



## **FACTUAL HISTORY**

On March 4, 2008 appellant, then a 41-year-old automation clerk, filed an occupational disease claim alleging that he developed impingement syndrome, bursitis and scapulothoracic impingement in the left shoulder due to performance of his federal job duties. He resigned from the employing establishment effective June 23, 2009.

Appellant's attending physician, Dr. John A. Reister, a Board-certified orthopedic surgeon, completed a report on June 23, 2009, noting appellant's history of left shoulder surgery including an arthroscopic Bankart repair for instability on December 14, 2006 and a second surgery to debride some of the superomedial angle of the scapula on August 28, 2007. Appellant did not have significant relief from these surgeries. Dr. Reister performed an open resection of the superomedial angle of the scapula to resolve snapping of the scapula. He reported that appellant continued to have complaints in his left shoulder due to instability and that he performed an open instability repair. Dr. Reister stated that appellant was continuing to seek treatment for his right shoulder. In a work capacity evaluation dated July 15, 2009, he stated that appellant could perform no repetitive upper extremity use of the shoulders and indicated that appellant could not reach, reach above the shoulder, bend or stoop or operate a motor vehicle at work. Dr. Reister also indicated that appellant could not push, pull or lift.

OWCP accepted appellant's claim for aggravation of bilateral scapulothoracic crepitus on August 20, 2009. In a report dated December 7, 2009, Dr. Jill Castro, a physician Board-certified in physical medicine and rehabilitation, stated that appellant's work restrictions per surgery were no overhead lifting, no lifting, pushing or pulling more than 10 to 20 pounds occasionally.

OWCP referred appellant for a second opinion evaluation on March 3, 2011. Dr. John D. Douthit, a Board-certified orthopedic surgeon and second opinion physician, completed a report on June 6, 2011. He noted appellant's history of injury and medical treatment. Dr. Douthit examined him and found limited motion, pain behavior and chronic crepitation of both shoulders with grinding. He noted that appellant had slight winging of his right scapula as well as popping of the right shoulder with pain. Dr. Douthit provided his range of motion and his complaints of pain, but noted that there was no atrophy. He noted appellant's previous shoulder surgeries which had not relieved appellant's pain. Dr. Douthit diagnosed chronic pain in both shoulders with scapulothoracic popping more in the right. He stated that he did not believe that the popping correlated with appellant's pain. Dr. Douthit opined that appellant's chronic bilateral shoulder pain did not correlate well with his clinical findings. He diagnosed bilateral scapulothoracic crepitation greater on the right. Dr. Douthit opined that appellant's pain was out of proportion to his physical findings. He stated, "I would conclude that the claimant's pain in his shoulders and neck is a result of his work and was an aggravation of chronic scapulothoracic bursitis and cervical arthritis. This is persistent at present and is currently the source of the work restrictions that he had from lifting." Dr. Douthit stated that appellant could not return to his date-of-injury position but could perform full-time work with restrictions on lifting over 25 pounds, overhead work and reaching. He completed a work capacity evaluation and indicated that appellant could not reach above the shoulder and was restricted to pushing, pulling and lifting no more than 25 pounds.

OWCP referred appellant for vocational rehabilitation services on July 19, 2011. In a letter dated August 9, 2011, it noted that he had failed to cooperate with the vocational rehabilitation counselor and informed him of the consequences. OWCP directed appellant to contact both his claims examiner and his vocational rehabilitation counselor within 30 days to commit to a good faith effort to participate in the rehabilitation effort to return him to gainful employment. It allowed him 30 days to respond if he felt that he had a good reason for not participating in vocational rehabilitation. OWCP directed appellant to provide a letter detailing his reasons and submit evidence in support of his position.

Appellant left a telephone message for the vocational rehabilitation counselor on September 8, 2011 stating that he had a sinus infection, was involved in an automobile accident and was "in bed" awaiting surgery.

On October 11, 2011 the vocational rehabilitation counselor identified the positions of receptionist and customer service representative with salary of approximately \$10.18 to \$15.99 hourly suitable for appellant. She stated that appellant's original federal job application and the description of the work he performed at the employing establishment was reviewed to perform a transferable skills analysis.

In a report dated October 13, 2011, the vocational rehabilitation specialist found that appellant could earn \$639.00 per week for full-time work as an administrative clerk. He noted that these were the median wages for the positions and that this pay rate would be appropriate as, according to the rehabilitation counselor's report, appellant was a high school graduate with two years of community college and very good computer skills as well as several years of experience in supervisory, clerical and customer service capacities. The position of customer service representative was sedentary requiring occasional lifting of 10 pounds and occasional reaching. The specific vocational preparation was six months to one year. The job was being performed in sufficient numbers as to make it reasonably available to appellant within his commuting area and that the weekly wage was between \$520.40 and \$630.60.

In a letter dated December 7, 2011, OWCP proposed to reduce appellant's compensation for wage loss based on his capacity to earn wages as a customer service representative at the rate of \$639.60 per week. It allowed 30 days for a response. OWCP noted that appellant was only partially disabled and could work with restrictions on lifting and reaching.

Counsel responded on January 9, 2011 and stated that appellant was not at maximum medical improvement as Dr. Reister had scheduled another surgery. He further argued that there was a disagreement regarding appellant's work restrictions and stated that appellant could not perform the repetitive activities necessary for a customer service representative.

By decision dated January 19, 2012, OWCP finalized the reduction of compensation effective January 22, 2012.

Counsel requested an oral hearing before an OWCP hearing representative on February 14, 2012. Dr. Castro completed a report on March 16, 2012 and recommended that appellant consult with Dr. Reister regarding surgery on both shoulders. He submitted a series of notes from a licensed clinical social worker.

Counsel appeared at the oral hearing on May 16, 2012. He questioned whether the reaching involved as a customer service representative included above the shoulder. Counsel argued that Dr. Reister's 2009 work restrictions created a conflict with Dr. Douthit's report. He also noted that OWCP determined that appellant was capable of earning the top end of the pay scale. Counsel argued that appellant had several preexisting conditions which needed to be considered including depression, anxiety, panic attacks and attention deficit disorder.

In a report dated June 11, 2012, Dr. Castro stated that appellant's function had deteriorated. She stated, "[h]e was unable to perform activities out of the body or away from the body. Appellant cannot move his arms overhead and at waist level is still limited with any reach away from the body. He has severe dysfunction in the scapulae as well which contributed to his continued pain syndrome and limited mobility. Even sitting at a keyboard in attempts to type is limited as appellant cannot sustain even that motion for any period of time."

On June 14, 2012 Dr. Martin Reichman, a Board-certified psychiatrist, stated that he treated appellant in 2009 due to major depression, generalized anxiety disorder and panic disorder with agoraphobia. He also diagnosed attention deficit hyperactivity disorder. Dr. Reichman stated that appellant was unable to work in any capacity due to his mental health problems and his physical health problems.

In a decision dated August 6, 2012, the hearing representative found that the position of customer service representative represented appellant's wage-earning capacity and that OWCP met its burden of proof to reduce appellant's compensation benefits. She found that the weight of the medical evidence established that appellant was not totally disabled. The hearing representative stated that appellant had the adequate vocational preparation to perform the position and that the position was within his work restrictions and skills. She noted that the position was reasonably available and that the median pay rate for the selected position was properly determined.

### **LEGAL PRECEDENT**

Section 8115 of FECA<sup>2</sup> 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, his or her wage-earning capacity is determined with due regard to the nature of his or her injury, the 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 or circumstances which may affect his or her wage-earning capacity in his or her disabled condition.<sup>3</sup>

OWCP must initially determine the employee's medical condition and work restrictions before selecting an appropriate position that reflects his or her vocational wage-earning

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<sup>2</sup> 5 U.S.C. §§ 8101-8193, 8115.

<sup>3</sup> 5 U.S.C. § 8115(a); *Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

capacity.<sup>4</sup> The medical evidence OWCP relies upon must provide a detailed description of the employee's condition and the evaluation must be reasonably current.<sup>5</sup> Where suitability is to be determined based on a position not actually held, the selected position must accommodate the employee's impairment from both injury-related and preexisting conditions, but not impairment attributable to post-injury or subsequently acquired conditions.<sup>6</sup>

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 his 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 *Albert C. Shadrick*<sup>7</sup> 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.<sup>8</sup>

### ANALYSIS

The Board finds that OWCP met its burden of proof to reduce appellant's compensation benefits based on his capacity to earn wages in the selected position of customer service representative.

Appellant filed an occupational disease claim on March 8, 2008. OWCP accepted this claim for aggravation of bilateral scapulothoracic crepitus. It determined that the selected position of customer service representative represented appellant's wage-earning capacity. To be an appropriate position for a loss of wage-earning capacity determination under 5 U.S.C. § 8115(a) the position must be medically and vocationally suitable. The evidence must also properly document the position's availability and the wages and OWCP must follow established procedures before reducing appellant's wage-loss compensation.

With respect to the issue of medical suitability of the selected position, OWCP relied on the report of the second opinion physician, Dr. Douthit. On June 6, 2011 Dr. Douthit limited appellant to no reaching over the shoulder and to pushing, pulling and lifting no more than 25 pounds. Dr. Castro, appellant's physician, found similar restrictions on December 7, 2009 limiting appellant to no overhead lifting, no lifting, pushing or pulling more than 10 to 20 pounds occasionally. Dr. Reister, appellant's physician, also found that appellant was only partially

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<sup>4</sup> *M.A.*, 59 ECAB 624, 631 (2008).

<sup>5</sup> *Id.*

<sup>6</sup> *N.J.*, 59 ECAB 171, 176 (2007); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8d (October 2009).

<sup>7</sup> 5 ECAB 376 (1953).

<sup>8</sup> *Karen L. Lonon-Jones*, 50 ECAB 293(1999).

disabled on July 15, 2009. He provided additional restrictions noting that appellant could perform no repetitive upper extremity use of the shoulders no reaching, reaching above the shoulder, bending, stooping or operating a motor vehicle at work. Dr. Reister also indicated that appellant could not push, pull or lift.

The selected position of customer service representative is a sedentary position requiring occasional lifting of 10 pounds and occasional reaching. The physical requirements are within the restrictions provided by Drs. Douthit and Castro. While Dr. Reister indicated in 2009 that appellant could not reach or lift, this report predated the findings of Drs. Castro and Douthit by six months or more. On June 11, 2012 Dr. Castro indicated that appellant's condition had worsened, finding that he was unable to perform activities out of the body or away from the body including moving his arms overhead or reaching away from his body. She further found that appellant had limitations on typing. The Board finds that the initial report from Dr. Castro and Dr. Douthit's June 6, 2011 report are entitled to the weight of the medical evidence and establish that appellant could physically perform the duties of the selected position. Dr. Douthit provided a detailed, clear history of injury and medical treatment, detailed findings on examination and explained the basis for his opinion. He failed to adequately support the newly established restrictions. Contrary to counsel's argument, the Board finds no conflict of medical opinion evidence and that the selected position was within appellant's medical restrictions.<sup>9</sup>

The Board also finds that the selected position of customer service representative was vocationally suitable. The specific vocational preparation required for the position was six months to one year. The vocational rehabilitation counselor found that appellant met this requirement as appellant was a high school graduate with two years of community college and very good computer skills as well as several years of experience in supervisory, clerical and customer service capacities. The job was being performed in sufficient numbers as to make it reasonably available to appellant within his commuting area and the weekly wage was between \$520.40 and \$630.60. The recommendations of the rehabilitation counselor were reviewed and approved by a rehabilitation specialist. Because the vocational rehabilitation counselor and specialist are experts in the field of vocational rehabilitation, OWCP may rely on his or her opinion as to whether the job is reasonably available and vocationally suitable.<sup>10</sup> The Board finds that OWCP properly reduced appellant's wage-loss compensation based on his capacity to earn wages as a customer service representative.

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

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<sup>9</sup> Counsel argued that OWCP failed to consider appellant's emotional conditions in determining that the selected position was within appellant's restrictions. As noted above, the selected position must accommodate the employee's impairment from both injury-related and preexisting conditions, but not impairment attributable to post-injury or subsequently acquired conditions. The record indicates that appellant's emotional conditions arose in 2009 after his accepted employment injury in 2008. Therefore these conditions were subsequently acquired and OWCP was not obligated to consider any limitations due to these conditions in evaluating appellant's wage-earning capacity. *See supra* note 6.

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.816.6b (June 2013). *W.D.*, Docket No. 09-188 (issued August 21, 2009).

**CONCLUSION**

The Board finds that OWCP properly determined that the position of customer service representative represents appellant's wage-earning capacity.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 6, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 8, 2014  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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