

FACTUAL HISTORY

OWCP accepted that on July 26, 1990 appellant, then a 36-year-old motor vehicle operator, sustained a left knee sprain when he jumped from a truck. It authorized left knee arthroscopic surgery performed on October 3, 1990 and June 9, 2008 and left total knee arthroplasty performed on November 28, 2011. OWCP paid appellant total disability compensation.

In an April 3, 2012 form report, Dr. Douglas S. Tase, an attending Board-certified orthopedic surgeon, advised that appellant could return to work with restrictions on April 9, 2012. In another form report dated April 3, 2012, he advised that appellant had a diagnosis code "718.16" and that he could return to work without restrictions.

By letter dated May 18, 2012, OWCP referred appellant, together with a statement of accepted facts and the medical record, to Dr. Kenneth P. Heist, a Board-certified osteopath specializing in orthopedic surgery, for a second opinion. In a June 5, 2012 medical report, Dr. Heist referenced his prior report dated August 2, 2011 regarding appellant's medical background and treatment.² He provided a history of the July 26, 1990 employment injury and appellant's medical treatment and employment background. Dr. Heist reviewed the medical record, listed findings on physical examination and stated that appellant was status post left total knee arthroscopy. He recommended the claim be expanded to include degenerative joint disease. Dr. Heist advised that appellant did not have a disabling condition. He had demonstrated a satisfactory response to his recent left total knee replacement surgery. Dr. Heist advised that appellant could return to full-time sedentary work, eight hours a day, five days a week with restrictions. He was permanently restricted from squatting, kneeling and climbing. Appellant could bend and stoop two to three hours and lift up to 30 pounds two hours a day. He could also ambulate short, level distances with periods of rest.

On July 18, 2012 OWCP referred appellant for vocational rehabilitation services. Appellant met with a vocational rehabilitation counselor on August 1, 2012. On September 26, 2012 he underwent vocational testing which demonstrated his transferable skills acquired from delivering medical supplies for 5 months, and working as a security guard for 5 years at a Kmart warehouse, a motor pool dispatcher for nearly 1½ years at the U.S. Department of the Army and as a truck driver and tool and parts attendant for 15 years at the U.S. Department of Navy. The vocational rehabilitation counselor determined that appellant could be reemployed as a taxicab starter/dispatcher. According to the Department of Labor's *Dictionary of Occupational Titles* (DOT), the duties of a taxicab starter/dispatcher required dispatching taxicabs in response to telephone requests for service; maintaining operational map showing location of each taxicab, contacting drivers of assigned sector by radio or telephone to relay requests for service; logging calls relayed to each driver and address of patron; and arranging relief of taxicab or driver. The physical requirements of the position included sedentary work with occasional lifting up to 10

² In his August 2, 2011 report, Dr. Heist found that appellant had internal derangement and degenerative joint disease of the left knee. He advised that appellant was totally disabled for full-duty work. Dr. Heist stated that he would benefit from left total knee arthroplasty and following this surgery he could return to full-time work with permanent restrictions.

pounds; no climbing, balancing, stooping, kneeling, crouching or crawling; and frequent reaching, handling, fingering, talking and hearing.

The vocational rehabilitation counselor determined that appellant met the specific vocational preparation based on his prior work experience as a motor pool dispatcher for the U.S. Army. Such work required appellant to dispatch vehicles around a base and surrounding area. The vocational rehabilitation counselor also determined that the job was performed in sufficient numbers to be reasonably available within appellant's commuting area. She noted that she obtained wage information from the New Jersey Department of Workforce Development and a July 2012 Occupational Employment Statistic Wage Survey established that the salary for this job in appellant's commuting area was \$440.00 a week.

On October 19, 2012 OWCP authorized an additional 90-day placement period. It was unsuccessful as of February 6, 2013. Rehabilitation services were closed. The vocational rehabilitation counselor advised that, although appellant initially was engaged in the job search process, he also contemplated relocation to Virginia and ultimately decided to pursue retirement.

On April 18, 2013 appellant elected to receive retirement benefits from the Office of Personnel Management effective April 8, 2013.

By notice dated July 22, 2013, OWCP proposed to reduce appellant's wage-loss 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 taxicab dispatcher, at the rate of \$440.00 per week, in accordance with the factors outlined in 5 U.S.C. § 8115.³ OWCP calculated that his compensation rate should be adjusted to \$1,930.00 each four weeks using the formula in *Albert C. Shadrick*.⁴ It indicated that appellant's salary as of February 27, 2011, the date his disability recurred was \$1,056.74 per week, that his current, adjusted pay rate for his job on the date of injury was \$1,056.74 and that he was currently capable of earning \$440.00 per week, the rate of a dispatcher. OWCP, therefore, determined that he had a 42 percent wage-earning capacity, an adjusted wage-earning capacity of \$443.83. This equaled a loss of wage-earning capacity of \$612.91, which when multiplied by 3/4 amounted to a compensation rate of \$482.50. OWCP found that appellant's current adjusted compensation rate, per four-week period, was \$1,930.00. It stated that the vocational rehabilitation counselor found that the dispatcher position to be suitable for appellant, given his work restrictions and training and was available in his commuting area. OWCP allowed appellant 30 days to submit additional evidence or argument regarding his capacity to earn wages in the constructed position.

In a September 6, 2013 decision, OWCP reduced appellant's compensation to reflect wage-earning capacity as a dispatcher effective that day.

By letter dated September 16, 2013, appellant, through his attorney, requested a telephone hearing with an OWCP hearing representative.

³ 5 U.S.C. § 8115.

⁴ 5 ECAB 376 (1953).

In an August 15, 2013 report, Dr. Tase advised that appellant had reached maximum medical improvement with respect to his bilateral total knee arthroplasty.

During the February 24, 2014 hearing, appellant's attorney argued that the DOT was out of date and should not be used as a standard for selecting suitable positions. He stated that the U.S. Department of Labor, Office of Administrative Law Judges (OALJ) had determined that the DOT was out of date. Counsel stated that it had been replaced by the Occupational Information Network (ONET) database.

In a March 28, 2014 decision, an OWCP hearing representative affirmed the September 6, 2013 decision. He found that the taxicab dispatcher position represented appellant's wage-earning capacity. The medical and factual evidence of record established that the selected job was medically and vocationally suitable for appellant and reasonably available in his commuting area.

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 proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.⁵ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on proper factual and medical background.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 wage-earning capacity or if the employee has no actual earnings, his or her wage-earning capacity is determined with due regards to the nature of the injury, his or her 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 and circumstances which may affect his or her wage-earning capacity in his or her disabled condition.⁷

OWCP must initially determine a claimant's medical condition and work restrictions before selecting an appropriate position that reflects his or her wage-earning capacity. The medical evidence relied upon must provide a detailed description of the condition.⁸ Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.⁹

⁵ *Bettye F. Wade*, 37 ECAB 556 (1986); *Ella M. Gardner*, 36 ECAB 238 (1984).

⁶ *See Del K. Rykert*, 40 ECAB 284 (1988).

⁷ 5 U.S.C. § 8115(a); 20 C.F.R. § 10.520; *see Pope D. Cox*, 39 ECAB 143 (1988).

⁸ *William H. Woods*, 51 ECAB 619 (2000).

⁹ *John D. Jackson*, 55 ECAB 465 (2004).

OWCP procedure instructs that, in cases where a claimant has undergone vocational rehabilitation, the vocational rehabilitation counselor will submit a final report to the vocational rehabilitation specialist summarizing why vocational rehabilitation was unsuccessful and listing two or three jobs which are medically and vocationally suitable for the claimant. Where no vocational rehabilitation services were provided, the vocational rehabilitation specialist will have provided the report. Included will be the corresponding job numbers from DOT (or OWCP specified equivalent) and pay ranges in the relevant geographical area.¹⁰ 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 employee service or other applicable service. Finally, application of the principles set forth in the *Shadrick*¹¹ decision will result in the percentage of the employee's loss of wage-earning capacity.

In determining an employee's wage-earning capacity based on a position defined 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. 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.¹² 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.¹³

ANALYSIS

The Board finds that OWCP met its burden of proof to reduce appellant's monetary compensation based on his capacity to earn wages as a dispatcher.

The Board finds that the medical evidence establishes that the physical demands of the constructed position were within appellant's medical restrictions. The position was sedentary and required occasional lifting up to 10 pounds and no climbing, stooping, kneeling, crouching or crawling. Dr. Heist, an OWCP referral physician, restricted appellant from lifting more than 30 pounds, squatting, kneeling and climbing and bending or stooping more than two to three hours. Appellant also had the appropriate training for the position as he previously worked as a motor pool dispatcher in the U.S. Army for almost one and one-half years. The vocational rehabilitation counselor conducted a search with the applicable state authority and determined that the selected job was available in sufficient numbers so as to make it reasonably available in his commuting area. She determined that the weekly rate for an entry-level position was

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.5 (June 2013).

¹¹ *Supra* note 4; 20 C.F.R. § 10.403.

¹² *James Henderson, Jr.*, 51 ECAB 619 (2000).

¹³ *Albert L. Poe*, 37 ECAB 684 (1986); *David Smith*, 34 ECAB 409 (1982).

\$440.00.¹⁴ The fact that appellant was unable to obtain a dispatcher position does not establish that the work is not reasonably available in his commuting area.¹⁵ While appellant contended that use of the DOT was outdated, the Board notes that FECA's Procedure Manual clearly states that the vocational counselor shall include in his or her report the DOT description of all the duties and physical requirements of each job.¹⁶

The Board finds that OWCP considered the proper factors, such as availability of suitable work and appellant's physical limitations, usual employment and age and employment qualifications in determining that the position of dispatcher represented his wage-earning capacity.¹⁷ OWCP used the information provided by the vocational rehabilitation counselor of the prevailing wage rate in the area for a dispatcher and established that jobs in the position selected for determining wage-earning capacity were reasonably available in the general labor market in the geographic commuting area in which the employee lived. The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of dispatcher and that the position was reasonably available within the general labor market of appellant's commuting area. The August 15, 2013 report from Dr. Tase did not negate his ability to perform the selected job. OWCP, therefore, properly determined that the position of dispatcher reflected appellant's wage-earning capacity and using the *Shadrick* formula¹⁸ properly reduced his compensation effective September 6, 2013.

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

CONCLUSION

The Board finds that OWCP properly reduced appellant's compensation benefits effective September 6, 2013, based on his capacity to earn wages in the constructed position of dispatcher.

¹⁴ Rehabilitation counselors are experts in the field of vocational rehabilitation and OWCP may rely on his or her opinion as to whether a job is reasonably available and vocationally suitable. See *Lawrence D. Price*, 54 ECAB 590 (2003); Federal (FECA) Procedure Manual, *supra* note 10 at Chapter 2.816.6b (June 2013).

¹⁵ See *Leo A. Chartier*, 32 ECAB 652, 657 (1981); Federal (FECA) Procedure Manual, *supra* note 10 at Chapter 2.816.6c (June 2013).

¹⁶ See Federal (FECA) Procedure Manual, *supra* note 10 at Chapter 2.816.4a (June 2013); see e.g., *T.G.*, Docket No. 14-921 (September 17, 2014) (where the Board discounted counsel's argument that the DOT was outdated and should not be used in loss of wage-earning capacity determinations).

¹⁷ *D.W.*, Docket No. 14-347 (issued June 4, 2014).

¹⁸ *Supra* note 4.

ORDER

IT IS HEREBY ORDERED THAT the March 28, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 4, 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