

FACTUAL HISTORY

This case has previously been before the Board. On April 26, 2011 the Board found that OWCP properly determined the effective pay rate of August 17, 2006, the date of her last recurrence of total disability for compensation purposes.² The Board further found that OWCP properly refused to reopen appellant's case for a merit review as she failed to meet the requirements of 20 C.F.R. § 10.606(b)(2) in her request for reconsideration. The facts and the circumstances of the case as set forth in the Board's prior decisions and are hereby incorporated by reference.³

On April 13 and June 11, 2010 Dr. Michael J. Sullivan, an attending Board-certified orthopedic surgeon with a subspecialty in hand surgery, provided work restrictions based on a review of a March 30, 2010 functional capacity evaluation (FCE). Based on the findings from the FCE, he indicated that appellant was capable of lifting up to 38 pounds for a third of a day and 23 pounds for the remaining two-thirds and 11 pounds for all day and that she could use both hands.

On December 7, 2010 appellant was referred for vocational rehabilitation to facilitate reemployment with the employing establishment.

In an April 1, 2011 report, Dr. Sullivan modified and updated appellant's work restrictions. He indicated that she was precluded from casing mail.

On June 3, 2011 Dr. Sullivan completed a work capacity evaluation form and provided permanent work restrictions. The work restrictions included no lifting more than 38 pounds for a third of a day, no lifting more than 23 pounds for the remaining two-thirds and no lifting more than 11 pounds for an eight-hour day.

On July 6, 2011 the vocational rehabilitation plan was changed to identifying employment outside the employing establishment as the employing establishment was unable to provide a job within appellant's work restrictions.

On August 12, 2011 the vocational rehabilitation specialist identified the position of general clerk/office clerk and receptionist with an hourly salary between \$7.30 and \$7.50 as within appellant's work restrictions and reasonably available in sufficient numbers in appellant's commuting area. The physical requirements listed in the Department of Labor, *Dictionary of*

² Docket No. 10-1425 (issued April 26, 2011).

³ On October 11, 2004 appellant, then a 46-year-old rural carrier, filed an occupational disease claim alleging that her right wrist condition was employment related. OWCP accepted the claim for right ulnocarpal impaction, which was subsequently expanded to include joint derangement and scar condition and fibroid of the skin and authorized arthroscopic surgery, which was performed on June 16, 2005. Appellant accepted a job offer as a modified rural carrier from the employing establishment and returned to work on September 19, 2005. By decision dated July 12, 2006, OWCP issued a loss of wage-earning capacity decision which found no loss of wages. By decision dated October 16, 2009, it vacated the July 12, 2006 loss of wage-earning capacity decision on the grounds that the original decision was in error. By letter dated November 3, 2009, OWCP placed appellant on the periodic rolls for temporary total disability with a weekly pay rate of \$988.29.

Occupational Titles (DOT) for general clerk/office clerk with DOT No. 209.562-010 included light strength; occasional pushing, occasional lifting, pushing and pulling 20 pounds, frequent lifting, carrying, pushing and pulling up to 10 pounds or constant pushing, lifting and pulling a negligible amount.

In a May 23, 2012 status report, the vocational rehabilitation specialist noted vocational rehabilitation services were unsuccessful after a total of 180 days of placement service. The rehabilitation specialist indicated that the following positions were suitable for appellant: receptionist with an hourly rate of \$8.81 and general clerk/office clerk with an hourly rate of \$8.31. Both positions were within appellant's physical, educational and vocational abilities. These positions were also reasonably available in appellant's commuting area.

On July 31, 2012 OWCP proposed to reduce appellant's compensation for wage loss, noting that the medical and factual evidence established that she no longer was totally disabled but had the capacity to earn wages as a general clerk/office clerk with a weekly salary of \$332.40.

In letters dated August 27, 2012, appellant noted her disagreement with the proposal to reduce her compensation. She contended that she had made every effort to obtain work, but that she had been told she was not hired due to a lack of a college degree. Appellant related that she had asked on at least four occasions for OWCP to allow her to attend college, but was denied.

On November 1, 2012 OWCP finalized the reduction of compensation, effective November 18, 2012, finding that appellant had the wage-earning capacity of general clerk/office clerk for eight our hours per day.

It applied the *Albert C. Shadrick*⁴ formula based on a weekly pay rate of \$988.29, effective August 17, 2006 and found that appellant had the capacity to earn weekly wages of \$332.40 in the constructed position of general clerk/office clerk. OWCP divided her constructed earnings of \$332.40 by the current pay rate for her date-of-injury job of \$1,245.04 to find a 27 percent wage-earning capacity. It multiplied this percentage by appellant's August 17, 2006 recurrent pay rate of \$988.29, to find an adjusted wage-earning capacity of \$266.84. OWCP subtracted her wage-earning capacity of \$266.84 from the recurrent pay rate of \$988.29 to find a loss of wage-earning capacity of \$721.45. It then multiplied this amount by the appropriate compensation rate of three-fourths which yielded \$541.09.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.⁵ An injured employee who is either unable to return to the position held at the time of injury or unable to earn equivalent wages, but who is not totally

⁴ 5 ECAB 376 (1953).

⁵ *H.N.*, Docket No. 09-1628 (issued August 19, 2010); *T.F.*, 58 ECAB 128 (2006); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.⁶

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 the employee's wage-earning capacity or if the employee has no actual wages, the wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, the employee's usual employment, age, 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.⁷

When OWCP makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an OWCP wage-earning capacity specialist for selection of a position, listed in the Department of Labor, DOT or otherwise available in the open market, that fit the 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 labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in *Shadrick*⁸ and codified by regulations at 20 C.F.R. § 10.403⁹ should be applied. Subsection(d) of the regulations provide that the employee's wage-earning capacity in terms of percentage is obtained by dividing the employee's actual earnings or the pay rate of the position selected by OWCP, by the current pay rate for the job held at the time of the injury.¹⁰

In determining an employee's wage-earning capacity based on a position deemed suitable but not actually held, OWCP must consider the degree of physical impairment, including impairments resulting from both injury-related and preexisting conditions, but not impairments resulting from postinjury or subsequently acquired conditions.¹¹ Any incapacity to perform the duties of the selected position resulting from subsequently acquired conditions is immaterial to the loss of wage-earning capacity that can be attributed to the accepted employment injury and for which appellant may receive compensation. Additionally, 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.¹²

⁶ 20 C.F.R. §§ 10.402, 10.403.

⁷ 5 U.S.C. § 8115(a); *see N.J.*, 59 ECAB 171 (2007); *T.O.*, 58 ECAB 377 (2007); *Dorothy Lams*, 47 ECAB 584 (1996).

⁸ *Supra* note 4.

⁹ 20 C.F.R. § 10.403.

¹⁰ *Id.* at § 10.403(d).

¹¹ *James Henderson, Jr.*, 51 ECAB 268 (2000).

¹² *Id.*

ANALYSIS

OWCP originally accepted appellant's claim for right ulnocarpal impaction, joint derangement and scar condition as a result of her repetitive casing mail employment duties. By letter dated November 3, 2009, it placed her on the periodic rolls for temporary total disability with a weekly pay rate of \$988.29. In a November 1, 2012 decision, OWCP determined that appellant's loss of wage-earning capacity was represented by the constructed position of general clerk/office clerk.

The Board finds that OWCP properly relied on the opinions of Dr. Sullivan, appellant's attending Board-certified orthopedic surgeon with a subspecialty in hand surgery, that she was capable of working an eight-hour day with restrictions. In reports dated April 12, June 11 and 30, 2010, Dr. Sullivan reviewed a March 30, 2010 FCE and indicated that appellant was capable of up to 38 pounds of lifting for a third of a day and 23 pounds for the remaining two-thirds and 11 pounds for all day and that she could use both hands. Dr. Sullivan provided the same work restrictions in a June 3, 2011 work capacity evaluation form. The rehabilitation counselor assigned to assist appellant in placement efforts identified a position as a general clerk/office clerk listed in the Department of Labor, DOT, appropriate for appellant based on Dr. Sullivan's work restriction evaluation and reports. OWCP used the information provided by the rehabilitation counselor of the applicable wage rate in the area for a general clerk/office clerk. Finally, it properly applied the principles set forth in the *Shadrick*¹³ decision to determine appellant's employment-related loss of wage-earning capacity. OWCP calculated that her compensation rate should be adjusted to \$541.09 per week using the *Shadrick* formula.

OWCP properly found that appellant was no longer totally disabled as a result of her accepted conditions and it followed established procedures for determining her employment-related loss of wage-earning capacity. The Board therefore finds that OWCP met its burden of proof to reduce her compensation for total disability in its November 1, 2012 decision.¹⁴

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

CONCLUSION

The Board finds that the position of general clerk/office clerk represented appellant's wage-earning capacity effective November 18, 2012.

¹³ *Shadrick*, *supra* note 4.

¹⁴ Appellant argued that the August 17, 2006 recurrent rate should not be used in the calculation for her wage-earning capacity. The Board notes that it has already ruled on the proper pay rate for compensation purposes (as defined in section 8101(4) of FECA (*supra* note 1) and 20 C.F.R. § 10.5(s)), in its prior decision dated April 26, 2011 (*supra* note 2) and that matter is *res judicata* and not subject to further consideration by the Board in this appeal. See *Hugo A. Mentink*, 9 ECAB 628 (1958); see also *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998) (in the absence of further review by OWCP on the issue addressed by a Board decision, the subject matter reviewed is *res judicata* and is not subject to further consideration by the Board).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 1, 2012 is affirmed.

Issued: September 9, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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