



shoulder strain, right labral tear and aggravation of right shoulder osteoarthritis. OWCP placed appellant on temporary total disability.

On September 17, 2008 appellant underwent a total right shoulder arthroplasty. The procedure was performed by Dr. Donald P. Endrizzi, Board-certified in orthopedic surgery.

On April 30, 2009 OWCP referred appellant for vocational rehabilitation.

In order to determine the extent of appellant's current condition, OWCP referred him to Dr. John J. Walsh, Board-certified in orthopedic surgery, for a second-opinion examination. In a May 11, 2011 report, Dr. Walsh stated that appellant had restricted motion in both shoulders; the right shoulder showed motion on elevation of 75 degrees, extension of 50 degrees, internal rotation to neutral, external rotation of 30 degrees and abduction of 75 degrees. He advised that appellant's right shoulder condition restricted appellant's ability to perform activities with his right upper extremity in any sustained, repetitive or exertive positions which exceeded 75 degrees of elevation and/or abduction. Dr. Walsh imposed restrictions of lifting 15 pounds on a frequent, sustained or repetitive basis and no lifting or working with the right upper extremity above shoulder height. In a work capacity evaluation which accompanied his report, he indicated that appellant could lift up to 20 pounds. Dr. Walsh did not place any restrictions on reaching.

On August 8, 2011 a vocational rehabilitation counselor recommended a position for appellant listed in the Department of Labor's *Dictionary of Occupational Titles* (DOT), outside courier/messenger DOT #230.663.010, which was within appellant's indicated restrictions and reasonably reflected his ability to earn wages.<sup>2</sup> In addition, the vocational counselor stated that the job was being performed in sufficient numbers so as to make it reasonably available to appellant in his commuting area; this was confirmed by telephone contact with Labor Market Information Services at the Maine Department of Labor, Occupational and Industrial Employment Projections.

In a report dated October 13, 2011, Dr. Endrizzi advised that appellant should continue with modified duty with regard to his right shoulder, with no lifting greater than 15 pounds. He restricted appellant from engaging in above the shoulder, repetitive activities as well as pulling, pushing and reaching.

By notice of proposed reduction dated December 8, 2011, OWCP advised appellant of its proposal to reduce his compensation because the factual and medical evidence established that he was no longer totally disabled. It stated that the case had been referred to a vocational rehabilitation counselor, who had located positions as an outside courier/messenger which he

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<sup>2</sup> The job description for the courier/messenger position stated:

"Delivers messages, telegrams, documents, packages, and other items to business establishments and private homes, traveling on foot or by bicycle, motorcycle, automobile or public conveyance. May keep log of items received and delivered. May obtain receipts or payment for articles delivered. May service vehicle driven, such as checking fluid levels and replenishing fuel. May be designated according to item delivered, as Telegram Messenger.

found to be suitable for appellant given his work restrictions and was available in appellant's commuting area. OWCP allowed appellant 30 days in which to submit any contrary evidence.

In an October 11, 2011 report, received by OWCP on January 9, 2012, Dr. Endrizzi reiterated his restrictions of no lifting exceeding 15 pounds, no work at or above the shoulder level, and no repetitive reaching, pulling or pushing.

By decision dated January 10, 2012, OWCP reduced appellant's compensation as the medical evidence established that he was no longer totally disabled for work due to effects of his May 8, 2006 employment injury. It determined that he had the capacity to earn wages as a outside courier/messenger at the weekly rate of \$394.25 in accordance with the factors outlined in 5 U.S.C. § 8115.<sup>3</sup> OWCP calculated that appellant's compensation rate should be adjusted to \$443.53 using the *Shadrick*<sup>4</sup> formula. It found that his current adjusted compensation rate, every four-week period, was \$1,865.00.

On January 20, 2012 appellant requested an oral hearing, which was held on April 13, 2012. At the hearing, appellant's representative argued that OWCP erred in finding that the courier/messenger job was within appellant's medical restrictions. He contended that there was a conflict in medical opinion between Dr. Walsh, the second opinion physician, and Dr. Endrizzi, appellant's treating physician, as to whether appellant could lift more than 15 or 20 pounds and whether he could engage in activities requiring frequent reaching.

In addition, appellant's representative asserted that the vocational counselor did not comply with FECA in finding that the courier/messenger position was available within appellant's local commuting area. He noted that she had confirmed the availability of this position through telephone contact with Labor Market Information Services at the Maine Department of Labor Occupational and Industrial Employment Projections; he stated that the hourly wage for this position was contained in a May 2010 Maine Department of Labor market survey. Appellant's representative contended that OWCP's procedure manual at Chapter 3.400.8(a)(3)(c), Nonmedical Services, *Case Development*,<sup>5</sup> sets forth the proper procedure for documenting job availability. It states at subsection A that the vocational counselor must include the name of the person contacted, the date and the result of the contact; and that subsection C indicates that contact with the state occupational information coordinating committee in the injured workers' state should be documented by stating the name of the person contacted, the date of contact and the content of discussion. Appellant's representative asserted that the job was not available in appellant's local commuting area because the vocational counselor failed to confirm that he had complied with these requirements. He advised that he called the contacts listed on the courier/messenger job description and found that the Main Labor Market Information Services and the Occupational Industrial Employment Projections no longer exist

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<sup>3</sup> 5 U.S.C. § 8115.

<sup>4</sup> *Albert C. Shadrick*, 5 ECAB 376 (1953); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.814.2 (April 1995).

<sup>5</sup> OWCP Procedure Manual, Part 3 -- Nonmedical Services, *Case Development*, Chapter 3.400.8(a)(3)(c) (December 1997).

and that the most recent job survey by the Maine Department of Labor was actually conducted in May 2009.

By decision dated August 6, 2012, an OWCP hearing representative affirmed the January 10, 2012 decision.

### **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.<sup>6</sup>

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injuries and the degree of physical impairment, his or her usual employment, the employee's age and vocational qualifications and the availability of suitable employment.<sup>7</sup> Accordingly, the evidence must establish that jobs in the position selected for determining wage-earning capacity are reasonably available in the general labor market in the commuting area in which the employee lives. In determining an employee's wage-earning capacity, OWCP may not select a makeshift or odd-lot position or one not reasonably available on the open labor market.<sup>8</sup>

### **ANALYSIS**

On appeal appellant's representative argued that OWCP did not meet its burden to reduce appellant's compensation because the selected position of courier/messenger exceeded his physical restrictions. He noted that the job description for the position required frequent reaching, which exceeded the prohibition of no frequent reaching imposed by Dr. Endrizzi, his treating physician. The representative also contended that the courier/messenger job was not reasonably available within appellant's local commuting area under OWCP's procedure manual at Chapter 3.400.8(3)(a), (c), which requires vocational counselors to confirm job availability by indicating the name of the person contacted, the date of the contact and the content of the discussion.

The Board finds that OWCP did not meet its burden to reduce appellant's disability compensation.

OWCP based its decision to reduce appellant's compensation on the vocational rehabilitation counselor's August 2011 report, which found that the courier/messenger position was within appellant's medical restrictions. The medical evidence of record consists of reports

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<sup>6</sup> *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

<sup>7</sup> *Samuel J. Chavez*, 44 ECAB 431 (1993); *Hattie Drummond*, 39 ECAB 904 (1988); see 5 U.S.C. § 8115(a); A. Larson, *The Law of Workers' Compensation* § 57.22 (1989).

<sup>8</sup> *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

from Dr. Endrizzi, appellant's treating physician, who performed the 2008 right shoulder arthroscopy, and Dr. Walsh, OWCP's referral physician, who stated in a May 11, 2011 report that appellant's right shoulder restricted his ability to perform activities with his right upper extremity in any sustained, repetitive or exertive positions which exceeded 75 degrees of elevation and/or abduction; he did not impose any explicit restrictions on reaching. Dr. Walsh imposed restrictions of lifting 15 pounds on a frequent, sustained or repetitive basis and lifting, 20 pounds on an occasional basis and working with the right upper extremity above shoulder height. Based on Dr. Walsh's restrictions, the vocational rehabilitation counselor recommended the outside courier/messenger position as within appellant's indicated restrictions. The position description stated that appellant would be required to engage in frequent reaching. Dr. Endrizzi subsequently submitted a report dated October 13, 2011 in which he imposed restrictions for above the shoulder, repetitive activities as well as pulling, pushing and reaching. In an October 11, 2011 report, received by OWCP on January 9, 2012, he reiterated his restrictions of no lifting exceeding 15 pounds, no work at or above the shoulder level, and also restricted appellant from repetitive reaching, pulling or pushing. Thus Dr. Endrizzi presented probative medical opinion that appellant had an additional medical restriction which rendered him unable to perform the selected position of courier/messenger.

Once appellant submitted this additional medical evidence indicating that he had greater physical restrictions than those upon which the courier/messenger position was based, OWCP was required to determine whether the offered position was still suitable. It is OWCP's burden of proof to justify reduction of compensation by identifying a suitable position. The duties of the courier/messenger position exceeded the restrictions imposed by Dr. Endrizzi. Therefore OWCP did not meet its burden of proof in this case to reduce appellant's compensation benefits.

The Board further notes that the vocational counselor did not fully comply with the requirements for proper procedure for documenting job availability in the local commuting area which is outlined in OWCP's procedure manual at Chapter 3.400 – 3.8(3)(a), (c). As Mr. Jones contended, the vocational counselor did not include the name of the person contacted or the date, the result of the contact; and the content of discussion.

Accordingly, for the reasons stated above, the Board will reverse the August 6, 2012 decision.

### **CONCLUSION**

The Board finds that OWCP has failed to meet its burden of proof in reducing appellant's compensation.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 6, 2012 decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 5, 2013  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

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