



## **FACTUAL HISTORY**

On May 23, 2007 appellant, then a 36-year-old lead transportation security screener, sustained a right elbow injury when she was struck by a hit and run driver. She stopped work on May 24, 2007 and returned to limited duty on July 9, 2007. OWCP accepted the claim for contusion of the right elbow and forearm; sprain of the back, thoracic region on the right; sprain of the lumbosacral joint, ligament and displacement of lumbar intervertebral disc without myelopathy.<sup>2</sup> On June 23, 2009 appellant underwent an authorized left L4-5 microdiscectomy. She received wage-loss compensation and was placed on the periodic rolls.

In a March 11, 2010 report, Dr. Larry Stark, Board-certified in family medicine and an osteopath, opined that appellant was partially disabled as a result of her work injury. He completed an assessment sheet advising that she could not perform all of her duties as a transportation security screener and was permanently disabled. While appellant could not return to her prior job, she could work with permanent restrictions. Dr. Stark recommended: sitting, walking, standing, twisting, bending, stooping, pushing, pulling, squatting, or kneeling for no more than one hour a day; lifting of no more than 20 pounds for up to one hour a day and no climbing. He noted that appellant had the ability to sit rather than stand using an ergonomic chair.

On March 11, 2010 the employing establishment advised that it was unable to accommodate appellant's work restrictions.

On August 22, 2010 OWCP referred appellant to a vocational rehabilitation counselor. It noted that the counselor would develop a plan to search for employment in the private sector within her physical restrictions.

In a letter dated November 29, 2010, the vocational rehabilitation counselor reported that, based upon her experience, education, medical restrictions, and labor market survey, appellant was employable as a medical fee clerk (DOT #214.482-018). He recommended training at Brookline College for a 28- to 32-week program. The vocational rehabilitation counselor found that once hired appellant could earn \$34,320.00 annually. He identified an office clerk position as a secondary vocational objective.

In a January 11, 2011 letter, OWCP approved the vocational training plan in the position of a hospital insurance/medical billing clerk (DOT #214.362-022). It found the position suitable to her work restrictions and that she would receive 90 days of placement assistance to help her locate work in such a position. Based upon the vocational rehabilitation counselor's evaluation and a survey of the local labor market, she would be capable of earning approximately \$20,800.00 to \$31,200.00 a year. It also advised appellant that her compensation would be reduced based upon the salary of this position at the end of vocational services, whether she was actually employed or not.

Appellant completed her training on October 3, 2011 and began the job placement services on October 5, 2011. In a memorandum of telephone call dated January 17, 2012,

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<sup>2</sup> Appellant sustained a recurrence of disability on July 16, 2008, January 22, 2009 and March 11, 2011.

OWCP granted her an additional 30 days of placement assistance. On January 17 and February 28, 2012 it granted 30-day extensions of placement services. On March 30, 2012 the vocational rehabilitation counselor noted that appellant stopped attending scheduled meetings and returning telephone calls.

In an April 17, 2012 job classification report, the vocational rehabilitation counselor found that the hospital insurance/medical billing clerk position was within appellant's work tolerance limitations. He advised that it was a sedentary job with up to 10 pounds of force occasionally. The vocation rehabilitation counselor noted that the DOT description for a hospital insurance/medical billing clerk included: verifying hospitalization insurance coverage, computing patient benefits, and compiling itemized hospital bills, typing insurance assignment forms with data, such as names of insurance companies to verify patients' coverage and to obtain information concerning extent of benefits, computing hospital bills, adding and using calculating machines, answering patient questions regarding statements, and insurance coverage, telephoning and writing companies with unpaid insurance claims to obtain settlement of claims, preparing forms, outlining hospital expenses for governmental welfare, and other agencies paying bills of specified patents. The weekly wage in her commuting area was \$597.24 a week. The vocational rehabilitation counselor noted that appellant was a high school graduate and had received training at Brookline College in medical billing. He advised that the job was full time and reasonably available in her commuting area. Accompanying his reports, the vocational rehabilitation counselor included certificates and a transcript that appellant received straight A's and graduated with honors. Regarding availability, he contacted the State of Arizona, as well as contacting other organizations such as WebPT and Mountain Vista Medical Center with regard to recent openings.

On April 30, 2012 the vocational rehabilitation counselor provided a final report. He advised that placement efforts were not successful, but were productive. The rehabilitation counselor noted that the primary factor seemed to be that, while there were many suitable job openings, there was strong competition for the jobs. This combined with the lack of work experience in a medical setting was most likely what limited her chances for successful placement. The rehabilitation counselor noted that there were two current job openings that were medically and vocationally suitable for appellant. He completed a job classification report which found that appellant was able to perform the position of hospital insurance/medical billing clerk (DOT #214.362-022); that it was reasonably available with the local labor market and compatible with her current work tolerance limitations. The rehabilitation counselor noted that the weekly wage was \$597.24 a week.

In a June 26, 2012 closing memorandum, the vocational rehabilitation counselor documented that the entry pay level for the position of hospital insurance/medical billing clerk was \$13.50 to \$16.07 per hour.

On August 9, 2012 the employing establishment confirmed that appellant's pay rate for her date-of-injury position, used to be "SVO6" and was now "F-Band." OWCP noted that the pay rate range for a lead position was \$33,637.00 to \$50,494.00 a year.

Appellant submitted additional medical evidence including requests for authorization of additional treatment.

On August 15, 2012 OWCP referred appellant for a second opinion, examination with a statement of accepted facts, a set of questions and the medical record, to Dr. Ronald M. Lampert, a Board-certified orthopedic surgeon. It inquired about appellant's injury-related conditions, the need for additional treatment, and whether she could perform the duties of a hospital insurance/medical billing clerk.

On August 16, 2012 OWCP notified appellant that it proposed to reduce her wage-loss compensation as the evidence established that she was no longer totally disabled, but was partially disabled with the capacity to earn wages as a hospital insurance/medical billing clerk, DOT #214.362-022, at the rate of \$13.50 per hour or \$540.00 per week. It explained that Dr. Stark, her treating physician, supported that the identified job was within her medical limitations. Appellant was advised that the rehabilitation counselor determined that her work experience, education, medical restrictions, and a labor market survey established that she was employable as a hospital insurance/medical billing clerk. OWCP informed appellant that her vocational rehabilitation counselor had documented that the hospital insurance/information clerk positions were reasonably available in her commuting area and that the entry pay level for the positions was \$13.50 an hour or \$540.00 a week. It informed appellant that this represented a 68 percent wage-earning capacity. Appellant was advised that the physical requirements of the position were deemed to be vocationally suitable and consistent with her work restrictions. He was provided 30 days to respond.<sup>3</sup>

Thereafter, OWCP received a May 3, 2012 laboratory report, a July 27, 2012 physician's assistant report and nursing notes.

In an August 31, 2012 report, Dr. Lampert reviewed appellant's history of injury and treatment and found that she had reached maximum medical improvement. He opined that, although appellant was not able to return to her original date-of-injury position, she was able to work in the position of a hospital insurance/medical billing clerk without restrictions for eight hours per day, five days a week.

Appellant provided additional reports from nurse practitioners and a physician's assistant. The evidence did not address her capacity to perform work in the selected position.

By decision dated September 25, 2012, OWCP reduced appellant's wage-loss compensation, effective October 21, 2012, based on her ability to work as a hospital insurance/medical billing clerk. It noted that Dr. Lampert found that she could perform the duties of this position.

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<sup>3</sup> OWCP provided a calculation sheet regarding the proposed reduction. It indicated that her pay rate when her disability recurred on March 11, 2010 was \$857.37 per week; the current adjusted pay rate for her job on the date of injury was \$858.78 per week, she was currently capable of earning \$540.00 per week, the pay rate for a hospital insurance/information clerk. OWCP determined that appellant had a 68 percent wage-earning capacity, which resulted in an adjusted wage-earning capacity of \$540.14 per week. It determined that she had a loss of wage-earning capacity of \$317.23 per week. OWCP concluded that, based upon a three-fourths compensation rate, appellant's compensation would be \$237.92 per week, increased by cost-of-living adjustments to \$245.50 per week or \$982.00 every four weeks.

## 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.<sup>4</sup>

Section 8115(a) of FECA,<sup>5</sup> provides 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. Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.<sup>6</sup> 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.<sup>7</sup> Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.<sup>8</sup> The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.<sup>9</sup> 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>10</sup>

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 his or her physical limitation, 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.<sup>11</sup> Finally, application of the principles set forth

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<sup>4</sup> *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984). See *Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

<sup>5</sup> 5 U.S.C. § 8115.

<sup>6</sup> *Hubert F. Myatt*, 32 ECAB 1994 (1981); *Lee R. Sires*, 23 ECAB 12 (1971).

<sup>7</sup> See *Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

<sup>8</sup> *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

<sup>9</sup> *Id.*

<sup>10</sup> *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

<sup>11</sup> *Karen L. Lonon-Jones*, 50 ECAB 293, 297 (1999).

in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.<sup>12</sup>

### ANALYSIS

Appellant's claim was accepted for contusion of the right elbow and forearm, sprain of the back, thoracic region, on the right, sprain of the lumbosacral joint, ligament and displacement of lumbar intervertebral disc without myelopathy. On June 23, 2009 she underwent left L4-5 microdiscectomy. Appellant received appropriate compensation and was placed on the periodic rolls.

Appellant's attending physician, Dr. Stark advised that appellant was partially disabled as a result of her employment injury and could not perform the duties of her date-of-injury job. He completed a work capacity evaluation and found that appellant could work within restrictions. Dr. Stark recommended sitting, walking, standing, twisting, bending, stooping, pushing, pulling, squatting, or kneeling for no more than one hour per day; lifting of no more than 20 pounds for up to one hour per day, and no climbing.

The employing establishment was unable to accommodate appellant's work restrictions. Thereafter, appellant underwent vocational rehabilitation training for positions that were suitable and in accordance with her restrictions. A vocational rehabilitation counselor proceeded to identify an appropriate position that fit appellant's capabilities.<sup>13</sup> The counselor identified the hospital insurance/medical billing clerk position as being sedentary with occasional lifting and within her physical limitations. Appellant underwent training for the position and completed a course of study at Brookline College in medical billing. The rehabilitation counselor indicated that the position fell within appellant's work restrictions and was reasonably available in her commuting area. Appellant received more than 90 days of placement assistance but was unable to obtain a position before her vocational rehabilitation assistance expired. At the end of the vocational rehabilitation, the counselor determined that the position was available in sufficient numbers so as to make it reasonably available within appellant's commuting area and that the wage of the position was equal to \$540.00 per week. Evidence from the rehabilitation counselor establishes that appellant had the appropriate knowledge, training and background to perform the selected position. The record indicates that appellant received straight A's and graduated with honors.

OWCP obtained an August 31, 2012 opinion from Dr. Lampert, a referral physician, who reviewed appellant's history, reviewed the position description examined and found that she

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<sup>12</sup> *Id.* See *Shadrick*, 5 ECAB 376 (1953).

<sup>13</sup> See *supra* note 10.

could perform the duties of the selected position full time without restriction. Appellant did not submit any current medical evidence supporting that she was unable to perform the duties of the offered position.<sup>14</sup>

The Board finds that the hospital insurance/medical billing clerk, DOT #214.362-022 position conforms to work restrictions set forth by Dr. Stark and the second opinion physician, Dr. Lampert. The Board notes that Dr. Lampert examined appellant and provided findings and an opinion that appellant was capable of performing the duties of this position. The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of hospital insurance/medical billing clerk.

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 hospital insurance/medical billing clerk represented appellant's wage-earning capacity.<sup>15</sup> The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of hospital insurance/medical billing clerk and that such a position was reasonably available within the general labor market of her commuting area.

The Board finds that OWCP met its burden of proof to reduce appellant's compensation based on its determination that the selected position of hospital insurance/medical billing clerk represented her wage-earning capacity effective October 21, 2012.

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 OWCP met its burden of proof in reducing appellant's compensation based on its determination that the selected position of hospital insurance/medical billing clerk represented her wage-earning capacity effective October 21, 2012.

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<sup>14</sup> The record contains reports from physician's assistants and nurse practitioners. 5 U.S.C. § 8101(2) provides that the term "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by the applicable state law. Consequently, this evidence cannot be considered medical evidence and is of no probative medical value. *See also Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board has held that a medical opinion, in general, can only be given by a qualified physician).

<sup>15</sup> *See Clayton Varner*, 37 ECAB 248, 256 (1985).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 25, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 25, 2013  
Washington, DC

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

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