

sidewalk.² It authorized left knee arthroscopic surgery performed on June 18, 2009. On November 27, 2009 appellant returned to part-time modified work, four hours a day. He stopped work on September 25, 2010. On January 16, 2011 OWCP placed appellant on the periodic rolls.

In medical reports dated September 13 and November 8, 2011, Dr. Anoushiravan Ehya, an attending Board-certified orthopedic surgeon, provided findings on physical examination and stated that appellant was status post left knee surgery. He advised that appellant could return to work with permanent restrictions which included no lifting, pushing or pulling greater than 20 pounds, no frequent squatting, kneeling, stair-climbing, and no prolonged standing and walking. Appellant could not stand or walk greater than 30 minutes at any time or greater than 2 hours a day. He should be allowed to alternate sitting and standing while performing his work duties.

On November 30, 2011 OWCP referred appellant for vocational rehabilitation services. Appellant met with a vocational rehabilitation counselor on January 5, 2012. He underwent vocational testing and a transferable skills analysis, which indicated, among other things, his prior skills in telecommunications from the U.S. Army and in customer service from the employing establishment and computer technician training. The vocational rehabilitation counselor determined that appellant could be reemployed as an adjustment clerk (customer complaint clerk). According to the Department of Labor's *Dictionary of Occupational Titles* (DOT), the duties of the adjustment clerk required the investigation of customer complaints about merchandise, service, billing or credit rating; examination of records, such as bills, computer printouts, microfilm, meter readings, bills of lading and related documents and correspondence; conversing or corresponding with customer and other company personnel, such as billing, credit, sales, service, or shipping, to obtain facts regarding customer complaints, examination of pertinent information to determine accuracy of customer complaints and responsibility for errors; and notification of customer and designated personnel of findings, adjustments and recommendations, such as exchange of merchandise, refund of money, credit of customer's account or adjustment of customer's bill.

The position also may require making recommendations for management improvements in product, packaging, shipping methods, service or billing methods and procedures to prevent future complaints of a similar nature; examination of merchandise to determine accuracy of complaint; follow up on recommended adjustments to ensure customer satisfaction; keying information into a computer to obtain computerized records; tracing missing merchandise; being designated as a tracer clerk (clerical); investigation of overdue and damaged shipments or shortages in shipments for common carrier and being designated as an over-short-and-damage clerk (clerical); and being designated according to type of complaint adjusted as a bill master (clerical), merchandise-adjustment clerk (retail trade), service investigator (utilities; telephone).

The physical requirements of the position included sedentary work with occasional lifting up to 10 pounds; no climbing, balancing, stooping, kneeling, crouching or crawling; and occasional reaching, handling and fingering.

² Appellant had previously filed an occupational disease claim under File No. xxxxxx745 for a left knee injury which OWCP denied on October 6, 2006.

The vocational rehabilitation counselor determined that appellant would meet the specific vocational preparation upon completion of six to seven months of training. He also determined that the job was performed in sufficient numbers to be reasonably available within appellant's commuting area. Appellant's vocational rehabilitation counselor noted that there were seven positions currently available and three anticipated job openings. He noted that the wage information from the State of California Employment Development Department established that the salary for this job in appellant's commuting area was \$12.00 an hour or \$480.00 a week. The vocational rehabilitation counselor stated that qualifications required by employers included customer service and computer office skills. He related that his labor market survey identified openings that did and did not require such experience. The vocational rehabilitation counselor noted appellant's communications center experience from the military and customer service experience from the employing establishment and therefore, concluded that he could compete for these openings. He concluded that appellant would be employable in the plan objective with the proposed training.

Appellant attended medical accounting and auditing and computer training from April 9 to October 11, 2012 at Larson's Training Centers, Inc. He successfully completed 650 hours of required coursework and received certificates for medical claims processing, medical terminology, computer-based business skills, MS Word levels 1 and 2, MS Excel, Access and PowerPoint, and manual and computerized accounting. Thereafter, appellant moved to Dallas, South Dakota. On November 15, 2012 the vocational rehabilitation counselor initiated a 90-day placement period, but appellant did not obtain employment.

In a February 26, 2013 report, Dr. Ehya provided findings on physical and x-ray examination. He diagnosed mild degenerative joint disease of the right knee. Dr. Ehya ruled out internal derangement of the right knee and advised that appellant had a possible medial meniscus tear. He reiterated his opinion that appellant could return to work with the same work restrictions set forth in his September 13 and November 8, 2011 reports.

OWCP authorized an additional 90-day placement period, but terminated the unsuccessful effort on April 17, 2013 and closed appellant's rehabilitation services. The vocational rehabilitation counselor advised that, although appellant had been cooperative and looked for employment, he was distracted by medical issues related to his knees.

On May 6, 2013 the vocational rehabilitation counselor updated the labor market survey for the selected adjustment clerk position due to appellant's relocation to South Dakota. He determined that appellant's six- to seven-month training met the specific vocational preparation. The vocational rehabilitation counselor further determined that the position was reasonably available in appellant's commuting area. He identified 10 full-time job openings currently available as confirmed by telephone contact with a May 2013 "CVC" Labor Market Survey for South Dakota and data from the South Dakota Department of Labor and Regulations. The vocational rehabilitation counselor noted that the wage information from the South Dakota Department of Labor and Regulations established that the salary for this job in appellant's commuting area was \$12.00 an hour or \$480.00 a week. He reiterated that appellant could compete for these job openings based on his prior communications center and customer service experience. The vocational rehabilitation counselor concluded that appellant was employable in the plan objective.

By notice dated June 19, 2013, 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 an adjustment clerk, at the rate of \$400.00 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 \$2,083.00 each four weeks using the formula in *Albert C. Shadrick*.⁴ It indicated that appellant's salary as of June 18, 2009, the date he stopped working, was \$1,032.38 per week, that his current, adjusted pay rate for his job on the date of injury was \$1,086.69 and that he was currently capable of earning \$400.00 per week, the rate of an adjustment clerk. OWCP, therefore, determined that he had a 37 percent wage-earning capacity, an adjusted wage-earning capacity of \$650.40, which when multiplied by 3/4 amounted to a compensation rate of \$487.80; increased by applicable cost-of-living adjustments to \$520.75 which rendered a new gross monthly compensation rate of \$2,083.00. It found the adjustment clerk position 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 July 10, 2013 letter, appellant contended that he was unable to perform full-time work due to his current disability and medical problems. He noted that he had attended school on a part-time schedule. Appellant claimed that his back and bilateral knee conditions prevented him from normal function. He also developed severe bilateral carpal tunnel syndrome due to his mail carrier duties and vocational training.⁵ Appellant indicated that he was scheduled to see a specialist regarding this condition on July 15, 2013.

In a July 9, 2013 report, Dr. Ehya listed findings on physical examination and diagnosed bilateral knee osteoarthritis. He reiterated his opinion that appellant could return to work with the previous restrictions, except no prolonged standing or walking greater than 15 minutes at any time or more than 1 hour a day.

In a July 31, 2013 decision, OWCP reduced appellant's compensation to reflect wage-earning capacity as an adjustment clerk effective July 28, 2013.

By letter dated August 7, 2013, appellant, through his attorney, requested a telephone hearing with an OWCP hearing representative.

During a January 15, 2014 telephone hearing, appellant stated that he received benefits from the Department of Veterans Affairs for post-traumatic stress disorder (PTSD) and hearing loss. He contended that the selected adjustment clerk position was not vocationally or medically suitable. Appellant stated that he had no prior work experience related to the position and thus, he would have to receive on-the-job training. He further stated that his preexisting PTSD affected his ability to be in public and enclosed areas. Appellant's attorney questioned the use of the Department of Labor, *Dictionary of Occupational Titles*, contending that it was no longer in effect and that it did not reflect modern job surveys as it had not been used since 1991. He

³ 5 U.S.C. § 8115.

⁴ 5 ECAB 376 (1953).

⁵ On January 28, 2014 appellant filed a claim for carpal tunnel syndrome. The record does not contain a decision regarding this claim.

asserted that it was junk science. Counsel contended that OWCP was aware of appellant's preexisting PTSD condition which prohibited appellant's employment and it had a duty to fully develop the facts of his case. He noted appellant's lack of customer service experience and questioned the availability of an adjustment clerk position in his area.

In a March 14, 2014 decision, an OWCP hearing representative affirmed the July 31, 2013 decision. He found that the medical and factual evidence of record established that the selected adjustment clerk job was medically and vocationally suitable for appellant and fairly and reasonably represented his loss of wage-earning capacity. The hearing representative noted that there was no argument or evidence that the loss of wage-earning capacity determination was erroneously calculated.

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.⁶ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on proper factual and medical background.⁷

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.⁸

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 must provide a detailed description of the condition.⁹ Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.¹⁰

OWCP's 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

⁶ *Bettye F. Wade*, 37 ECAB 556 (1986); *Ella M. Gardner*, 36 ECAB 238 (1984).

⁷ *See Del K. Rykert*, 40 ECAB 284 (1988).

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

⁹ *William H. Woods*, 51 ECAB 619 (2000).

¹⁰ *John D. Jackson*, 55 ECAB 465 (2004).

provided the report. Included will be the corresponding job numbers from DOT (or OWCP specified equivalent) and pay ranges in the relevant geographical area.¹¹ 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*¹² 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 postinjury 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.¹³ 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.¹⁴

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 an adjustment clerk.

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, no climbing, stooping, kneeling, crouching or crawling. Dr. Ehya, an attending physician, restricted appellant from lifting more than 20 pounds, frequent squatting, kneeling or stair-climbing and standing and walking more than 15 minutes at a time or more than 1 hour a day. Appellant had the appropriate training for the position as he received training through the vocational rehabilitation process at Larson's Training Centers, Inc. and earned certificates for medical claims processing, medical terminology, computer-based business skills, MS Word levels 1 and 2, MS Excel, Access and PowerPoint, and manual and computerized accounting. The vocational rehabilitation counselor conducted a search and determined that the selected job was available in sufficient numbers in both California where appellant had lived, and South Dakota, where he had relocated so as to make it reasonably available to him in his commuting area. He determined that the hourly rate for an entry-level position was \$12.00 or \$480.00 a week.¹⁵ The fact that appellant was unable to obtain an

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity Based on a Constructed Position*, Chapter 2.816.5 (June 2013).

¹² *Supra* note 4; 20 C.F.R. § 10.403.

¹³ *James Henderson, Jr.*, 51 ECAB 619 (2000).

¹⁴ *Albert L. Poe*, 37 ECAB 684 (1986); *David Smith*, 34 ECAB 409 (1982).

¹⁵ 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 11 at Chapter 2.816.6b (June 2013).

adjustment clerk position does not establish that the work is not reasonably available in his commuting area.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 adjustment clerk 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 an adjustment clerk and established that jobs in the position 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 adjustment clerk and that the position was reasonably available within the general labor market of appellant's commuting area.

Appellant contended that he was not vocationally qualified to work as an adjustment clerk as he had no prior work experience in this position. A review of the vocational rehabilitation counselor's reports showed that appellant's prior military communications experience, customer service experience from the employing establishment and computer technician training, and successful completion of training as a part of his vocational rehabilitation established that the adjustment clerk position was suitable for him.

Appellant further contended that he was medically unable to perform the duties of the selected position due to his back, bilateral knee and preexisting PTSD conditions. However, he did not submit any rationalized medical evidence supporting his contention. The Board notes that Dr. Ehya, appellant's own attending physician, opined that appellant could return work with restrictions.

Appellant contended that OWCP improperly utilized the DOT as it was outdated and no longer in use and thus, it was junk science. The Board notes that FECA 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.¹⁸

OWCP properly applied the principles set forth in *Shadrick*¹⁹ to determine appellant's employment-related loss of wage-earning capacity. It calculated that his compensation rate should be adjusted to \$487.80 using the *Shadrick* formula. OWCP used appellant's capacity to earn \$400.00 per week, the rate of an adjustment clerk and a current pay rate for his date-of-injury job of \$1,086.69 to determine that he had a 37 percent wage-earning capacity or 63 percent loss of wage-earning capacity. It then multiplied the pay rate at the time his disability began on June 18, 2009, \$1,032.38, by the 37 percent wage-earning capacity figure. The resulting figure of \$381.98 was subtracted from appellant's disability pay rate of \$1,032.38 to

¹⁶ See *Leo A. Chartier*, 32 ECAB 652, 657 (1981); Federal (FECA) Procedure Manual, *supra* note 11 at Chapter 2.816.6c (June 2013).

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

¹⁸ See Federal (FECA) Procedure Manual, *supra* note 11 at Chapter 2.816.4a (June 2013); *see also T.G.*, Docket No. 14-921 (issued September 17, 2014).

¹⁹ *Supra* note 4.

yield his loss of wage-earning capacity of \$650.40. OWCP multiplied this amount by the appropriate compensation rate of three-fourths, to yield \$487.80 and then increased this amount by applicable cost-of-living adjustments to \$520.50 rendering the new monthly gross compensation rate to be \$2,082.00.²⁰ The Board finds, therefore, that OWCP properly determined that the position of adjustment clerk reflected appellant's wage-earning capacity and using the *Shadrick* formula, properly reduced his compensation effective July 28, 2013.

Appellant may request a 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 OWCP properly reduced appellant's compensation benefits effective July 28, 2013, based on his capacity to earn wages in the constructed position of adjustment clerk.

ORDER

IT IS HEREBY ORDERED THAT the March 14, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 3, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

²⁰ The Board notes that appellant's potential earnings had been \$480.00 but OWCP utilized \$400.00 as the potential earnings. The final compensation rate was reduced by \$1.00 from the proposed wage-earning capacity due to a change in deductions.