



## ISSUE

The issue is whether OWCP properly reduced appellant's compensation benefits effective February 10, 2013, based on his capacity to earn wages in the constructed position of surveillance system monitor.

On appeal, counsel contends that the medical evidence does not support that appellant is capable of performing the constructed position.

## FACTUAL HISTORY

This case has previously been before the Board.<sup>3</sup> In a June 18, 2003 decision, the Board reversed an August 30, 2001 OWCP decision reducing appellant's compensation to reflect his wage-earning capacity in the selected position of word processing data entry clerk. The facts relevant to the current appeal are set forth below.

OWCP accepted that on October 2, 1987 appellant, then a 41-year-old shipwright mechanic, sustained a lumbar strain, aggravation of herniated nucleus pulposus at L3-4 and L4-5, a bilateral wrist sprain and bilateral carpal tunnel syndrome when he slipped on axle grease on two occasions on that date. It authorized a lumbar laminectomy performed on November 18, 1998. Appellant underwent right carpal tunnel release performed on October 7, 1999 and left carpal tunnel release performed in October 2000.

In work capacity evaluations dated March 20 and August 28, 2008, Dr. Jin Xiao, an attending physician Board-certified in occupational medicine, and Dr. Stephen A. Wertheimer, an attending Board-certified orthopedic surgeon, found that appellant was unable to perform his usual job, but he could work eight hours a day with permanent restrictions. Dr. Wertheimer advised that appellant could bend and stoop, perform repetitive movements with his wrists and elbow and push, pull and lift up to 10 pounds, four hours a day. He advised that appellant could sit six hours a day, walk and stand two hours a day, twist, bend, stoop, squat, kneel and climb one hour a day and push, pull and lift up to 25 pounds one hour a day. Dr. Wertheimer could also operate a motor vehicle at work and to and from work.

On September 30, 2008 OWCP referred appellant for vocational rehabilitation services. Appellant met with a vocational rehabilitation counselor on October 31, 2008. The vocational rehabilitation counselor determined that appellant could be reemployed as a surveillance system monitor or gate guard. According to The Department of Labor's *Dictionary of Occupational Titles* (DOT), the duties of the surveillance system monitor position required monitoring premises of public transportation terminals to detect crimes or disturbances using closed circuit television monitors; notifying authorities by telephone of the need for corrective action, observing television screens that transmitted in sequence views of transportation facility sites; pushing hold buttons to maintain surveillance of location where incident is developing; telephoning police or other designated agency to notify authorities of location of disruptive activity, adjusting monitor controls when required to improve reception; and notifying repair service of equipment malfunctions. The job required no climbing, balancing, stooping, kneeling,

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<sup>3</sup> Docket No. 02-293 (issued June 18, 2003).

crouching, crawling, reaching, handling or fingering. The strength level was listed as sedentary, which involved occasional lifting up to 10 pounds.

The vocational rehabilitation counselor determined that appellant would meet the specific vocational preparation upon completion of approximately 40 hours of State of California approved security guard training to learn skills necessary for entry-level security job duties. Appellant's counsel also determined that the job was performed in sufficient numbers to be reasonably available within his commuting area. The vocational rehabilitation counselor noted that 7 out of 10 employers in appellant's commuting area were hiring. He found that the salary for an entry level surveillance security monitor was between \$10.00 and \$14.00 per hour.

In an October 6, 2009 report, Dr. Wertheimer reviewed descriptions of the surveillance system monitor and gate guard positions as requested by OWCP. He advised that appellant was capable of performing the duties of the surveillance system monitor position, but not the duties of the gate guard position.

In a November 10, 2009 report, Dr. Xiao reviewed appellant's medical records, descriptions of the surveillance system monitor and gate guard positions and Dr. Wertheimer's October 6, 2009 report. She concurred with Dr. Wertheimer's opinion that appellant was capable of performing the duties of a surveillance system monitor; however, appellant was not able to perform the duties of a gate guard in light of his physical condition and history of spinal and carpal tunnel release surgeries with residual symptoms.

By letter dated April 20, 2010, OWCP advised appellant that the duties of the surveillance system monitor position were suitable for return to work under his current work restrictions. Appellant would receive 90 days of placement assistance to help locate work in the identified position. OWCP also informed him that his compensation would likely be reduced based upon his wage-earning capacity.

Appellant completed security guard training on May 21, 2010 and subsequently a 90-day placement period, but did not obtain employment.

By letter dated December 27, 2012, OWCP proposed to reduce appellant's compensation because the factual and medical evidence established that he was no longer totally disabled. It determined that he had the capacity to earn wages as a surveillance system monitor, at the rate of \$400.00 per week, in accordance with the factors outlined in 5 U.S.C. § 8115.<sup>4</sup> OWCP calculated that his compensation rate should be adjusted to \$322.37 a week using the formula in *Albert C. Shadrick*.<sup>5</sup> It found that appellant's current adjusted compensation rate, every four-week period, was \$1,962.00, that the case had been referred to a vocational rehabilitation counselor, who had located a position as a surveillance system monitor, which he found to be suitable for appellant given his work restrictions and was available in appellant's commuting area. OWCP allowed him 30 days to submit additional evidence or argument regarding his

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<sup>4</sup> 5 U.S.C. § 8115.

<sup>5</sup> 5 ECAB 376 (1953); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.2 (April 1995).

capacity to earn wages in the constructed position. Appellant did not respond within the allotted time period.

In a January 28, 2013 decision, OWCP finalized the reduction of appellant's wage-loss compensation, effective February 10, 2013, based on the constructed position of surveillance system monitor with the ability to earn \$322.37 a week.

On February 14, 2013 appellant requested a telephone hearing with an OWCP hearing representative.

During a June 13, 2013 telephone hearing, appellant stated that he had contacted Pacific Gateway, a California state contractor that helped applicants search for jobs. The company stated that there were no jobs under the job title of surveillance system monitor. Appellant was told the duties of this job were part of a security guard position. He applied for jobs with security companies and was advised by one company that he would have to be able to perform full guard duties which included keyboarding and using a mouse. Appellant responded that he could not perform such duties due to his carpal tunnel syndrome and the braces he wore on his wrists. His vocational rehabilitation counselor sent him to five companies where he completed applications, but did not obtain employment.

In a May 1, 2013 report, Dr. Wertheimer referenced his October 6, 2009 report and stated that he was informed by appellant's attorney that appellant had been interviewed by several firms that indicated the surveillance system monitor position actually required more than sitting and monitoring. The position required patrolling facilities with a general security presence and a visible deterrent to crime and client rule infractions. Dr. Wertheimer stated that appellant reported that he would have to be able to respond to emergencies such as, medical and bomb threats and alarms. He would also have to perform emergency response proceedings. Dr. Wertheimer stated that the job was not a sit-down job as stated by OWCP. Appellant's attorney indicated that appellant might have to be proactive which would require him to walk, monitor areas and interfere. Dr. Wertheimer stated that he previously reviewed the physical demands of the surveillance system monitor job and they did not include the job duties described by counsel. He stated that, if appellant had to respond to emergencies physically, then he would not be able to perform the surveillance system monitor job. Dr. Wertheimer concluded, however, that getting up and walking around to notify others would be within his capability.

In a September 11, 2013 decision, an OWCP hearing representative affirmed the January 28, 2013 decision. She found that the medical and factual evidence of record established that the selected surveillance system monitor job was medically and vocationally suitable for appellant and reasonably represented his loss of wage-earning capacity.

### **LEGAL PRECEDENT**

Once OWCP has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of benefits.<sup>6</sup>

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<sup>6</sup> *Harold S. McGough*, 36 ECAB 332 (1984); *Samuel J. Russo*, 28 ECAB 43 (1976).

Section 8115 of FECA<sup>7</sup> 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 DOT or otherwise available in the open market, that fits that 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 *Shadrick*<sup>8</sup> will result in the percentage of the employee's loss of wage-earning capacity. The basic rate of compensation paid under FECA is 66 2/3 percent of the injured employee's monthly pay.<sup>9</sup>

### ANALYSIS

OWCP accepted that appellant sustained a lumbar strain, aggravation of herniated nucleus pulposus at L3-4 and L4-5, a bilateral wrist sprain and bilateral carpal tunnel syndrome when in the performance of duty. The medical evidence in the record establishes that he could return to work with restrictions. Dr. Xiao, an attending physician, opined that, while appellant could not perform his regular work duties, he could work eight hours a day with restrictions. She determined that he could bend and stoop, could perform repetitive movements with his wrists and elbow and push, pull and lift up to 10 pounds, four hours a day. Dr. Wertheimer, another attending physician, also opined that appellant could not perform his regular work duties, but he could work eight hours a day with restrictions. He determined that appellant could sit six hours a day, walk and stand two hours a day, twist, bend, stoop, squat, kneel and climb one hour a day and push, pull and lift up to 25 pounds one hour a day. Dr. Wertheimer further determined that he could also operate a motor vehicle at work and to and from work. On October 31, 2008 appellant met with the vocational rehabilitation counselor who identified two jobs that appellant could perform that were reasonably available. One of these positions was surveillance system monitor.

The Board finds that the selected position of surveillance system monitor was medically and vocationally suitable. The position of surveillance system monitor is within appellant's physical abilities as it is classified as sedentary work requiring occasional lifting of no more than

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<sup>7</sup> 5 U.S.C. §§ 8101-8193, 8115.

<sup>8</sup> *Supra* note 5; 20 C.F.R. § 10.403.

<sup>9</sup> *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

10 pounds and no climbing, balancing, stooping, kneeling, crouching, crawling, reaching, handling or fingering. The vocational rehabilitation counselor determined that appellant met the specific vocational preparation as he underwent and successfully completed security guard training. Further, the job was available in sufficient numbers so as to make it reasonably available to claimant in his commuting area. The vocational rehabilitation counselor documented openings in the area in his report. The hourly rate for an entry level position was between \$10.00 and \$14.00. The fact that appellant was unable to obtain a surveillance system monitor position does not establish that the work is not reasonably available in his commuting area.<sup>10</sup> Further, while appellant contended that there were no jobs under the job title of surveillance system monitor, he acknowledged that his vocational rehabilitation counselor referred him to five companies where he completed applications for such work.

The Board finds that OWCP considered the proper factors, such as vocational training and availability of the surveillance system monitor position, to determine that the position represented appellant's wage-earning capacity. The position was within the restrictions as set forth by Drs. Xiao and Wertheimer. OWCP followed the established procedures under the *Shadrick*<sup>11</sup> decision in calculating appellant's loss of wage-earning capacity. The Board finds that it properly determined that appellant was medically and vocationally capable of working in the position of surveillance system monitor. OWCP properly adjusted appellant's monetary compensation to reflect his capacity to earn wages in the constructed position.

Appellant's attorney contended before OWCP and on appeal before the Board that the constructed surveillance systems monitor position was not limited as it had been portrayed and as such it did not reasonably represent appellant's wage-earning capacity. The medical evidence did not support that he was capable of performing real duties of the position. Appellant, however, did not submit any factual basis as to the duties of the position nor any medical evidence showing that he could not physically perform the surveillance systems monitor position. Dr. Wertheimer, appellant's own attending physician, stated that, while appellant could not respond to emergencies physically, which the Board notes is not required by the surveillance systems monitor position, he was capable of getting up and walking around to notify others about the emergencies.

### CONCLUSION

The Board finds that OWCP properly reduced appellant's compensation benefits effective February 10, 2013, based on his capacity to earn wages in the constructed position of surveillance system monitor.

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<sup>10</sup> See *Leo A. Chartier*, 32 ECAB 652, 657 (1981).

<sup>11</sup> *Supra* note 5.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 11, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 21, 2014  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

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