



## **FACTUAL HISTORY**

On August 20, 2002 appellant, then a 49-year-old mail processor clerk, filed an occupational disease claim alleging injury to her left shoulder as a result of sweeping, lifting and pulling trays of mail. On September 10, 2002 OWCP accepted a left shoulder sprain. On August 17, 2004 it issued a schedule award for 10 percent impairment of the left upper extremity. Appellant was released to modified work and the employing establishment accommodated her work restrictions as a limited-duty mail processing clerk. She earned wages in this position at a level 6, grade 0. The employing establishment reduced appellant's hours under the National Reassessment Program (NRP) and, as of January 1, 2010, it could no longer accommodate her limitations.<sup>2</sup> After the modified position was withdrawn, OWCP paid compensation for wage loss.

On October 5, 2011 OWCP referred appellant to Dr. Ghol Bahman Ha'Eri, a Board-certified orthopedic surgeon, for a second opinion. In an October 26, 2011 report, Dr. Ha'Eri listed appellant's accepted conditions as left shoulder sprain and left shoulder rotator cuff tendinitis. He found that she had residuals of the accepted work injury. Dr. Ha'Eri recommended temporary daily employment limitations of two hours intermittent reaching above the shoulder and one hour pushing/pulling and lifting up to 20 pounds. He also requested a magnetic resonance imaging (MRI) scan of appellant's shoulder. In a supplemental report, Dr. Ha'Eri noted that the November 17, 2011 MRI scan showed supraspinatus tendinitis and subacromial bursitis. He noted that her work restrictions remained the same.

In a February 22, 2012 report, Dr. Behzad Haghi, Board-certified in family medicine and occupational medicine, diagnosed tenosynovitis, de Quervain's and impingement syndrome of the shoulder. He listed appellant's restrictions as no repetitive pushing/pulling with right upper arm, no lifting over 15 pounds, and no repetitive reaching above the right shoulder.

On January 29, 2013 appellant accepted a position as a customer care agent. The employing establishment noted that the position would be in strict compliance with her work restrictions including no repetitive pushing/pulling with right arm, no lifting over 15 pounds and no repetitive reaching above the shoulder. Appellant commenced work on February 11, 2013. The employing establishment noted that the annual salary for appellant's position as a customer care agent was \$53,633.00 (or \$1,031.40 per week). The record indicates that as of the date of injury of February 4, 2002, appellant was paid based on a level 5, step M. In a telephone call on May 10, 2013, the employing establishment advised OWCP that the current wages for appellant's date-of-injury mail processor clerk level 5/M position was \$50,871.00.

By decision dated May 13, 2013, OWCP found that appellant had actual earnings as a customer care agent of \$53,633.00 that fairly and reasonably represented her wage-earning capacity. Appellant had performed this position for two months or more and it was considered suitable. OWCP also noted that her actual earnings met or exceeded the current wages of the job that she held when injured. Accordingly, OWCP determined that appellant's entitlement to

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<sup>2</sup> OWCP accepted a traumatic injury for a right shoulder sprain that occurred on January 26, 2002 in OWCP File No. xxxxxx065. It accepted a prior claim for lumbar strain, thoracic or lumbosacral neuritis and displacement of lumbar intervertebral disc in OWCP File No. xxxxxx218.

wage-loss compensation ceased the date that she was reemployed with no loss in earning capacity.

### **LEGAL PRECEDENT**

Section 8115(a) of FECA provides that, in determining compensation for partial disability, the wage-earning capacity of an employee is determined by the employee's actual earnings if the actual earnings fairly and reasonably represent the employee's wage-earning capacity. Generally, wages actually earned are the best measure of a wage-earning capacity, and in the absence of showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such a measure.<sup>3</sup> The formula for determining loss of wage-earnings capacity based on actual earnings developed in the *Albert C. Shadrick* decision,<sup>4</sup> has been codified at 20 C.F.R. § 10.403.<sup>5</sup> OWCP procedures provide that a determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity should be made after an employee has been working in a given position for more than 60 days.<sup>6</sup> The amount of any compensation paid is based on the wage-earning capacity determination and it remains undisturbed until properly modified.<sup>7</sup>

### **ANALYSIS**

OWCP accepted appellant's claim for left shoulder sprain. The second opinion physician, Dr. Ha'Eri, found that appellant could work with restrictions including pushing/pulling/lifting of up to 20 pounds. Appellant's treating physician, Dr. Haghi, found that appellant was restricted in her work capacity and opined that she should perform no repetitive pushing/pulling with her right upper arm, no lifting over 15 pounds and no repetitive reaching above the right shoulder. The employing establishment offered appellant a position as a customer care agent, and indicated that this position would be within Dr. Haghi's restrictions. Appellant commenced work in this position on February 11, 2013. At the time that OWCP issued its decision finding that appellant had no loss of wage-earning capacity on May 13, 2013, appellant had worked for over 60 days.

Appellant's performance of the position in excess of 60 days is persuasive evidence that the position represents her wage-earning capacity.<sup>8</sup> There is no evidence that the position was

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<sup>3</sup> See *Sharon C. Clement*, 55 ECAB 552 (2004).

<sup>4</sup> 5 ECAB 376 (1953).

<sup>5</sup> *Lottie M. Williams*, 56 ECAB 302 (2005); see also *C.G.*, Docket No. 11-1538 (issued March 26, 2012).

<sup>6</sup> Federal (FECA Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993).

<sup>7</sup> *J.F.*, Docket No. 11-133 (issued October 19, 2011).

<sup>8</sup> OWCP procedures provide that a determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity should be made after an employee has been working in a given position for more than 60 days. See *supra* note 6.

seasonal, temporary or makeshift work designed for her particular needs.<sup>9</sup> The physical restrictions are within the limitations set by her treating physician, Dr. Haghi. Appellant's actual earnings as a customer care agent properly represented her wage-earning capacity. OWCP properly accepted these earnings as the best measure of her wage-earning capacity.

The position paid appellant \$53,633.00 annually. The current wages for her date-of-injury position as a mail processor clerk, level 5/M were \$50,871.00. Accordingly, the rate of pay for the customer care agent in the amount of \$53,633.00 exceeds appellant's date-of-injury position rate of pay. Therefore, appellant had no loss of wage-earning capacity under the *Shadrick* formula as of the date of May 13, 2013, the date of OWCP's decision.

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

### **CONCLUSION**

The Board finds that appellant's actual earnings as a customer care representative fairly and reasonably represented her wage-earning capacity.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 13, 2013 is affirmed.

Issued: February 10, 2014  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

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<sup>9</sup> *J.F.*, Docket No. 11-133 (issued October 19, 2011).