

FACTUAL HISTORY

On May 13, 2008 appellant, then a 60-year-old letter carrier, filed a traumatic injury claim alleging that on May 19, 2008 he sustained a head injury when he fell while delivering mail and hit the back of his head on concrete. On September 26, 2008 OWCP accepted his claim for contusion of the face, scalp and neck except eye(s); postconcussion syndrome and sprain of the neck. It paid appropriate compensation benefits.

In a September 10, 2010 Primary Treating Physician's Permanent and Stationary Report, Dr. Shahzad Jahromi, a physician Board-certified in occupational medicine, listed diagnoses of chronic neck pain, degenerative disc disease of the cervical spine, cervical radiculopathy, cervical sprain/strain; contusion of the head; headache, postconcussion syndrome; and status post slip and fall injury. He opined that appellant was unable to return to his usual and customary work. Dr. Jahromi placed appellant on permanent restrictions of limited lifting and carrying up to 25 pounds and no repetitive reaching with arms above shoulder levels and no repetitive flexion and extension of the neck. He noted that appellant will need future medical treatment for medication use and possible physical therapy for occasional exacerbation of his pain. In an October 7, 2011 industrial work status form, Dr. Jahromi indicated that appellant can work with the following restrictions: able to lift/carry up to 20 pounds, needs to be able to change position, alternating sitting and standing every 20 minutes and the elbow of affected arm must be kept adjacent to trunk with no work above shoulder level.

On November 16, 2010 OWCP referred appellant to a vocational rehabilitation counselor who provided vocational counseling and placement services. Appellant did not receive a job offer during the period of vocational counseling, and in a December 20, 2011 report, the counselor recommended closing his file. In a January 14, 2012 report, the vocational counselor listed 10 employers in the Fresno area that had openings for an office clerk. In a February 17, 2012 closure memorandum, the counselor noted that a training plan was developed and approved for the positions of general clerk and receptionist, but that after four months of placement services, appellant was unable to obtain work. The general clerk position was described as performing any combination of clerical duties requiring limited knowledge of systems or procedures. The counselor indicated that the targeted job remained vocationally and medically appropriate and existed in sufficient numbers within reasonable commuting distance of the injured worker. She listed the wages of a general clerk as \$360.00 to \$400.00 weekly or \$9.00 to \$10.00 per hour.

On March 7, 2012 OWCP proposed reducing appellant's compensation for wage loss to reflect his capacity to earn wages as a general office clerk at \$360.00 per week. It noted that the Department of Labor's *Dictionary of Occupational Titles* (DOT) described the physical requirements of the general office clerk as light in nature and involve frequent reaching, handling, fingering and near acuity, with occasional talking, hearing and accommodating. OWCP applied the *Shadrick* formula,² and recommended reducing appellant's compensation accordingly.

² See *Albert C. Shadrick*, 5 ECAB 376 (1953); codified at 20 C.F.R. § 10.403(d)-(e).

By letter to OWCP dated March 27, 2012, appellant disagreed with the assessment that the job duties fell within his job restrictions. Furthermore, he contended that all the job referrals from the vocational rehabilitation service were from Craig's List, and that many of these referrals were scams.

By decision dated May 7, 2012, OWCP finalized the reduction of appellant's compensation benefits to reflect that appellant was capable of performing the duties of a general office clerk effective June 3, 2012.

By letter dated May 14, 2012, appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative. At the hearing held on September 17, 2012, appellant testified that he has usual daily pain. He testified that his doctor limited him from doing repetitive motions with his arms and twisting his head from side to side. Appellant noted that he could tolerate only limited sitting and standing and that his physician did not want him to do repetitive motion at shoulder level. He contended that he could not be a general office clerk because he could not move things back and forth as it required walking and standing and also reaching and manipulating things. Appellant also alleged that several of the jobs on Craig's List were just scams.

The record was left open for 30 days to provide appellant the opportunity to submit further evidence. Appellant resubmitted reports that were previously in the record. These included a report dated December 11, 2009 and a work capacity evaluation dated December 17, 2009 by Dr. Shen Ye Wang, a Board-certified neurologist. In the December 11, 2009 report, Dr. Wang listed appellant's diagnoses as status post slip and fall injury on wet pavement when delivering mail on April 19, 2008; status post head concussion due to the industrial injury of April 19, 2008; post-traumatic headaches; post-traumatic head syndrome with dizziness, unsteady gait, subjective reporting of short-term memory loss, anxiety, depression and insomnia; cervical sprain/strain injury from April 19, 2008 fall, aggravating the preexisting underlying cervical spondylosis with foraminal narrowing at multiple levels; bilateral carpal tunnel syndrome and left ulnar neural neuropathy due to the cumulative injury as a postal service letter carrier for more than 20 years but not related to the specific accident of April 19, 2008; and sinusitis, nonindustrial. He opined within a reasonable medical probability that appellant's residual headaches, dizziness and neck pain were caused by the specific industrial injury of April 19, 2008. Dr. Wang also believed that the psychological counseling should be accepted as part of the industrial injury. He indicated that appellant's current physical restrictions were primarily related to his progressive worsening of neck pain in shoulders, numbness of the hands bilaterally and decreased range of motion of the neck. Dr. Wang opined that appellant could do sedentary or semi-sedentary work in an office environment. He stated that appellant's work restrictions would include no persistent bending, flexing, turning or twisting the neck and allow appellant to change positions for comfort because of the constant neck pain in one position; no use of the arms and hands at or above shoulder level repeatedly; no repetitive use of the hands bilaterally; and no lifting, carrying, pushing or pulling heavy objects weighing more than 15 pounds with either hand. Dr. Wang further noted that for the neck pain and numbness of the hands, appellant should be allowed to have additional breaks for approximately 5 to 10 minutes every hour. He opined that, if the employing establishment cannot accommodate appellant's permanent physical restrictions, then appellant should remain on temporary total disability. Dr. Wang noted that appellant's prospects of improvement will depend on the success of the

future medical treatment, including surgical release of the carpal tunnel; surgical release of the ulnar neuropathy across the Guyon's canal; and additional treatment of his persistent neck pain.

In a December 17, 2009 work capacity evaluation, Dr. Wang listed appellant's work capacity restrictions, including sitting limited to four hours a day, walking, standing, reaching above shoulder and pushing/pulling/lifting up to 15 pounds a day for one hour, reaching, bending/stooping, limited to two hours, and repetitive movements of the wrists and elbow limited to one hour.

Appellant also submitted new progress reports dated August 23 and October 2, 2012 wherein Dr. Jahromi indicated that appellant has not worked since the injury, but that he could return to modified duty and that the permanent modified-duty description was in the file.

By decision dated December 6, 2012, an OWCP hearing representative affirmed the May 7, 2012 decision reducing appellant's compensation.

LEGAL PRECEDENT

Section 8115 of FECA³ provides that 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 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, 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.

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 for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open market, that fits the employee's capabilities with regard to 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*,⁴ will result in the percentage of the employee's loss of wage-earning capacity.⁵

ANALYSIS

OWCP accepted that appellant sustained contusions on his face, scalp and neck except eyes; postconcussion syndrome and sprain of the neck causally related to the May 19, 2008

³ 5 U.S.C. §§ 8101-8193, 8115.

⁴ G.A., Docket No. 12-1826 (issued June 25, 2013).

⁵ See *Dennis D. Owen*, 44 ECAB 475, 479-80 (1993); *Wilson L. Clow, Jr.*, 44 ECAB 157, 171-75 (1992); *Albert C. Shadrick*, *supra* note 2.

employment injury and paid appropriate compensation and medical benefits. Appellant's treating physician, Dr. Jahromi, indicated that, while appellant was unable to return to his usual customary work, he was able to return to work with restrictions. In an October 7, 2011 report, he indicated that appellant could lift/carry up to 20 pounds, needed to be able to change positions alternating sitting and standing every 20 minutes, and that the elbow of the affected arm must be kept adjacent to the trunk with no work above shoulder level. The clerk position was described as involving light physical requirements.

There is no indication that the duties of the general clerk position exceeded appellant's physical abilities as set forth by Dr. Jahromi. Appellant also resubmitted the report by Dr. Wang. Although the reports of Dr. Wang were somewhat more restrictive than those of Dr. Jahromi in that he limited appellant to pushing/pulling/lifting up to 15 pounds a day for one hour, the Board notes that these reports were dated in December 2009, almost two years prior to Dr. Jahromi's report. Also, Dr. Wang opined that appellant could do sedentary or semi-sedentary work in an office environment. Accordingly, the Board finds that the medical evidence supports that the position of general clerk was within appellant's medical restrictions.

The Board also finds that the position of general clerk was vocationally suitable. The vocational rehabilitation counselor listed 10 positions within appellant's commuting area that had openings for an office assistant. The counselor indicated that these positions were vocationally and medically appropriate for appellant and existed in sufficient numbers within reasonable commuting distance of the injured worker. Because the counselor is an expert in the field of vocational rehabilitation, OWCP may rely on his or her opinion as to whether the job is reasonably available and vocationally suitable.⁶ The fact that appellant was unable to secure a position does not mean that the position is not reasonably available to him in the open labor market.⁷

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 general clerk represented appellant's wage-earning capacity.⁸ The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of general clerk and that it was reasonably available within the general labor market of appellant's commuting area. Therefore, OWCP properly reduced appellant's compensation effective June 3, 2012 based on his capacity to earn wages as a general clerk.

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

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8d (October 2009). *See also M.P.*, Docket No. 12-1458 (issued May 9, 2013).

⁷ *See J.Q.*, Docket No. 13-395 (issued May 1, 2013).

⁸ *See D.C.*, Docket No. 13-747 (issued June 25, 2013); *Clayton Varner*, 37 ECAB 248, 256 (1985).

CONCLUSION

The Board finds that OWCP met its burden to establish that the constructed position of general office clerk represented appellant's wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 6, 2012 is affirmed.

Issued: September 10, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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