

FACTUAL HISTORY

OWCP accepted that on June 19, 2006 appellant, then a 59-year-old clerk, sustained a sprain, rotator cuff injury and aggravation of tendinitis of the right shoulder as a result of lifting heavy sacks at work.² It authorized right shoulder arthroscopy with arthroscopic repair of biceps tendinitis, subacromial decompression, debridement of a partial thickness rotator cuff tear and open distal clavicle excision performed on November 15, 2006. On January 3, 2007 appellant returned to full-time, modified-duty work at the employing establishment. OWCP authorized additional open repair of the right rotator cuff performed on May 1, 2007. In a December 5, 2007 decision, it accepted that on October 22, 2007 appellant sustained a recurrence of disability causally related to her June 19, 2006 employment injuries.

On July 29, 2010 appellant declined the employing establishment's offer of modified duty, contending that the position did not meet the restrictions set forth by her attending physician. On August 4, 2010 the employing establishment advised her that there was no work available.

In a March 11, 2011 medical report, Dr. Michael W. Gish, an attending Board-certified orthopedic surgeon, advised that appellant could perform sedentary work with permanent restrictions which included no repetitive gripping, squeezing or pulling; no frequent reaching above countertop level with either shoulder; occasional reaching above shoulder level; frequent lifting not exceeding five pounds at countertop level and occasional lifting not exceeding two pounds above shoulder level.

By letter dated June 21, 2011, OWCP accepted that on August 4, 2010 appellant sustained a recurrence of disability.

On September 28, 2011 OWCP referred appellant for vocational rehabilitation services. Appellant met with a vocational rehabilitation counselor on October 11, 2011. The vocational rehabilitation counselor noted that appellant did not have a GED and had severe lifting restrictions which would greatly limit the number of appropriate positions available to her. She planned to request a waiver for vocational testing as appellant had basic computer knowledge, was able to type and presented herself well which would be beneficial in procuring a position perhaps dealing with the public. The vocational rehabilitation counselor stated that vocational testing would not present any further information to assist her in determining suitable positions within appellant's abilities and educational background. On November 9, 2011 she determined that appellant could be reemployed as a customer service representative or receptionist. The duties of the customer service representative position listed in the Department of Labor's *Dictionary of Occupational Titles* required interviewing applicants; recording the interview information into a computer; soliciting the sale of new or additional services; and adjusting complaints or referring complaints to designated departments. This job was classified as

² In a prior claim assigned File No. xxxxxx772, OWCP accepted that appellant sustained a rotator cuff sprain and impingement syndrome of the left shoulder. It combined this claim and the instant claim assigned File No. xxxxxx644 into a master claim assigned File No. xxxxxx644. In an April 28, 2009 decision, OWCP granted appellant a schedule award for 21 percent impairment of the right upper extremity and 13 percent impairment of the left upper extremity, totaling a 34 percent bilateral upper extremity impairment.

sedentary with no climbing, balancing, stooping, kneeling, crouching, crawling, feeling, tasting, smelling, far acuity, depth perception, color vision or field of vision. The position required occasional reaching, handling and near acuity, frequent fingering and accommodation, and constant talking and hearing. The strength level was listed as sedentary, which involved occasional lifting up to 10 pounds. The vocational rehabilitation counselor determined that appellant would meet the specific vocational preparation in six months to one year. She noted that many customer service representative positions were entry level with basic computer knowledge. The vocational rehabilitation counselor made an illegible statement about what occurs with a lack of experience. She determined that the job was performed in sufficient numbers to be reasonably available within appellant's commuting area. The vocational rehabilitation counselor noted that expected growth for the position was 6.6 percent between 2008 and 2018. There were 21 openings due to growth and 88 openings due to replacement. The yearly wages for an entry level position was \$23,290.00.

By letter dated June 15, 2012, OWCP proposed to reduce appellant's compensation benefits based on her capacity to earn wages as a customer service representative.

In a July 16, 2012 decision, OWCP finalized the June 15, 2012 proposed decision based on her capacity to earn wages as a customer service representative. It applied the principles identified in *Albert C. Shadrick*,³ finding a new wage-earning capacity of 43 percent and accordingly reduced her compensation.

On July 19, 2012 appellant, through her attorney, requested an oral hearing before an OWCP hearing representative. By letter dated November 28, 2012, she requested a review of the written record in lieu of an oral hearing and submitted additional medical evidence.

In a work capacity evaluation dated December 5, 2012, Dr. Gish revised his prior restrictions to no reaching or reaching above the shoulder and lifting no more than five pounds. He also restricted her to operating a motor vehicle at work for no more than four hours a day.

In a February 19, 2013 decision, an OWCP hearing representative affirmed the July 16, 2012 decision. The hearing representative found that the medical and factual evidence of record established that the selected customer service representative job was medically and vocationally suitable for appellant and represented her loss of wage-earning capacity.

LEGAL PRECEDENT

Section 8115 of FECA⁴ provides that 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 the employee has no actual earnings, her wage-earning capacity is determined with due regard to the nature of her injury, the degree of physical impairment, her usual employment, her age, her qualifications for other employment, the availability of suitable employment and

³ 5 ECAB 376 (1953); 20 C.F.R. § 10.403(d).

⁴ 5 U.S.C. §§ 8101-8193, 8115.

other factors or circumstances which may affect her wage-earning capacity in her disabled condition.

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 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 that employee's capabilities with regard to her physical limitations, 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. Finally, application of the principles set forth in *Shadrick*⁵ will result in the percentage of the employee's loss of wage-earning capacity. The basic rate of compensation paid under FECA is 66 2/3 percent of the injured employee's monthly pay.⁶

ANALYSIS

OWCP accepted that appellant sustained a sprain, rotator cuff injury and aggravation of tendinitis of the right shoulder while in the performance of duty on June 19, 2006 and authorized right shoulder surgeries. In the March 11, 2011 report, Dr. Gish, an attending physician, found that appellant could perform sedentary work with permanent restrictions that included no repetitive gripping, squeezing or pulling; no frequent reaching above countertop level with either shoulder; occasional reaching above shoulder level; frequent lifting of no more than five pounds at countertop level; and occasional lifting of no more than two pounds above shoulder level. Based upon Dr. Gish's March 11, 2011 report, OWCP referred appellant for vocational rehabilitation. The Board finds that OWCP properly referred her to vocational rehabilitation as appellant was no longer totally disabled due to her employment-related injuries.

The Board finds, however, that OWCP failed to meet its burden of proof to reduce appellant's compensation based on the constructed position of customer service representative. 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.⁷ In his March 11, 2011 report, Dr. Gish indicated that appellant could perform a sedentary position and noted restrictions which included no repetitive gripping, squeezing or pulling; no frequent reaching above countertop level with either shoulder; occasional reaching above shoulder level; frequent lifting not exceeding five pounds at countertop level; and occasional lifting not exceeding two pounds above shoulder level. Based on these restrictions, the rehabilitation counselor found the position of customer service representative to be suitable on November 9, 2011. However, on December 5, 2012 Dr. Gish modified these restrictions to include no reaching, no reaching above the shoulder, no operating a motor vehicle more than four hours, no repetitive movements of the elbow, and no pushing, pulling and lifting more than five pounds. The position requirement of

⁵ *Supra* note 3; 20 C.F.R. § 10.403.

⁶ *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

⁷ *See Maurissa Mack*, 50 ECAB 498 (1999); *Robert Dickinson*, 46 ECAB 1002 (1995).

occasional lifting up to 10 pounds contradicts these revised restrictions. The position of customer service representative exceeded appellant's physical restrictions.

Based on the evidence of record, the Board finds that OWCP has not established that the constructed position of customer service representative is medically suitable. Therefore, it failed to meet its burden of proof to reduce appellant's wage-loss compensation.⁸

CONCLUSION

The Board finds that OWCP improperly reduced appellant's compensation based on its finding that she had the capacity to perform the constructed position of customer service representative.

ORDER

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

Issued: March 25, 2014
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8d (October 2009); *see also William H. Woods*, 51 ECAB 619 (2000).