

**United States Department of Labor
Employees' Compensation Appeals Board**

B.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Los Angeles, CA, Employer**

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**Docket No. 13-1347
Issued: February 18, 2014**

Appearances:

Alan J. Shapiro, Esq., for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge

ALEC J. KOROMILAS, Alternate Judge

MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 14, 2013 appellant, through her attorney, filed a timely appeal from a March 26, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) reducing her compensation benefits. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether OWCP properly determined that the selected position of customer complaint clerk represented appellant's wage-earning capacity.

On appeal, counsel asserts that OWCP's March 26, 2013 decision is contrary to fact and law.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on or before July 7, 2007 appellant, then a 52-year-old mail handler, sustained repetitive motion injuries to her right hand and middle finger. It accepted right carpal tunnel syndrome and right trigger finger. Appellant has other claims that were combined with the present file: File No. xxxxxx518, accepted for degenerative osteoarthritis and meniscal tear of the right knee occurring on or before March 14, 2000, permanent and stationary as of April 23, 2009; File No. xxxxxx876 accepted for May 22, 2002 traumatic right shoulder and head injuries; File No. xxxxxx482 accepted for a third degree ligament tear of the right thumb occurring on October 6, 2003, resolved with no work restrictions as of November 20, 2003; File No. xxxxxx362, involving a 2004 occupational disease claim accepted for left shoulder, elbow, wrist and thumb sprains; File No. xxxxxx542 accepted for right lateral epicondylitis sustained on or before October 28, 1994, open for medical treatment; File No. xxxxxx805 accepted for a right shoulder strain and tendinitis of the right hand sustained on or before April 1, 2005, open for medical treatment. OWCP denied her claim under File No. xxxxxx374 for right ankle tendinitis.

On January 4, 2007 appellant underwent surgical reconstruction of the left thumb ligament, de Quervain's tendon interposition arthroplasty and release of first dorsal compartment. She returned to light duty on March 1, 2007, with intermittent work absences through March 2009.

Dr. Nicole Pham-Bailey, an attending Board-certified physiatrist, treated appellant for right carpal tunnel syndrome, right carpometacarpal arthritis, right long digit trigger finger, a partial tear of the right supraspinatus tendon and a tear of the right medial meniscus. She administered steroid injections and prescribed medication from 2007 through 2009.

By decision dated March 10, 2009, OWCP granted appellant a schedule award for an 11 percent impairment of the left arm due to arthroplasty of the carpometacarpal joint of the left thumb. The date of maximum medical improvement was September 17, 2007.

Appellant stopped work on April 9, 2009 as the employing establishment could no longer provide modified duty. She did not return to work and received wage-loss compensation on the periodic rolls. On April 25, 2009 appellant underwent right thumb trapeziectomy and pinning and right middle digit trigger release, authorized by OWCP.

In an October 1, 2009 report, Dr. Pham-Bailey permanently restricted gripping or grasping with the right hand to no more than 15 minutes at one time and for no more than 20 cumulative minutes an hour. She limited lifting and carrying limited to 10 pounds.

As Dr. Pham-Bailey found that appellant could perform limited-duty work, OWCP referred her for vocational rehabilitation. Appellant completed a functional capacity evaluation and vocational aptitude testing.² A vocational rehabilitation counselor noted on November 9, 2009 that appellant had a high school diploma, worked for nine years as a file clerk, two years as

² An October 8, 2009 functional capacity evaluation demonstrated that appellant could perform full-time work at the medium physical demand level. A November 3, 2009 vocational aptitude test revealed ninth grade reading level and a sixth grade math level.

a shipping clerk, one year as a driving instructor and 21 years as a mail handler. The vocational rehabilitation counselor completed a transferrable skills analysis finding that appellant could perform a clerical position after computer skills training.

On January 8, 2010 the vocational rehabilitation counselor identified the position of customer complaint clerk (U.S. Department of Labor's *Dictionary of Occupational Titles* #241.367-014) as a vocational goal. The position was at the sedentary physical demand level, with occasional lifting up to 10 pounds, occasional reaching, no stooping, kneeling, crouching or climbing. The customer complaint clerk position required specific vocational preparation of six months to one year, commensurate with appellant's 11 years of clerical job experience. Appellant's work history also met the four- to six-month vocational reparation requirement. The vocational rehabilitation counselor recommended that appellant enroll in a six-month office management course at a community college. OWCP approved the rehabilitation plan on February 11, 2010.

Appellant began classes on February 17, 2010, taking five computer courses in word processing and accounting and a class in career development. She earned a certificate in Office Management Systems on August 11, 2010. OWCP conducted placement efforts from August 20, 2010 to February 1, 2011.³

On February 25, 2011 appellant underwent a surgical repair of a left supraspinatus tear and a closed manipulation of the right shoulder under anesthesia. Dr. Pham-Bailey provided permanent work restrictions on April 11, 2011 limiting lifting or forceful grasping with the left hand to 10 pounds and no repetitive overhead reaching or forceful pulling/pushing with the left arm. She provided identical restrictions for the left arm on August 23, 2011, noting that appellant's condition was permanent and stationary.

On June 9, 2011 appellant retired from the employing establishment.

The vocational rehabilitation counselor resumed job placement activities on December 28, 2011. She performed a labor market survey on January 24, 2012, determining that entry level customer complaint clerk positions were available in appellant's commuting area with a starting salary of \$8.00 to \$19.23 an hour. The vocational rehabilitation counselor noted that appellant successfully completed a six-month office management program, which qualified her for entry level work, in addition to prior work experience as a file clerk, shipping clerk and mail handler.

By notice dated June 27, 2012, OWCP advised appellant that it proposed to reduce her monetary compensation under 5 U.S.C. §§ 8106 and 8115 based on her projected earnings of \$13.33 an hour or \$533.20 a week in the selected position of customer complaint clerk. It noted that the position was within the work restrictions provided by Dr. Pham-Bailey, as it did not require lifting more than 10 pounds or repetitive upper extremity motion. OWCP afforded

³ The vocational rehabilitation counselor provided numerous job contacts for appellant from August 2010 to January 2011. Appellant applied for over 60 clerical positions from October 2010 and January 2011. The vocational rehabilitation counselor found appellant fully cooperative.

appellant 30 days to submit evidence or argument against the proposed reduction of compensation. Appellant did not submit additional evidence prior to August 16, 2012.

By decision dated August 16, 2012, OWCP finalized the proposed reduction of appellant's compensation effective August 26, 2012 based on her projected earnings of \$533.20 a week as a customer complaint clerk. It found that the selected position was medically and vocationally appropriate. OWCP noted that appellant had not submitted evidence or argument indicating that she was unable to perform the job. Beginning August 26, 2012, appellant would receive \$418.75 in weekly compensation.

In an August 21, 2012 letter, counsel requested a telephonic oral hearing, held on December 12, 2012. At the hearing, he asserted that the customer complaint clerk position exceeded appellant's medical limitations and her vocational skills. Following the hearing, appellant submitted the January 12 and December 13, 2013 reports of Dr. Pham-Bailey reiterating previous work restrictions for both upper extremities.

By decision dated March 26, 2013, OWCP's hearing representative affirmed the August 16, 2012 decision finding that the selected position of customer complaint clerk properly represented appellant's wage-earning capacity. She found that the selected position was within the left upper extremity restrictions under File No. xxxxxx362 and the right upper extremity restrictions under File No. xxxxxx241. The hearing representative noted that a review of appellant's other claim files revealed no other current work restrictions. She further found that the job was commensurate with appellant's work experience and vocational preparation in office management services.

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.⁴ Under section 8115(a), 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 his or her wage-earning capacity or if the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his or her usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect 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's *Dictionary of Occupational Titles* or otherwise available in the open market, that fits the employee's capabilities with regards to his or her physical limitations, education, age and prior experience. Once this selection is made, a

⁴ *David W. Green*, 43 ECAB 883 (1992).

⁵ *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

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 will result in the percentage of the employee's loss of wage-earning capacity.⁷

ANALYSIS

OWCP accepted that appellant sustained multiple upper and lower extremity injuries and conditions while working as a mail handler, including bilateral rotator cuff tears, carpometacarpal arthritis of both thumbs and a long right trigger finger. Appellant stopped work on April 9, 2009 and did not return. Dr. Pham-Bailey, an attending Board-certified physiatrist, found appellant able to perform full-time restricted duty as of October 1, 2009.

The medical evidence establishes that appellant could perform light duty. OWCP referred her for vocational rehabilitation in November 2009. Appellant completed a functional capacity evaluation and vocational assessment. Dr. Pham-Bailey provided permanent work restrictions for both upper extremities on February 25 and August 23, 2011. She restricted lifting to 10 pounds, with no repetitive overhead reaching, forceful gripping, grasping or pushing. The vocational rehabilitation counselor identified the position of customer complaint clerk as within appellant's physical limitations and vocational aptitudes. The customer complaint clerk position was classified as sedentary, with occasional lifting up to 10 pounds and occasional reaching. The physical requirements are within the restrictions set forth by Dr. Pham-Bailey. The vocational rehabilitation counselor determined the prevailing wage rate of these positions and their reasonable availability in the open labor market. Based on these considerations, OWCP issued the March 26, 2013 decision reducing appellant's compensation based on her ability to earn \$533.20 a week as a customer complaint clerk.

The Board finds that OWCP appropriately considered the proper factors, such as availability of customer complaint clerk positions and appellant's physical limitations, in determining that the job represented her wage-earning capacity. OWCP properly considered Dr. Pham-Bailey's restrictions and the medical evidence in each of appellant's claims in determining that the customer complaint clerk position was medically suitable work. Appellant completed a six-month office management course and had extensive prior work experience as a file and chipping clerk. OWCP followed the established procedures under the *Shadrick* decision in calculating appellant's employment-related loss of wage-earning capacity. Counsel does not contest OWCP's calculations. Also, appellant did not submit probative medical evidence indicating that she was not capable of performing the selected position.

The Board finds that OWCP properly found that appellant was medically and vocationally capable of working eight hours a day as a customer complaint clerk. Thus, OWCP's March 26, 2013 decision affirming the prior reduction of appellant's compensation

⁶ 5 ECAB 376 (1953).

⁷ *Francisco Bermudez*, 51 ECAB 506 (2000); *James A. Birt*, 51 ECAB 291 (2000).

based on her ability to earn wages in the selected position of customer complaint clerk is proper under the law and facts of this case.⁸

On appeal, counsel asserts that OWCP's March 26, 2013 decision was contrary to fact and law. The Board finds that the selected position of customer complaint clerk is within appellant's medical limitations and commensurate with her work experience and vocational training.

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 properly determined that the selected position of customer complaint clerk represented appellant's wage-earning capacity.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 26, 2013 is affirmed.

Issued: February 18, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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

⁸ *E.T.*, Docket No. 10-559 (issued March 28, 2011).