



bilateral plantar fibromatosis and right Achilles tendinitis. Appellant underwent surgery on both feet and received compensation for periods of wage loss.

On March 3, 2008 OWCP reduced appellant's wage-loss compensation to zero on the grounds that her actual wages as a modified-duty letter carrier fairly and reasonably represented her wage-earning capacity. In April 2009, however, appellant was sent home because there were no operationally necessary tasks for her to perform at work. OWCP began paying compensation for temporary total disability on the periodic rolls.

In a January 28, 2010 report, Dr. Benjamin C. Tam, the attending Board-certified orthopedic surgeon, found that appellant was no longer totally disabled and could return to work with restrictions. He permanently restricted her to sedentary duty with up to two hours of walking and standing and up to two and one-half hours of pushing, pulling and lifting.

As the employing establishment was not able to accommodate these restrictions, OWCP referred appellant to vocational rehabilitation services.

In February 2011 appellant advised Dr. Tam that she had increasing complaints of paresthesia involving her fingers. She had examination findings consistent with carpal tunnel syndrome, subsequently confirmed by nerve conduction studies. Appellant underwent a left carpal tunnel release in March 2011. Dr. Tam was unable to state unequivocally whether her carpal tunnel syndrome resulted from the repetitive use of her wrists in the rehabilitation computer training class, as her symptoms appeared to have presented three months after her vocational rehabilitation had ended.

Based on the medically determinable residuals of the injury, and taking into consideration all significant preexisting impairments and pertinent nonmedical factors, the rehabilitation counselor found that appellant was able to perform the job of a receptionist (clerical). The rehabilitation counselor explained how appellant met the specific vocational preparation for the position. She confirmed through direct telephone employer contacts, the Los Angeles Times classified ads and online job listings that full-time positions within appellant's permanent restrictions were being performed in sufficient numbers so as to make them reasonably available to her within her commuting area. The rehabilitation counselor was also able to confirm through direct employer contacts that the position paid a mean weekly wage of \$388.40.

An OWCP rehabilitation specialist found that the selected position of receptionist remained vocationally and medically appropriate because it was sedentary in nature and within appellant's work restrictions, and because appellant had completed a nine and a half-month training program, including classes to improve her English communication skills, both spoken and written. She found that the targeted position existed in sufficient numbers within appellant's commuting area so as to be considered reasonably available. The rehabilitation specialist confirmed that the salary range was from \$320.00 to \$480.00 per week.

In March 2012 OWCP proposed to reduce appellant's wage-loss compensation to reflect her capacity to earn entry-level wages as a receptionist.

Dr. Tam saw appellant on April 13, 2012 for a follow-up evaluation. He noted that her status was upgraded to permanent and stationary with modified-duty restrictions in 2007.

Dr. Tam noted that she was released from her position at the employing establishment in 2009. He stated that he last saw appellant two months earlier. Appellant received authorization for eight physical therapy treatments, which she completed. This improved her symptoms somewhat, but she currently presented with more pain because of the cold weather and rain. Dr. Tam examined appellant and diagnosed bilateral retrocalcaneal bursitis, left worse than right, status post excision of calcaneal spur. He provided her a prescription and released her to return on an as-needed basis.

Appellant contested the proposed reduction. She argued that she was totally disabled for work in a full or partial capacity. Appellant explained that she had left carpal tunnel syndrome, bilateral hand degenerative joint disease, and left middle and thumb trigger fingers. She alleged that the rehabilitation counselor knew about these conditions and diagnosis and knew that she could not type 35 words per minute. Further, appellant stated that she looked for jobs but was deemed not qualified due to lack of typing experience or computer literacy. Further, she was still recovering from surgery on December 22, 2011 for a macular hole in her right eye. Appellant had no vision in her right eye, which prohibited her from driving or having any contact with direct light. She added that she had sleep apnea, with difficulty breathing and sleeping. Appellant was still taking physical therapy and rehabilitation for her feet and ankle until May 2012. “Therefore, I am unable [to] have the ability to find or perform work at total and functional capacity in the items I have included.”

In a final decision dated September 27, 2012, OWCP determined that appellant had the capacity to earn \$320.00 a week as a receptionist. It found that she failed to submit any concrete evidence to support that she was unemployable. Based on a review of the record, OWCP found no evidence that appellant could not perform the duties of the selected position.

On appeal, appellant repeats her limitation and limited mobility, as well as her poor vision in the right eye. She also implicates her age and the fact that English is her second language: “it makes finding work or being considered impossible.” Appellant adds that she tried, that she filled out many job applications, but she did not receive any calls for an interview.

### **LEGAL PRECEDENT**

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.<sup>2</sup> “Disability” means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.<sup>3</sup>

Section 8115(a) of FECA provides that in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his or her actual earnings, if his or her actual earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings of the employee 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 as

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<sup>2</sup> 5 U.S.C. § 8102(a).

<sup>3</sup> 20 C.F.R. § 10.5(f).

appears reasonable under the circumstances is determined with, due regard to the nature of his or her injury, the 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 or circumstances which may affect his or her wage-earning capacity in his or her disabled condition.<sup>4</sup>

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.<sup>5</sup> When it makes a medical determination of partial disability and of the 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 labor market, that fits the employee's capabilities in light of 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 *Albert C. Shadrick* will determine the percentage of the employee's loss of wage-earning capacity.<sup>6</sup> The *Shadrick* formula is codified at 20 C.F.R. § 10.403.

### ANALYSIS

In some situations, vocational rehabilitation efforts do not succeed, and the claimant's wage-earning capacity must be determined on the basis of a position deemed suitable but not actually held. In making this determination, the test is whether the claimant's wage-earning capacity appears reasonable, giving due regard to the factors specified in section 8115 of FECA.<sup>7</sup>

Dr. Tam, the attending orthopedic surgeon, found in 2010 that appellant was no longer totally disabled for work. He found that she could return to work with permanent restrictions: sedentary duty with up to two hours of walking and standing and up to two and a half hours of pushing, pulling and lifting. Notwithstanding appellant's concern about her inability to find work, Dr. Tam never downgraded her status or indicated that she was totally disabled. He most recently saw her on April 13, 2012 and did not change her work status or permanent restrictions. Dr. Tam released her to return on an as-needed basis.

Because the medical evidence showed that appellant was only partially disabled for work, OWCP referred her to vocational rehabilitation services. As she was unable to secure employment, the rehabilitation counselor identified the position of receptionist (clerical) as vocationally and medically suitable.

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<sup>4</sup> 5 U.S.C. § 8115(a).

<sup>5</sup> *Harold S. McGough*, 36 ECAB 332 (1984).

<sup>6</sup> *Hattie Drummond*, 39 ECAB 904 (1988); see *Albert C. Shadrick*, 5 ECAB 376 (1953).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 8.814.8 (October 2009).

An OWCP rehabilitation specialist confirmed that the position of receptionist remained vocationally and medically suitable because it was sedentary in nature and within appellant's established work restrictions, and because appellant had completed a nine and one-half-month training program. She also confirmed that the position was reasonably available. The rehabilitation specialist is an expert in the field of vocational rehabilitation, and OWCP may rely on her opinion as to whether the selected job is reasonably available and vocationally suitable.<sup>8</sup>

Appellant contested the proposed reduction in her compensation, but the medical evidence did not support her contention that she was totally disabled for all work. The Board has reviewed the medical record and can find no evidence citing the selected position of receptionist as unsuitable to appellant's capabilities. Dr. Tam acknowledged appellant's hand complaints, but he noted that her symptoms appeared to have presented three months after vocational rehabilitation had ended. As to her inability to find a job, this does not equate to a finding that the selected position was not performed in sufficient numbers so as to be considered reasonably available within appellant's commuting area.<sup>9</sup>

The Board finds that OWCP has met its burden to justify the reduction of appellant's compensation based on her capacity to earn wages in the selected position of receptionist. OWCP gave due regard to relevant factors, such as appellant's physical limitations, employment qualification and the availability of suitable employment. It followed established procedures to determine her loss of wage-earning capacity. Accordingly, the Board will affirm OWCP's September 27, 2012 decision.

Appellant argues that the position is unsuitable due to her limitations, age and language skills. However, she has submitted no documentation to substantiate these claims. The fact that she could not obtain a job interview does not mean that the position is not reasonably available to her in the open labor market. Indeed, the very fact that appellant was unable to secure a position made it necessary to determine her wage-earning capacity on the basis of a position deemed suitable but not actually held. Such a position must be performed in sufficient numbers within the claimant's commuting area. If it is, as both the rehabilitation counselor and OWCP rehabilitation specialist confirmed, then the position is deemed to be reasonably available notwithstanding a claimant's current failure to secure such a position. OWCP did not reduce appellant's compensation based on actual wages. It reduced her compensation under section 8115(a) of FECA based on her capacity to earn wages in her partially disabled condition.

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

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<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 8.814.8.b(2) (October 2009).

<sup>9</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 8.814.8.c (October 2009) (lack of job openings).

**CONCLUSION**

The Board finds that OWCP properly reduced appellant's wage-loss compensation based on her capacity to earn wages as a receptionist.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 27, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 1, 2013  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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