

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

E.W., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Cleveland, OH, Employer**

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**Docket No. 14-584
Issued: July 29, 2014**

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

Case submitted on the record.

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Acting Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 15, 2014 appellant filed a timely appeal from a July 19, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP met its burden of proof to reduce appellant's compensation effective July 19, 2013, based on its determination that the constructed position of a doctor's office clerk represented her wage-earning capacity.

¹ Appellant actually indicated that she was appealing a January 8, 2014 decision. However, the Board notes that this was OWCP correspondence and not a final decision. The only OWCP final decision in the record over which the Board may take jurisdiction is the July 19, 2013 decision.

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board. In a November 17, 2003 decision, the Board affirmed OWCP's May 20 and July 9, 2003 decisions, which denied appellant's occupational disease claim.³ In a February 1, 2011 decision, the Board found that she had not met her burden of proof to establish a recurrence of disability beginning May 5, 2009 causally related to her November 14, 2002 work injury.⁴ The facts and history contained in the prior appeals are incorporated by reference.

OWCP accepted the claim for a lumbosacral strain and a herniated disc at L5-S1. Appellant was working full time with a 20-pound lifting restriction until decreasing her work hours to six per day with a 10-pound lifting restriction on or around May 5, 2009. In August 2010, the employing establishment was no longer able to accommodate her restrictions. Appellant was placed on the periodic rolls and received compensation for total disability.

In a January 13, 2011 report, Dr. Scott Massien, a Board-certified internist and treating physician, noted that the lumbosacral sprain and strain had resolved. However, he indicated that the disc herniation at L5-SI had not resolved and continued to produce pain. Dr. Massien examined appellant and provided findings of spasm in the low back. He explained that, because of the symptoms, her lumbar disc herniation remained active. Dr. Massien advised that appellant could not perform her duties as a mail handler without restrictions due to protracted discomfort from her lumbar disc herniation, sciatica and weakness in her legs. He also explained that she could not do heavy physical labor. Dr. Massien indicated that he had reviewed appellant's job description as a mail handler and opined that she could not perform those duties. He stated that she had restrictions which included: a 10-pound lifting or carrying restriction 2.5 hours a day; sitting 2.5 hours a day; standing and walking a combined total of one hour a day; and no climbing, no kneeling, no bending, no twisting, pushing and pulling 10 pounds for 2.5 hours a day. Dr. Massien advised that appellant was currently working 2.5 hours a day five days a week. He advised that her restrictions were permanent and that she had reached maximum medical improvement.

On February 4, 2011 OWCP referred appellant to vocational rehabilitation services.

In a July 11, 2011 work capacity evaluation, Dr. Massien noted that appellant could work six hours a day. Restrictions included: sitting for three hours a day; walking one hour a day, standing one hour a day; no reaching, reaching above the shoulder, no twisting; pushing one hour a day up to 10 pounds, pulling one hour a day up to 10 pounds, lifting two hours a day up to 10 pounds; no squatting, kneeling or climbing; two 30-minute breaks twice a day; and working a total of six hours a day.

By letter dated August 25, 2011, OWCP referred appellant for a second opinion, along with a statement of accepted facts, a set of questions and the medical record to Dr. Robert Nickoderm, a Board-certified orthopedic surgeon. In a September 1, 2011 report, Dr. Nickoderm

³ Docket No. 03-1880 (issued November 17, 2003).

⁴ Docket No. 10-968 (issued February 1, 2011).

described appellant's history of injury and treatment, provided results on examination and determined that she continued to have residuals of the accepted injury. He provided permanent work restrictions, with the ability to work only six hours daily. Specifically, the restrictions consisted of "limitations of sitting for three hours a day, walking one hour a day, standing one hour a day; no twisting, no bending or stooping; pushing one hour a day up to 10 pounds, pulling one hour a day up to 10 pounds, lifting two hours a day up to 10 pounds; no squatting, kneeling or climbing; two 30-minute breaks twice a day; working a total of six hours a day."

In a September 9, 2011 report, the vocational rehabilitation counselor reported that appellant had no transferable skills from her mail handler position and limited job skills of marketability. He noted that this left her employable only for part-time sedentary jobs with low wages. The vocational rehabilitation counselor reported that appellant would require career training to acquire job skills, enhance her employability and to upgrade wage-earning capacity to reduce some of the preinjury earnings gap. He noted that she passed the admission test with adequate abilities for medical office specialist skills training enrollment.

In a letter dated September 9, 2011, OWCP advised appellant that a vocational rehabilitation plan was developed by her vocational rehabilitation counselor for her return to work as a medical secretary or doctor's office clerk. Appellant was notified that she would be given 90 days of placement services to reach this goal. OWCP noted that she had a wage-earning capacity between \$369.90 and \$433.80 for 30 hours a week. Appellant was advised that, at the end of the rehabilitation program, whether she was employed or not, her compensation would likely be reduced based on this amount.

The doctor's office clerk position, as listed in the Department of Labor, *Dictionary of Occupational Titles* (DOT), under DOT No. 237.367-038 was classified as a sedentary light position. The duties included: receiving callers at establishment; determining nature of business and directing callers to destination; and obtaining caller's name and arranging for appointment with person called upon. Additional duties required: operating telephone console to receive incoming messages; typing memoranda, correspondence, reports; and other documents. The physical requirements were described as sedentary and included: occasional lifting up to 10 pounds frequently; frequent reaching, handling, talking and hearing; and occasional fingering. No climbing, balancing, stooping, kneeling, crouching or crawling was required. The vocational rehabilitation counselor found that appellant passed the admission test which showed adequate abilities for medical office skills training enrollment. He listed the average weekly earnings of a doctor's office clerk as \$493.20 a week. The vocational rehabilitation counselor determined that the position was available in sufficient numbers on a full-time or part-time basis in appellant's commuting area based on a labor market survey.⁵

On August 27, 2012 the vocational rehabilitation counselor advised that appellant had completed her vocational rehabilitation training and would begin her job search; but in a September 10, 2012 report, he indicated that she was obstructing her placement services by not appearing for her meetings and failing to complete agreed upon actions.

⁵ On February 11, 2013 the vocational rehabilitation counselor again confirmed that the position remained reasonably available on a full- or part-time basis at the hourly wage of \$12.26.

In a September 21, 2012 treatment note, Dr. Massien noted that appellant was “doing okay. No issues. Chronic low back pain.” Dr. Massien diagnosed sciatica down the right leg and chronic lumbar disc herniations with mild symptoms. He examined appellant and determined that she had some spasm in the low back and some pain while lying down and getting up from the examination table. Dr. Massien diagnosed chronic lumbar disc herniation with sciatica. He recommended that appellant continue with her 10-pound lifting restriction. Dr. Massien advised that she was “basically on no work available, as job cannot accommodate light duty.” He indicated that appellant’s restrictions were permanent and that she had reached maximum medical improvement.

On October 24, 2012 a sanction warning letter was issued to appellant for not cooperating with vocational rehabilitation. In a November 30, 2012 memorandum to the file, OWCP noted that she was again cooperating with the vocational rehabilitation effort.

In a March 20, 2013 decision, however, OWCP reduced appellant’s compensation because she failed to complete vocational rehabilitation. On March 26, 2013 appellant requested a hearing. On June 11, 2013 OWCP reversed the March 20, 2013 decision finding that OWCP had improperly reduced her compensation without issuing a prereduction notice under 5 U.S.C. § 8113(b). It was directed to reinstate benefits at the previous level retroactive to March 20, 2013 and provide the appropriate notices before reducing appellant’s compensation.

On June 18, 2013 OWCP proposed to reduce appellant’s wage-loss compensation because the medical and factual evidence of record established that she was no longer totally disabled but partially disabled. It found that she had the capacity to earn the wage of the constructed position of doctor’s office clerk, DOT No. 237.367-038 at the rate of \$367.80 a week (\$12.26 x 30 hours a week). Appellant was provided 30 days to submit additional evidence or argument in support of any objection to the proposed reduction. No evidence or argument was received in response.

In a July 19, 2013 decision, OWCP reduced appellant’s compensation benefits, effective that date, based upon her ability to earn wages in the constructed position of doctor’s office clerk. Using the formula in *Albert C. Shadrick*,⁶ it noted that her salary on the date that her disability began, August 4, 2012, was \$1,055.02 a week and the current adjusted pay rate for her job on the date of injury was \$873.38 effective June 2, 2013.⁷ OWCP found that appellant was currently capable of earning \$367.80 a week, the pay rate of a doctor’s office clerk for 30 hours a week. It determined that she had a wage-earning capacity of 42 percent, which resulted in an adjusted wage-earning capacity of \$443.11 a week or a loss of wage-earning capacity of \$611.91 a week, reduced by the 75 percent compensation rate to equal \$458.93 and increased by cost-of-living adjustments of \$481.50 a week. This yielded a new compensation rate of \$1,926.00 every four weeks.

⁶ 5 ECAB 376 (1953).

⁷ This included night pay and Sunday pay.

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.⁸

Section 8115(a) of FECA,⁹ provides in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his or her actual earnings if his or her actual earnings fairly and reasonably represent his or her 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.¹⁰ 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 his or 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 his or her wage-earning capacity in his or her disabled condition.¹¹ Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.¹² 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 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.¹⁴

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 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 regards to his or 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.¹⁵ 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.¹⁶

⁸ *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *Ella M. Gardner*, 36 ECAB 238, 241 (1984).

⁹ 5 U.S.C. § 8115.

¹⁰ *Hubert F. Myatt*, 32 ECAB 1994 (1981); *Lee R. Sires*, 23 ECAB 12 (1971).

¹¹ See *Pope D. Cox*, 39 ECAB 143, 148 (1988); 5 U.S.C. § 8115(a).

¹² *Albert L. Poe*, 37 ECAB 684, 690 (1986); *David Smith*, 34 ECAB 409, 411 (1982).

¹³ *Id.*

¹⁴ *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

¹⁵ *Karen L. Lonon-Jones*, 50 ECAB 293, 297 (1999).

¹⁶ *Id.* See *Shadrick*, 5 ECAB 376 (1953).

ANALYSIS

OWCP accepted appellant's claim for lumbosacral strain and a herniated disc at L5-S1. Appellant worked in several modified-duty positions until August 2010 when the employing establishment was no longer able to accommodate her restrictions. She was placed on the periodic rolls and received compensation for total disability.

Both Dr. Massien, the treating physician and Dr. Nickoderm, the second opinion physician, limited appellant to working only six hours daily. Appellant's restrictions included: limitations of sitting for three hours a day; walking one hour a day; standing one hour a day; no twisting, no bending or stooping; pushing one hour a day up to 10 pounds; pulling one hour a day up to 10 pounds; lifting two hours a day up to 10 pounds; no squatting, kneeling or climbing; two 30-minute breaks twice a day; and working a total of six hours a day. Based upon these restrictions, OWCP referred her for vocational rehabilitation.

The Board finds, however, that OWCP failed to meet its burden of proof to reduce appellant's compensation based on the constructed position of doctor's office clerk. The issue of whether appellant has the physical ability to perform a selected position is primarily a medical question that must be resolved by the medical evidence.¹⁷ Based upon the above noted restrictions, the vocational rehabilitation counselor found the position of doctor's office clerk to be suitable on September 9, 2011 and February 11, 2013. However, the Board finds that the position, while sedentary, does not conform to the above-noted restrictions. Appellant's restrictions are comprised of sitting three hours a day, walking and standing for one hour a day. The requirements of the sedentary position of doctors clerk are not consistent with these limitations. The Board, therefore, finds that OWCP did not meet its burden of proof to establish that appellant was capable of working in the position of doctor's office clerk for six hours a day as it exceeded her physical restrictions. Based on the evidence of record, the Board finds that it has not established that the constructed position of doctor's office clerk is medically suitable. Therefore, OWCP failed to meet its burden of proof to reduce appellant's wage-loss compensation.¹⁸

On appeal, appellant noted that she was sent home in November 2010 with no work available. She indicated that she eventually won a grievance in 2013 and received a new job offer to return to duty in December 2013 for two hours on Tour 3 in the old unit. Appellant also indicated that she was informed that she was not entitled to the six hours of compensation for her full benefits. As found above, OWCP improperly reduced her compensation.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof in reducing appellant's compensation based on its determination that the constructed position of a doctor's office clerk represented her wage-earning capacity effective July 19, 2013.

¹⁷ See *Maurissa Mack*, 50 ECAB 498 (1999); *Robert Dickinson*, 46 ECAB 1002 (1995).

¹⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8d (February 2011); see also *William H. Woods*, 51 ECAB 619 (2000).

ORDER

IT IS HEREBY ORDERED THAT the July 19, 2013 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 29, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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