

expired December 27, 2002. OWCP accepted the claim for lumbar disc herniation and paid her wage-loss compensation beginning November 19, 2002.

Appellant received treatment from Dr. Jorge Isaza, a Board-certified orthopedic surgeon, who noted that she underwent a posterior lumbar interbody fusion of L5-S1 on October 15, 2003 and continued to have low back pain. Dr. Isaza continued to treat her, noted her status and placed her off work.

On December 28, 2007 OWCP referred appellant for a second opinion to Dr. Byron Thomas Jeffcoat, a Board-certified orthopedic surgeon. In a January 7, 2008 report, Dr. Jeffcoat noted appellant's history of injury and treatment and examined appellant. He determined that appellant could return to a medium level of physical activity for six hours per day.

By letter dated January 17, 2008, OWCP requested that appellant's treating physician, Dr. Isaza, review the report from Dr. Jeffcoat and provide an opinion regarding whether or not he concurred with Dr. Jeffcoat's opinion regarding her work restrictions. Dr. Isaza did not respond directly to OWCP but he continued to treat appellant. In reports dated May 8 and June 19, 2008, he released appellant to work with light-duty restrictions. Dr. Isaza did not specify any individual restrictions.

On October 20, 2008 OWCP referred appellant along with a statement of accepted facts, and the medical record to Dr. Christopher Cenac, a Board-certified orthopedic surgeon, for an impartial medical evaluation to resolve the conflict in opinion between Drs. Isaza, the attending physician, and Dr. Jeffcoat, the second opinion physician, regarding how many hours appellant could work and her limitations.

In a November 3, 2008 report, Dr. Cenac noted appellant's history of injury and treatment and examined appellant. His findings included that she had normal reflexes in the knees but a diminished and present heel reflex on the left. Straight leg examination was nonphysiologic with subjective complaints of pain. Dr. Cenac indicated that appellant was unable to toe and heel walk and used a cane for ambulation. He also noted that she had a stocking-type distribution of sensory deficits in the left leg which was nonphysiologic and a well-healed lumbar incision. There was no atrophy in either lower extremity by direct measurement and motor function was 5/5 in the long toe extensors with some coaching. Dr. Cenac opined that appellant was able to perform activities in the light/medium level with 35-pound lifting restrictions and had reached maximum medical improvement. He opined that she could work full time within certain restrictions. Dr. Cenac prescribed limitations of no more than six hours a day for: sitting, walking, standing, reaching, reaching above shoulder, twisting, bending, stooping, lifting, squatting, kneeling, operating a motor vehicle at work and operating a motor vehicle to and from work. He indicated that appellant could work eight hours while engaging in repetitive movements of the wrists and elbow, pushing and pulling. Dr. Cenac advised that she could not do any climbing.

As the employing establishment was unable to provide appellant with a position within the restrictions, on June 29, 2009 OWCP referred her for vocational rehabilitation services.

In a September 23, 2011 report, Dr. Isaza noted that appellant reached maximum medical improvement without surgery. He ordered a functional capacity evaluation (FCE) to more accurately determine her restrictions.

The vocational rehabilitation counselor determined that, based upon her experience, education, medical restrictions, and a labor market survey, appellant was employable as a personal care assistant and a cashier.² By letter dated November 10, 2011, OWCP advised appellant that she would receive 90 days of placement assistance. It advised her that her compensation would be reduced based upon the wage-earning capacity at the end of these services.

Scott Dickie, a physical therapist, provided the results of appellant's FCE in a report dated November 22, 2011. It revealed that appellant was capable of working at the sedentary to light physical demand level for an eight-hour day with restrictions to include leg lift capability of 10 pounds, shoulder lifting of 10 pounds, overhead lifting of 5 pounds, carrying of 10 pounds and one hand carrying of 10 pounds. Mr. Dickie noted that she "exhibited symptom/disability exaggeration behavior by our criteria." He indicated that appellant passed only 12 out of 29 validity criteria during the FCE, earning 41 percent, which "suggests very poor effort or voluntary submaximal effort, which is not necessarily related to pain, impairment or disability."

In a November 30, 2011 report, Dr. Isaza indicated that he had reviewed the results of appellant's FCE. He indicated that appellant was capable of returning to work as indicated in the FCE.

The vocational rehabilitation counselor closed appellant's file on February 29, 2012 and noted that placement services had been provided for 90 days; however the injured worker did not secure a job. She verified the current availability and wages of the jobs identified. The vocational rehabilitation counselor noted that a labor market survey was completed and that appellant's job capabilities included that she could perform the duties of a cashier. DOT No. 211.462.014. The vocational rehabilitation counselor indicated that the position of a cashier was a light-duty position and complied with her restrictions. She advised that the entry-level wage for a cashier was \$7.47 per hour, or \$299.00 per week. The vocational rehabilitation counselor noted a slight decline in growth; however, she confirmed such positions were reasonably available in appellant's commuting area.

In a report dated March 28, 2012, Dr. Isaza opined that appellant's restrictions remained the same. In a September 19, 2012 report, he repeated that her restrictions were unchanged. Appellant was also treated on May 16, July 13 and August 16, 2012 by Dr. Sean Graham, Board-certified in pain medicine, for low back and left leg pain. Dr. Graham diagnosed failed back syndrome and lumbar radiculopathy. He did not list work restrictions.

On September 14, 2012 OWCP notified appellant that it proposed to reduce her compensation for wage loss due to her accepted injury. It found that the factual and medical

² A September 30, 2011 job classification worksheet for a cashier indicated that the job entailed light physical demands and was reasonably available at a weekly wage of \$299.00. The rehabilitation counselor also noted that appellant's previous work experience qualified her for the position.

evidence established that she was no longer totally disabled for work but was instead partially disabled and had the capacity to earn wages as a cashier, DOT No. 211.462.014, at the rate of \$299.00 per week. OWCP found that the position of a cashier was vocationally suitable and fairly and reasonably represented appellant's wage-earning capacity. It provided her 30 days to submit evidence or argument concerning her ability to earn wages. OWCP provided a calculation sheet which indicated that appellant's pay rate when her disability began on November 19, 2002 was \$409.11 per week; the current adjusted pay rate for her job on the date of injury was \$495.20 per week she was currently capable of earning \$299.00 per week, the pay rate for a cashier. OWCP determined that she had a 60 percent wage-earning capacity, which resulted in an adjusted wage-earning capacity of \$245.47 per week, and a loss of wage-earning capacity of \$163.64 per week. It applied the basic, two-thirds, compensation rate to this to arrive at weekly compensation of \$109.09 that was increased by applicable cost-of-living adjustments to yield \$137.25 per week, or \$549.00 every four weeks. Appellant was provided 30 days to submit additional evidence or argument.

OWCP received additional medical evidence. In a September 28, 2012 report from Dr. John Braswell, a Board-certified anesthesiologist and associate of Dr. Graham, who diagnosed failed back syndrome and lumbar radiculopathy. He explained that because appellant had the left lower extremity radicular pain for almost 10 years, he did not believe that anything was going to resolve her pain completely. A September 19, 2012 treatment note from Dr. Isaza noted findings and diagnoses. Dr. Isaza stated that appellant's restrictions were unchanged.

Appellant disagreed with the proposal to reduce her compensation in a letter dated September 24, 2012. She indicated that every job she applied for required a diploma or college.

By decision dated November 9, 2012, OWCP finalized the proposed reduction of compensation benefits, effective November 18, 2012, as the evidence established that appellant had the capacity to earn wages of a cashier.

On November 19, 2012 appellant requested reconsideration and disagreed with OWCP's finding that she could work as a cashier. She indicated that she could not perform the duties of a cashier. A November 15, 2012 treatment note from Dr. Graham noted appellant's status and diagnosed failed back syndrome and lumbar radiculopathy.

By decision dated December 11, 2012, OWCP denied modification of its prior decision.

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

³ *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).

Section 8115(a) of FECA,⁴ 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.⁵ 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.⁶ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.⁷ 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.⁸ 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.⁹

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.¹⁰ Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.¹¹

ANALYSIS

Appellant's claim was accepted for lumbar disc herniation and she received compensation for total disability. OWCP began developing the claim regarding her ability to

⁴ 5 U.S.C. § 8115.

⁵ *Hubert F. Myatt*, 32 ECAB 1994 (1981); *Lee R. Sires*, 23 ECAB 12 (1971).

⁶ *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

⁷ *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

⁸ *Id.*

⁹ *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

¹⁰ *Karen L. Lonon-Jones*, 50 ECAB 293, 297 (1999).

¹¹ *Id.* *See Shadrick*, 5 ECAB 376 (1953).

work. Dr. Isaza, appellant's physician, who placed appellant off work, while physicians to whom OWCP referred appellant, Dr. Jeffcoat and Dr. Cenac, opined that she could work within restrictions. On November 3, 2008 Dr. Cenac opined that appellant could perform light to medium work full time.¹² Dr. Isaza subsequently obtained a November 22, 2011 FCE which concluded that appellant could perform sedentary to light work full time.

The employing establishment was unable to provide a position for appellant within her restrictions and OWCP referred her for vocational rehabilitation counseling. Thereafter, appellant was unable to secure employment within her restrictions. On November 8, 2011 the vocational rehabilitation counselor determined that, based upon her experience, education, medical restrictions and a labor market survey, appellant was capable of working as a cashier, in the light physical demand level, and noted that the position was reasonably available in appellant's labor market at the weekly wage of \$299.00. On September 14, 2012 OWCP proposed to reduce appellant's compensation and it finalized its decision on November 9, 2012.

The Board finds that the weight of the medical evidence supports that appellant has the ability to work eight hours daily within restrictions consistent with the selected cashier position. The November 22, 2011 FCE, ordered by Dr. Isaza supports that appellant was capable of working in a sedentary to light physical demand level with restrictions. Dr. Isaza's subsequent treatment notes advise that appellant's restrictions were unchanged. The Board finds that the physical demands of the selected cashier position are consistent with the restrictions set forth in the November 22, 2011 FCE. Additionally, Dr. Cenac's November 3, 2008 report supports that appellant could work full time in a light to medium level.

The Board finds that OWCP considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment and age and employment qualifications, in determining that the position of cashier 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 a cashier and that such a position was reasonably available within the general labor market of her commuting area. OWCP therefore properly determined that the position of cashier reflected appellant's wage-earning capacity and using the *Shadrick* formula,¹⁴ reduced her compensation effective November 18, 2012.

On appeal, appellant argues that she is not qualified to be a cashier and that she could not do any of the movements on the examination. She provided no evidence to substantiate her claim. Furthermore, Dr. Isaza agreed with the restrictions from the FCE which are consistent with the duties of the cashier position. Other recent medical evidence submitted by appellant does not address her work restrictions and she did not otherwise provide any medical evidence which indicated that she could not work as a cashier. Consequently, OWCP properly found that

¹² Although Dr. Cenac was selected as an impartial specialist under 5 U.S.C. § 8123(a) regarding appellant's ability to work, he is not an impartial specialist with regard to whether the selected position of cashier is appropriate as of November 18, 2012 as his report predated the wage-earning capacity determination.

¹³ *James M. Frasher*, 53 ECAB 794 (2002).

¹⁴ *See Shadrick*, *supra* note 11; *see also* 20 C.F.R. § 10.403.

the constructed position of a cashier fairly and reasonably represented appellant's wage-earning capacity effective November 18, 2012.

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 met its burden of proof in reducing appellant's compensation based on its determination that the constructed position of a cashier represented her wage-earning capacity effective November 18, 2012.

ORDER

IT IS HEREBY ORDERED THAT the December 11 and November 9, 2012 Office of Workers' Compensation Programs' decisions are affirmed.

Issued: September 4, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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