

cuff. She was separated from her casual employment with the employing establishment on March 24, 2009 while still disabled from her regular position.

On April 15, 2010 Dr. Mark G. Smith, an attending Board-certified orthopedic surgeon, performed left shoulder surgery, including arthroscopy, subacromial decompression and rotator cuff repair. The procedures were authorized by OWCP.

Effective May 5, 2010, appellant began receiving total disability wage-loss compensation on the periodic payment cycle.

In a January 3, 2011 report, Dr. Smith stated that appellant had reached maximum medical improvement and indicated that she was restricted from lifting over her shoulder or lifting more than 20 pounds. He noted that he would see her again as needed.

On January 6, 2011 OWCP referred appellant for participation in a vocational rehabilitation program based upon Dr. Smith's work restrictions. Appellant was approved for 90 days of job placement services beginning April 4, 2011. Despite her efforts, she was not able to obtain a position.

On July 11, 2011 Dr. Smith stated that appellant had reached maximum medical improvement on January 3, 2011. He noted, "[Appellant] does have work restrictions, which have been deemed permanent, of no work above shoulder level and a maximum of 20 pounds lifting with both hands. These restrictions are the same as her prior appointment."

On August 23, 2011 appellant's vocational rehabilitation counselor ended vocational rehabilitation services. She determined that appellant was vocationally qualified as a customer service representative as represented in the Dictionary of Occupational Titles (DOT #239.362-014). The position involved responding to customer queries on various matters and required occasional lifting of 10 pounds and engaging in frequent fingering. She documented that the position paid \$10.00 per hour based upon the most recent wage data available and indicated that labor market surveys showed that the position of customer service representative was reasonably available within appellant's commuting area.

In a May 22, 2012 letter, OWCP advised appellant that it proposed to reduce her compensation based upon her ability to earn wages as a customer service representative, a position which had weekly wages of \$400.00. It indicated that appellant was vocationally and physically 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. She did not respond within the allotted time.

By decision dated July 11, 2012, OWCP reduced appellant's compensation effective July 29, 2012 based on her ability to earn wages as a customer service representative. It indicated that the evidence of record revealed that appellant was vocationally and physically capable of working as a customer service representative, that the position was reasonably available in her commuting area and that it represented her wage-earning capacity. Under the

Shadrick decision,² OWCP calculated the percentage of appellant's loss of wage-earning capacity based on this position.

In a June 29, 2012 report, Dr. Smith stated that appellant reported that she did not feel that she could work in a position using her left hand keying. In an August 17, 2012 report, he stated that he did not think she could work in her regular job.

Appellant requested a telephone hearing with an OWCP hearing representative. During the November 14, 2012 hearing, she testified that she worked for over 32 years as a file clerk, mail clerk and customer service representative for an insurance company. Appellant stated that she had difficulty repetitively using her left hand on a keyboard, lifting above shoulder level and engaging in gripping. She asserted that these physical limitations prevented her from working as a customer service representative. Appellant's counsel at the time argued that the selected position did not accurately represent appellant's wage-earning capacity.

In a February 5, 2013 decision, OWCP's hearing representative affirmed OWCP's July 11, 2012 wage-earning capacity decision noting that appellant was vocationally and physically capable of working as a customer service representative. He indicated that the position was reasonably available in her commuting area and represented her wage-earning capacity.

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.³ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁴

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.⁵ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.⁶ The job selected for determining wage-earning capacity must

² See *infra* note 11.

³ *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

⁴ See *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

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

⁶ *Albert L. Poe*, 37 ECAB 684, 690 (1986), *David Smith*, 34 ECAB 409, 411 (1982).

be a job reasonably available in the general labor market in the commuting area in which the employee lives.⁷ 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 or her commuting area.⁸

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.⁹ In determining wage-earning capacity based on a constructed position, consideration is not given to conditions which arise subsequent to the employment injury.¹⁰

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 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.¹¹

ANALYSIS

OWCP accepted that on August 16, 2008 appellant sustained a left ulna distal shaft fracture, left shoulder sprain and a partial thickness tear of her left rotator cuff. Appellant stopped work and received disability compensation. By decision dated July 11, 2012, OWCP reduced her compensation effective July 29, 2012 based on her ability to earn wages as a customer service representative.

OWCP received information from Dr. Smith, an attending Board-certified orthopedic surgeon, which found that appellant was not totally disabled for work and had a partial capacity to perform work for eight hours per day subject to specified work restrictions. Dr. Smith stated that she had reached maximum medical improvement on January 3, 2011 and provided permanent work restrictions of no work above shoulder level and no lifting of more than 20 pounds.

⁷ *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).

⁸ See *Leo A. Chartier*, 32 ECAB 652, 657 (1981).

⁹ See *Jess D. Todd*, 34 ECAB 798, 804 (1983).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(d) (December 1995).

¹¹ 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).

In August 2011, appellant's vocational rehabilitation counselor determined that appellant was able to perform the position of customer service representative and that state employment services showed that the position was available in sufficient numbers so as to make it reasonably available within appellant's commuting area. This sedentary position involved responding to customer queries on various matters and required occasional lifting of 10 pounds and engaging in frequent fingering. The Board finds that OWCP properly relied on the opinion of the rehabilitation counselor that appellant was vocationally capable of performing the customer service representative position.¹²

The medical evidence of record shows that appellant was physically capable of performing the customer service representative position. The customer service representative position met the physical restrictions provided by Dr. Smith. In his June 29, 2012 report, Dr. Smith stated that appellant reported that she did not feel that she could work in a position using her left hand keying. However, he was only reporting her belief and did not provide his own opinion on her ability to work. In his August 17, 2012 report, Dr. Smith stated that he did not think appellant could work in her regular job, but he did not provide any indication that she could not work as a customer service representative under previously established restrictions.

Appellant did not submit any evidence or argument showing that she could not vocationally or physically perform the customer service representative 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 customer service representative represented her wage-earning capacity.¹³ The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of customer service representative and that such a position was reasonably available within the general labor market of her commuting area. Therefore, OWCP properly reduced her compensation effective July 29, 2012 based on her capacity to earn wages as a customer service representative.

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 July 29, 2012 based on her capacity to earn wages as a customer service representative.

¹² It should be noted that appellant testified that she had worked for over 32 years for an insurance company in various clerical and customer service positions.

¹³ See *Clayton Varner*, 37 ECAB 248, 256 (1985).

ORDER

IT IS HEREBY ORDERED THAT the February 5, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 8, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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