

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

E.D., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Oakland, CA, Employer**

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**Docket No. 13-1232
Issued: January 30, 2014**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 25, 2013 appellant filed a timely appeal from the January 30, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 case.

ISSUE

The issue is whether OWCP met its burden of proof to find the constructed position of information clerk represented appellant's wage-earning capacity.

FACTUAL HISTORY

On or before September 15, 2009 appellant, then a 55-year-old mail processing clerk, developed bilateral finger and hand symptoms as a result of performing repetitive duties at work. OWCP accepted the claim for bilateral trigger finger and bilateral carpal tunnel syndrome.

¹ 5 U.S.C. § 8101 *et seq.*

Appellant stopped work on May 26, 2010 pursuant to the National Reassessment Process (NRP) when the employing establishment could no longer accommodate her work restrictions. OWCP paid total disability wage-loss compensation beginning May 26, 2010.

Appellant was treated by Dr. Richard A. Nolan, a Board-certified orthopedic surgeon, from October 7, 2009 to June 16, 2010, for bilateral thumb and hand pain. Dr. Nolan diagnosed bilateral trigger thumb and bilateral carpal tunnel syndrome and returned her to limited-duty work. A December 23, 2009 electromyogram (EMG) revealed no abnormalities, no evidence of carpal tunnel syndrome, cervical radiculopathy or peripheral neuropathy. On August 27, 2010 Dr. Nolan performed an exploration of the flexor pollicis longus tendon at sesamoids with release of the fibrous pulley and inspection of the flexor pollicis longus tendon and diagnosed right trigger thumb. He performed similar surgery on the left hand on February 11, 2011.

On May 19, 2011 OWCP referred appellant for a second opinion to Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon, to determine whether appellant had residuals of her work injury and could return to work. In a June 29, 2011 report, Dr. Swartz noted results on examination, a review of appellant's history and the records provided to him. He noted findings of atrophy over the right forearm, tenderness of the A1 flexor pulley of both thumbs, intact sensation of both upper extremities and negative Tinel's test and Phalen's sign bilaterally. Dr. Swartz diagnosed bilateral trigger thumb injuries, status post surgery on both thumbs and no evidence of carpal tunnel syndrome. He noted that appellant had residual bilateral trigger thumb. Dr. Swartz advised that she would require additional treatment including cortisone injections for both thumbs. He opined that appellant was presently capable of vocational rehabilitation and future reemployment. In a July 13, 2011 work capacity evaluation, Dr. Swartz noted that she could return to work full time with permanent restrictions operating a motor vehicle four to six hours a day, repetitive movements of the wrist for five to six hours a day, pushing pulling and lifting for three hours a day from 5 to 10 pounds and squatting, kneeling and climbing for one hour a day. He reviewed a July 27, 2011 EMG that was performed for him which revealed no evidence of carpal tunnel syndrome, radial or cubital tunnel syndrome, brachial plexopathy or cervical radiculopathy. Dr. Swartz opined that appellant had no residuals of bilateral carpal tunnel syndrome and no further treatment was required related to the trigger thumb or carpal tunnel syndrome conditions.

OWCP referred Dr. Swartz's reports and the July 27, 2011 EMG to Dr. Nolan. In an August 31, 2011 report, Dr. Nolan noted persistent pain in the thumbs at the sesamoids which were aggravated by repetitive work duties. Appellant had positive Tinel's test and Phalen's signs bilaterally. Dr. Nolan noted that she had persistent symptoms of right carpal tunnel syndrome with positive Tinel's test and Phalen's signs that waxed and waned. He noted that symptoms of trigger thumb had resolved but appellant had persistent tenosynovitis secondary to the trigger thumb process. In a duty status report dated August 31, 2011, Dr. Nolan noted that she could return to work full time with restrictions of intermittent standing for eight hours per day, walking for six hours a day, no climbing or kneeling, bending/stooping at the waist limited to four hours per day, pulling/pushing, simple grasping and fine manipulation of the right and left upper extremity limited to five hours per day and reaching above the shoulder for the right and left upper extremity limited to two hours per day, all subject to a lifting restriction of 10 pounds continuously and 15 pounds intermittently.

On August 22, 2011 appellant was referred for vocational rehabilitation. In a December 13, 2011 rehabilitation plan, the rehabilitation counselor recommended a 90-day job placement plan and noted that appellant could perform at the sedentary level with occasional hand usage subject to Dr. Nolan's restrictions. The rehabilitation counselor noted that appellant had worked as a mail processing clerk, a bank senior adjustment clerk and an accounting clerk. Appellant had an associate's degree in business with training in accounting, typing and shorthand. A rehabilitation plan was prepared and approved by the rehabilitation counselor and appellant with the objective of obtaining a position of information clerk or surveillance systems monitor, both sedentary positions, with average weekly wages of \$430.00 for a surveillance system monitor and \$400.00 for an information clerk. The rehabilitation counselor noted that appellant completed security guard training on December 10, 2011. The rehabilitation counselor stated that these jobs were within appellant's educational and vocational capabilities based on her previous work experience and basic computer skills. The rehabilitation counselor noted that these positions were reasonably available in appellant's commuting area and attached job classification for the positions.

In a letter dated December 13, 2011, OWCP notified appellant that the rehabilitation plan developed by appellant and his counselor for a surveillance system monitor and information clerk was determined to be within her work limitations with restrictions as set forth in Dr. Nolan's duty status report of August 3, 2011. It advised that the rehabilitation counselor's vocational evaluation and survey of the local labor market revealed a wage-earning capacity of \$430.00 per week for a surveillance system monitor and \$400.00 for an information clerk. OWCP further advised appellant that, at the end of the rehabilitation program, whether employed or not, it would reduce her compensation.

In a January 9, 2012 letter, appellant indicated that she had not developed the rehabilitation plan, rather the plan had been developed by the rehabilitation counselor. She noted that her Form CA-17 advised that she could return to work within her restrictions and that she desired to return to limited-duty work at the employing establishment. Appellant recounted how she previously was advised that there was no work within her restrictions under NRP and stated that it had been over a year since the employing establishment was instructed to return her to work.²

In a memorandum of conference dated January 10, 2012, the claims examiner, rehabilitation counselor and appellant participated in a 90-day placement conference. The claims examiner noted that appellant had been working full-time limited duty with the employing establishment where, on May 26, 2010, she was sent home because the employing establishment could no longer accommodate her limited-duty restrictions under NRP. OWCP noted that appellant was referred for vocational rehabilitation, a rehabilitation plan was developed and two positions were identified: a surveillance system monitor and an information clerk. Appellant was advised that she would be provided with job placement assistance after which her compensation would be reduced reflecting her wage-earning capacity.

² The employing establishment continued to indicate that it had no work available within appellant's restrictions.

Appellant continued to submit reports from Dr. Nolan dated January 20 to April 11, 2012 who treated her for intermittent pain in the thumbs. In a duty status report dated April 11, 2012, Dr. Nolan diagnosed bilateral trigger thumb and returned her to work full time with restrictions of standing for eight hours a day, walking for six hours per day, bending and stooping at the waist for four hours per day, pushing/pulling at counter level for six hours per day, simple grasping and fine manipulation for four hours per day, reaching above the shoulder for two hours per day, driving a vehicle for one hour per day, no repetitive lifting or pulling greater than 10 pounds and no repetitive forceful grasping, all restrictions subject to limitations on continuous lifting up to three pounds and intermittent lifting up to 10 pounds.

In vocational rehabilitation reports dated February 7 to April 10, 2012, the rehabilitation counselor noted appellant's placement services were extended to April 28, 2012. On March 30, 2012 the rehabilitation counselor advised that appellant accepted a full-time position as a desk clerk at Mercy Housing subject to restrictions and her passing a background check with a tentative start date of April 9, 2012. In a report dated April 17, 2012, the rehabilitation counselor noted that prior to starting the job appellant requested that Dr. Nolan review the job offer prior to her reporting for duty. The rehabilitation counselor indicated that as of April 16, 2012 appellant had not contacted her and had not reported for work.

On April 20, 2012 appellant declined the job offer at Mercy Housing noting that the duties were outside her work limitations. She indicated that she was not physically qualified to patrol a complex and felt it was unsafe. Appellant indicated that her physician requested the job tasks and Form CA-17. She submitted reports from Dr. Nolan dated May 16 to July 11, 2012, who noted her continued complaints of thumb pain. Dr. Nolan noted that appellant was released to modified duty but that the recent job offer was beyond the restrictions on the Form CA-17 and was refused. In duty status reports dated May 16 and June 3, 2012, he continued the work restrictions set forth in the April 11, 2012 duty status report.

In vocational rehabilitation reports dated April 17 to June 18, 2012, Dr. Nolan advised that appellant was offered a suitable position at Mercy House with assurances that the employing establishment would accommodate her restrictions but that she refused the position for personal reasons. In a rehabilitation closure memorandum dated June 28, 2012, the rehabilitation counselor noted that appellant did not obtain employment. The rehabilitation counselor advised that an updated labor market survey revealed the market was favorable for an information clerk and surveillance system monitor, and that the positions were readily available in sufficient numbers both full and part time in appellant's commuting area. The rehabilitation counselor provided a job description for the positions of information clerk³ and surveillance system monitor. The average weekly wage of an information clerk, DOT # 237.367-022 was \$400.00.

³ The job description for an information clerk includes: answering inquiries from persons entering the establishment; providing information regarding activities conducted at the establishment, location of departments, offices, and employees within the organization; informing customers of location of store merchandise in retail establishment; providing information concerning services, such as laundry and valet services in the hotels; receiving and answering requests for information from company officials and employees; may call employees or officials to information desk to answer inquiries; and keeping record of questions asked. The physical demands of the job are sedentary and include lifting occasionally 0 to 10 pounds, no climbing, balancing, stooping, kneeling, crouching or crawling, occasional reaching and handling and no fingering.

The rehabilitation counselor further noted starting a job search on December 27, 2011. The rehabilitation counselor reported identifying employers with suitable jobs for appellant but that appellant had not obtained employment. The rehabilitation counselor noted that the positions were consistent with the medical restrictions provided by Dr. Nolan on August 3, 2011. The rehabilitation counselor advised that labor market surveys dated August 26 and November 18, 2011 noted that the positions remained vocationally and medically appropriate and within her work limitations, they were available in sufficient numbers in her commuting area and were currently available.

OWCP requested that the employing establishment provide salary information for appellant when injured. It indicated that on November 21, 2009 appellant's salary was \$53,102.00 per year and was entitled to a night differential.

Appellant submitted additional reports from Dr. Nolan dated August 8 to November 7, 2012 who treated her for bilateral thumb pain which was aggravated with repetitious use of the upper extremities. Dr. Nolan noted positive findings upon examination and advised that she could return to modified duties. In duty status reports dated August 8 to November 7, 2012, he continued the restrictions set forth in the duty status report dated April 11, 2012.

On November 21, 2012 OWCP issued a proposed reduction of compensation finding that the evidence established that appellant was partially disabled and had the capacity to earn wages as an information clerk, at the rate of \$400.00 per week. It noted that this position was in compliance with Dr. Nolan's restrictions as set forth in his duty status report of April 11, 2012. OWCP referenced the rehabilitation counselor's report which determined that appellant would be employable as an information clerk which reasonably represented her wage-earning capacity.

In an undated letter, appellant indicated that she had not received rehabilitation training for an information clerk. She indicated that her medical condition of trigger finger thumbs had not resolved and she would not be able to perform the job duties of an information clerk because it required repetitive use of her hands. Appellant further indicated that she could not perform the duties of a surveillance system monitor. She was treated by Dr. Nolan on November 30, 2012 and January 4, 2013, for persistent bilateral thumb pain which was aggravated with lifting and repetitious use of the upper extremities. In duty status reports dated November 30, 2012 and January 4, 2013, Dr. Nolan continued her work restrictions noted on April 11, 2012.

In a January 30, 2013 decision, OWCP adjusted appellant's compensation to reflect her wage-earning capacity as an information clerk.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.⁴

⁴ *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

Section 8115(a) of FECA,⁵ states in pertinent part: “In determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity.” Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of evidence showing they do not fairly and reasonably represent the injured employee’s wage-earning capacity, must be accepted as such measure.⁶ 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 regard to the nature of her 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 her wage-earning capacity in her disabled condition.⁷ Wage-earning capacity is a measure of the employee’s ability to earn wages in the open labor market under normal employment conditions.⁸ 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.⁹ In determining an employee’s wage-earning capacity, OWCP may not select a makeshift or odd-lot position or one not reasonably available on the open labor market.¹⁰

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 or 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 labor market, that fits that employee’s capabilities with regard to her physical limitation, 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.¹¹ Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee’s loss of wage-earning capacity.¹²

ANALYSIS

Appellant’s claim was accepted for bilateral carpal tunnel syndrome and bilateral trigger thumb. She began receiving wage-loss compensation on May 26, 2010 when the employing establishment could no longer accommodate her work restrictions.

⁵ 5 U.S.C. § 8115.

⁶ *Hubert F. Myatt*, 32 ECAB 1994 (1981); *Lee R. Sires*, 23 ECAB 12 (1971).

⁷ *See Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

⁸ *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

⁹ *Id.*

¹⁰ *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

¹¹ *Karen L. Lonon-Jones*, 50 ECAB 293, 297 (1999).

¹² *Id. See Shadrick* 5 ECAB 376 (1953).

OWCP further developed appellant's claim and referred her to Dr. Swartz who diagnosed bilateral trigger thumb injuries, status post surgery with no evidence of carpal tunnel syndrome. Dr. Swartz noted that appellant had residuals of bilateral trigger thumbs with pain but was able to perform a sedentary position. He opined that she was capable of vocational rehabilitation at this time and reemployment in the future. In a July 13, 2011 work capacity evaluation, Dr. Swartz noted that appellant could return to work full time with permanent restrictions as noted. Thereafter, in reports dated April 11, 2012 to January 4, 2013, Dr. Nolan, appellant's treating physician, also indicated that appellant could work with restrictions that he noted. The employing establishment continued to indicate that it had no work within appellant's restrictions.

OWCP referred appellant for vocational rehabilitation counseling. When appellant was unable to secure employment as part of her vocational rehabilitation, the rehabilitation counselor on June 28, 2012 identified several positions, including the sedentary position of an information clerk, as jobs that appellant would be capable of performing and which were available in her area.¹³ The rehabilitation counselor identified the position in the Department of Labor's *Dictionary of Occupational Titles*, DOT # 237.367.022, and provided the required information concerning the position description, the availability of the position within appellant's commuting area and pay ranges within the geographical area, as confirmed by state officials. The rehabilitation counselor determined that the information clerk position was in accord with appellant's background, education and experience. The job requirements entail answering inquiries from persons entering the establishment; providing information regarding activities conducted at the establishment, location of departments, offices and employees within the organization; informing customers of location of store merchandise in retail establishments; providing information concerning services; receiving and answering requests for information from company officials and employees; calling employees or officials to the information desk to answer inquiries; and keeping record of questions asked. The physical demands are sedentary and include lifting occasionally 0 to 10 pounds, no climbing, balancing, stooping, kneeling, crouching or crawling, occasional reaching, and handling and no fingering.

The rehabilitation counselor noted that the labor market survey revealed the market was favorable as the informational clerk was readily available in sufficient numbers both full and part time in appellant's commuting area. The average weekly wage of an information clerk was \$400.00 per week with hiring occurring regularly. The rehabilitation counselor indicated that the position was consistent with Dr. Nolan's medical restrictions. In his April 11, 2012 duty status report, Dr. Nolan released appellant to full-time work with restrictions of standing for eight hours a day, walking for six hours per day, bending and stooping at the waist for four hours per day, pushing/pulling at counter level for six hours per day, simple grasping and fine manipulation for four hours per day, reaching above the shoulder for two hours per day, driving a vehicle for one hour per day, no repetitive lifting or pulling greater than 10 pounds and no repetitive forceful grasping, all restrictions subject to limitations on continuous lifting up to 3 pounds and intermittent lifting up to 10 pounds.

¹³ Where vocational rehabilitation is unsuccessful, the rehabilitation counselor will prepare a final report, which lists two or three jobs which are medically and vocationally suitable for the employee and proceed with information from a labor market survey to determine the availability and wage rate of the position. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(b) (December 1995); see also *Dorothy Jett*, 52 ECAB 246 (2001).

The Board finds that OWCP met its burden of proof to reduce appellant's compensation based on her ability to earn wages as an information clerk. The medical evidence establishes that appellant is capable of performing the duties required for the selected position of information clerk. The medical evidence includes reports dated April 11 to January 4, 2013, from Dr. Nolan, appellant's treating physician, who indicated that appellant was not disabled for all work but that she could work with restrictions noted above. The duties of the selected sedentary position conform with the recommended limitations. None of the reports from Dr. Nolan indicated that appellant was incapable of performing the duties required for the selected position of information clerk.

The Board finds that OWCP also considered the proper factors, such as availability of suitable employment and appellant's physical limitations, usual employment and age and employment qualifications, in determining that the position of information clerk represented appellant's wage-earning capacity. The weight of the evidence of record establishes that appellant had the requisite physical ability, skill and experience to perform the position of information clerk and that such a position was reasonably available within the general labor market of her commuting area. OWCP properly determined that the position of information clerk reflected appellant's wage-earning capacity and reduced appellant's compensation effective January 30, 2013.

The Board finds that OWCP properly determined that the position of information clerk reflected appellant's wage-earning capacity effective January 30, 2013.

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 position of information clerk reflects appellant's wage-earning capacity effective January 30, 2013.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated January 30, 2013 is affirmed.

Issued: January 30, 2014
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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