area. Additionally, the labor market survey noted a weekly wage of \$400.00 as an insurance clerk. OWCP terminated all vocational rehabilitation services effective August 26, 2011.

On August 29, 2011 OWCP advised appellant that it proposed to reduce her compensation based on her ability to earn wages in the selected position of insurance clerk. It afforded her 30 days within which to submit additional evidence or argument in response to the proposed reduction in compensation. OWCP did not receive a reply from appellant within the allotted timeframe.

By decision dated October 6, 2011, OWCP reduced appellant's compensation based on her ability to earn weekly wages of \$400.00 as an insurance clerk. The reduction was effective October 23, 2011.

On October 7, 2011 OWCP received appellant's undated response to its August 29, 2011 preliminary notification. Appellant submitted documentation regarding applications submitted for various job vacancies, contending that there were very few available positions in the San Diego area for someone with her qualifications. More experienced applicants were reportedly hired instead. Appellant also noted that CCC had not trained her in Microsoft Office, which was required by many employers. She had since moved to New Rochelle, NY to live with her mother. Appellant was currently seeking additional training in Microsoft Office while temporarily residing with her mother.

Appellant's counsel requested an oral hearing which was held on February 8, 2012. In a decision dated March 29, 2012, the hearing representative affirmed the October 6, 2011 wage-earning capacity determination.

LEGAL PRECEDENT

Once OWCP accepts a claim it has the burden of proof to justify termination or modification of compensation benefits.⁸ An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.⁹

⁸ *James B. Christenson*, 47 ECAB 775, 778 (1996); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

⁹ 20 C.F.R. §§ 10.402, 10.403; *see Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

Under FECA wage-earning capacity is determined by the actual wages received by an employee if those earnings fairly and reasonably represent his or her wage-earning capacity.¹⁰ If the actual earnings do not fairly and reasonably represent the employee's wage-earning capacity or if the employee has no actual wages, the wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the employee's usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect wage-earning capacity in his or her disabled condition.¹¹

OWCP must initially determine the employee's medical condition and work restrictions before selecting an appropriate position that reflects his or her vocational wage-earning capacity.¹² The medical evidence OWCP relies upon must provide a detailed description of the employee's condition and the evaluation must be reasonably current.¹³ Where suitability is to be determined based on a position not actually held, the selected position must accommodate the employee's impairment from both injury-related and preexisting conditions, but not impairment attributable to postinjury or subsequently acquired conditions.¹⁴

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, *Dictionary of Occupational Titles* or otherwise available in the open labor market that fits the employee's capabilities with regard to 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.¹⁵ 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

Regarding medical suitability of the constructed position, Dr. Hall reviewed the physical demands of the insurance clerk position and advised OWCP that appellant was capable of

¹⁰ 5 U.S.C. § 8115(a).

¹¹ *Id.*; *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

¹² *M.A.*, 59 ECAB 624, 631 (2008).

¹³ *Id.*

¹⁴ *N.J.*, 59 ECAB 171, 176 (2007); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8d (October 2009).

¹⁵ The job selected for determining wage-earning capacity must be a position that is reasonably available in the general labor market in the commuting area in which the employee resides. *David L. Scott*, 55 ECAB 330, 335 n.9 (2004).

¹⁶ *Albert C. Shadrick*, 5 ECAB 376 (1953); 20 C.F.R. § 10.403(d).

performing such sedentary duties.¹⁷ Moreover, appellant testified at the February 8, 2012 hearing that there was nothing physically preventing her from doing the job. The Board finds that the selected position of insurance clerk, which is sedentary in nature, was medically suitable to her physical restrictions.

The Board also finds that the identified position was vocationally suitable. The rehabilitation counselor indicated that appellant's Associate's degree coupled with the training program at CCC, which included a four-week externship with San Diego Imaging, was sufficient vocational preparation for the selected position. Appellant successfully completed CCC's insurance coding and billing specialist program with a 4.0 GPA. She claimed that she needed additional training in word processing and preparing spreadsheets; but the Department of Labor, *Dictionary of Occupational Titles* job description does not specifically identify proficiency in Microsoft Office as a necessary component of the insurance clerk position.

As noted, appellant received approximately six months of job placement assistance. Despite her best efforts, she was not able to secure employment as an insurance clerk. The Board notes that, her inability to secure employment is not, by itself, indicative that the selected position was not reasonably available. The rehabilitation counselor's July 11, 2011 labor market survey identified eight potential employers in the San Diego area with full-time openings and two others with part-time openings.¹⁸ Based upon the employer contacts, the rehabilitation counselor determined that the insurance clerk position was reasonably available in appellant's then commuting area. In turn, the rehabilitation specialist (RS) advised the claims examiner that the selected position was vocationally suitable and existed in sufficient numbers so as to be considered reasonably available in appellant's commuting area. Because the RS is an expert in the field of vocational rehabilitation, OWCP may rely on his or her opinion as to whether the job is reasonably available and vocationally suitable.¹⁹ The Board finds that OWCP properly reduced appellant's wage-loss compensation based on her ability to earn \$400.00 per week as an insurance clerk.

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 the position of insurance clerk represented appellant's wage-earning capacity effective October 23, 2011.

¹⁷ There is no evidence of any preexisting conditions that might affect appellant's ability to perform the selected position.

¹⁸ But even a lack of current job openings does not equate to a finding that the position was not performed in sufficient numbers to be considered reasonably available. *Supra* note 14, Chapter 2.814.8c.

¹⁹ *Supra* note 14 at Chapter 2.814.8b(2).

ORDER

IT IS HEREBY ORDERED THAT the March 29, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 9, 2013
Washington, DC

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

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

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