



## **FACTUAL HISTORY**

On July 11, 1990 appellant, then a 41-year-old flat sorter machine clerk, filed an occupational disease claim alleging that on July 10, 1990 she first became aware that her bilateral carpal tunnel syndrome was due to her employment duties. OWCP accepted the claim for resolving right wrist de Quervain's disease, which was expanded to include right thumb basilar arthritis.<sup>2</sup> Appellant accepted a limited-duty position as modified distribution clerk on October 12, 1998 and stopped work on September 2, 2010 as no work was available within her restrictions. On September 20, 2010 OWCP accepted her claim for a recurrence of disability beginning September 2, 2010. By letter dated October 20, 2010, it placed appellant on the periodic rolls for temporary total disability.<sup>3</sup>

In an August 3, 2010 report, Dr. Deborah Venesy, a treating Board-certified physiatrist, diagnosed radial styloid tenosynovitis and arthropathy. She determined that appellant was capable of working with restrictions. The restrictions included no lifting or carrying more than 10 pounds intermittently or 5 pounds continuously and 15- to 30-minute intervals of alternate pulling/pushing, fine manipulation and reaching above the shoulder.

On October 27, 2010 OWCP referred appellant for vocational rehabilitation services based upon Dr. Venesy's work restrictions.

In an April 30, 2011 report, a vocational rehabilitation counselor discussed appellant's education, work history and results of vocational testing. The vocational rehabilitation counselor recommended computer training classes in order to improve her computer skills.

In a June 2, 2011 report, the vocational rehabilitation counselor noted that OWCP had approved a one-year computer training program with New Horizons Learning Center. Based on his report and a May 26, 2011 labor market survey, the vocational rehabilitation counselor identified two positions for appellant, listed in the Department of Labor, *Dictionary of Occupational Titles* as receptionist,<sup>4</sup> DOT #237.367.038, and administrative clerk, DOT #219.362.010. The positions were noted to be sedentary and found to be within appellant's restrictions, her vocational and work history, education, skills and training so as to reflect her

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<sup>2</sup> By decision dated May 31, 1995, OWCP granted appellant a schedule award for a 20 percent right upper extremity permanent impairment.

<sup>3</sup> Appellant retired effective February 10, 2013.

<sup>4</sup> The job description of receptionist stated: "Receives callers at establishment, determines nature of business and directs callers to destination: Obtains caller's name and arranges for appointment with person called upon. Directs caller to destination and records name, time of call, nature and business and person called upon. May operate PBX telephone console to receive incoming messages. May type memos, correspondence, reports and other documents. May work in office of medical practitioner or in other health care facility and be designated Outpatient Receptionist (medical ser.) or Receptionist, Doctor's office (medical ser.). May issue visitors pass when required. May make future appointments and answer inquiries." The physical demands for the job according to the Department of Labor, *Dictionary of Occupational Titles* entailed a strength level of sedentary (occasionally lifting up to 10 pounds), with no climbing, balancing, stooping, kneeling, crouching, crawling, feeling, taste/smelling, far acuity, depth perception, color vision and field of vision; occasionally fingering; frequently reaching, handling, talking, hearing, near acuity and accommodation.

capacity to earn wages. The vocational counselor confirmed that the jobs for receptionist and administrative clerk were being performed in sufficient numbers so as to make them reasonably available within that commuting area. The weekly wages were \$495.00 for a receptionist and \$536.00 for an administrative clerk.

On September 17, 2012 OWCP referred appellant to Dr. Robert J. Nickodem, Jr., a Board-certified orthopedic surgeon, to address her current medical condition and work capability. In an October 9, 2012 report, Dr. Nickodem, based upon a physical examination, review of the medical record and statement of accepted facts, concluded that appellant continued to have residuals from her accepted de Quervain's disease and right thumb basilar arthritis conditions. A physical examination revealed a positive Phalen's test, a positive Tinel's sign over the volar wrist palmar ligament and mildly positive Finkelstein maneuver at the first right dorsal compartment. Dr. Nickodem stated that he found decreased right thumb sensation and provided range of motion findings. He opined that appellant was disabled from performing her date-of-injury position as she was unable to perform repetitive right wrist and thumb motions. Although she was disabled from her date-of-injury job, Dr. Nickodem concluded that she was capable of working with restrictions. The restrictions included no right wrist or elbow repetitive motion, up to one hour of pushing, pulling and lifting and no lifting more than 15 pounds on an intermittent basis. Dr. Nickodem reviewed the job descriptions for the proposed positions of administrative clerk and receptionist. He opined that the positions were within her work restrictions. However, he indicated that she would be unable to perform prolonged data entry or computer work, but would be able to perform those duties on an intermittent basis.

On January 26, 2013 appellant elected to receive retirement benefits from the Office of Personnel Management effective February 10, 2013.

On April 16, 2013 an OWCP claims examiner requested the vocational rehabilitation counselor to provide updated job classification (CA-66) forms for the positions of administrative clerk and receptionist along with updated pay rate information from the Bureau of Labor Statistics. The position of receptionist was classified as sedentary which included occasional force of 10 pounds or negligible amount used to frequently lift, carry, push, pull or move objects. Physical demands included frequent reaching and handling and occasional fingering.

On April 30, 2013 OWCP received labor market surveys dated February 20 and 26, 2013 from the vocational rehabilitation counselor updating information for the receptionist and administrative clerk job titles. The weekly wages were noted as \$495.00 for a receptionist and \$536.00 for an administrative clerk.

On May 14, 2013 OWCP issued a notice proposing to reduce appellant's compensation as it determined that the position of receptionist was medically and vocationally suitable for her and represented her wage-earning capacity. It advised her that she had the capacity to earn wages as a receptionist, DOT #237.367.038 at a rate of \$495.00 per week, in accordance with the factors outlined in 5 U.S.C. § 8115.<sup>5</sup> OWCP calculated that appellant's compensation should be adjusted to \$479.66 using the *Albert C. Shadrick*<sup>6</sup> formula. It indicated that her current weekly

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<sup>5</sup> 5 U.S.C. § 8113.

<sup>6</sup> 5 ECAB 376 (1953).

salary for her job when injured was \$1,060.83, that her salary as of September 9, 2010, the date disability recurred, was \$1,021.92 and that she was currently capable of earning \$495.00 per week, as a receptionist. OWCP therefore determined that appellant had a 47 percent wage-earning capacity. It found that her current adjusted compensation rate per four-week period was \$1,704.00. OWCP stated that the case had been referred to a vocational rehabilitation counselor who had determined that the receptionist position was suitable for appellant, given her work restrictions, and was reasonably available in her commuting area. It allowed appellant 30 days in which to submit any contrary evidence. No evidence was forthcoming.

By decision dated June 14, 2013, OWCP finalized its notice of proposed reduction and reduced appellant's benefits effective that date to reflect that she was capable of performing the duties of a receptionist earning \$495.00 per week.

On June 17, 2013 appellant's counsel requested a telephone hearing before an OWCP hearing representative, which was held on November 26, 2013. At the telephonic hearing counsel argued that the hourly rate of \$12.00 was unrealistic.

By decision dated February 12, 2014, OWCP's hearing representative affirmed the June 14, 2013 loss of wage-earning capacity determination.

### **LEGAL PRECEDENT**

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.<sup>7</sup> 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.<sup>8</sup>

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.<sup>9</sup>

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

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<sup>7</sup> *H.N.*, Docket No. 09-1628 (issued August 19, 2010); *T.F.*, 58 ECAB 128 (2006); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

<sup>8</sup> 20 C.F.R. §§ 10.402, 10.403.

<sup>9</sup> 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).

otherwise available in the open market, that fit the employee's capabilities with regard to his 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*<sup>10</sup> and codified by regulations at 20 C.F.R. § 10.403<sup>11</sup> 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.<sup>12</sup>

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 post-injury or subsequently acquired conditions.<sup>13</sup> 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.<sup>14</sup>

### ANALYSIS

OWCP accepted appellant's claim for right wrist de Quervain's disease, which was expanded to include right thumb basilar arthritis. It determined that the selected position of receptionist represented her wage-earning capacity based upon the reports of Dr. Venesy, appellant's treating Board-certified physiatrist, and Dr. Nickodem, a second opinion Board-certified orthopedic surgeon. The Board finds that OWCP properly reduced appellant's compensation effective June 14, 2013 based on her ability to perform the duties of a receptionist.

Based on Dr. Venesy's work restrictions, OWCP properly referred appellant for vocational rehabilitation.<sup>15</sup> Dr. Venesy identified appellant's work restrictions as lifting or carrying more than 10 pounds intermittently or 5 pounds continuously and 15- to 30-minute intervals of alternate pulling/pushing, fine manipulation and reaching above the shoulder. The rehabilitation counselor assigned to assist appellant in placement efforts identified a position as a receptionist list in the Department of Labor, *Dictionary of Occupational Titles* as appropriate for appellant based on Dr. Venesy's work restrictions.

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<sup>10</sup> *Supra* note 6.

<sup>11</sup> 20 C.F.R. § 10.403.

<sup>12</sup> *Id.* at § 10.403(d).

<sup>13</sup> *James Henderson, Jr.*, 51 ECAB 268 (2000).

<sup>14</sup> *Id.*

<sup>15</sup> *See N.J.*, 59 ECAB 171 (2007); *John D. Jackson*, 55 ECAB 465 (2004); *Mary E. Marshall*, 56 ECAB 420 (2005).

OWCP subsequently referred appellant to Dr. Nickodem to address her current medical condition and work capability and whether she could perform the positions identified by the vocational rehabilitation counselor. Dr. Nickodem provided an accurate history of injury and conducted a thorough examination. He opined that appellant was disabled from performing her date-of-injury job, but was capable of working with restrictions including no right wrist or elbow repetitive motion, up to one hour of pushing, pulling and lifting and no lifting more than 15 pounds on an intermittent basis. Dr. Nickodem reviewed the job descriptions for the proposed positions of administrative clerk and receptionist and stated that they were within her work restrictions. He related that appellant would be unable to perform prolonged data entry or computer work, but was able to perform those duties on an intermittent basis.

The Board finds that the position of receptionist was vocationally suitable for appellant. The vocational rehabilitation counselor determined that the duties of the receptionist position were reflective of appellant's previous work experience and educational history and qualified her for the position. OWCP also advised that the position was available in sufficient numbers so as to make it reasonably available within appellant's commuting area.

As OWCP considered the proper factors such as appellant's physical condition, availability of employment, usual employment, age and employment qualifications, the Board finds that it properly determined that the selected position of receptionist represented her wage-earning capacity.<sup>16</sup>

Finally, OWCP properly applied the principles set forth in the *Shadrick*<sup>17</sup> decision to determine appellant's employment-related loss of wage-earning capacity. It calculated that her compensation should be adjusted to \$426.00 per week or \$1,704.00 every four weeks using the *Shadrick* formula. OWCP indicated that appellant's weekly rate for the job when she held when injured was \$1,060.83 and that the weekly pay rate when disability recurred was \$1,021.19. It noted that, as she was capable of earning \$495.00 per week, she had a 47 percent wage-earning capacity with an adjusted compensation rate of \$226.00, resulting in a compensation rate every four weeks of \$1,704.00.

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 decision. The Board, therefore, finds that OWCP met its burden of justifying a reduction in her compensation for total decision effective June 14, 2013.

On appeal counsel argued that OWCP used an antiquated system and defunct publication and there is no evidence that the position of receptionist exists in the current economy. The Board notes that the rehabilitation counselor found that the selected position was available in sufficient numbers. 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

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<sup>16</sup> See *S.J.*, Docket No. 09-1794 (issued September 20, 2010); *John D. Jackson, id.*; *Loni L. Cleveland*, 52 ECAB 171 (2000).

<sup>17</sup> *Supra* note 6.

suitable.<sup>18</sup> Appellant has submitted no evidence supporting the allegations that the receptionist position does not exist nor that the position was not reasonably available to her in the open labor market.

**CONCLUSION**

The Board finds that OWCP properly reduced appellant's compensation based on its finding that she had the capacity to earn wages in the selected position of receptionist.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated February 12, 2014 is affirmed.

Issued: August 25, 2014  
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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<sup>18</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.816.6 (June 2013). *See also B.H.*, Docket No. 13-583 (issued September 10, 2013).