



## **FACTUAL HISTORY**

On February 6, 1999 appellant, then a 34-year-old part-time flexible mail handler, filed a traumatic injury claim alleging that on that day she injured her left shoulder and upper arm in the performance of duty.<sup>3</sup> OWCP accepted the claim for left shoulder contusion and her claims for a recurrence of disability. It authorized left shoulder arthroscopic surgery which occurred on June 24, 2009 and expanded the acceptance of appellant's claim to include left shoulder impingement syndrome. Appellant stopped work on June 23, 2009 and was placed on the periodic rolls for temporary total disability effective February 14, 2010.

In a January 26, 2010 report, Dr. Mark A.P. Filippone, an attending Board-certified physiatrist, diagnosed left shoulder internal derangement, supraspinatus tendinitis, rule out rotator cuff tear, right carpal tunnel syndrome, left shoulder adhesive capsulitis, rule out left brachioplexopathy, rule out cervical radiculopathy and rule out ulnar neuropathy. He provided physical examination findings, noting appellant's injury was sustained in 1999. Dr. Filippone recommended that her claim be expanded to include left carpal tunnel syndrome and a cervical condition. In concluding, he opined that appellant was totally disabled from working.

In a March 9, 2010 report, Dr. Andrew M. Hutter, a second opinion Board-certified orthopedic surgeon, provided physical findings and again concluded that appellant was capable of working with restrictions. He recommended that a functional capacity evaluation be performed to determine her work capabilities.

A functional capacity evaluation (FCE) was performed on April 2, 2010 which indicated that appellant was capable of working 40 hours a week in a light-duty job. It noted that she was capable of lifting up to 10.5 pounds from the floor to waist level and from waist to shoulder height. The report indicated that appellant was capable of frequent sitting, standing, walking, climbing, squatting, kneeling, twisting, forward bending, right grasping, right forward reach and right overhead reach and occasional left overhead reach, left forward grasp and left grasp.

In a May 18, 2010 report, Dr. Hutter provided physical findings and reviewed the April 2, 2010 FCE. He diagnosed cervical and left shoulder strains. Based upon FCE findings, a review of the medical record and physical examination, Dr. Hutter concluded that appellant was capable of working 40 hours a week with restrictions. In an attached work capacity evaluation form, he provided work restrictions which included no pushing, pulling or lifting more than 10 pounds and no reaching above the left shoulder.

On August 3, 2010 appellant was referred for vocational rehabilitation services. She met with a vocational rehabilitation counselor on August 17, 2010 and completed vocational testing on September 15, 2010 demonstrating an ability to work on a computer. The vocational rehabilitation counselor implemented a private-sector reemployment plan as the employing establishment could not accommodate appellant's medical restrictions.

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<sup>3</sup> This was assigned claim File No. xxxxxx146. Under claim File No. xxxxxx502, OWCP accepted appellant's March 17, 2007 occupational disease claim for left shoulder and upper arm contusion. On October 14, 2008 it combined claim File Nos. xxxxxx502 and xxxxxx146, with claim File No. xxxxxx146 listed as the master file.

On November 22, 2010 the vocational rehabilitation counselor completed a preliminary labor market survey report showing that the jobs as account clerk under U.S. Department of Labor, *Dictionary of Occupational Titles* (DOT) #216-482-010, customer order clerk DOT #249-362-026 and receptionist DOT #237-367-038, were reasonably available in appellant's commuting area. Starting weekly wages for the position of receptionist were listed as \$480.00 and \$520.00 for the positions of accounting clerk and customer order clerk, respectively. The positions were all sedentary, with occasional lifting up to 10 pounds. The vocational rehabilitation counselor noted that the positions were within the medical limitations provided by Dr. Hutter and recommended a computer course to prepare appellant for these positions.

On November 29, 2010 OWCP informed appellant that it had approved the plan developed by her and the vocational rehabilitation counselor.

On November 30, 2010 OWCP referred appellant for vocational training for computerized accounting on November 30, 2010.

In a December 20, 2010 work capacity evaluation form, Dr. Filippone indicated that appellant was permanently and totally disabled from any type of work.

In reports for the period March 25 through October 4, 2011, Dr. Filippone opined that appellant continued to be totally disabled. In a March 25, 2011 report, he related that she continued to have complaints of cervical pain, left shoulder pain and bilateral hand and finger numbness and tingling. On April 28 and July 12, 2011, Dr. Filippone stated that appellant continued to have bilateral shoulder pain and her right arm, neck and bilateral carpal tunnel syndrome remain unchanged. In his June 8, 2011 report, he opined that her claim should be expanded to include cervical spine and right shoulder conditions. In his August 16, 2011 report, Dr. Filippone reiterated his opinion that appellant's cervical spine and bilateral shoulder conditions were a direct result of her employment injury.

On June 13, 2011 the vocational rehabilitation counselor implemented a 90-day new employing establishment placement plan based on appellant's completion of vocational training.

In a September 13, 2011 status report, Christopher Pope, an OWCP rehabilitation specialist, noted that vocational rehabilitation services were unsuccessful. He noted that the following positions were suitable for appellant: accounting clerk with weekly wages of \$525.00; receptionist with weekly wages of \$480.00; and customer order clerk with weekly wages of \$525.00. The jobs were sedentary with no lifting more than 10 pounds and no prolonged standing, walking, pushing, pulling, stooping, bending or squatting.

On September 15, 2011 OWCP issued a notice proposing to adjust appellant's wage-loss compensation based on her ability to earn wages in the constructed position of customer order clerk.

In a September 26, 2011 letter, appellant's counsel disagreed with the proposal to reduce appellant's wages based on her ability to work in the constructed position. He noted that Dr. Filippone considered appellant to be totally disabled from working. Thus, counsel argued there was an unresolved conflict in the medical opinion evidence between Drs. Hutter and Filippone on the issue of appellant's ability to work.

By decision dated October 18, 2011, OWCP adjusted appellant's compensation benefits effective October 23, 2011 finding that the position of customer order clerk represented her wage-earning capacity. It noted that her weekly pay rate when injured was \$837.18 and that the current pay rate for job and step when injured was \$1,004.12. OWCP found that appellant was capable of earning \$525.00 a week, that the adjusted wage-earning capacity a week was \$632.60, that the percentage of new wage-earning capacity was 63 percent, that the loss in wage-earning capacity amount a week was \$371.52, leaving appellant with a compensation rate of \$278.64 a week or \$284.00 a week when increased by applicable cost-of-living adjustments. It calculated that this resulted in a new compensation rate every four weeks of \$1,136.00 beginning on October 23, 2012.

On October 21, 2011 counsel requested an oral hearing before an OWCP hearing representative, which was held on February 28, 2012.

By decision dated May 14, 2012, OWCP's hearing representative affirmed the October 18, 2011 loss of wage-earning capacity decision.

On August 10, 2012 counsel requested reconsideration and submitted reports dated June 27 and November 28, 2011 from Dr. Filippone in support of the request. Appellant again argued that OWCP failed to meet its burden to reduce her wage-loss compensation as there was an unresolved conflict in the medical opinion evidence between Drs. Hutter and Filippone on whether appellant was totally disabled from any type of work.

By decision dated October 12, 2012, OWCP denied modification of the October 18, 2011 loss of wage-earning capacity decision.

### **LEGAL PRECEDENT**

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages.<sup>4</sup> Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.<sup>5</sup>

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was, in fact, erroneous.<sup>6</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>7</sup>

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<sup>4</sup> See 5 U.S.C. § 8115 (determination of wage-earning capacity).

<sup>5</sup> *Sharon C. Clement*, 55 ECAB 552 (2004).

<sup>6</sup> *Harley Sims, Jr.*, 56 ECAB 320 (2005); *Tamra McCauley*, 51 ECAB 375 (2000).

<sup>7</sup> *Id.*

## ANALYSIS

OWCP accepted the conditions of left shoulder and upper arm contusions, left shoulder impingement syndrome and authorized left shoulder arthroscopic surgery which occurred on June 24, 2009. Dr. Hutter, a Board-certified orthopedic surgeon and second opinion physician, found that appellant was capable of working with restrictions based on a physical examination and review of an April 2, 2010 FCE. Dr. Filippone, an attending Board-certified physiatrist, opined that she was permanently and totally disabled and recommended expansion of her claim to include left carpal tunnel syndrome and cervical conditions. On October 18, 2011 OWCP determined that appellant could perform the duties of customer order clerk and reduced her compensation to reflect her wage-earning capacity in this constructed position. The issue is whether appellant established that the October 18, 2011 loss of wage-earning capacity decision should be modified.

Appellant did not allege that she had been retrained or otherwise vocationally rehabilitated. Once OWCP found that she could perform the duties of a customer order clerk, the issue is whether there has been a material change in her work-related condition that would render her unable to perform those duties.<sup>8</sup> Counsel contended that the reports from Dr. Filippone, an attending Board-certified physiatrist, created a conflict in the medical opinion evidence with Dr. Hutter, a second opinion Board-certified orthopedic surgeon. Dr. Filippone opined that appellant was totally disabled without providing any rationale explaining this conclusion. The Board has held that a medical opinion not fortified by rationale is of diminished probative value.<sup>9</sup> In addition, Dr. Filippone requested expansion of appellant's claim to left carpal tunnel syndrome and cervical conditions. OWCP has not accepted right shoulder or cervical condition as related to the accepted employment injury. If it has not accepted a condition as employment related, appellant has the burden of proof to establish causal relationship.<sup>10</sup> None of the reports from Dr. Filippone provide any rationale explaining how and why the accepted left shoulder and upper arm contusions and left shoulder impingement syndrome caused the nonaccepted conditions.<sup>11</sup> The Board finds that there was not a conflict in the medical opinion evidence and that OWCP properly relied upon Dr. Hutter's opinion in reducing her wage-loss compensation.

Following the loss of wage-earning capacity determination, counsel requested modification on August 10, 2012 and submitted reports dated June 27 and November 28, 2011 from Dr. Filippone, who reiterated his opinion that appellant was totally disabled and that her claim should be expanded to include right shoulder and cervical conditions. As noted above, OWCP did not accept a left carpal tunnel syndrome or cervical condition as causally related to the accepted left shoulder and upper arm contusions and left shoulder impingement syndrome. In addition, Dr. Filippone provided no rationale explaining why appellant was totally disabled or

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<sup>8</sup> *F.B.*, Docket No. 10-99 (issued July 21, 2010); *Selden H. Swartz*, 55 ECAB 272 (2004); *Phillip S. Deering*, 47 ECAB 692 (1996).

<sup>9</sup> *F.T.*, Docket No. 09-919 (issued December 7, 2009); *S.S.*, 59 ECAB 315 (2008); *Roma A. Mortenson-Kindschi*, 57 ECAB 418 (2006).

<sup>10</sup> See *Jaja K. Asaramo*, 55 ECAB 200 (2004).

<sup>11</sup> *Deborah L. Beatty*, 54 ECAB 340 (2003).

the cause of her disability. As he again provided an unrationalized opinion regarding her disability and provided no rationale explaining why her claim should be expanded to include additional conditions, she did not establish that modification of the loss of wage-earning capacity determination was warranted.

Appellant did not meet her burden of proof to establish a material change in the nature and extent of her injury-related condition, that the original determination was in fact erroneous or that she was vocationally rehabilitated. She failed to establish that the October 18, 2011 loss of wage-earning capacity decision should be modified.

On appeal, counsel argues that the original wage-earning capacity decision was erroneous due to an unresolved conflict in the medical opinion evidence. As discussed above, the Board has found no conflict in the medical opinion evidence as OWCP properly relied upon the opinion of the OWCP referral physician.

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 appellant failed to meet her burden of proof to establish that a modification of the loss of wage-earning capacity determination was warranted.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated October 12, 2012 is affirmed.

Issued: September 11, 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