

appellant stated that years of lifting heavy mailbags contributed to his back condition. He noted that he currently worked with restrictions. OWCP accepted the claim for lumbar radiculitis and paid appropriate benefits. Appellant began to miss partial and full days of work beginning July 12, 2006. He has not worked a full 8-hour day since at least October 10, 2008. Beginning July 23, 2010 the employing establishment determined that they could no longer accommodate appellant's work restrictions. Appellant has been paid disability compensation since July 23, 2010.

In an October 4, 2010 report, Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon and OWCP referral physician, reviewed appellant's file and presented examination findings. He opined that appellant has chronic degenerative disc disease in the lower lumbar segments, including L4-5 and L5-S1, with mild disc bulging at those levels. Dr. Swartz stated that the examination did not reveal any objective neurological findings but noted that appellant probably has continued nerve root irritation to a point where there were radicular symptoms and radiculopathy. He noted that the August 13, 2007 electrodiagnostic study revealed probable right L5-S1 radiculopathy. Dr. Swartz opined that appellant was capable of working eight hours per day with the following restrictions: walking limited to two to three hours per day; standing limited to three to four hours per day; reaching above shoulder limited to four hours per day; twisting/bending/stooping limited to three hours per day; operating motor vehicle at work and to and from work limited to four hours per day; pushing/pulling/lifting limited to 10 to 20 pounds for four hours per day; squatting/kneeling limited to one hour per day; and climbing limited to one-half hour per day.

On November 26, 2010 appellant's case was referred for vocational rehabilitation services. He underwent vocational testing on March 11, 2011, where it was determined that after a brief training period he would have the skills necessary to work as a receptionist or customer complaint clerk. On April 13, 2011 OWCP approved the training plan. Appellant successfully completed the training and began 90 days of placement services. However, during a November 4, 2011 conference call, he indicated that he no longer wished to participate in the rehabilitation effort. On November 10, 2011 a vocational rehabilitation counselor identified the positions of receptionist and customer complaint clerk as suitable for appellant. The positions were identified as sedentary and the vocational counselor confirmed that the positions were available in appellant's commuting area on a full- or part-time basis.

On November 21, 2011 OWCP issued a notice of proposed reduction of benefits finding that appellant was capable of earning wages as a customer complaint clerk. By decision dated December 27, 2011, it finalized the proposed reduction of compensation benefits effective December 27, 2011 finding that appellant had the capacity to earn wages as a customer complaint clerk.

On January 14, 2012 appellant appealed the decision and requested a review of the written record by an OWCP hearing representative. By decision dated February 27, 2012, an OWCP hearing representative found that the case was not in posture for a hearing and reversed the December 27, 2011 decision. The hearing representative found that OWCP had not met its burden in part because of conflicting information in the decisions and statement of accepted facts regarding the accepted work injury. On remand, OWCP was instructed to combine this case with claim number xxxxxx542 and to create a new statement of accepted facts. It was also instructed to refer appellant back to Dr. Swartz for another second opinion evaluation based on the complete record.

OWCP subsequently created an amended statement of accepted facts which combined the current case with claim number xxxxxx542 and was noted to supersede all prior statements of accepted facts.² The amended statement of accepted facts along with a set of clarification questions were sent to Dr. Swartz, the second opinion examiner.

In an April 16, 2012 report, Dr. Michael E. Hebrard, a Board-certified physiatrist, opined that appellant was temporarily totally disabled. He opined that appellant has a sitting tolerance of 15 to 20 minutes and sometimes greater depending on the day and the level of activity. Dr. Hebrard also noted that appellant had a standing tolerance of less than 5 minutes and a walking tolerance of 20 to 25 minutes after his back warms up. Appellant had no problem walking, but has problems with limping.

A June 4, 2012 memorandum indicated that, although appellant arrived at Dr. Swartz' office for his scheduled second opinion appointment, the police were called and he was removed as he was upset and angry at the Department of Labor and its physicians. In an undated statement received June 19, 2012, appellant confirmed that police were called to Dr. Swartz' office on June 4, 2012. He claimed that Dr. Swartz was not considerate or professional about evaluating him. On June 20, 2012 OWCP was advised that Dr. Swartz would no longer see appellant.

In response, OWCP referred appellant for a second opinion evaluation with Dr. Mohinder S. Nijjar, a Board-certified orthopedic surgeon. In a July 20, 2012 report, Dr. Nijjar took a detailed medial history, reviewed the statement of accepted facts and medical records provided and performed a physical examination. He opined that appellant continued to suffer residuals of the accepted work-related lumbar radiculitis and strain/sprain of the lumbar spine. Dr. Nijjar ordered a functional capacity evaluation (FCE), which was performed on August 13, 2012.

In a July 10, 2012 report, Dr. Hebrard noted examination findings and diagnosed lumbosacral radiculitis; sciatica and lumbar spondylosis; and lumbar disc displacement. He opined that appellant could sit, stand and walk anywhere from 15 to 20 minutes, sometimes greater or less, depending on the day and level of activity.

In an August 22, 2012 supplemental report, Dr. Nijjar opined, based on appellant's physical examination and FCE, that appellant could work eight hours per day with permanent restrictions. He found that appellant could sit, stand and walk for eight hours per day with only up to one hour of twisting at the waist, bending and stooping. Dr. Nijjar found that appellant could pull, push and lift eight hours per day up to 10 pounds and required a 5-minute break every 30 minutes.

On September 6, 2012 OWCP determined a conflict in medical opinion existed as to whether appellant would be able to perform the selected position of a receptionist and/or customer complaint clerk. Appellant was referred, along with the medical record, statement of accepted facts and questions, to Dr. Michael F. Charles, a Board-certified orthopedic surgeon, for

² Under claim number xxxxxx542, OWCP accepted a low back strain for an October 30, 1997 back injury when appellant pinched a nerve in his back as a result of stooping, bending, twisting, reaching and lifting. The claim was in a closed status as there had been no medical treatment since 2002. This claim was eventually combined with the current claim as the master file.

an impartial medical evaluation. In an October 17, 2012 report, Dr. Charles noted his review of the medical record, statement of accepted facts, the Department of Labor, *Dictionary of Occupational Titles* (DOT) strength level definitions and position descriptions for receptionist and customer complaint clerk and set forth his examination findings. He opined that appellant could work the duties of receptionist and customer complaint clerk for eight hours per day. Dr. Charles stated that there was no objective finding of significant lumbar radiculopathy or lower extremity dysfunction. He found no objective finding of neurological deficit, noting that appellant refused to perform certain range of motion activities, which limited his evaluation. Dr. Charles stated that there was no gross evidence of appellant being unable to perform those physical activities. He indicated that appellant's complaints of decreased sensation in the S1 distribution on the left and L5 distribution on the right were not supported by atrophy or other changes of the musculature. Dr. Charles confirmed that appellant could perform the duties of receptionist and customer complaint clerk for eight hours per day as long as he was able to alternate tasks so that he did not sit, walk or stand for more than two hours per day without changing positions. He also stated that appellant was limited to pushing, pulling and lifting no more than 20 pounds, bending and stooping no more than two hours per day and required a 5-minute break every 30 minutes.

On November 30, 2012 the vocational rehabilitation counselor provided updated labor market survey and form OWCP 66 for the position of customer complaint clerk, DOT No. 241.367-014. The customer complaint clerk position was identified as sedentary and the duties included investigation of customer complaints about merchandise, service, billing or credit rating; examination of records to obtain facts regarding customer complaint; examination of pertinent information to determine accuracy of customer complaint and to determine responsibility for errors. The duties further include notifying customer and designated personnel of findings and providing recommendations. The clerk may be required to examine merchandise to determine accuracy of complaint, to follow up on recommended adjustments and to key information into computer to obtain computerized records. The vocational counselor documented that enough full-time positions were reasonably available in appellant's commuting area. The entry pay level was \$560.00 per week with the average in appellant's area of \$480.00 per week or \$12.00 per hour.

On December 19, 2012 OWCP issued a notice of proposed reduction of benefits finding that appellant was capable of earning wages as a customer complaint clerk at the rate of \$480.00 per week. It afforded him 30 days in which to submit evidence or argument regarding his capacity to earn wages in the position described.

Appellant subsequently submitted physical therapy notes, requests for authorization and a November 8, 2012 report from Dr. Hebrard. In his November 8, 2012 report, Dr. Hebrard noted appellant's subjective complaints, including a walking and sitting tolerance of 20 to 25 minutes and presented examination findings. He stated that appellant has functional deficits in terms of sitting, standing, walking, twisting, bending, reaching and lifting activities. Dr. Hebrard opined that appellant has a chronic low back condition, which has acute exacerbations and stated that appellant's condition was currently exacerbated with restricted range of motion of the lower extremities.

By decision dated January 22, 2013, OWCP finalized the proposed reduction of compensation benefits effective the same day finding that appellant had the capacity to earn wages as a customer complaint clerk. It determined that he had 44 percent loss of wage-earning

capacity and his compensation was reduced to a net compensation of \$1,487.84 every four weeks.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.³ 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 disabled for all gainful employment, is entitled to compensation computed on loss of wage-earning capacity.⁴

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.⁵

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, *Dictionary of Occupational Titles* or otherwise available in the open market, that fit 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 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*⁶ and codified by regulations at 20 C.F.R. § 10.403⁷ 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.⁸

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

³ *H.N.*, Docket No. 09-1628 (issued August 19, 2010); *T.F.*, 58 ECAB 128 (2006); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

⁴ 20 C.F.R. §§ 10.402, 10.403.

⁵ 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).

⁶ 5 ECAB 376 (1953).

⁷ 20 C.F.R. § 10.403.

⁸ *Id.* at § 10.403(d).

resulting from postinjury or subsequently acquired conditions.⁹ 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.¹⁰

Section 8123(a) of FECA provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.¹¹ When the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.¹²

ANALYSIS

The accepted conditions in this case are lumbar radiculitis and low back strain. On July 23, 2010 OWCP placed appellant on the periodic rolls for temporary total disability.

OWCP found a conflict of the medical evidence regarding appellant's disability for work. Appellant's treating physician, Dr. Hebrard, opined that appellant was temporarily totally disabled. The second opinion physician, Dr. Nijjar, opined, that appellant could work eight hours per day with permanent restrictions. Appellant was referred to an impartial medical examiner, Dr. Charles, to resolve the conflict in medical opinion.

On October 17, 2012 Dr. Charles conducted a thorough physical examination of appellant and reviewed his medical history as well as descriptions of receptionist and customer complaint clerk. He reported that there was no objective finding of significant lumbar radiculopathy or lower extremity dysfunction. Dr. Charles found no objective finding of neurological deficit, noting that appellant refused to perform certain range of motion activities, which limited his evaluation and there was no evidence that appellant was unable to perform those physical activities. He indicated that appellant's complaints of decreased sensation in the S1 distribution on the left and L5 distribution on the right were not supported by atrophy or other changes of the musculature. Dr. Charles confirmed that appellant could perform the duties of receptionist and customer complaint clerk for eight hours per day as long as he was able to alternate tasks so that he did not sit, walk or stand for more than two hours per day without changing positions. He also stated that appellant was limited to pushing, pulling and lifting no more than 20 pounds, bending and stooping no more than two hours per day and required a 5-minute break every 30 minutes. The Board finds that the opinion of Dr. Charles is entitled to the special weight of

⁹ *James Henderson, Jr.*, 51 ECAB 268 (2000).

¹⁰ *Id.*

¹¹ 5 U.S.C. § 8123(a); *Geraldine Foster*, 54 ECAB 435 (2003); see *J.J.*, Docket No. 09-27 (issued February 10, 2009).

¹² *B.P.*, Docket No. 08-1457 (issued February 2, 2009); *J.M.*, 58 ECAB 478 (2007); *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

the medical evidence because it is well rationalized and based on a thorough physical examination and review of the medical history as well as a description of the selected position.

Appellant submitted a November 8, 2012 report from Dr. Hebrard, who was on one side of the conflict prior to the referral to Dr. Charles. Dr. Hebrard stated that appellant has functional deficits in terms of sitting, standing, walking, twisting, bending, reaching and lifting activities and noted that appellant stated that he could only tolerate 20 to 25 minutes of walking and sitting. Additional reports from a physician on one side of the conflict that is properly resolved by a referee specialist are generally insufficient to overcome the weight accorded the referee specialist's report or create a new conflict.¹³ Dr. Hebrard failed to provide a well-rationalized opinion that appellant's functional deficits were such that he could not perform the customer complaint clerk position. Additionally the walking and sitting restriction were based on appellant's subjective complaints.

On November 30, 2012 the vocational rehabilitation counselor provided an updated report, which found that the selected position of customer complaint clerk reasonably available in appellant's area, with an average weekly salary of \$480.00 per week. This position was identified as sedentary and was reasonably available in appellant's commuting area on a full-time basis.

The evidence establishes that appellant was capable of performing the duties required for the selected position of customer complaint clerk. As noted, Dr. Charles agreed that appellant was capable of doing sedentary work and indicated that appellant could perform the selected position of customer complaint clerk as long as he was able to alternate tasks so that he did not sit, walk or stand for more than two hours per day without changing positions. He also stated that appellant was limited to pushing, pulling and lifting no more than 20 pounds, bending and stooping no more than two hours per day and required a 5-minute break every 30 minutes, all which are within the limitations of a customer complaint clerk. The vocational rehabilitation counselor previously determined that appellant was able to perform the position of customer complaint clerk. On November 30, 2012 the counselor provided a job description, which was comprised of sedentary requirements related to the investigation and resolution of customer complaints and determined that the position fell within appellant's medical restrictions. The counselor noted that the position was available on a full-time basis within his commuting area and that the wage of the position was \$480.00 per week in appellant's area.

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 customer complaint clerk represented his wage-earning capacity.¹⁴ The evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the duties and that the position was reasonably available within the general labor market of his commuting area. The wage information as set forth by the vocational counselor indicated that the wage for the position of customer complaint clerk was \$480.00 per week. Applying the *Shadrick*¹⁵ principles, the current pay rate for the date-of-injury

¹³ *Dorothy Sidwell*, 41 ECAB 857 (1990).

¹⁴ *See N.J.*, 59 ECAB 171 (2007); *James M. Frasher*, 53 ECAB 794 (2002).

¹⁵ *See supra* note 7.

position is compared with the wage-earning capacity of \$480.00 per week and a percentage of loss of wage-earning capacity is determined. OWCP properly determined that appellant had a 44 percent loss of wage-earning capacity and reduced his compensation to a \$1,487.84 net every four weeks. The Board finds that OWCP met its burden of proof to reduce his compensation in this case.

On appeal, appellant maintains that OWCP's decision is flawed. As discussed, the evidence is sufficient to show that OWCP met its burden of proof to reduce his compensation in this case. 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 to reduce appellant's compensation benefits based on his capacity to earn wages in the constructed position of customer complaint clerk.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated January 22, 2013 is affirmed.

Issued: September 19, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board